

UNITED STATES DEPARTMENT OF DEFENSE  
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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT  
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

+ + + + +

TRAINING TO PROSECUTE & DEFEND SEXUAL  
ASSAULT CASES

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TUESDAY  
JANUARY 7, 2014

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The Subcommittee met in Conference  
Room 150 at One Liberty Center, 875 North  
Randolph Street, Arlington, Virginia, at 8:00  
a.m., Elizabeth Hillman, Chairman, presiding.

PRESENT:

Elizabeth Hillman, Chair  
Harvey Bryant  
Brigadier General Malinda Dunn (Ret.)  
Colonel Stephen Henley (Ret.)  
Rhonni Jaus  
Colonel Larry Morris (Ret.)  
Russell Strand

PRESENTERS:

Claudia Bayliff, National Judicial Education  
Program  
Lieutenant Colonel George Cadwalader, U.S.  
Marine Corps\*  
Lieutenant Colonel Matthew Calarco, U.S.  
Army

Colonel Francis Gilligan (Ret.), Office of  
Military Commissions

David M. Houghland, U.S. Air Force

Viktoria Kristiansson, AEquitas

Lieutenant Commander Justin McEwen, U.S.  
Navy\*

Candace Mosley, National District Attorneys  
Association

Edward O'Brien, DCAP, former Judge Advocate  
Neal Puckett

Bridget Healy Ryan, U.S. Army Legal Services  
Agency

Teresa Scalzo

Colonel Vance Spath, U.S. Air Force

Sandra Tullius

Colonel Ken Theurer, U.S. Air Force

Lisa Wayne, NACDL

Ron White

Yvonne Younis, Defender Association of  
Philadelphia

**STAFF:**

Maria Fried, Designated Federal Official

Colonel Patricia Ham, Staff Director

Dillon Fishman

Jan Chayt

\* present by teleconference

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

(8:36 a.m.)

COL HAM: Good morning, everyone. Happy New Year. First, I want to give you Kelly McGovern's regrets. She wanted to be here today. She is still on maternity leave but she was going to come in today but had some issues with school closures, et cetera. She starts back full-time next week.

Today, we are looking at training of defense counsel and prosecutors, both military and civilian and some comparisons of evidentiary rules. And we are going to start with that with Mr. Fran Gilligan. Sir?

COL GILLIGAN: Thank you. It is a pleasure to be here. Around the community here in D.C., there is a lot of questions being raised about the rights of victims. And I think it is important to sort of step back a little bit and realize that we have various sources of rights for criminal defendants, starting with the Sixth Amendment to the

1           Constitution, the right to compulsory process  
2           and the right of confrontation. So, I think  
3           it is important as you look at things that you  
4           might do to protect victims and to assist in  
5           prosecutions to keep that in mind.

6                        There has been some issue with  
7           CAAF over the years about the application of  
8           the Military Rules of Evidence. Certainly as  
9           to defendants, you can grant more rights to  
10          defendants than is constitutionally required.  
11          The same doesn't apply to victims, that you  
12          can grant more rights to victims that might  
13          trump the rights that defendants have under  
14          the Sixth Amendment.

15                      So as I say, I sort of hear this  
16          tenor in town and so I just want to put that  
17          out as a beginning on that.

18                      I have been asked to talk about  
19          Article 32 in the Rights of Victims and then  
20          was notified this week to talk a little bit  
21          about Rule 412 on that.

22                      Let me talk about Rule 412, 413,

1           414, 415, and then MREs 513 and 514. As to  
2           the rules, what I have handed out for you,  
3           though, is a comparison. So, you can just  
4           look. A lot of people are talking about that  
5           MRE 412 is different than the Federal Rule  
6           412. I have compared them there for you. You  
7           can see that's not quite true. They are  
8           substantially the same and I have lined them  
9           up.

10                        Oh, and by the way, when we talk  
11           about rules of evidence, there is a new book  
12           on rule, MRE rules of evidence. Have brought  
13           three extras along if anybody wants them.  
14           These are the rules of evidence effective May  
15           15th of this year. So, you have to use these.  
16           You cannot go to the softbound manual. So, I  
17           brought three along and you are welcome to  
18           those. If you want more, yell. We can make  
19           more of those.

20                        So, I do that as a preliminary.  
21           But take a look on page one on 412. It pretty  
22           much lines up substantially the same. We

1 don't have, on the FREs on civil cases down  
2 near the bottom, of course we don't have that.  
3 You flip over to page two. There as to the  
4 filing of motions in the hearing, the  
5 difference you see here is in the right-hand  
6 column on page two is the bullet number two.  
7 Military Rule of Evidence 412 spells out the  
8 procedures in more detail, which is going to  
9 be helpful for victims, especially when you  
10 consider the LRM Kastenberg case, which is at  
11 72 MJ 364. If you do, before admitting  
12 evidence under this rule, the Military Judge  
13 must conduct a hearing, which shall be closed.  
14 At this hearing, the parties may call  
15 witnesses, including the alleged victim and  
16 other relevant -- you notice that is there  
17 twice. They have got a typo. The alleged  
18 victim must be afforded a reasonable  
19 opportunity to attend and to be heard.

20 Question as to be heard, how that  
21 works out. A lot of people think to be heard  
22 is you can submit things in writing and not be

1 heard orally. That has got to be  
2 discretionary with the judge, under Rule for  
3 Commission 801 and 601. You can look at those  
4 but it has got to be discretionary with the  
5 judge under that. You might want to clarify  
6 that and give the victim the full opportunity  
7 to be heard orally on that and not leave that  
8 vague like that one there.

9 The motion related to the papers  
10 and the record of the hearing must be sealed  
11 and remain under seal. And then it talks  
12 about if the military judge determines on the  
13 basis of the hearing described in paragraph 2  
14 of this subsection that the evidence that the  
15 accused seeks to offer is relevant for the  
16 purpose other than subsection B and that the  
17 probative value of such evidence outweighs the  
18 danger of unfair prejudice to the alleged  
19 victim's privacy, such evidence shall be  
20 admissible under this rule to the extent an  
21 order by the military judge specifies evidence  
22 that may be offered in areas with respect to

1 the alleged victim may be examined or cross-  
2 examined.

3 So, that is the difference right  
4 there in that one there. And it is really, as  
5 I say, it doesn't go to the substance of the  
6 rule, which is on page one. It goes to the  
7 procedure. And, as I say, discretion is  
8 granted to the judge under the rules for  
9 courts-martial as to that.

10 Flipping over to 413,  
11 substantially the same; 414 substantially the  
12 same. Now, there has just got to be some  
13 wording difference as to that.

14 We don't have civil cases. So, we  
15 don't have Federal Rule of Evidence 415.

16 I have been asked to talk about  
17 Military Rule of Evidence 513 and 514. And  
18 these are privilege protections that are  
19 available for victims and the victim advocate  
20 and also for the psychotherapist.

21 We don't have to do a chart to  
22 compare those because the federal rules of

1 evidence do not have 513 and 514. They were  
2 not enacted in 1980 as part of the Federal  
3 Rule of Evidence package that we have.

4 Flipping over now to the other  
5 handout I gave you, I was asked to talk about.  
6 And at the time I was asked, we did not -- we  
7 had the proposal as to the changes to the  
8 Article 32s. As of the 16th of December, the  
9 President signed off on the NDAA for 2014 and  
10 made some substantial changes that are very  
11 helpful for victims. And I think it is  
12 important to sort of bear in mind the rights  
13 that victims have. And I think you can  
14 contrast this. And I was asked to contrast  
15 this early on between the grand jury and our  
16 Article 32. And as I say, now things have  
17 changed that we have 2014.

18 But a great contrast, if you want  
19 to see one, is to look at what can happen at  
20 grand jury proceedings. In the case that you  
21 will see that is going to be coming out as a  
22 Supreme Court Case called Kaley, K-A-L-E-Y

1           versus United States. It was argued on my  
2           birthday, October 16, 2013. I wasn't born in  
3           2013 but was argued on my birthday. A great  
4           case. Those who are fortunate to live here in  
5           D.C. to go down and listen to arguments, Mr.  
6           Srebnick was the -- he is a Miami lawyer  
7           involved as a defense counsel down there was  
8           arguing the case for the defense. And the  
9           issue was, in this case, relating right back  
10          to grand juries and Article 32s.

11                       Kaley was charged with stealing  
12          about a million dollars' worth of medical  
13          equipment. And what the FBI did, they came in  
14          under an asset forfeiture rule and seized all  
15          that property. And of course, his position  
16          was -- the Kaleys' position was that he wants  
17          that property freed up. There really is no  
18          reasonable suspicion that he was involved in  
19          stealing all this medical equipment. So, he  
20          wants it freed up. And the reason for it to  
21          be freed up was so that Mr. Srebnick could get  
22          his lawyer's fee on that.

1           And so he is arguing that on asset  
2 forfeiture cases, that there has to be more  
3 than a grand jury hearing, that there has to  
4 be a right to counsel, a right to call  
5 witnesses, a right to cross-examine. Does  
6 this sound familiar under Article 32? Which  
7 I suggest to you now we don't have, that we  
8 have the right to do this.

9           And so, Justice Scalia says wait  
10 just a minute now -- and this relates to our  
11 subject -- wait just a minute now. You are  
12 saying as to property rights, the hearing has  
13 to be much greater than we have as to rights  
14 to personal detention of the individual and to  
15 indict an individual?

16           Oh, he said, oh, yes. Yes, many  
17 more rights. Oh, he says, I had better sit up  
18 here and pay careful attention to this case  
19 because it is a lot more important than I  
20 thought it was. And it sort of crystalizes  
21 the rights you don't have before a grand jury  
22 but they think for asset forfeiture hearings,

1           you have many more rights.

2                       I suggest we will have to wait and  
3           see. By June we will have a result in that  
4           case as how many rights do you have for asset  
5           forfeiture hearings on that.

6                       I put in the new Article 32 rule.  
7           And I put them side by side in the handout, so  
8           you can contrast them on that. But I am going  
9           to make it much easier for you to contrast  
10          them. If you just turn to page two, I have  
11          really kind of laid out all the differences we  
12          now have with the new Article 32 proceedings.

13                      Absent exceptional circumstances,  
14          it has to be conducted by a JAG who is equal  
15          to or senior to the accused or government  
16          counsel. In many places, we did not have  
17          JAGs. It is interesting when you talk to  
18          service personnel on this about whether you  
19          have JAGs doing 32s.

20                      For four years, like General Dunn,  
21          I was an SJA at the 101st Airborne Division  
22          down in Fort McClellan Alabama for four years.

1 I never had JAGs do Article 32 investigations.  
2 What we would do in the four years I was  
3 involved, we would appoint a line officer to  
4 be a permanent Article 32 investigator for the  
5 installation, a wonderful setup that we had.  
6 That individual would be advised for those who  
7 were prior military, be advised by someone in  
8 the admin law division, so there would be no  
9 conflict with those in the prosecution side of  
10 the case.

11 And you might say, well how did we  
12 get those bodies to be a permanent 32 for the  
13 SJA office? Pretty easy. You put out the  
14 word on the installation. Does anyone want to  
15 go on the FLEP program? Yes. I mean the FLEP  
16 program is a fully funded legal program. And  
17 so we would bring these people in and they  
18 also would go ahead and apply for the FLEP  
19 program. And by the way, when you see that  
20 sort of background coming in as to the OER and  
21 what they have done, every one of them, the  
22 three individuals I have all went on the FLEP

1           program on that. So but now you have got to  
2           have to have a JAG in there.

3                       On the Annapolis case that those  
4           of us in this community, and I think probably  
5           those throughout the United States, are  
6           familiar with the allegation as to the  
7           Annapolis rape case we had. On there was a  
8           military judge who sat on that case as the  
9           Article 32 officer where the victim was on the  
10          stand there for some 20 hours. That has got  
11          to change as a result of the new legislation,  
12          I suggest to you because the accused's rights  
13          are going to be fairly limited now at the  
14          Article 32.

15                      We want to sort of step back on  
16          this. You have got to ask yourself how would  
17          you be advising convening authorities now,  
18          SJAs, defense counsels and prosecutors as to  
19          these new rules? And I suggest we are going  
20          to have different advice for giving each one  
21          of these individuals now, based on the new  
22          statute that we have on that.

1                   I suggest that you could have  
2                   sworn affidavits that would be presented by  
3                   the government to show that an offense has  
4                   been committed. That would be sufficient.  
5                   You can see the defendant now does not have  
6                   the right to bring in and cross-examine  
7                   witnesses. He does not even have a right,  
8                   without the consent of the victim to talk to  
9                   the victim, the defense counsel in the case.  
10                  So, we want to keep that in mind.

11                  We do have, and we had a series of  
12                  cases that went up to CAAF, there is a  
13                  requirement now to have suitable recording  
14                  devices for the Article 32.

15                  You want to clarify on page three  
16                  who a victim is. I think that ought to be  
17                  done as part of your group. There is some  
18                  discrepancies that appears between the new  
19                  Article 6b and the new Article 32(h)(2).  
20                  There is some difference there. The question  
21                  is whether the victim has to be named in the  
22                  specification or not named in the

1 specification. There is an inconsistency  
2 there.

3 Article 6b that I set forth for  
4 you there and I have really, rather than  
5 reading it all, I have sort of put in the  
6 highlights for you there.

7 The victim has various rights at  
8 various hearings that you will see there.  
9 They have a right to have a reasonable and  
10 accurate timely notice of a continuation of  
11 pretrial confinement, preliminary hearings,  
12 Article 32 hearings, courts-martial, clemency  
13 hearings, parole hearings. It talks about the  
14 victim may not be excluded, unless you are  
15 going to show some prejudice to the accused.  
16 That can be overcome very easily by requiring  
17 the victim to be called as the first witness.  
18 So you cannot have the tailing of testimony.  
19 That maybe you want to write that into a new  
20 manual provision as to how that works and  
21 maybe with a presumption as to that.

22 And of course, we now have

1 extensive rights for the victim as to the  
2 right to counsel. And we have to ask ourself  
3 now if you are that lawyer representing that  
4 victim, what are you going to do to help the  
5 victim? Many things can be done, very  
6 expensive things.

7 MR. BRYANT: Excuse me but as I  
8 understand it, calling the victim as the first  
9 witness to get around that provision, would  
10 assume that the victim is consenting to  
11 testify.

12 COL GILLIGAN: Yes.

13 MR. BRYANT: He or she has the  
14 right to decline to testify.

15 COL GILLIGAN: She does have that  
16 right.

17 MR. BRYANT: Okay.

18 MR. STRAND: But could the  
19 government step in? Say a victim gets a  
20 sexual assault kit in the hospital. The  
21 government pays for that procedure. Can the  
22 government then, insert themselves as the

1           victim because they are pecuniary liable  
2           because they have expended some money to pay  
3           for that exam.

4                   COL GILLIGAN:  And as to getting  
5           the exam, I think the government certainly is  
6           entitled to a discovery of any results from  
7           that examination.

8                   MR. STRAND:  But can the  
9           government insert themselves as the victim,  
10          since they paid for that exam?

11                   COL GILLIGAN:  Oh, I don't know.

12                   MR. STRAND:  Because when it talks  
13          about pecuniary liable, there is a government  
14          expense into all these things, the police  
15          response, the sexual assault kit, all that  
16          other stuff.

17                   COL GILLIGAN:  I don't know.  We  
18          will get some litigation on that, I am sure.  
19          It is a great question, though.  How that will  
20          shake out on that, we are going to be getting  
21          a lot of litigation on this.

22                   But of course bear in mind, LRM,

1           that case, the various ramifications of that  
2           are all going to be litigated, too. I am  
3           anxious to see how that litigation shakes out  
4           on something like that.

5                        As I say, extensive rights to  
6           counsel far beyond -- I always like going  
7           back. As I mentioned at the beginning as to  
8           the sources of rights we had, there was a big  
9           question as to these sources of rights. And  
10          would a manual provision be controlling if it  
11          grants more rights to the government or to the  
12          defendant in the case? The answer is yes, as  
13          long as it does not interfere with someone  
14          else's right in the case on that.

15                      You can grant more rights to the  
16          defendants. Not necessarily true about  
17          granting more rights to the victim. As I said  
18          at the beginning, you want to -- and that was  
19          up in the air for years.

20                      It would be interesting. John  
21          Cooke was involved with the Rules of Evidence.  
22          When the Rules of Evidence, the Military Rules

1 of Evidence were promulgated in 1980, bear in  
2 mind, CAAF did not agree that the military  
3 rules of evidence could trump other provisions  
4 that you could grant. That was up in the air.  
5 People didn't realize that.

6 It was up in the air until 1992  
7 because when the first cases came out as to  
8 the application of Military Rules of Evidence,  
9 CAAF refused to follow them. He said they  
10 were just suggestions.

11 So that is why, as I did in my  
12 introduction here, you have to keep -- people  
13 don't realize that they said we don't have  
14 these. If you are interested in the case  
15 sites on that, I can give them to you. Just  
16 send me an email on that.

17 It wasn't until 1992 in the Lopez  
18 case which indicated that those rules can  
19 trump the case law. And that was the issue.  
20 Can rules trump case law on that?

21 And then that happened again in  
22 the Supreme Court in Scheffer case in the late

1 '90s.

2 Beth?

3 PROF. HILLMAN: Haven't we really  
4 come full circle on that, though, now that  
5 with for instance the changes in Article 120,  
6 it is not only -- that sort of action is not  
7 only not a suggestion, it erases case law that  
8 has put essential gloss interpretation of  
9 relevant terms. So that it is a reset button  
10 now, when we have those changes.

11 That is a huge pivot away from  
12 judicial control of the terms that are  
13 relevant in this area of law, it seems.  
14 Specifically, in the sexual assault arena.

15 COL GILLIGAN: It is a reset  
16 button. And I mean I was always interested  
17 and I would just like to mention during the  
18 early 1980s how CAAF just decided they didn't  
19 have to apply the Military Rules of Evidence.  
20 People forget that.

21 PROF. HILLMAN: Yes, that is not  
22 where they are anymore. I have a question for

1           you.

2                           COL GILLIGAN:    Sure.

3                           PROF. HILLMAN:   Just to roll back  
4           a little bit as you talked about 412 and the  
5           intersection with Article 32 hearings as they  
6           once were and how they will now be.

7                           What about that applicability  
8           issue?  You mentioned that the description  
9           that these are not so different statutes, as  
10          you lay this out, you show the language is  
11          quite the same but that has been the source of  
12          the argument, that there is a different  
13          process that has a different substantive  
14          outcome in the military system.

15                          COL GILLIGAN:   Well, 412 does  
16          apply.  You look at -- and I don't remember  
17          the exact -- you want to look at the 1100  
18          rules, which says that they will apply at your  
19          32.  Nothing was done to change the  
20          application of the 1100 rules to the 32 on  
21          that.  So yes, 412 will apply, as will the  
22          other privileges apply and that is spelled out

1 in the rule on that.

2 MR. STRAND: So for clarification,  
3 if there is a 412 issue in a 32, even under  
4 the new set of rules, does the Article 32  
5 officer then have to refer that to a military  
6 judge or judicial oversight? Or will that 32  
7 officer make that decision on whether or not  
8 to allow that evidence in? I guess part of  
9 where I am confused as far as how it applies.

10 COL GILLIGAN: Well, the 32  
11 officer will make the decision. And I would  
12 recommend that the manual rules clarify it,  
13 that the victim has, if it is contrary to the  
14 interests of the victim, the victim has the  
15 right to apply it.

16 And I would think that LRM would  
17 allow you to do that. Anything as to  
18 privileges of the victim under 513, 514, or  
19 412, the victim should have a right to go  
20 through the appellate process to protect the  
21 victim's interest on that.

22 PROF. HILLMAN: You mean by

1 extraordinary writ.

2 COL GILLIGAN: Yes, absolutely.

3 MR. STRAND: Writ, as opposed to  
4 the local trial judge?

5 COL GILLIGAN: To writ, yes. I  
6 think LRM, as I say, left that open but, as  
7 you read LRM, it is going to allow the  
8 extraordinary writ to go through all the way  
9 to CAAF. If it goes through to CAAF, it would  
10 also go to Supreme Court, once it has been  
11 granted there.

12 And bear in mind the extraordinary  
13 writs can go to the Supreme Court. Donato is  
14 a good example of that one, which was a writ  
15 case that went to the Supreme Court.

16 COL MORRIS: Sir, on this chart,  
17 is that language gone altogether then?  
18 Looking at the second block there, are we  
19 recognizing the previous rights to pull  
20 witnesses in, cross them and -- is that gone  
21 altogether?

22 COL GILLIGAN: Yes, it is. If you

1 do the contrast there, yes. Yes, I put there  
2 -- what I did with some quotes there to give  
3 you the exact language on page two. The NDAA  
4 has curtailed the right of the accused at the  
5 hearing from presenting "anything he may  
6 desire on his own behalf." That is gone.

7 COL MORRIS: You know all of the  
8 judicially recognized function of a 32 as a  
9 discovery goal, you would expect that that is  
10 effectively dead language.

11 COL GILLIGAN: That is gone.  
12 Absolutely, I think that is gone. That is why  
13 I mention the Haley case. Because in the  
14 Haley case Justice Scalia says oh, you want to  
15 use this as a discovery device. Oh, you want  
16 to use this a device to intimidate witnesses.  
17 I mean, it was a great case to hear. Because  
18 immediately came to mind it was a sexual  
19 offense case in the military in the Article  
20 32. He said no, no, we are not going to allow  
21 that. So, it is interesting if you go back to  
22 look at that transcript of the oral argument

1           in that case there. I went down to hear  
2           another case and it had just so happened the  
3           second case was this one. I was delighted to  
4           hear that case. And then when you asked me to  
5           come here, I said, I can talk about it.

6                   COL MORRIS: I recognize the way  
7           it has been abused but I think the abuse is  
8           more weak 32 officers.

9                   COL GILLIGAN: I know.

10                   COL MORRIS: Given that and given  
11          that you are tightening in the pipe there then  
12          on the defensibility to use that for discovery  
13          purposes, do you see the need then for some  
14          compensating adjustment in the discovery rules  
15          to provide some separate, more formal early  
16          vehicle to get discovery so you are not just  
17          left with a thwarted or postponed ability to  
18          prepare your case and take care of your  
19          client?

20                   COL GILLIGAN: No. No, additional  
21          rules are needed.

22                   COL MORRIS: No additional rules

1 are needed you say?

2 COL GILLIGAN: No additional tools  
3 are needed. If you look at RCM 701 and  
4 contrast that to the federal rule, RCM 701,  
5 and you could do a line by line with the  
6 federal rule on that, is much more extensive.  
7 So, you don't have to do anything more to  
8 protect the rights of the defendant on that.  
9 As I say, 701 is more extensive right now.

10 COL MORRIS: In that you get more  
11 paper earlier in the process than you do at  
12 the federal level.

13 COL GILLIGAN: Yes.

14 COL MORRIS: I think that is true  
15 and I think government not always so conscious  
16 of that and it can be stingy there with the  
17 reg guidance.

18 But the other part of it still is  
19 access to witnesses. You know, you are losing  
20 the chance to get information out of a human  
21 being in some kind of controlled setting. So,  
22 you are going to need to cast a ballot for

1           your own pretrial witness interviews, where  
2           you at least had the formal structure and  
3           process that 32 made available to you. Does  
4           that concern you from an overall impact on  
5           justice standpoint?

6                       COL GILLIGAN: No, and here is  
7           why, because there is basically no change in  
8           how you could work it as a counsel. And think  
9           of it this way. You are a defense counsel or  
10          prosecutor in a case and you are advising your  
11          witnesses as a prosecutor in a case. And  
12          think of those of you who worked in the  
13          federal system with the FBI and the FBI knows  
14          this and they assert it all the time, and you  
15          say to the FBI, I am the Defense Counsel  
16          Gilligan. I would like you to come over to my  
17          office and talk to me. And the FBI is going  
18          to tell you, I would be glad to come to your  
19          office. I have this assistant prosecutor who  
20          would like to come along.

21                       And so the advice, setting aside  
22          people who know their rights, you encourage,

1 as a prosecutor you encourage witnesses to  
2 cooperate with the defense but you also tell  
3 the witness, you have a right not to talk to  
4 them. That is a personal right that you have.  
5 I encourage you, and they say the ABA  
6 standards require you to encourage them, but  
7 you have the right not to talk to them or to  
8 have a third party there or a lawyer there.

9 So the answer is, we have done  
10 nothing than follow the model rules and what  
11 the model rules do except most people don't  
12 give that sort of advice to their witnesses.

13 So, all I am saying is we have  
14 really clarified the advice by a very formal  
15 setting, the advice we are giving to victims,  
16 those who are qualified as victims. So, I see  
17 no difference there because of that.

18 As I say, most people don't do  
19 that but I have seen, if you go back to the  
20 model rules again and even look in the  
21 discussion of the model rules, as a good  
22 counsel you would be crazy not to advise your

1 witnesses that way. No ethical violation at  
2 all to do that.

3 MR. BRYANT: Well, if you don't  
4 tell your witnesses as a prosecutor, and I  
5 have been both a federal prosecutor and a  
6 state prosecutor, you run the risk that when  
7 the defense counsel or their investigators  
8 contact them, on their own, they assume that.  
9 They will "they" told me not to talk to you.  
10 And you protect yourself by making sure that  
11 you have documented military or civil, I told  
12 the witness they have a right not to but I  
13 can't tell you don't talk to them.

14 COL GILLIGAN: We give them a form  
15 letter. That this spells out exactly  
16 everything I just said. And just copy the  
17 model rules in that so you don't have the  
18 judge say oh, yes, okay Gilligan has told me  
19 not to cooperate at all. No, not the case.  
20 Here is the notice we gave to our witnesses in  
21 the case.

22 MR. BRYANT: To go back to the new

1 and improved Article 32, it appears to me that  
2 all they have done is reduced the fact that  
3 the Defendant can -- anything he may desire on  
4 his own behalf, because they still have the  
5 right to receive additional evidence in  
6 defense of mitigation relevant to the probable  
7 cause determination.

8 And I would assume and throw in,  
9 for instance, an alibi witness. No, he  
10 couldn't have. He wasn't there. That sort of  
11 thing. The defense is still going to be able  
12 to present those types of witness.

13 COL GILLIGAN: Oh, absolutely.

14 MR. BRYANT: So you just can't  
15 shotgun your witnesses and bring in somebody  
16 to talk about things that aren't relevant to  
17 the probability that this offense happened and  
18 this is the person who did it.

19 COL GILLIGAN: The defense. And  
20 you are going to talk to the defense this  
21 afternoon.

22 The defense has a lot of strategic

1           and tactical things that they are going to  
2           have to talk to their defendants about. You  
3           are going to see a lot more waiver of 32s,  
4           except when you have something you might  
5           present as a defense. That is what I predict  
6           is going to happen in this case.

7                   MR. BRYANT: Well, in the civilian  
8           world, it is rare, the equivalent of a 32  
9           probable cause hearing that the defense puts  
10          on any evidence because they don't want the  
11          prosecution to see or hear anything.

12                   COL GILLIGAN: That is exactly  
13          what you are going to hear. They are going to  
14          talk to you this afternoon probably about  
15          waivers.

16                   And you think about it, probable  
17          cause is a very easy standard to satisfy for  
18          the government. All you have got to do is  
19          look at the manual. The manual has got a nice  
20          discussion in the analysis there about a  
21          checklist you can use for probable cause.  
22          Very easy to satisfy the checklist. If you

1 look at the analysis that John Cooke and Fred  
2 Lederer wrote there as to what they call the  
3 basis of knowledge determination or  
4 reliability determination.

5 The checklist, as a judge I used  
6 to use when I was in Europe for three years as  
7 a military judge and issued lots of search  
8 warrants over there as a judge. I would just  
9 go through that checklist that is in the  
10 analysis to the manual. It is a very easy  
11 standard to meet, especially and eyewitness  
12 not from the criminal environment is presumed  
13 to be reliable. I mean that is the key  
14 standard that you have from a victim.

15 Beth?

16 PROF. HILLMAN: Am I right that  
17 these changes, as you see them in the Article  
18 32, would do nothing to stop what happened in  
19 the Annapolis case?

20 COL GILLIGAN: They would because  
21 the victim wouldn't have to testify.

22 PROF. HILLMAN: So, that is the

1 key distinction.

2 COL GILLIGAN: Well, I think, too,

3 --

4 PROF. HILLMAN: It is the  
5 requirement.

6 COL GILLIGAN: Yes, I think the  
7 judge in the Annapolis case could have used a  
8 lot more discretion to limit what happened in  
9 that case. A very good judge in the case. I  
10 know the judge personally but could have done  
11 a lot more to limit what we were hearing that  
12 case.

13 MR. STRAND: So what I see as some  
14 of the difference between civilian and  
15 military, the military has basically used  
16 discovery -- I mean used the 32 as discovery.  
17 Now, they are going to have to go and find  
18 other ways, basically the same traditional  
19 ways that other defense attorneys in the  
20 civilian world have used for discovery --

21 COL HAM: Except they have  
22 investigators.

1                   MR. STRAND: Except they have  
2                   investigators. Well, some do, some don't. A  
3                   lot of rural prosecutors don't have  
4                   investigators. But that is a key difference.

5                   So, would you recommend that  
6                   defense attorneys get investigators to equal  
7                   the --

8                   COL GILLIGAN: There is a couple  
9                   of cases out of whether the defense is  
10                  entitled to investigators. You might want to  
11                  look at those. And it is easy to reference  
12                  those. They are in Chapter 18 of the book  
13                  Courts-Martial Procedure. It lays out the  
14                  right to investigators in that chapter there,  
15                  if you want to look at that in detail.

16                  PROF. HILLMAN: I'm sorry, I'm  
17                  still stuck on where I was before and I  
18                  apologize.

19                  So, if the victim does choose to,  
20                  there is nothing that changes what happens at  
21                  that point. So, the only real difference to  
22                  what is the incident that motivated this

1 entire change would be the refusal to.

2 So in other words, nothing in the  
3 process that has been changed here would  
4 protect that victim, should he or she choose  
5 to participate.

6 COL GILLIGAN: Other than the  
7 rules we have before the changes. So, I  
8 agree.

9 PROF. HILLMAN: Okay.

10 COL GILLIGAN: Now, you are left  
11 to the discretion of the JAG Article 32  
12 Officer. I mean that is built into it.

13 PROF. HILLMAN: Or the advisor, if  
14 there is not a JAG --

15 COL GILLIGAN: Oh, the Advisor to  
16 the 32, yes.

17 COL HAM: Ma'am, I want to point  
18 out also that we have requested a transcript,  
19 if one was made, of that Article 32  
20 investigation so, you could find out exactly  
21 what happened. And the Navy has declined to  
22 provide that.

1 COL GILLIGAN: I think I can give  
2 you some background and what happened in that  
3 case there. And this is something for you to  
4 consider.

5 Consider this. Many times you  
6 have the victim who has been involved in  
7 misconduct. In this case here, let's assume  
8 you are at an academy and the victim is under  
9 21 years of age and has been drinking, which  
10 is your Annapolis case. So, what you have is  
11 the victim in that case was subject to a  
12 violation of 92 violations for the drinking  
13 that was involved. And that is why it started  
14 off and how it ended up the way it did, where  
15 you had some disputes about her testifying,  
16 not testifying. And she was very concerned  
17 with herself is whether she was going to stay  
18 in the academy because of her Article 92  
19 violation. So you find that, too.

20 Without getting into the  
21 transcript, that was the major issue how that  
22 happened in that case on that.

1                   But Beth, you are right. It has  
2                   got to be discretionary with the 32 Officer  
3                   with the advice of whoever the advisor is on  
4                   that. Otherwise, no changes.

5                   PROF. HILLMAN: I'm sorry to be  
6                   stuck on that but the challenge there, it  
7                   seems to me, if the larger part of this  
8                   problem we need to address is getting victims  
9                   to feel comfortable coming forward to say you  
10                  either you come forward and be subjected to  
11                  this excruciating process or you come forward  
12                  but refuse to participate in this process, we  
13                  have created a process that doesn't actually  
14                  do what we needed to do.

15                  COL GILLIGAN: I'm not offended by  
16                  that. I think we don't need the 32, just to  
17                  tell you that.

18                  So, I think the idea of what  
19                  Congress did here is right on target. What I  
20                  would have recommended is basically, this  
21                  allows the 32 by the government to be some  
22                  sworn statement. Back to Harvey, what you

1           said, if you have got other defenses you want  
2           to present.

3                       I have always asked myself this  
4           and you might want to ask if you have been  
5           involved in the military, how many times have  
6           you seen the defense with the full 32s that we  
7           had, actually get the charges dismissed or  
8           dropped down? I have raised that questions  
9           with individuals in classes I have given and  
10          you can count on two hands the number of times  
11          that has happened.

12                      I can say in the four years I was  
13          an SJA, you might say, well, don't ride in on  
14          your government horse here, Gilligan, I never  
15          saw a defense who was able to knock out the  
16          charges at a 32 or reduce them.

17                      I think as an SJA, if you are an  
18          SJA and you look ahead as to what has got to  
19          come up, that case has got to go to a GCM.  
20          And that is just my experience in four years.

21                      So, as I say, I have done this  
22          with audiences. And when I say two hands, I

1           probably could say to one hand. I have given  
2           this talk to other people on that. So, I  
3           don't think the Article 32 is all it is  
4           cracked up to be is what my point is.

5                        So, I don't think this is a  
6           drastic change as to it has got to effect  
7           defendants in the future. You are going to  
8           hear trial defense services is going to come  
9           in and say otherwise, I am sure, on that. But  
10          I just -- and Larry can speak to that, having  
11          been the chief of trial defense service on  
12          that.

13                       MR. STRAND: So, under these  
14          changes, the government doesn't have to bring  
15          in the victim. The government can simply  
16          submit the sworn statement or what other sworn  
17          testimony they have and the victim doesn't  
18          have to appear. The government makes the case  
19          and they decide.

20                       So, I think that is what I see as  
21          a major change to where before I don't think  
22          you could just generally submit the statement

1 of the victim and let it go at that.

2 COL GILLIGAN: That's right.

3 MR. STRAND: The defense had the  
4 right to cross-examine and now they don't have  
5 that right to cross-examine. I see that as a  
6 --

7 COL MORRIS: But isn't your point  
8 that that is a pretty imperfect choice; that  
9 there are all kinds of good reasons the victim  
10 ought to and may well want to testify and  
11 shouldn't be faced with the choice of either  
12 checking out altogether or putting up with all  
13 the shit they put up with in Annapolis.

14 COL GILLIGAN: You have got to ask  
15 yourself on that, Larry, if you were advising  
16 the victim, what would be your advice to the  
17 victim? And it has got to depend on the facts  
18 of that case.

19 And you want to think about  
20 victims, whether they want to testify and be  
21 subject to question. I mean, the issues that  
22 come up now for victims are very extensive

1           because of social media. You want to be  
2           thinking about that.

3                        If I am advising a victim, boy,  
4           that has got to be one of the first things I  
5           ask the victim about when I am the lawyer for  
6           the victim. So, I think this is a substantial  
7           change and I think it will cut back on the  
8           discovery that the defense has had and it will  
9           cut back on the cross-examination and  
10          intimidation that you get victims.

11                      COL MORRIS: Do you see any effect  
12          when you look at like the framers of Article  
13          32 from the original corrective function that  
14          it was supposed to serve or to guard against  
15          this kind of government steamroller to begin  
16          with, is this a weakening of that function or  
17          is your sense that the system otherwise hasn't  
18          matured so much that that need has diminished  
19          anyway?

20                      COL GILLIGAN: The original  
21          Article 32 was 1917 and the system has matured  
22          since then. You think of all of the things

1           that have changed since 1917. And so yes, so  
2           we can go to what we now have with the  
3           December NDAA.

4                       MR. BRYANT: How do we look at the  
5           differences between the federal system, in  
6           which 99.9 percent of the cases go strictly to  
7           a grand jury. There is very rarely a  
8           preliminary hearing or anything equivalent to  
9           an Article 32 in the entire federal system.  
10          And yet, there is still ample discovery.  
11          Defense attorneys get the transcripts from  
12          grand jury of anybody who is going to testify.

13                      So, I am just curious when you say  
14          I understood what you meant when you said you  
15          are not concerned about the Article 32. But  
16          suppose there was some sort of hybrid grand  
17          jury system in the military, where the victim  
18          would come in and testify not really subject  
19          to cross-examination, except by the grand  
20          jurors, which occurs quite a lot, actually.

21                      I'm just curious, since we have  
22          that system that really has no preliminary

1           hearings.

2                           COL GILLIGAN:  Yes, I can go  
3           further than that, though, Harvey.  My  
4           solution to this here is the offenses that  
5           have been defined as sexual offenses in the  
6           military, applying that over in the 50 states  
7           in the United States, should be turned over to  
8           the civilian community and not be tried.  So,  
9           it is sort of a reverse O'Callahan.  All those  
10          cases are now not triable.  You take  
11          O'Callahan on its face.  Those cases cannot be  
12          tried by the military.  You don't have to show  
13          a service connection.  The jurisdiction is  
14          solely left to the state courts and the  
15          federal courts.  The military cannot try them.

16                           And so I think that is the answer.  
17          If people are concerned with rights and that,  
18          we do that.  And I think that is the better  
19          way to go.  And you could do that.

20                           BG DUNN:  The one issue with that,  
21          though, don't you think is the deployed  
22          environment issue.  Because --

1 COL GILLIGAN: But that is why I  
2 said in the 50 states.

3 BG DUNN: Yes, okay. So, you  
4 still have to have some sort of system for the  
5 deployed environment because certainly a large  
6 issue in the deployed environment outside the  
7 military was the civilian contractors and  
8 these terrible assaults and trying to hold  
9 them accountable.

10 COL GILLIGAN: Unless you adopt  
11 what I say, we are going to have complaints  
12 for the next ten years. It doesn't make any  
13 difference what you do here, how we tinker  
14 with the rules on that.

15 So, to avoid the congressional  
16 concern, the way to do that is a reverse  
17 O'Callahan. And that will avoid the issues  
18 that we see.

19 MR. STRAND: One of my concerns,  
20 and I think one of the things you might be  
21 struggling with that is it is still left up to  
22 a JAG on what evidence comes in in a 32, as

1           opposed to a military judge. That is where I  
2           saw some of the abuses myself as an agent and  
3           also working with the agents where a lot of  
4           that stuff came in the 32 that didn't really  
5           matter, shouldn't have mattered but it came in  
6           and it became a big issue, not necessarily in  
7           the government winning or losing that battle  
8           but the victim cooperating or being able to  
9           cooperate.

10                        So, my thought is, and I don't  
11           know what your thought is on this, but to take  
12           those 412 issues and some of the other issues  
13           on what comes in, and if there is a question  
14           on it, that it not be up to the 32 Officer but  
15           it goes to a military judge to try to remedy  
16           and keep some of that stuff out because that  
17           is where the abuse is I have seen happen. You  
18           know where some of the sexual conduct, not  
19           just regular sexual misconduct, but the sexual  
20           conduct comes in and it is going to be a  
21           routine matter. And what I have seen from  
22           some of the 32 Officers, whether they be JAGs

1 or field artillery is what they don't want to  
2 do is they don't want to create a problem for  
3 the prosecution or the defense and they side  
4 on well, let's just let it in and then we can  
5 argue it out later in court. And that is what  
6 really impacts the victims, just to come in in  
7 the first place.

8 So, what are your thoughts on  
9 maybe if there is a 412 issue, if there is  
10 other Military Rules of Evidence issues, that  
11 it not be determined by a 32 Officer but it  
12 goes to a military judge?

13 COL HENLEY: Russ, could I just  
14 add on and then Fran, maybe you can comment.  
15 Then why have the 32 at all? Have the  
16 military judge conduct a probable cause  
17 determination after they have brought the  
18 charges. Then, you eliminate, I think the  
19 concern you have, Beth, with treatment of the  
20 victim at the 32 and those questions being  
21 decided by, albeit a JAG, a JAG who may or may  
22 not be experienced in handling the emotions of

1 the courtroom without the level of experience  
2 that I think a military judge has.

3 Get rid of the 32 for all cases  
4 and the military judge gets involved at  
5 referral of charges. And at that point, you  
6 can deal with the various discovery issues,  
7 the expert witness issues.

8 PROF. HILLMAN: And the defense  
9 counsel who needs somewhere to go to get  
10 resources.

11 COL HENLEY: And the judge's  
12 determination is binding. If the judge  
13 decides there is no probable cause, case gone.

14 PROF. HILLMAN: So you have to  
15 overcome that.

16 COL HENLEY: Harvey, is that your  
17 experience in grand jury proceedings?

18 MR. BRYANT: Well, if the  
19 prosecutor who is in charge of that particular  
20 case in the grand jury doesn't feel like he  
21 has got a decent case after he has put on  
22 everything he can put on, he is not even going

1 to present an indictment to the grand jury.

2 COL HENLEY: But when you go to a  
3 judge for a probable cause hearing, and the  
4 judge makes a --

5 MR. BRYANT: Well you can talk  
6 about later discovery and all those issues,  
7 sure. Sure, that's it.

8 COL HENLEY: The judge says no  
9 problem.

10 MR. BRYANT: It becomes a motions  
11 practice up until trial to get all that out.

12 COL HENLEY: But I have always, I  
13 agree with Fran. I always questioned the  
14 value of the Article 32 investigation from a  
15 judicial perspective because invariably, I end  
16 up dealing with those issues after the case  
17 has been referred to trial. The issues that  
18 arose during the Article 32 hearing come up  
19 through motions practice where defense counsel  
20 filed a motion for a new 32 because they  
21 weren't allowed to call witnesses or ask the  
22 right questions. Now, I am not saying it

1           resulted in relief under all circumstances,  
2           but I agree the 32 is still based on the  
3           changes in NDAA. I'm not sure it answers the  
4           questions. If the concern is treatment of the  
5           victim in its current state, I think if you  
6           involve the military judge and you trust the  
7           military judge in the various services to make  
8           those right decisions, I think that is the  
9           answer.

10                           But the secondary benefits I see  
11           is the judge getting involved early on dealing  
12           with discovery issues and moving the case  
13           forward, which I think is another criticism.  
14           I think victims have the case just languishes  
15           and there is no end in sight. And I think as  
16           soon as the judge gets involved and the  
17           parties recognize that there is a judge making  
18           those decisions, there could be some benefit  
19           to that.

20                           BG DUNN: But in the second and  
21           third order effects, then there would have to  
22           be some change with the referral process as

1 well. I mean you have to --

2 COL HENLEY: Yes, because right  
3 now the judge can't get involved until --

4 BG DUNN: Exactly, until the case  
5 is referred. So, that issue would have to be  
6 addressed.

7 COL HAM: I would say there was an  
8 Army study that was done in 2004. And Denise  
9 Vowell, who was the Chief Trial Judge of the  
10 Army ran it. And one of the primary  
11 recommendations that came out of that was to  
12 increase the authority of the Military Judge  
13 was approved by the Judge Advocate General.

14 And as part of that study, they  
15 rewrote all the rules of courts-martial and  
16 rules of in the UCMJ, statutory provisions  
17 that would have to be changed to allow the  
18 judge to enter the process at a much earlier  
19 stage, even pre-referral for issues like  
20 unlawful command influence, unlawful pretrial  
21 punishment, pretrial confinement issues,  
22 Article 32 issues, discovery, experts, et

1           cetera. So, there was a fully study done by  
2           that by at least one of the services that did  
3           recommend exactly what you are saying, sir.

4                   BG DUNN: So, what you are saying  
5           is that the baseline work has been done to  
6           address what changes would have to be made.  
7           And then what happened? Then it went nowhere  
8           in the Joint Service Committee?

9                   COL HAM: General Roman approved  
10          it and it was sent to the Joint Services  
11          Committee where it died.

12                   BG DUNN: And we have actual  
13          death, okay.

14                   PROF. HILLMAN: And we have utter  
15          disparity across the services in terms of the  
16          independence of military judges. I mean, so  
17          the response here has been to increase the  
18          number of lawyers in the process. We have a  
19          third branch now of lawyers right in the  
20          process, rather than to give some muscle to  
21          the match.

22                   MR. STRAND: I don't think the

1 military rules -- I mean I know it says  
2 military rules of evidence apply to 32 but I  
3 have not seen them applied at a 32, unless you  
4 have judicial oversight, it really doesn't  
5 apply. Only in words.

6 COL GILLIGAN: I think what you  
7 are seeing and I see this in the Navy Marine  
8 Corps, they are appointing a lot of judges to  
9 be 32 Officers right now and that has been --  
10 and so, as I say, the Annapolis case, other  
11 cases. I have got friends of mine who are  
12 military judges and that is what they are  
13 doing on 32s.

14 So, I wouldn't put that in there.  
15 I wouldn't put another appeal level in there  
16 on something like that.

17 COL HENLEY: I think the problem  
18 you would run into at least from an Army  
19 perspective, if you start detailing military  
20 judges to all sexual assault cases, I don't  
21 think our bench has enough judges to actually  
22 then preside over the case when they are --

1           for the trial. I think we are down to 20 some  
2           judges. I mean, that would be the difficulty.  
3           And you are talking about expanding resources  
4           in places that would seem obvious, which would  
5           be the trial judiciaries if you end up making  
6           these suggestions.

7                           But having judges, we did it in  
8           the Army by using the reserve judiciary and by  
9           using them, we still had the resources to  
10          actually detail judges to court-martial  
11          itself.

12                          COL HAM: For high-profile cases,  
13          sir, or complicated cases?

14                          COL HENLEY: Well, you are talking  
15          about high-profile cases, we would use one or  
16          two judges who were otherwise available  
17          because they weren't busy. They were doing  
18          other things involving military commissions.

19                          MR. STRAND: So, I guess the real  
20          question that I hear from you is do we really  
21          need the 32?

22                          COL HENLEY: I think that is a

1 question that we need to ask and answer.

2 BG DUNN: But it needs to go along  
3 with earlier judicial involvement in the  
4 process, based on the discussion we are  
5 having.

6 COL HENLEY: Right. And I think  
7 when people refer to the 32 as the equivalent  
8 of the grand jury proceeding, it is not. So,  
9 why not just get rid of that whole discussion?  
10 And I think people understand what a probable  
11 cause hearing is. They understand that a  
12 military judge, a judicial officer is making  
13 that determination, is protecting the rights  
14 of both parties. We recognize that and you  
15 don't refer to this hybrid 32 which seems to  
16 be criticized widely, based on some of the  
17 most recent high-profile cases. I think it  
18 has long-served its purpose. I think Larry  
19 alluded to in the old days to try to prevent  
20 cases where defendants were being steamrolled.  
21 I don't think we have that situation anywhere.

22 MR. STRAND: Well, if we look at

1           the 32 like a car, you know the car is  
2           basically broken. We tried to fix some of the  
3           parts. We have changed out the carburetor but  
4           the engine is still the same. And so, if we  
5           have another way to get the air into the  
6           engine, which is the victim doesn't testify  
7           but if the victim does, it is still going to  
8           go into that engine. It is going to be eaten  
9           up the same way.

10                   COL HENLEY: All right, I just  
11           think this would be a good opportunity to  
12           address the system. Generally, Article 32  
13           investigations for sexual assault offenses, I  
14           think every offense would benefit.

15                   PROF. HILLMAN: That is what is  
16           happening through this issue. Right? These  
17           are not changes that are specific to the  
18           sexual assault.

19                   I mean, in general, the 110 pages  
20           in the NDAA that affect military justice, they  
21           are shaking out the system. Right?

22                   MR. BRYANT: On the other hand,

1           when we are talking about doing away with the  
2           32, there still needs to be some --  
3           prosecutors should want to be able to see  
4           their victims or their witnesses, not just  
5           their victims, on the stand at some point.  
6           Maybe not subject to cross-examination by  
7           defense counsel but you learn a lot about your  
8           case. You know, you read your case and then  
9           when the witness takes the stand or is under  
10          oath, it often varies from what they told the  
11          investigator or what they may have said to you  
12          in your office because now they have raised  
13          their hand and there is other people around  
14          and their story is changing. And that is one  
15          of the things as a prosecutor. I don't know  
16          how we balance that. You want to see how they  
17          are going to do, how it plays out before the  
18          actual trial.

19                           COL HAM: And sir, you could  
20          subpoena a witness --

21                           MR. BRYANT: Whether it is a  
22          robbery or whatever it is, I mean it doesn't

1 matter.

2 COL HAM: I mean you can subpoena  
3 a witness for a grand jury. If the prosecutor  
4 decides the victim should be heard and that is  
5 not in this provision. The prosecutor has no  
6 authority to call the victim against the  
7 victim's will

8 MR. BRYANT: Right. And a grand  
9 jury system is a little easier because defense  
10 counsel in the federal system and in at least  
11 in Virginia is not in the grand jury. So they  
12 are not subject to cross-examination by  
13 defense counsel but the grand jury can ask  
14 questions and usually do.

15 BG DUNN: Yes, and I think -- I  
16 mean, what you are addressing I think is also  
17 part of the small value of the 32, especially  
18 if you keep lawyers out of the 32 process is  
19 you get the perspective of people who are  
20 likely to sit as your jurors in a case. And  
21 the questions that they may have and issues  
22 that they may see. And you lose that if you

1 don't have some process.

2 A 32 was, when a line officer  
3 properly conducted actually was valuable to  
4 prosecutors from that perspective, in a case  
5 that was an edgy case.

6 MR. STRAND: But I don't think we  
7 are going to be able to go back there. I  
8 don't think we will have line officers doing  
9 this anymore.

10 BG DUNN: Well but what Harvey is  
11 addressing in terms of some ability for  
12 prosecutors to see how the case shakes a  
13 little bit before it goes forward or to have  
14 another perspective on it.

15 COL MORRIS: And for both sides.

16 BG DUNN: For both, yes.

17 COL MORRIS: That is in the  
18 interest of justice, the more you have churned  
19 the information so that the whole referral  
20 process in the system is much more  
21 sophisticated and well thought out.

22 BG DUNN: Right. Because from a

1 justice perspective, a case that shouldn't go  
2 forward shouldn't go forward because the  
3 emotional toll on somebody who is wrongly  
4 accused, the financial toll on somebody who is  
5 wrongly accused. I mean that kind of -- those  
6 cases need to be brought up short as soon as  
7 possible and you may need a perspective  
8 outside --

9 MR. BRYANT: We are sort of  
10 arguing it both ways here because we need to.  
11 And I think what Colonel Morris was also  
12 referring to was if there is a chance for the  
13 defense to see the witnesses and they are  
14 really good and the case is strong, you are  
15 going to go to your defendant and say now you  
16 need to authorize me to go to the prosecutor  
17 and see what we can work out here.

18 BG DUNN: Yes, plead guilty now.  
19 Right. And again, which is better for the  
20 justice system.

21 MR. STRAND: But in sexual assault  
22 cases specifically, you have oftentimes very

1           traumatized victims who are hyper-vigilant to  
2           any criticism who are really going through  
3           some significant emotional and psychological  
4           and physical changes. And the perception in  
5           the system that we currently have, if they are  
6           going to go to that 32 and they are going to  
7           testify and they are going to be subject to  
8           cross-examination, I think that really reduces  
9           reporting. It reduces the victim's ability to  
10          cooperate throughout the rest of the process,  
11          as opposed to other types of crimes.

12                    But I do understand we are looking  
13          at changing the whole system. So, it goes  
14          back to the question if we have to have a 32  
15          so the prosecution knows what kind of case  
16          they have or so the defense can see how the  
17          witnesses are, I think that might be fool's  
18          errand as far as to see just --

19                   MR. BRYANT: You know we are  
20          trying to work this out, see which is best for  
21          the whole system.

22                   COL HAM: Remember Mr. Giller and

1 Colonel Gilligan says different but the  
2 prosecutor doesn't run even this version of  
3 the 32. The investigating officer runs it.  
4 So, it is a bit -- it is still different from  
5 your preliminary hearing, where you would  
6 decide who to call. The investigating officer  
7 decides who he or she wants to hear from.

8 MR. STRAND: So, Colonel Gilligan,  
9 what do you think if we just did away with the  
10 32? What impact, if any, and what  
11 recommendations would you have to take its  
12 place?

13 COL GILLIGAN: Well, I would stick  
14 with the new changes. I think the new changes  
15 eliminate practically a large part of the 32s.  
16 So you can go, as I say, as we started with,  
17 you can go with a sworn statement from the  
18 victims, the commanders, and things like that.

19 I want to go back to one thing  
20 that was mentioned earlier, the question of  
21 tenure for military judges. It might  
22 important to do that. The Coast Guard and the

1 Army have done it by regulation. The Marine  
2 Corps and the Navy and Air Force do not. It  
3 might be good to recommend that there be a  
4 tenure in the sense that judges now serve for  
5 whatever the assignment cycle is for those  
6 services, whether it is three years or four  
7 years. That might be the time for Department  
8 of Defense to take that position. As I said,  
9 the Army and Coast Guard have already done  
10 something like that. You could do that.

11 PROF. HILLMAN: Thank you for  
12 clarifying that. You know this discussion has  
13 helped me think about one of the challenges we  
14 have specifically in the sexual assault arena  
15 is the sort of education and training efforts  
16 that we need to do if we continue to have  
17 essentially untrained persons, like Article 32  
18 Officers making decisions and we are testing  
19 out the legitimacy of our case and the  
20 credibility of our victim against lay persons  
21 who lack that understanding. And this is not  
22 something we can change only in the criminal

1 process, that the investigation, the  
2 prosecution, the adjudication that has to  
3 change outside of that. And that is, of  
4 course, what our hope would be, that this  
5 would be a rug that will shake and things will  
6 start to change throughout.

7 But to the extent that we have  
8 used those responses to judge whether or not  
9 it is a credible case going forward, we have  
10 failed to actually go forward. And I don't  
11 think this an overwhelming problem right now  
12 in the context we are in right at this moment  
13 with this issue. But it is a problem.

14 I mean we are talking today later  
15 about training again. We have been talking  
16 about comparable training, civilian versus  
17 military counsel, courts, everybody,  
18 investigators, but really then we are talking  
19 about training everybody. Because if you have  
20 a system that is designed to recognize what  
21 constitutes a legitimate complaint but you  
22 test it against a standard that actually

1 doesn't understand what constitutes a  
2 legitimate complaint or the circumstances that  
3 would lead to that. Then, you are putting a  
4 filter that is going to keep everything out.  
5 Right?

6 MR. STRAND: Right, which has, in  
7 effect happened. A delayed reporting, well  
8 you didn't do this right away, you washed.  
9 All those things that make people not believe  
10 it.

11 BG DUNN: It is hard. And the  
12 thing is, the sexual assault cases are  
13 different. I mean when I talk about it in  
14 terms of the justice system and not forcing  
15 someone through the system as an accused when  
16 there isn't enough evidence to convict them,  
17 I mean I am thinking robbery cases, I am  
18 thinking drug cases. I am thinking of all the  
19 cases within our system. But sexual assault  
20 cases, of course, have special sensitivity  
21 because they are the most likely to be he  
22 said/she said and have all of the attendant

1 trauma and issues associated with that, that  
2 people don't understand, people haven't been  
3 educated about.

4 MS. JAUS: And if I may say so,  
5 the most likely to have a delayed report, the  
6 most likely to have absolutely no  
7 corroborating evidence.

8 MR. STRAND: And that seemed  
9 credible from the layperson.

10 BG DUNN: Right. But now we have  
11 put judge advocates -- pardon me?

12 COL HAM: Grand jury are lay  
13 people.

14 MS. JAUS: But it is a much lower  
15 standard. It is a lesser standard. It is  
16 just like the grand jury standard is  
17 reasonable cause to believe. It is not the  
18 standard of beyond a reasonable doubt.

19 BG DUNN: But a 32 is just  
20 probable cause. We are talking about 32s.

21 MS. JAUS: I thought just a grand  
22 jury in general.

1 MR. BRYANT: Now the grand juries  
2 are probable cause. That is what they are  
3 told. They have to establish that it is  
4 probable that this offense occurred, probable  
5 that this is the person who did it.

6 MS. JAUS: Right. I was just  
7 saying in the civilian arena, in New York the  
8 grand jury, it would be a reasonable cause to  
9 believe.

10 MR. BRYANT: Okay.

11 MS. JAUS: It is a very low  
12 standard, a lighter standard.

13 BG DUNN: Yes, just sort of a gut  
14 check before you move forward.

15 MS. JAUS: Right.

16 MR. STRAND: So, if we kept a 32  
17 and you articulated that the 32, the way that  
18 the NDAA spells it out is fine.

19 My concern still is the one with  
20 your concern, Beth, as far as the cross-  
21 examination and what is allowed during that  
22 cross-examination. And I still have a real

1           problem with 412 coming in and being decided  
2           by a 32 Officer, as opposed to judicial  
3           oversight.

4                       BG DUNN:  Although you do now, if  
5           you have judge advocates responsible for  
6           appointing 32 Officers, at least from a  
7           training and education perspective, now you  
8           have shrunk your group and you have elevated  
9           their basic understanding of the law to begin  
10          with.

11                      I mean I think to address some of  
12          those concerns we have that training.

13                      MR. STRAND:  Well, it depends on  
14          who the 32 Officers are.

15                      BG DUNN:  Well, no, no.  I am  
16          saying from the ability to get a hold of them  
17          and train them in this at the Army/Navy/Air  
18          Force schools and to focus on this issue, at  
19          least you have dramatically shrunk the number  
20          of --

21                      MR. STRAND:  As opposed to having  
22          train all the Field Artillery Officers.

1                   BG DUNN: I mean, which would be  
2                   impossible. It is absolutely impossible. But  
3                   at least you have a much better shot at doing  
4                   that training and over the course of a couple  
5                   of years inculcating it into the system with  
6                   this.

7                   Although, you know Steven Henley  
8                   is approaching and Patty Ham's mention of the  
9                   study that was done 12 or 13 years ago saying  
10                  eliminate them and increase the authority of  
11                  military judges to get involved early may be  
12                  something to explore.

13                  Although, ultimately we still have  
14                  the whole training issue because ultimately  
15                  those victims are sitting in a courtroom  
16                  testifying.

17                  MR. BRYANT: You know at some  
18                  point, they are going to testify if this goes  
19                  to trial.

20                  BG DUNN: They are going to be  
21                  there.

22                  MR. BRYANT: But then you have got

1 a judge there to help protect, you know keep  
2 it --

3 BG DUNN: Although you had a judge  
4 that may be Article 32 as well.

5 MR. BRYANT: More relevant.

6 MR. STRAND: Well, he was a judge  
7 but was he acting as a judge? Or was he  
8 acting as simply a 32 -- did he have judicial  
9 authority?

10 COL GILLIGAN: He was an acting  
11 judge sitting as the 32.

12 COL HENLEY: He didn't -- at least  
13 it was my experience when we made military  
14 judges available to serve as Article 32  
15 Officers, they weren't referred to as a  
16 military judge. They weren't called Judge  
17 Baxter is the 32 Officer. It was Colonel  
18 Jones or Lieutenant Colonel Smith because of  
19 that issue that they are not there in their  
20 judicial capacity. They may have specialized  
21 judicial training. But they weren't making  
22 those evidentiary rulings because they would

1 not be the judge detailed at the actual court-  
2 martial.

3 BG DUNN: But they make a decision  
4 in terms of the 32. Basically -- I mean, an  
5 Article 32 officer can do whatever he or she  
6 darn well pleases in that Article 32, which is  
7 why some Article 32 Officers control the  
8 process very well, understand what should come  
9 in, what should stay out. Let's move this  
10 thing along; here is our purpose. And others,  
11 like Judge Ito in the OJ case, allow things to  
12 go totally berserk in there.

13 So, even when you have a judge  
14 advocate or a military judge serving as an  
15 Article 32 Officer, I think it is very  
16 training and personality dependent as to what  
17 is going to go on in that Article 32. And you  
18 can't control the personalities involved.

19 PROF. HILLMAN: It is an excellent  
20 point but the heroic model of fairness is not  
21 the one that we want. We would like the  
22 person, if they are going to act like a judge,

1 to walk, talk, and look like a judge, and in  
2 fact be called a judge if that person is going  
3 to be a judge.

4 So, why should the victim have  
5 greater faith in this process? We are sort of  
6 -- you have said this looks fine to you, that  
7 it will actually solve a lot of the problem.  
8 But the problem of confidence, I don't get how  
9 this helps this late model version of the 32  
10 because the victim isn't really encouraged to  
11 trust that the court will protect him or her  
12 as this goes forward.

13 COL HENLEY: Can I tell you that  
14 you are talking about symbolism? If a victim  
15 walked into a probable cause hearing and a  
16 Military Judge, robed, is presiding over what  
17 is happening in front of them, because your  
18 point, Russ, on the 32, if the judge's  
19 detailed as a 32 Officer and they are not  
20 wearing robes, so they just come in in their  
21 normal everyday uniform like --

22 MR. STRAND: And they don't have

1           judicial authority, per se.

2                   COL HENLEY: Correct. But the  
3 confidence, if you are looking at it from the  
4 victim's perspective that they will get a fair  
5 shake, I think if you walk in and you see  
6 somebody in a black robe, that probably adds  
7 to their confidence that they will be treated  
8 fairly.

9                   MR. STRAND: You could fix the 32  
10 process even more, supposedly. You could take  
11 out the right to cross-examine. You could  
12 take out the right to all this other stuff, if  
13 the victim decides to testify. But that would  
14 be another action.

15                   Or, somebody, I guess what I would  
16 like to see is an argument to keep the Article  
17 32, other than doing what we are doing because  
18 it is there and it is going to work, okay.  
19 But there are still some significant issues,  
20 I think, that I am struggling with as well as  
21 far as what protections does that victim have  
22 in a 32. Because there still really is

1           discovery.  If that victim testifies in a 32  
2           they way I see it, and I could be wrong, if I  
3           am a victim of sexual assault and I am  
4           testifying in a 32 and that defense attorney  
5           then has the right to cross-examine me, there  
6           is a lot of discovery going on, even though it  
7           says there is no discovery.  And I just opened  
8           up Pandora's box to that because I testified.  
9           That is my concern right now.  And tell me if  
10          I am wrong but the other thing is what is the  
11          argument to keep the 32?  Since we have  
12          basically taken, suppose they have taken  
13          discovery how we fixed it, what do we have a  
14          32 for?

15                   COL GILLIGAN:  Well, for a  
16                   probable cause determination.  That's all.

17                   MR. STRAND:  Could a Military  
18                   Judge make that probable cause determination  
19                   and have no adverse effect on the military  
20                   justice?

21                   COL GILLIGAN:  You could have a  
22                   presumption that -- and we do have this, a

1 presumption once the charges are sworn. You  
2 can't swear the charges without a probable  
3 cause determination by the person swearing to  
4 the charges. It says that right on the charge  
5 sheet.

6 So you could go, you could  
7 eliminate that. We don't have a 32 for  
8 special courts. In special courts now, they  
9 have upped their punishment to a BCD and a  
10 year. So you could do the same for a GCM.  
11 Just go to the judge. The defense can come in  
12 and make a motion there was no probable cause  
13 and they can do it this day, even after your  
14 32.

15 You don't see -- I have never saw  
16 one of those motions in 400 cases. So,  
17 another point that comes into play. But you  
18 could have, the defense could make a motion  
19 there was no probable cause. And then you  
20 would have a determination in front of the  
21 judge.

22 One thing I just want to step back

1 a little back about judges with robes. You  
2 want to ask yourself, and I don't know the  
3 answer, do the Marines and the Navy wear  
4 robes, Dillon?

5 No, okay. So you want to keep  
6 that in mind. Some services don't have robes  
7 for judges.

8 COL MORRIS: Steven, where you  
9 would see the referral happening then, if you  
10 have the judge involved with this preliminary  
11 hearing? You would have a GCM CA already make  
12 a referral decision, just based on paper then?

13 COL HENLEY: Right, I think you  
14 could do it that way. That would certainly  
15 make a --

16 COL GILLIGAN: That is how we do  
17 it with special courts is on a preferred --

18 COL MORRIS: But the stakes are a  
19 heck of a lot different.

20 COL GILLIGAN: Oh, yes.

21 COL MORRIS: You know, this is  
22 people on trial for their lives still. So, we

1           are still taking about an awful lot of places  
2           that force everybody to assess the case.  If  
3           you zip right to a judge there, you have a  
4           convening authority who can be rightly  
5           criticized for not evaluating cases  
6           comprehensively and not now being blinded to  
7           the input of basically what is an adversarial  
8           proceeding.

9                   COL HENLEY:  Just because a judge  
10           makes a finding, a probable cause finding,  
11           doesn't mean the case needs to be referred  
12           either.

13                   You could have a referral as  
14           charged.

15                   COL MORRIS:  So you see that as a  
16           pre-referral decision?

17                   COL HENLEY:  Pre-referral, yes.

18                   BG DUNN:  So some sort of hearing  
19           pre-referral involving a Military Judge and  
20           determination of probable cause.

21                   COL HENLEY:  Yes, to address those  
22           scenarios.  Because the problem now is the

1 Article 32 Officer makes a finding that the  
2 case should not be -- there is no indication  
3 that be referred to trial.

4 How often do you as SJAs --

5 BG DUNN: Would ignore that.

6 COL MORRIS: But I don't think  
7 that is so. You know, you may not just ditch  
8 the case but you sure make a lot of -- because  
9 that is why your numbers there are interesting  
10 but that only X number actually dumped the  
11 case. But wouldn't you think that you would  
12 have multiple hands on which you have adjusted  
13 charges and dropped this or that charge based  
14 on what looked really great to your pumped up  
15 prosecutor that turns out to be not so great  
16 when you put a human in there and stack up the  
17 evidence.

18 So, I think there is a lot of --  
19 your command authorities don't just say to you  
20 hey, go ahead and suggest dropping the case  
21 but let's steam forward. And they are going  
22 to ask you what is in his head. What do you

1 say about that? Why are you so confident or  
2 are you not?

3 COL HENLEY: Right but what could  
4 you not accomplish in a PC determination  
5 presided over by a Military Judge that you  
6 would get at the 32? Why do you hesitate to  
7 have the Military Judge involved in the  
8 process?

9 COL MORRIS: In my view, what you  
10 have done to the 32 here, yours is only a more  
11 efficient version. I would go the opposite  
12 and see the lay guys involved --

13 COL HENLEY: Right. It's  
14 mandatory.

15 COL MORRIS: You know, and make  
16 everybody do it all the time.

17 MR. STRAND: But the 32 system was  
18 created in 1917. It has been adjusted  
19 throughout but that is long before we had  
20 independent investigations, long before we had  
21 specially trained agents in all the services.

22 So back in, even in the '50s and

1 even in the '70s, they didn't have these  
2 massive investigations at hand the commander  
3 could look at and other people could look at.  
4 They didn't have the collection statements; 32  
5 officers did all of that.

6 So, we know have specially trained  
7 agents in all the services. We talked about  
8 that at previous meeting. They collect a  
9 substantial amount of information. They have  
10 got all these things -- so do we need a 32  
11 investigation or do we just need somebody to  
12 take a look at what is there with the sworn  
13 statements and everything else and make that  
14 determination?

15 And then obviously, it would have  
16 go back to the craft of the lawyer and how to  
17 change the mindset of how we have done things  
18 in the past on collecting it and checking  
19 witnesses and credibility of witnesses and  
20 then basically go to what civilians had been  
21 doing all along.

22 COL HAM: But civilians go to a

1 grand jury.

2 BG DUNN: Yes, civilians have the  
3 opportunity for the witnesses to be up there  
4 and for a group of people who are not  
5 associated to be able to look at it and offer  
6 that.

7 MS. JAUS: It is very different.  
8 It is a very brief proceeding. I mean the  
9 witness --

10 MR. STRAND: There is no cross-  
11 examination, --

12 MS. JAUS: There is absolutely no  
13 cross-examination. The witness is just saying  
14 bare bones.

15 MR. STRAND: -- which I see as the  
16 biggest problem with the 32.

17 BG DUNN: Right but we are talking  
18 about trying to devise some sort of similar  
19 system.

20 MS. JAUS: Yes, but that is -- the  
21 grand jury system is really the briefest  
22 thing. You are just saying the bare bones of

1 the case and it is very rare that an  
2 indictment is not -- that you don't get an  
3 indictment because the grand juries don't hear  
4 much more. There is no cross-examination and  
5 defendants almost never testify, even though  
6 they have the right to testify.

7 COL MORRIS: Are you we talking  
8 about the state system in New York? Because  
9 in the federal system, there is a more  
10 extensive questioning of the witnesses and  
11 building of a transcript.

12 MS. JAUS: Right but we don't have  
13 that in the states. I think it is pretty much  
14 across the board in the state system.

15 COL HAM: But the Constitutional  
16 purpose is to put laypeople between the power  
17 of the state and facing prosecution.

18 MS. JAUS: Right.

19 MR. STRAND: But the 32 system  
20 doesn't do that.

21 COL HAM: Because the Constitution  
22 specifically excludes the armed forces from

1 the entitlement to a grand jury proceeding.

2 So, Congress statutorily created  
3 this, although probably a more apt analogy is  
4 the referral, which is the probable cause  
5 determination and the sending to trial. That  
6 is like the grand jury bill. So, Congress  
7 created something to make up for the fact that  
8 there is no grand jury proceeding and put a  
9 lay person in-between the power of the  
10 prosecutor and the courtroom.

11 MR. STRAND: But they have removed  
12 that provision. So, we are back at do we need  
13 a grand jury. I don't think the 32 is a grand  
14 jury, especially the way it is currently  
15 configured.

16 BG DUNN: No, but I think, as  
17 Colonel Ham said, it was a mechanism to  
18 somehow achieve that function.

19 PROF. HILLMAN: But if we are  
20 talking archaic, I mean specially trained  
21 investigators, the exemption in the  
22 Constitution for cases arising in the land and

1       naval forces, and in times of war, that is  
2       pretty archaic too, as we apply it now.

3                   Can I ask a procedural question?  
4       It is almost ten. So what should we do here?  
5       I don't know if Colonel Gilligan has last  
6       words for us or things that we haven't  
7       mentioned that you should tell us but just  
8       administratively, I think everybody needs to  
9       give you lunch orders. And I just want to  
10      make sure we are on track. What would you  
11      like us to do in terms of timing here, Dillon?

12                   MR. FISHMAN: Yes, I would suggest  
13      that maybe we can wrap up with Colonel  
14      Gilligan. We might be able to ask him back in  
15      February if you all have additional matters  
16      you want to discuss. Because I think we have  
17      strayed from some of the subject because it is  
18      important. And then administratively, yes, we  
19      are ready to collect those, if you all have  
20      them. We need your lunch orders.

21                   PROF. HILLMAN: Right. And so and  
22      then should we take a short break before our

1 next presenters?

2 MR. FISHMAN: I would suggest five  
3 minutes.

4 PROF. HILLMAN: Okay, what did we  
5 miss? What do you want to tell us before we  
6 break?

7 COL GILLIGAN: Well, I thought you  
8 had a great discussion. I like the new  
9 changes to the Article 32. I think it is --  
10 of course, the new NDAA requires manual  
11 provisions to be changed. I think you have to  
12 be thinking about the manual provisions. I  
13 gave suggestions as to what ought to be done  
14 as to appellate issues. I think you need to  
15 spell those out a little more. You need to  
16 spell out a little more about the victims'  
17 appearances at the various hearings I  
18 mentioned on page two of the one outline.

19 I wish you all good luck with this  
20 project. Thanks for having me.

21 PROF. HILLMAN: Thank you so much  
22 for bringing such depth of experience and

1 precision to an area where we often get  
2 muddied about what the different rules are and  
3 where they fit together on this, as we try to  
4 sort of figure this out.

5 And I would be grateful if we do,  
6 as Dillon mentioned, have further questions if  
7 you would consider helping us in the future,  
8 too.

9 COL GILLIGAN: I would be glad to  
10 come back. I live and work right here in  
11 town.

12 PROF. HILLMAN: Thank you. So,  
13 let's take a five-minute break.

14 (Whereupon, the foregoing meeting  
15 went off the record at 9:57 a.m. and went back  
16 on the record at 10:12 a.m.)

17 PROF. HILLMAN: I want to thank  
18 everybody for dealing with the travel issues  
19 and I am grateful that we are pretty much  
20 fully constituted or we are getting closer.

21 Ms. Mosley, I am really glad you  
22 could come to talk to us. We are, as Ms. Jaus

1 was just reminding me, despite all the  
2 military talk that we continue to engage in,  
3 we are the Comparative Systems Subcommittee  
4 and we are interested in what we can gain from  
5 any traction on these issues from the civilian  
6 world of experience with these topics, too.  
7 So, we are grateful you are here and look  
8 forward to hearing from you.

9 MS. MOSLEY: I am Candace Mosley  
10 and I am Director of Programs for the National  
11 District Attorneys Association. I am a former  
12 prosecutor from Harris County, Texas, which is  
13 in Houston. I was a prosecutor there for six  
14 years. For the first couple of years, I was  
15 in general trials. It is a very structured  
16 office because it was a large office. And so,  
17 you started in misdemeanor, progressed to  
18 felony. I was in general trials and then I  
19 volunteered to go into the domestic violence  
20 division, which it is really interesting  
21 because you got a lot more experience. I am  
22 sure there is several former prosecutors here.

1 I know Mr. Bryant is here and he was a member  
2 of the Board of the National District  
3 Attorneys Association. So, I know you all are  
4 familiar with that and that basically there  
5 were not, at that time, because I have been  
6 with NDAA for 20 years, so this was about --  
7 I know -- with the Southern Methodist  
8 University School of Law, 30 years ago almost.  
9 But at the time that I was a prosecutor in  
10 Harris County, domestic violence, no one was  
11 interested in prosecuting those cases. And so  
12 there was a revolving door in that division  
13 and experienced prosecutors would not stay.

14 So, I volunteered and stayed there  
15 for four years. And it was really, really  
16 interesting. One of the things I really  
17 enjoyed is that you got to try all types of  
18 cases. You got the felonies. You got all  
19 different types of cases.

20 So, after my experience as a  
21 prosecutor in Houston, I joined the National  
22 College of District Attorneys. And that was

1           20 years ago and at that point in time, NDAA  
2           was kind of looked at as our parent  
3           organization. The National College did  
4           training and technical assistance and then  
5           there was American Prosecutors Research  
6           Institute that did a lot of research for  
7           prosecutors. In the last five years, we were  
8           all merged together, so now we are all the  
9           National District Attorneys Association.

10                        So, basically, my role has changed  
11           tremendously in working with the National  
12           District Attorneys Association. I initially  
13           did tuition-based training programs for  
14           prosecutors and members of the prosecution  
15           team. And that varied from hands-on trial  
16           advocacy training to topic-specific, like  
17           prosecuting child abuse cases, prosecuting  
18           homicide cases, and annual national conference  
19           on domestic violence.

20                        After that, though, what ended up  
21           happening, as many of you know, the National  
22           Advocacy Center was developed in South

1 Carolina and the National District Attorneys  
2 Association actually got basically the  
3 contract to do the state and local side of the  
4 training. So, I moved to Columbia, South  
5 Carolina for 11 years, where we basically did  
6 hands-on trial advocacy training for all  
7 levels of experienced prosecutors. And it was  
8 incredible, just a wonderful experience.  
9 Because as you could imagine in most  
10 prosecutors' offices, the more seasoned  
11 prosecutors were the ones who got to go to the  
12 tuition-based types of training that were very  
13 costly. And for the National Advocacy Center,  
14 the thing that really helped were the novices  
15 which really didn't get that type of training,  
16 unless there was some in-house training or the  
17 prosecutor coordinators in their individual  
18 states did the training. They were able to  
19 get that type of training that they  
20 desperately needed. So, we had levels from  
21 prosecutors who had zero experience up to two  
22 or three years.

1                   And if you look in your little  
2                   resource packet, I gave you some of those  
3                   agendas. For instance, the prosecutor boot  
4                   camp course, that was for babies, zero to two  
5                   to three years of experience. You got  
6                   fundamental lectures and then you would --  
7                   mainly the special workshops. There were a  
8                   couple of performance workshops but that is  
9                   what that was about.

10                   The trial advocacy courts, and we  
11                   have that in your packet as well, that was for  
12                   prosecutors who had about three to six years  
13                   of experience. And this we really love  
14                   because you got to work through every single  
15                   stage of the trial. And that was very  
16                   beneficial because you weren't just in the  
17                   front of the room lecturing at people. People  
18                   got to actually practice what we preached.  
19                   So, that was one of the other types of  
20                   training.

21                   We still did our tuition-based  
22                   training courses and we still did topic-

1 specific courses, like prosecuting sexual  
2 assault, homicide cases, forensic evidence.

3 The other two things you see in  
4 your packet, one is some of the topics since  
5 I knew we were talking about sexual assault.  
6 There is just some resource information. For  
7 instance, a prosecutor from Indianapolis,  
8 Kristina Korobov, who also works with NDAA.  
9 This is hers on jury selection. It is just a  
10 PowerPoint just to give you an idea of the  
11 type of training and checklists and that type  
12 of thing that we provide.

13 Also I put in because this was  
14 really interesting, was something that was  
15 developed under the National Center for the  
16 Prosecution of Violence Against Women which I  
17 head up. This was before I was heading it up  
18 but it is just a really wonderful checklist on  
19 every type of jury selection issue that may  
20 come up.

21 We get, I would say, on average,  
22 probably 20 to 30 technical assistance

1 requests daily just in the area of domestic  
2 violence, which encompasses intimate sexual  
3 assault as well as the stalking, the cyber  
4 stalking, elder abuse, basic domestic violence  
5 cases. That is just through emails. We get  
6 a huge amount of technical assistance  
7 requests. And what we have seen an increase  
8 of are those complex issues like expert  
9 witnesses, unique defenses that are coming up  
10 and prosecutors needing assistance on that.

11 I know one of the things that I  
12 was asked was the relative level of experience  
13 of prosecutors handling these cases. And one  
14 of the things I was discussing with Dillon  
15 yesterday was, and many of you know it because  
16 you are former prosecutors, is just so varied.  
17 I mean, you would think that, obviously,  
18 promising practices would dictate that it  
19 would be a more seasoned prosecutor who has  
20 had some experience, has a certain number of  
21 trials and felonies, had maybe chiefed or  
22 supervised somebody in the misdemeanor

1           division before going to a felony. But many  
2           offices across the country many people think  
3           are large urban offices and they are not.  
4           Many of the prosecutors that we have seen that  
5           come to training are in two- and three-person  
6           offices. There are, obviously, some that are  
7           very structured like New York and Houston, and  
8           Dallas, and large urban areas. But the  
9           majority of prosecutors' offices out there for  
10          state and local prosecutors are these smaller  
11          offices in rural areas.

12                        So, we get technical assistance  
13          requests constantly from a person who doesn't  
14          have trial experience and they have got the  
15          felony.

16                       MR. BRYANT: May I ask you  
17          something, Candace, at this point? Do you  
18          have to be a member of the National District  
19          Attorneys Association to request and get  
20          assistance?

21                       MS. MOSLEY: No. That is one big  
22          thing that we really are very particular

1 about. You do not have to be a member. You  
2 don't have to be a state and local prosecutor.  
3 You can be a --

4 MR. BRYANT: So a military  
5 prosecutor could request assistance?

6 MS. MOSLEY: And they have and we  
7 have assisted.

8 You don't have to be a state and  
9 local prosecutor. You can be a military  
10 prosecutor. You can be a federal prosecutor.  
11 We don't turn down or turn away any  
12 prosecutors. And it is a variety of types of  
13 requests.

14 I was telling Dillon on Friday I  
15 was helping a prosecutor from New York who had  
16 a sexual assault case. And her victim was an  
17 adult victim who had Downs Syndrome. And she  
18 put in an urgent request on Thursday and said,  
19 look, I have got to select a jury on Monday.  
20 I don't know what to do on this. Can you give  
21 me some suggestions?

22 And so I basically was crafting a

1           voir dire for her all day Friday and sent her  
2           voir dire questions. If that was going to be  
3           what was going to assist her, no problem  
4           whatsoever.

5                         One thing I have noticed, though,  
6           that is really interesting, we get these types  
7           of requests daily from prosecutors. We get  
8           the whole I have got an expert witness I have  
9           never heard of. This is what we think they  
10          are going to testify. We just found this out.  
11          We need transcripts. We need bios. We need  
12          prior testimony. What do you have?

13                        Our child abuse unit has a huge  
14          database on experts. But we also work with  
15          other organizations like the National  
16          Association of Prosecutor Coordinators. And  
17          they are an association of each individual  
18          state that has an organization dedicated to  
19          prosecutors, like the California District and  
20          County Attorneys Association, NYPTI in New  
21          York, who I love Shawn Smith. He is amazing.  
22          They have an incredible database on experts.

1           They have a database also unique to capital  
2           cases. And capital murder cases, where we had  
3           a grant where we were giving them a lot of  
4           information to upload.

5                        So, we have a variety of resources  
6           that if we don't have information on that  
7           expert in our database, we can reach out to  
8           someone like Shawn. He has started a  
9           prosecutors' Wikipedia where he has just got  
10          loads and loads of information on all types  
11          unique defenses and experts.

12                       Then we have a huge number of what  
13          we call faculty members, who are seasoned  
14          prosecutors who have lectured for us all over  
15          the country. We can reach out to them, if the  
16          expert is from their jurisdiction. That just  
17          happened yesterday. Someone had an expert who  
18          was a doctor from Arkansas. I reached out to  
19          a prosecutor by the name of Melanie Martin,  
20          who is a seasoned prosecutor in Little Rock.  
21          And she is like oh, my gosh, I have already  
22          found out about her. She is a nurse. She is

1           wonderful. It is going to be bad if the  
2           defense is using her because she is very  
3           credible and she is used with prosecution and  
4           everybody likes her.

5                        So, we get all those different  
6           varieties of requests. One of the other  
7           things that I found, though, that is really  
8           unique, and I guess this is the advent of  
9           people being more familiar with the internet.  
10          Over the last, I would say, two and a half  
11          years, I get a huge amount of requests from  
12          survivors and survivors' families that I did  
13          not see before. And a lot with the sexual  
14          assault is I have got a delay in reporting.  
15          I now want to prosecute. What can I do? Or  
16          I have contacted this prosecutors office or  
17          this police agency. They are not assisting  
18          me. They are not listening to me. Can you  
19          help me?

20                       It is really interesting on  
21          domestic violence, elder sexual assault cases  
22          where a family member is complaining that

1 nobody is prosecuted.

2 MR. BRYANT: Are you getting those  
3 from current or former military survivors?

4 MS. MOSLEY: You know what? I  
5 have had two from military. Two of them. One  
6 was in Alaska and her husband was in the  
7 military but she was living off base. And he  
8 was no longer -- he had been deployed and so  
9 he wasn't there. And so she then wanted to  
10 file a sexual assault claim. And I actually  
11 have done some training with the AG's Office  
12 in Alaska and I called my contact there. And  
13 they got someone to talk to her so they could  
14 talk to her so they could talk to her about  
15 filing charges.

16 We have had that happen. We have  
17 had also military prosecutors who have called  
18 us for information on different types of cases  
19 and different types of experts or defenses  
20 that they have wanted information on and we  
21 have assisted them with that as well.

22 We will send out any information

1           that we have that is going to be helpful to  
2           them.

3                       COL HAM: Ms. Mosley, do you do  
4           other types of assistance during the trial  
5           that would cause you to not be part of the  
6           trial team but to, I don't know, on a  
7           particularly complex or high-profile case in  
8           a jurisdiction to actually attend so that you  
9           can advise during the trial?

10                      MS. MOSLEY: We have not done  
11           that. We have not done that yet. We get  
12           calls, though, I am stuck in the middle of  
13           trial and this just got dumped on me. Can you  
14           give me some information on that?

15                      So, we are not in the courtroom  
16           with them but we will provide the information  
17           for them. We get calls about requests on how  
18           to handle the high-profile case when they are  
19           having a media onslaught. And we have some  
20           very seasons prosecutors, and as I was also  
21           speaking to Mr. Bryant earlier, our former  
22           Executive Director, because he has resigned

1           now, but Scott Burns was our media person and  
2           he also was a person who testified on the Hill  
3           for us all the time. He is exceptionally good  
4           with media requests.

5                       That is another thing. We get  
6           media requests daily, inundated. When some  
7           hot issue comes out, some hot high-profile  
8           case, he gets contacted wanting to know the  
9           voice from the America's prosecutors.

10                      The one thing that I have always  
11           been very fond of that he will not comment on  
12           anything unless he talks to that prosecutor's  
13           office. But that happens regularly as well.

14                      The other thing with the military  
15           is that we actually have done training for the  
16           military. I, myself, did training for four  
17           years for the Navy. We had a Lieutenant  
18           Commander come to our career course. That was  
19           one of our most, I guess, famous or infamous  
20           courses. It is a course that is a hands-on  
21           trial advocacy course. It has been anywhere  
22           from two weeks up to four weeks long in prior

1           years. And at this point in time, it was a  
2           two-week long course. It was in Houston,  
3           Texas. And the thing that was really  
4           interesting about that course, we had the  
5           foundational lecture. So we call it a  
6           building blocks course. The foundational  
7           lectures, followed by workshops on every stage  
8           of the trial. We had actors who had come in  
9           and role-played defendants and defense  
10          witnesses.

11                           And so this Lieutenant Commander  
12          said, you know what, can you kind of trim this  
13          down to about a week and do this for us? And  
14          so for four years, I traveled to a variety of  
15          naval bases. We were in Bremerton, and we  
16          were in Norfolk, and San Diego, and Mayport  
17          doing these hands-on trial advocacy trainings.  
18          And we would be told, for instance, the issue  
19          on one base may be sexual assaults that were  
20          more like acquaintance rape, no evidence, no  
21          injuries. Could you do a scenario that was  
22          familiar to that within the trial advocacy?

1           We want the foundational training but we also  
2           want to deal with some of those issues that  
3           our prosecutors are going to come in contact  
4           with with that type of case. And so we would  
5           do that. So, that was, I think, was very  
6           interesting training because I was not aware,  
7           at that point in time, on how we were going to  
8           do that. I wasn't aware of court-martial  
9           rules and we basically followed the procedure  
10          under general court-martials. There were a  
11          lot of similarities, obviously a lot of  
12          differences but it was a very unique learning  
13          experience, I think, for all of us that were  
14          involved in that type of training.

15                    The other thing that someone was  
16                    asking was what are the type of -- Dillon  
17                    mentioned was the types of training that are  
18                    available to prosecutors' offices, especially  
19                    in this economic climate where there is little  
20                    money?

21                    I have had domestic violence  
22                    conferences where I could give a full

1 scholarship for transportation costs, lodging  
2 at the hotel, the conference was free, could  
3 reimburse some transportation. And I had  
4 people turn it down because they couldn't  
5 afford to be out of their offices.

6 So, the bulk of prosecutors really  
7 don't have the money. Their offices don't  
8 have the money for the training. And a lot of  
9 them will do in-house training, which works  
10 wonderfully. They use their seasoned  
11 prosecutors to do that. Some of them will  
12 save up the money and somehow fund to come to  
13 national courses.

14 We have also seen offices who have  
15 come to us and said can you, just like the  
16 Navy did, can you tailor something for our  
17 jurisdiction? So, I also manage our  
18 independent contract training is what we call  
19 it. And we will go into an office, like we  
20 went into San Diego. They wanted a management  
21 training for every single manager in their  
22 office. It was 100 supervisors in that office

1           and I did that back in May. So, we can tailor  
2           it specifically to their needs and to go out  
3           and do that type of training.

4                        As I mentioned, the National  
5           Association of Prosecutor Coordinators are  
6           very instrumental in individual states. Not  
7           only are there the entities that do some of  
8           the legislative lobbying for those prosecutors  
9           in that state, they also do training for that  
10          state. And they can do it a, probably not as  
11          an expensive cost and people can drive,  
12          because it is more of a regional.

13                      The thing, though, I think that is  
14          very crucial that I really enjoy about our  
15          organization is national-based training. I  
16          think it just makes a huge difference to sit  
17          down and learn from people from all over the  
18          country who were doing the same or similar  
19          things that you are doing. If you are trying  
20          a huge horrible sexual assault case and you  
21          have got a wealth of issues, it is really  
22          incredible to sit next to a prosecutor who has

1       dealt with that defense before, or someone who  
2       has got a judge that is difficult and they  
3       have got a challenge they can share with you.

4               The whole networking really makes  
5       a huge difference and also learning that you  
6       are not a microcosm. It is like what happens  
7       in your world is not everything that always  
8       happens, that there are other challenges and  
9       issues out there and maybe you haven't seen  
10      them yet but they may be on the forefront, so  
11      you need to be aware of them and know that  
12      those are coming. Also, once you go back  
13      home, you have contacts now. You may have a  
14      witness that shows up in that state that you  
15      don't know about and you can reach out to that  
16      prosecutor. You can reach out to that  
17      prosecutor with regard to an expert to see if  
18      they have encountered that person, if they  
19      have transcripts on that person. And so I  
20      think that the national base training is  
21      really an excellent avenue.

22               I will tell you that by far, the

1 hands-on trial advocacy training has been, the  
2 attendees have found, the most beneficial.  
3 Even if you have front of the room lecture  
4 training and you have incorporated some  
5 demonstrations, that is useful as well. But  
6 it is the ability to not only practice what  
7 someone preaches, we also would videotape the  
8 person and they get to see themselves. So, it  
9 is one thing to tell a person this is how you  
10 might be impeding the message to the trier of  
11 fact but they see themselves doing those  
12 things, it makes a huge difference. Sometimes  
13 I have seen myself, it is ugly. It can be.

14 MR. BRYANT: When you show them  
15 those videos, then is there someone there to  
16 help critique that, too?

17 MS. MOSLEY: Yes, we have -- what  
18 we do on those types of training is that there  
19 is a live courtroom where they are doing  
20 performance exercises in front of other  
21 members in their workshop and in front of  
22 seasoned prosecutors who give what we call a

1 live critique. And that critique is a  
2 substantive critique. It is on those issues  
3 that may be reversible and we don't want them  
4 to ever do again. It is that type of thing.

5 The video then happens in a  
6 different room with a different prosecutor and  
7 it is more of a -- not a substantive critique  
8 but more of the things that you do  
9 procedurally -- excuse me -- that could impede  
10 the messages like the body chemistry. It is  
11 those types of things.

12 However, if someone is in there  
13 and they are still lamenting over the  
14 substantive critique that they have got, we  
15 certainly have that prosecutor also assist  
16 them with that. If they are saying hey,  
17 someone just told me I was going to commit  
18 reversible error and there is still a meltdown  
19 over that, then obviously we will have them  
20 attach that. But it really does make a big  
21 difference when you are telling people about  
22 using their voice to increase.

1                   There are so many different ways  
2                   to increase persuasion. You know we hear our  
3                   story and we hear our version of the facts.  
4                   And that is what we are familiar with. And  
5                   trying to get across to prosecutors that the  
6                   best way to communicate that is in that  
7                   conversational mode versus being up there and  
8                   being a little robot and just reciting the  
9                   facts. And so for them to see themselves and  
10                  to see how they are able to be expressive and  
11                  to communicate in a persuasive manner that  
12                  victim's rendition of the facts so that they  
13                  can achieve justice makes a huge difference.  
14                  So, that has been very helpful.

15                   One of the things that not only do  
16                   we miss that we get calls about constantly is  
17                   the fact that we had to pull out of the  
18                   National Advocacy Center. We had a variety of  
19                   training besides the boot camp and the trial  
20                   advocacy training. We had some training for  
21                   more experienced level prosecutors. For  
22                   instance, that that just concentrated on

1 cross-examination. We had training that  
2 concentrated on the use of experts in direct,  
3 in preparation of cross-examination of  
4 experts. We had appellate prosecution  
5 practices. So, we had a variety of training.

6 We just were approved on Friday by  
7 BJA for the new criminal justice academy,  
8 which is going to be housed in Salt Lake City,  
9 the university there, their law school. And  
10 basically right now, they are going to build  
11 a new law school so we have a new facility to  
12 do this type of training that is specifically  
13 designed for live courtroom performances and  
14 video feedback critiquing.

15 And so what we are doing right now  
16 is working under temporary conditions. We are  
17 going to be in the law school. Lodging will  
18 be in a nearby hotel but we will be running  
19 the training in a law school.

20 We have been approved for nine  
21 trainings. On Friday, they approved the first  
22 four. They will be once a month, beginning in

1 March. So it will be March, April, May, and  
2 June. And they will all be trial advocacy one  
3 types of training. So, it is the one that has  
4 been missed by most prosecutors' offices and  
5 it again, will utilize actors to play  
6 defendants and defense witnesses. It will  
7 walk them through every stage of the trial,  
8 where they will have a lecture on one stage of  
9 the trial. They will have a review  
10 demonstration and then they will go on to live  
11 performance exercises and complete the  
12 exercises.

13 MR. BRYANT: Is there a particular  
14 membership fee for military? Is there a  
15 special membership fee? Maybe that is outside  
16 your parameters.

17 MS. MOSLEY: No, we have done that  
18 for our tuition-based training. We have done  
19 that and it just kind of depends. We will get  
20 an email. We have a fund for scholarships for  
21 tuition. We, unfortunately, don't have a fund  
22 that covers the other transportation, et

1           cetera, but it will cover the tuition. And so  
2           we have been requested for military for a  
3           waiver of tuition and we have those funds  
4           available. We do provide that.

5                       We also have some grant training.  
6           So, we have a lot of training that is under a  
7           grant. It is not just our tuition-based  
8           training. And if it is under a grant, there  
9           is not a charge for the tuition and some of  
10          those other expenses are covered, depending on  
11          what the grant is and what it allows.

12                      MR. BRYANT: But what about  
13          membership of NDAA itself?

14                      MS. MOSLEY: You know what? I  
15          don't know the answer to that. I can find  
16          out, though, if there is a discount for  
17          military.

18                      MR. BRYANT: Yes, I am just  
19          curious if there is any special military  
20          discount price.

21                      MS. MOSLEY: But you don't have to  
22          be a member to attend any of the trainings or

1 to get a scholarship to come to the training  
2 or to be a recipient of the technical  
3 assistance.

4 MR. BRYANT: But if you are a  
5 member, you get -- and I should be asking  
6 questions.

7 If you are a member, do you get  
8 all the emails that come out from NDAA --

9 MS. MOSLEY: Oh, sure. Sure.

10 MR. BRYANT: -- which includes a  
11 nationwide broadcast of these requests for  
12 assistance?

13 MS. MOSLEY: Yes, there is news  
14 clips and then also there are some technical  
15 assistance requests that come out that we will  
16 blast out to our Board. We have 105 members  
17 on our Board. And so they can go out  
18 nationwide so that they will get a response.

19 We also have a Listserv that is  
20 managed by Brent Berkley. And that is for  
21 anyone who has attended our trainings,  
22 prosecutors, investigators, and there is about

1           1400 members on that. He can blast things on  
2           that Listserv and you can get a response  
3           within an hour of people who have encountered  
4           that defense, that expert, et cetera.

5                        So, there is a lot of resources  
6           available free but there also are some  
7           advantages of being a member because you do  
8           get the news clips. You get the email. You  
9           get the monthly magazine as well that has  
10          issues that are on the forefront for  
11          prosecutors.

12                      MS. JAUS: So what you are saying  
13          is you used to be in South Carolina. You used  
14          to do all those big trainings. Now,  
15          everything has changed and you are in Salt  
16          Lake City.

17                      MS. MOSLEY: We are going to be  
18          doing that type of hands-on training in Salt  
19          Lake City.

20                      MS. JAUS: Starting in March?

21                      MS. MOSLEY: Starting in March.  
22          And we still have a tuition-based hands-on

1 training program which is our career course.  
2 That still has been running annually and that  
3 has been -- we have done it the last three  
4 years in San Diego. And that is a tuition-  
5 based course. It is about nine days long.  
6 But the training that will be in Salt Lake  
7 City, there will be no tuition charge for it  
8 and it will also cover the transportation, et  
9 cetera.

10 MR. BRYANT: So even though the NAC  
11 is closed to us, it is still open to the feds.

12 MS. MOSLEY: Oh, yes, it is still  
13 open.

14 MR. BRYANT: And you are  
15 continuing to have -- conduct trainings all  
16 over the country, different places.

17 MS. MOSLEY: Right.

18 MR. BRYANT: You are not sitting  
19 around waiting for the Salt Lake City thing,  
20 you are still doing them.

21 MS. MOSLEY: No, we have done a  
22 huge amount. For instance, I managed three

1 grants. One of the grants is a grant from the  
2 Office of Violence Against Women and it is for  
3 training on sexual assault, domestic violence,  
4 cyber stalking, stalking, elder violence. And  
5 what we basically do, it is a grant that  
6 allows us to drop into an existing training  
7 where they have expressed a need to train on  
8 any of those issues. And so, I have been  
9 doing that, managing that for over the last  
10 year. I have done 12 of those. And it has  
11 not cost the organization any money. We have  
12 dropped in and facilitated the training for  
13 them.

14 We also have had board members  
15 that have given us some foundational money for  
16 a national training, like we did a hands-on  
17 trial advocacy training in Danvers,  
18 Massachusetts in August. We had some  
19 foundational money to do that training and we  
20 ran it as a national course. So, we have got  
21 60 people from around the country because they  
22 are like we need this type of training and we

1 can't find it elsewhere. And so, we did that  
2 training there.

3 So, we do a huge amount of  
4 training. That is just on the tuition-based  
5 side. So, that is not even the other units  
6 that we have that handle -- we have a traffic  
7 unit. We have a child abuse unit. We have a  
8 capital unit. We have community prosecution.  
9 There is a variety of different units that do  
10 training and do grant-funded training as well  
11 for prosecutors and law enforcement.

12 COL HAM: Do you know the total  
13 amount of the grant training or of the grants,  
14 I guess, annually?

15 MS. MOSLEY: We have about eight  
16 million in grants annually.

17 PROF. HILLMAN: What does it cost  
18 to train? What does it cost to run that  
19 course for an individual?

20 MS. MOSLEY: I will tell you for  
21 like a regular tuition-based course, for about  
22 65 people, that is a five-day course, and you

1           may have like a half a day off, you are going  
2           to have about maybe 11 presenters, we run them  
3           in a hotel. It literally costs almost  
4           \$50,000.

5                           MS. JAUS: And how much does the  
6           individual pay for the tuition?

7                           MS. MOSLEY: \$595.

8                           MS. JAUS: So \$600. That doesn't  
9           include the hotel or anything?

10                          MS. MOSLEY: No, so the office  
11           pays for the \$595. They have got to pay for  
12           the hotel. We try to get contracts only if  
13           they give us federal per diem, because some  
14           people are coming on grant money, some aren't.  
15           So, they have to pay the transportation, the  
16           lodging, and that. But now under a different  
17           grant that I manage under the Office of  
18           Violence Against Women, it is for an annual  
19           national conference on domestic violence.  
20           That gives me about 30 scholarships that I can  
21           offer free tuition, five nights at the host  
22           hotel, and the transportation. So, those are

1 free of charge. But it is a limited number.

2 And then we do have a set amount  
3 of tuition-only scholarships available for any  
4 of our tuition-based training but it would  
5 just cover the tuition.

6 PROF. HILLMAN: That is really  
7 helpful to me. I have lots of other questions  
8 but maybe we should hear from Ms.  
9 Kristiansson and then get more on this.

10 Does anybody else have questions  
11 for Ms. Mosley before we --

12 MR. STRAND: Just real quick. Do  
13 you have a sense of I have 100 prosecutor  
14 attorneys in the United States working sexual  
15 assault cases, prosecuting. What percentage  
16 of that 100 do you think, and this is a SWAG,  
17 do you think would have had specialized  
18 training from your folks?

19 MS. MOSLEY: You know what? It  
20 depends. It depends on what jurisdiction they  
21 are in. If there are more novice prosecutors,  
22 the chances are pretty slim because for an

1 office to put the type of money, a couple  
2 grand or \$2,500, they are going to be more  
3 seasoned prosecutors.

4 If they were there when the  
5 advocacy center was available, then they would  
6 have had some training. And it also depends  
7 on what state they are in. There are some  
8 states whose prosecutors' associations do some  
9 tremendous training at very reasonable prices,  
10 like the California District Attorneys  
11 Association, Texas District and County  
12 Attorneys Association, New York -- NYPTI is  
13 wonderful, New York Prosecutors Training  
14 Institute. They are all wonderful. So, it  
15 really depends.

16 PROF. HILLMAN: Thank you. Ms.  
17 Kristiansson?

18 MS. KRISTIANSSON: Good morning.  
19 Thank you for having me and I am sorry about  
20 the Amtrak problems.

21 MS. MOSLEY: Not your fault.

22 MS. KRISTIANSSON: It's the cold

1 weather. It is cold weather.

2 And just you reminded me when you  
3 talked about the video critique, I, myself,  
4 had one of those video critiques and on the  
5 top of the list was that I used my hands too  
6 much when I speak. And I have not been able  
7 to successfully modify my behavior. So, I  
8 apologize. It is distracting, as I was told  
9 at the NAC.

10 So, on behalf of AEquitas, which  
11 is the Prosecutors' Resource on Violence  
12 Against Women, I want to thank you all for  
13 having me today. I am thrilled that the  
14 systems' response panel is evaluating the  
15 training of trial counsel responsible for  
16 prosecuting sexual assault cases.

17 In the civilian world, prosecutors  
18 are uniquely positioned not only as the  
19 seekers of justice but as leaders in their  
20 community. And their education, therefore, is  
21 of paramount importance. As our nation's 35th  
22 president reminded us, leadership and learning

1 are indispensable to each other. And that is  
2 certainly true when we are talking about the  
3 skills necessary to prosecute cases involving  
4 violence against women, particularly sexual  
5 assault.

6 Research on education and training  
7 of adults is very clear that learning has to  
8 be constant and reinforced. The primary  
9 challenges that we face in educating and  
10 training our civilian prosecutors are, number  
11 1), and this is not in order, overwhelming  
12 caseloads lead prosecutors to believe that  
13 they do not have the time for training; 2)  
14 budget cuts have resulted in offices pulling  
15 travel money for national conferences and  
16 restricting staff to in-house training; and 3)  
17 that training is often conducted by  
18 individuals who are not experts on adult  
19 learning principles knowledgeable of the  
20 relevant sexual assault research, or trained  
21 in best practices, and who often lack  
22 expertise beyond their own professional

1 experiences, which may be tainted by misguided  
2 institutional or office culture and  
3 ineffective practices.

4 These systemic issues often  
5 exacerbate or lead to unintended consequences  
6 for victims and communities, including but not  
7 limited to incomplete investigations,  
8 ineffective or nonexistent leadership and  
9 guidance, lack of collaboration with law  
10 enforcement advocates and other allied  
11 professionals; improper technique and tones  
12 utilized during interviews and investigations;  
13 undercharged or uncharged offenses; failure to  
14 identify, file, and litigate crucial pretrial  
15 motions; and prosecution of cases without  
16 calling all possible corroborating witnesses  
17 and without introducing all relevant evidence.

18 This morning, I will provide first  
19 information about AEquitas and a little bit  
20 about my background; best and promising  
21 practices for handling adult sexual assault  
22 cases, which AEquitas' philosophy and training

1 models embody and upon which I will focus; and  
2 three, other sources of training and support  
3 offered to prosecutors within their offices.

4 I am happy to answer any questions  
5 at any time at the conclusion or during my  
6 remarks.

7 So, AEquitas' mission. We are a  
8 nonprofit and our mission is to improve the  
9 quality of justice in sexual violence,  
10 intimate partner violence, stalking, and human  
11 trafficking cases, by developing, evaluating,  
12 and refining prosecution practices that  
13 increase victim safety, and offender  
14 accountability.

15 Our staff is comprised of former  
16 prosecutors to provide 24/7 case consultation,  
17 conduct legal research, deliver a live and  
18 web-based training, and publish monographs,  
19 articles, and other resources.

20 Our guiding philosophy is that  
21 success in criminal cases means achieving  
22 justice, which the United States Supreme Court

1 has defined as an outcome in which the guilty  
2 do not escape and the innocent do not suffer.

3 The prosecutors' mandate to seek  
4 justice requires practices that focus on  
5 protecting victims from offenders, as well as  
6 the collateral consequences of participating  
7 in the criminal justice process.

8 It is critical to ensure that  
9 cases are charged properly and to ensure that  
10 prosecutors are choosing to prosecute cases  
11 based on a belief that the accused is guilty  
12 and that such a decision furthers the goal of  
13 seeking justice, regardless of the ultimate  
14 verdict. Obtaining a conviction, therefore,  
15 is often not the most accurate criterion for  
16 success in achieving justice.

17 Each of our attorney advisors at  
18 AEquitas spends his or her time developing and  
19 presenting live and webinar based training,  
20 researching and writing to develop concise  
21 resources on which prosecutors can rely for  
22 practical strategies and information and

1 providing technical assistance.

2 I have been an attorney advisor  
3 for AEquitas since 2011. Before that time, I  
4 was a special assistant to the Attorney  
5 General of New Jersey and a Deputy Attorney  
6 General with the New Jersey Human Trafficking  
7 Task Force in the major crimes division of the  
8 New Jersey Division of Criminal Justice.

9 Prior to that, I served as a  
10 senior attorney at the National Center for the  
11 Prosecution of Violence Against Women at the  
12 American Prosecutors Research Institute, where  
13 Candace works.

14 I began my legal career as an  
15 assistant district attorney in Philadelphia,  
16 at the Philadelphia District Attorney's  
17 Office, where I prosecuted, among other cases,  
18 cases involving sexual assault, intimate  
19 partner violence, and child physical and  
20 sexual abuse.

21 When I was a prosecutor in  
22 Philadelphia, all prosecutors were offered the

1 same training: a mandatory week-long  
2 orientation; mandatory weekly meetings, unless  
3 you missed them because you were in court  
4 which happened at least 50 percent of the  
5 time, including training and/or a guest  
6 speaker; resources that included case law,  
7 sample questions, and recommended practices;  
8 biannual free two-day CLE that prosecutors  
9 could choose to attend; an assigned mentor;  
10 and a plethora of experienced and helpful  
11 individuals who served as mentors and guides.

12 Prosecutors were encouraged to  
13 observe others in court whenever time  
14 permitted. I went to every single training I  
15 possibly could. Even after I had fulfilled my  
16 CLE requirements when I was a prosecutor in  
17 that office, I had tried to attend additional  
18 sessions. I sought out peers, more  
19 experienced prosecutors, former prosecutors,  
20 defense attorneys, anybody from whom I could  
21 learn. Not every prosecutor, however, has the  
22 benefit of working in an office with very

1 experienced prosecutors who value mentoring  
2 and who share similar prosecution  
3 philosophies. By that, I mean mentors who are  
4 interested in seeking justice by charging,  
5 preparing, and prosecuting challenging cases  
6 and they may not exist in every office.

7 One of the best statements shared  
8 by an early mentor was prosecutors who aren't  
9 losing cases aren't trying cases. At the same  
10 time in that office, we were encouraged to use  
11 our judgment to modify charges or even  
12 withdraw cases and we would check those with  
13 a supervisor before doing so.

14 I honestly feel I was very  
15 fortunate, very lucky to have had the unique  
16 opportunity to have been trained in an  
17 extremely justice-seeking environment and  
18 similar messages in leadership really should  
19 be part of every single prosecutor's  
20 education.

21 You had asked us to discuss our  
22 best practices and promising practices. So,

1 I will share information about what we do at  
2 AEquitas to train prosecutors.

3 Foundationally, we value evidence-based  
4 research and we seek both to inform our own  
5 practices with this research, as well as  
6 provide feedback and experiential insight to  
7 our research partners.

8 The three foundational principles  
9 of all of our trainings are that the  
10 achievement of justice must be sought in a  
11 manner that is victim-centered, offender  
12 focused and collaborative.

13 Our primary delivery method for  
14 training is instructor-led, classroom-based,  
15 which is hands-on and involves significant  
16 interaction between faculty and participants.  
17 Trainings are provided at the national, state,  
18 and local levels, and we also do training  
19 internationally based on the same model.

20 State-specific trainings are  
21 tailored to the state and local trainings  
22 address the issue specifically expressed of

1 interest to the local jurisdiction. Our  
2 institute model refers to the interactive  
3 learning approach that incorporates the adult  
4 learning principles, which basically recognize  
5 that adults learn in order to create change.  
6 In full recognition of the fact that adults  
7 have a different degree of motivation and are  
8 influenced by their previous experiences,  
9 AEquitas has taken the institute model and  
10 developed original content and exercises to  
11 address, respond to, and modify the  
12 preexisting beliefs and knowledge with which  
13 prosecutors arrive at the training.

14 We help several national  
15 institutes on the prosecution of topics  
16 ranging from domestic violence to domestic  
17 violence homicide, to human trafficking,  
18 sexual assault generally, as well as in PL-280  
19 jurisdictions.

20 Prosecutors from across the nation  
21 can apply and attend at no cost at all to them  
22 or their offices. The institutes --

1 MR. BRYANT: Does that include the  
2 military?

3 MS. KRISTIANSOON: I think that  
4 military prosecutors can attend the  
5 institutes. They have before, when I have  
6 attended as faculty. So, I would have to  
7 double check current practice but I have seen  
8 it myself. So, I assume it includes the  
9 military.

10 The institutes are not only free  
11 for participants but they are delivered at a  
12 remarkably low cost between \$200 and \$700 per  
13 attendee. These amounts include but aren't  
14 limited to the travel-related expenses for  
15 faculty and staff, printed materials, and  
16 conference space.

17 Faculty, which include our staff  
18 and other experts, including but not limited  
19 to prosecutors, judges, mental health and  
20 medical professionals and advocates from  
21 across the country arrive on Monday for their  
22 own faculty training. So they receive

1 materials in advance, they have a day of  
2 intensive faculty training, and they stay  
3 through mid-day Friday. The attendees arrive  
4 on Tuesday. So, the training is full day  
5 Tuesday, full day Wednesday, full day  
6 Thursday, half a day on Friday.

7 We also conduct state-specific  
8 hybrid versions of our institutes upon  
9 request. The institute training formula is  
10 really designed to stimulate attitudinal  
11 change and empower participants to pursue  
12 sexual assault cases. It also provides  
13 participants with the tools and strategies  
14 necessary to do so thoughtfully and  
15 effectively. The delivery of the information  
16 helps us, as staff, pinpoint and uncover the  
17 issues that serve as barriers to effective  
18 understanding of dynamics, laws, and trial  
19 skills, so that we can address and then work  
20 to overcome these barriers during our time  
21 together that week, and during our follow-up  
22 afterwards.

1                   Sessions are a combination of  
2                   brief lectures, small and large group  
3                   discussions, demonstrations, case studies,  
4                   skill building, and application-oriented  
5                   activities. Participants are provided with  
6                   bound and electronic training materials, which  
7                   are intended to facilitate the learning  
8                   activities and to provide them with a  
9                   resource, once they return to their job.

10                   They are unique in that the  
11                   teaching method allows faculty and  
12                   participants to develop relationships with  
13                   each other and openly and honestly share  
14                   information and experiences. The teaching  
15                   method also provides a solid foundation for  
16                   faculty and participants, as well as the  
17                   participants among themselves to stay in  
18                   touch.

19                   Prior to and at the conclusion of  
20                   the institutes, we remind all participants  
21                   that we, as attorney advisors are available  
22                   24/7 for any case consultation or technical

1 assistance.

2 MR. BRYANT: What is the funding  
3 for AEquitas that allows for free training and  
4 this 24-hour assistance?

5 MS. KRISTIANSSON: We apply  
6 actually through the Pennsylvania Coalition  
7 Against Rape to OVW. And we applied  
8 specifically for the institutes.

9 MR. BRYANT: All right, so it is  
10 coming from the Department of Defense.

11 MS. KRISTIANSSON: Coming from the  
12 Feds, right. They have all the money.

13 MR. BRYANT: So people say.

14 MS. JAUS: And where are you  
15 located? You are in Pennsylvania?

16 MS. KRISTIANSSON: We actually are  
17 located, our office is in Washington, D.C. but  
18 our attorney advisors can work from anywhere.  
19 Most of us are remote, which actually makes it  
20 easier for us then to get to training because  
21 we are informed at the very last minute and  
22 somebody in the western part can go more

1 easily to California.

2 MS. JAUS: I see what you are  
3 saying.

4 MS. KRISTIANSOON: So we are  
5 anywhere. We just travel with our computers.

6 MS. JAUS: You just go to the  
7 location.

8 MS. KRISTIANSOON: Correct.  
9 Correct and we also do webinars, which I will  
10 talk about.

11 So, we measure the effectiveness  
12 of our training through Kirkpatrick Level 1  
13 participant satisfaction evaluations for all  
14 of our in-person training events. And then we  
15 evaluate the data and it gives us an objective  
16 measurement of training, so that we can  
17 improve future content, our interaction, our  
18 activities, and our instructors.

19 We have developed the Prosecuting  
20 Alcohol-facilitated Sexual Assault Trial  
21 Advocacy Training for the U.S. Navy. In  
22 addition to the Military Institute on the

1 Prosecution of Sexual Violence for the U.S.  
2 Army and Air Force.

3 The Prosecuting Alcohol-  
4 facilitated Sexual Assault Training was most  
5 recently hosted in August of 2013 but the  
6 second training for Army and Air Force has not  
7 taken place since 2011.

8 I mentioned webinars earlier, so  
9 we also use them as a training delivery  
10 method. They are not perfect by any stretch  
11 of the imagination because I think they can  
12 get a little boring for people who are on the  
13 other end. So, we make them interactive and  
14 we are constantly trying to figure out very  
15 inexpensive ways to make them more exciting.  
16 But they are a great delivery tool because  
17 they are completely free, it is just our time  
18 for developing a webinar our regular time  
19 anyway. We are just logging that time. And  
20 then anybody can log on for free and they are  
21 archived and available at any time on our  
22 webinar.

1           So, we have actually been asked by  
2           a number of jurisdictions to provide training  
3           specific to jurisdictions and training on  
4           specific topics. So, we do more and more  
5           webinars; every month we are doing more of  
6           those.

7           MR. FISHMAN: Is there a way to  
8           measure the effectiveness or to assess those  
9           trainings?

10          MS. KRISTIANSSON: We do an  
11          evaluation at the end where we ask every  
12          webinar participant to complete an evaluation  
13          and many of them do. Many of them will stay  
14          on and complete but a lot of them don't. So  
15          I think for any of us who have ever listened  
16          to a webinar, a webinar can be challenging to  
17          stay engaged as a participant.

18          MR. FISHMAN: And do you all  
19          collect data on the participants, so that you  
20          have an idea of their experience and their  
21          training level?

22          MS. KRISTIANSSON: Some. Some but

1 sometimes we are not able to do that. When  
2 they log in, we are asking questions but they  
3 are not mandatory. So, they don't have to  
4 provide all of that information in order to  
5 listen. We would rather have them listen.  
6 Maybe some of them don't want their offices to  
7 know that they are listening or don't want  
8 others to know. So, it is not mandatory  
9 information.

10 MR. FISHMAN: Is that information,  
11 and Ms. Mosley, same question to you all, is  
12 that information that we might be able to get  
13 for the Subcommittee, if we wanted some of the  
14 data on training level of experience by  
15 participants, obviously, anonymously?

16 MS. KRISTIANSOON: Yes, we  
17 actually do evaluations as well for all of our  
18 training. We were at the National Advocacy  
19 Center, we did a pre, during and a post  
20 training. So, a three-level evaluation. And  
21 we got a lot of feedback from people who said  
22 I went back and I was able to do this and this

1 really helped me in the trial that I was doing  
2 the next week.

3 So, we do have some collection of  
4 data. We would have to pull some of that  
5 together. I could not give you the actual  
6 forms. As an educational institution, we  
7 couldn't provide that. And anonymously, we  
8 could probably give you an idea of the range  
9 of experience level. Like if you gave me a  
10 specific course, like the forensic evidence  
11 course that we had in February, I could  
12 actually pull those evals and just give you an  
13 idea of what the people voluntarily said with  
14 their experience level.

15 But I can give you just, as I am  
16 sure Viktoria could as well, for our courses  
17 like our homicide and our forensic evidence,  
18 you are going to get the more seasoned  
19 prosecutors and investigators. More law  
20 enforcement at forensic evidence and homicide  
21 than at the other courses. Our management  
22 courses you are going to get really seasoned

1           folks as well.

2                           But then for some of our courses,  
3           you are going to get the variety.  If some  
4           office, for instance, has some funding  
5           available, they are going to send some of  
6           their junior folks so that they can get that  
7           training.  Because it is rare, and I think  
8           Viktorija will agree with this, or where they  
9           can find that, if they are doing it in-house  
10          or how strong their prosecutor association is.  
11          If their prosecutor association is like NYPTI,  
12          they might can get to that type of training  
13          and that would be more affordable for them  
14          than coming to a national training.

15                        PROF. HILLMAN:  May I follow up on  
16          something that you said that troubles me?  I  
17          mean, you started with a critique of why we  
18          don't do better in this regard because of the  
19          big structural underpinnings, insufficient  
20          commitment to training, insufficient type of  
21          training, too low a priority, lousy teaching,  
22          inattention to the ways in which people are

1 motivated to acquire this, but then you just  
2 said in response to Dillon's question that  
3 some people wouldn't want their office to know  
4 that they were listening to the webinar. So,  
5 what do you know about not only the structural  
6 problems but the attitudes about training that  
7 are keeping people from reaching out to get  
8 the help they know they need on some level?

9 MS. KRISTIANSOON: I think certain  
10 individuals who others view as being very  
11 experienced might not want to say I need to  
12 listen to this webinar because I have this  
13 trial coming up. They want to be able to put  
14 on this persona. And that could have a  
15 significant amount to do with that person or  
16 perhaps institutional culture, office culture.

17 MS. JAUS: I think there is  
18 another issue because I come from a very large  
19 district attorney's office. I was the chief  
20 of sex crimes and child abuse. And I think  
21 that what happens with the trainings is that  
22 when you have a very busy urban office or busy

1 office where you are understaffed. People,  
2 bosses don't want the assistants to go to the  
3 trainings because it takes so much time and we  
4 have so much work to do. So, if somebody says  
5 I want to go off and listen to this webinar,  
6 I want to go to this training and you are  
7 thinking you have to go to court and try this  
8 case, I think that is a very big problem.

9 I think, from my own perspective,  
10 I think training is great. It is just that  
11 sometimes you don't have the staff and the  
12 resources to do the actual work. And so there  
13 is no time for the training. And so I think  
14 that is one of the problems why people are  
15 afraid to listen to a webinar from some of  
16 these big offices.

17 MS. KRISTIANSSON: I think that  
18 absolutely could be. Why aren't you in court?

19 MS. JAUS: Exactly.

20 MS. KRISTIANSSON: This person has  
21 six cases listed tomorrow. How do you have  
22 time to listen to a webinar?

1 MS. JAUS: Exactly.

2 MR. BRYANT: Is there a way to get  
3 CLE credit from listening to the webinar? Do  
4 you all issue something in that regard?

5 MS. KRISTIANSOON: Yes.

6 MR. BRYANT: Because I was  
7 thinking maybe that is an issue too. If you  
8 are not getting CLE credit for it, they don't  
9 want you messing with it in your office.

10 MS. JAUS: They don't want staff  
11 to take that time.

12 MS. MOSLEY: Some states you can  
13 also just do the self-study hours. Like in  
14 Texas, you can do self-study. So, if they  
15 listen to a webinar, they can submit to the  
16 Texas state bar themselves and get credit for  
17 it.

18 MS. KRISTIANSOON: You just  
19 certify yes, I listened to this webinar.

20 PROF. HILLMAN: I am just having  
21 issues with that, remembering listening to a  
22 webinar experience in my own, the sort of

1 background music part of what it can be.

2 MS. KRISTIANSSON: I know, right.  
3 It can be painful. But I think in large part  
4 we are moving a lot in that direction in many  
5 levels in the criminal justice system, whether  
6 we are talking about training, whether we are  
7 talking about interviewing witnesses. We are  
8 -- the train has left the station and we have  
9 all got to figure out ways to get on and  
10 improve.

11 BG DUNN: Even in law schools,  
12 they have the online classes. That is the big  
13 movement.

14 MS. KRISTIANSSON: Yes.

15 PROF. HILLMAN: So what do you  
16 know about how to make that take better? I  
17 mean what are you doing? You said there is  
18 more webinars all the time. What are you  
19 doing to make them more effective?

20 MS. KRISTIANSSON: So right now,  
21 if we are being very honest, and we should be,  
22 they are boring. So what we are trying to do

1 is take what is currently the standard of  
2 delivery for most of us who do this. Most of  
3 us are nonprofits. We have limited funds. It  
4 is budgeted. We are, for example, talking to  
5 WHYY, which is the NPR affiliate in  
6 Philadelphia and saying, can we come in. You  
7 could videotape us and we could stream it  
8 live. It is basically the same thing. Can we  
9 just do that instead? We don't have the  
10 equipment because we are a nonprofit. We  
11 don't have thousands of dollars. We don't  
12 have the technical knowhow but can we come in  
13 and do this with you?

14 So, we are trying to work with  
15 different agencies that might be supportive  
16 and take the boring webinar and move it into  
17 the 21st century.

18 PROF. HILLMAN: Can I push you on  
19 that?

20 MS. KRISTIANSOON: Please.

21 PROF. HILLMAN: Why do you think  
22 that live streaming makes it more effective?

1 MS. KRISTIANSSON: Most of us are  
2 visual. So, you will have slides but you also  
3 be able to see a human being, rather than just  
4 hear a voice.

5 PROF. HILLMAN: But you could  
6 build a webinar that way and can it with those  
7 same visual images. Right?

8 MS. KRISTIANSSON: Most of the  
9 technology doesn't allow us to do that,  
10 unfortunately.

11 PROF. HILLMAN: What are you  
12 using?

13 COL HAM: So, it is the slides and  
14 a voice?

15 MS. KRISTIANSSON: Yes, it is  
16 slides and voice. So, most of the technology  
17 that is available, not only for the nonprofits  
18 but more importantly for the prosecutors'  
19 offices, so even if we were to record it, they  
20 wouldn't be able to see it. They wouldn't be  
21 able to play it.

22 I wish I could give you some you

1 know, it is because of the wiring on the  
2 technetron. I have no idea why but there is  
3 some very important bandwidth reason why they  
4 can't see it.

5 So, we have got to say okay, they  
6 can't do this. By the time their city council  
7 approves the budget, I am going to be 89. So,  
8 let's figure out something else we can do  
9 today to make it a little more exciting for  
10 them.

11 PROF. HILLMAN: Ms. Mosley, you  
12 wanted to add something?

13 MS. MOSLEY: We do some webinars  
14 but not a lot. But I will say that when we  
15 were at the National Advocacy Center, there  
16 was a TV station in the basement. And we did,  
17 for a while, did the television broadcast.  
18 But it was really too expensive for  
19 prosecutors' offices to have the satellite set  
20 up.

21 So, we moved to what we called NDA  
22 TV where we would go in. We would find really

1 interesting topics and we would have seasoned  
2 faculty members that we would interview, so it  
3 was a variety. It would be on a DVD but you  
4 saw the people. You saw the PowerPoint as  
5 well. And it was interactive between the  
6 people being videotaped. And we disseminated  
7 those free of charge.

8 So, we would have people who would  
9 have something coming up electronic like that  
10 and they didn't mind popping the DVD in and  
11 watching that and seeing how that played out.

12 But for the same reasons that  
13 Viktoria mentioned, we don't do a lot of  
14 webinars. Because you are right, our  
15 experience has shown that face-to-face works  
16 so much better, especially and hands-on trial  
17 advocacy or if you can't afford to do the  
18 hands-on trial advocacy because it is more  
19 costly than the \$50,000 I mentioned for a  
20 typical five-day course, because it is the  
21 student-faculty ratio. It is having more  
22 people in. You have got to pay for the

1 actors, et cetera. But, if you are going to  
2 have a front of the room lecture, at least  
3 have some demonstrations. People learn better  
4 if they are able to practice what you preach.

5 MR. STRAND: One of the issues  
6 that you mentioned, Viktoria, was we are  
7 trying to change, and I think you did as well,  
8 Candace, we are trying to change mindsets. We  
9 are trying to change bias and beliefs.  
10 Training, and webinars, and video  
11 teleconferences, and things like that don't do  
12 that. If you want to teach somebody how to do  
13 something like cook a new dish or something  
14 like that, that works great. But I agree, you  
15 have to have that interface. You have to have  
16 that action.

17 But there is also push for money  
18 saving, for costs, and things like that. And  
19 that is why you may have seen the Kirkpatrick  
20 Level 1. I am assuming, I don't know if you  
21 do Level 2 and Level 3. That takes more  
22 money. That takes more research. And that

1 takes more time.

2 I think what we are doing across  
3 the board, whether it is prosecutor training,  
4 or investigative training or whatever, even in  
5 medical training, we tend to take these cheap  
6 solutions but these cheap solutions are  
7 actually wasting time and money instead of  
8 putting time and money into what is really  
9 being effective. And that is that face-to-  
10 face. And getting that Kirkpatrick Level 2  
11 and 3 actually going to the supervisor to see  
12 what has changed, see what has changed in the  
13 practice, go back six months or a year later.  
14 That is where you get more bang for your buck  
15 but we are trying to save money by being cheap  
16 on the research on the effectiveness of  
17 training and we are kind of stuck in doing the  
18 ineffective training just to say we are doing  
19 it. And it does make a difference to some.  
20 I think that is the quandary to maybe instead  
21 of putting money into the webinars and some of  
22 these other things we know probably aren't as

1           effective, trying to get those grant monies or  
2           trying to get additional money into seeing  
3           what we are actually doing in the face to  
4           face, looking at the level of competences that  
5           they actually have from that and then selling  
6           the policy makers and the funding people that  
7           this is the best way to do it. This other  
8           stuff is kind of a waste.

9                           Does that kind of encapsulate what  
10          we are talking about?

11                          MS. KRISTIANSSON: I think yes,  
12          but -- comma but -- I do think that the  
13          webinars are still helping. I really do. I  
14          think that when we cannot deliver it in person  
15          and when there are other resources available,  
16          they really are helping. And I will tell you  
17          --

18                          MR. STRAND: It is better than  
19          nothing.

20                          MS. KRISTIANSSON: Right.

21                          MR. STRAND: Right.

22                          MS. KRISTIANSSON: And we do get

1           -- we know pretty much that let's say we have  
2           a webinar schedule, 100 people sign up. We  
3           know that 50 of them are going to actually log  
4           on and that most of them will stay on for the  
5           duration of the webinar.

6                        So, the numbers aren't bad. We  
7           also know we get a lot of follow-up after  
8           webinars. We have a lot of people who reach  
9           out to us for -- you know, you mention this in  
10          the webinar, can I talk to you about it. So,  
11          they are still yearning for that interaction.  
12          They are still yearning for that human being.  
13          So, they may not get it from the webinar but  
14          it will lead, hopefully, to something else.

15                      MR. STRAND: Right. That is an  
16          excellent point because I have done several  
17          webinars myself. And just the feedback, even  
18          either during the webinar people are asking  
19          questions, you have got facilitators answering  
20          the questions. You can see some real input  
21          and stuff like that is extremely beneficial.  
22          And then the after, you know, I have actually

1 had to do some writings afterwards to clarify  
2 some points that go out to everybody in the  
3 webinar, which actually encourages the  
4 instructor as well to kind of think through  
5 further on some of those thoughts, which  
6 actually make it better for us in the long-  
7 run.

8 So, I am not saying that webinars  
9 are a bad thing. And they fill a gap. They  
10 basically fill a gap. But what some agencies  
11 do is they just, it is like what we used to  
12 use in the Army is tech tapes. You know, in  
13 some of our initial training you put in a tape  
14 and you watch the tape. You answered some  
15 questions. You moved on. Well, that doesn't  
16 teach you anything, really. It just teaches  
17 you how to -- so we have to be sophisticated.

18 I think what you are trying to do  
19 with the current technology and the expanse of  
20 the technology and the bandwidth is  
21 phenomenal. And we need to keep doing that.  
22 You know, hopefully, some day we will all be

1 on Skype and we just have everybody hook up to  
2 their Skype account and boom, there you go.  
3 But that is not where we are at right now.  
4 So, there is some real benefit.

5 But I think, I sense, though, and  
6 we are having the same challenge, is getting  
7 enough research funding to do the Kirkpatrick  
8 Level 2 and 3 to see what really is, what  
9 change we are affecting as opposed to what we  
10 sense from the participants who just, you  
11 know, they got the honeymoon phase just after  
12 the training, this is great training. But is  
13 it really making a difference in their  
14 practice? I think that is where we probably  
15 need to look at funding to go beyond.

16 I don't know if you agree or  
17 disagree with that.

18 MS. KRISTIANSOON: I would love to  
19 see that, yes.

20 MR. STRAND: Okay.

21 MR. FISHMAN: Can I ask one thing  
22 just to add to the conversation as far as the

1 training goes? In the military setting, a lot  
2 of times there is talk that the prosecutors or  
3 defense counsel as well received a lot of  
4 training but may not have the same experience.  
5 Can some of the training substitute for  
6 experience, particularly if there is sort of  
7 ad hoc remediation or follow-up like you all  
8 talked about getting help right before trial,  
9 having access to those resources? So, can you  
10 sort of do a conversation or a comparison with  
11 that?

12 In other words, in some of those  
13 offices you talked about maybe the smaller  
14 offices might be the same thing. They don't  
15 have all that level of expertise, so they have  
16 to reach out.

17 So, can you do sort of a  
18 comparison for the panel on those things?

19 MR. STRAND: Can I add a couple of  
20 questions to that thought? Because that is  
21 exactly what I had written here. Do you think  
22 training can make up for lack of experience,

1           number one? Do you think experience can  
2           compensate for lack of training? And then  
3           basically to summarize it, if you had to make  
4           a choice between a prosecutor who has a great  
5           deal of experience and little or no  
6           specialized training or a prosecutor has  
7           little significant specialized training and  
8           little or no experience, kind of those things?

9                       MS. MOSLEY: I would want the  
10           person who had the most training. And I will  
11           tell you why. I have seen people -- but this  
12           is very unique to hands-on training. I have  
13           seen people who have come in who have had  
14           little trial experience and I always tell them  
15           the secret to our success in these trial  
16           advocacy courses is gathering the little  
17           nuggets because they don't even realize how  
18           much their experience -- we are just honing  
19           that. But they have incredible ideas but no  
20           one has given the opportunity. They are so  
21           fearful that they are going to do something  
22           that someone else is going to object to or the

1 judge will never let me do it, et cetera.  
2 When they are in that type of environment and  
3 they see other people do it, you actually see  
4 them blossom. You can see them, and I am sure  
5 Viktoria will agree with this, from Monday to  
6 Friday, you can see a change in them just in  
7 their confidence level in what they are doing.

8 So, I would say this. If someone  
9 who didn't have as much experience got some  
10 quality hands-on experience, I would much  
11 prefer that than someone who has been doing it  
12 the same old way, have been successful but who  
13 knows why you have been successful for 20  
14 years and you have little experience. That  
15 would be my preference.

16 MS. KRISTIANSSON: Unfortunately,  
17 my answer is the same answer to almost every  
18 question asked to a prosecutor and that is, it  
19 depends. It depends really what office that  
20 prosecutor is from, what experience that  
21 prosecutor has had. A prosecutor in Office A  
22 who has been there for 20 years will never

1           have the same kind of experience that someone  
2           in another office has had.

3                       So, if it is a good office where  
4           there are excellent mentors and the  
5           prosecutors are trying, challenging sexual  
6           assault cases and they have in-house training,  
7           they have that support, then that would give  
8           that office the edge. But it really, it  
9           depends.

10                      MS. JAUS: Can I say something  
11           else? Being a prosecutor for a very long time  
12           and a law professor and going to a lot of  
13           these trainings, I can say that I think  
14           training is essential. It is extremely  
15           important. It gives you the background. I do  
16           trial advocacy in my law school classes. But  
17           there is no substitute for the actual  
18           experience and you can't just go be in the  
19           courtroom by yourself. You have to have  
20           somebody helping you, a supervisor, a mentor,  
21           somebody. Because yes, you have the training  
22           and the background and that is fantastic but

1           what happens in court is very different  
2           because judges can throw you off. Defense  
3           attorneys can ask you questions that you don't  
4           know how to respond to. Something always  
5           happens in every courtroom proceeding, every  
6           trial attorney knows that. And unless you  
7           have somebody helping you and evaluating what  
8           you are doing, you don't really know if the  
9           training has been successful. Training is  
10          fantastic. You have to also have somebody in  
11          the courtroom watching you and helping you and  
12          supervising because I think without that you  
13          don't really know how effective the training  
14          is.

15                   MR. BRYANT: I think another way  
16          of looking at it, too, is if you are making  
17          hiring decisions and applicants who have come  
18          in, this person has been to a lot of courses,  
19          this person has had a lot of trials. Which  
20          one are you going to hire? And I think the  
21          answer is it depends. It depends.

22                   MR. STRAND: Well, the reason that

1 I think we are struggling with this is because  
2 in the military system, it depends on the  
3 service. You know, I think only one service  
4 has a specific criminal justice track that you  
5 can go into and you can basically spend your  
6 career there. The other services, you are in  
7 and out. You are in and out. You are in and  
8 out. So, what we are hearing and what I think  
9 we will continue to hear today is that the  
10 services are trying to make up for the lack of  
11 experience with some really good quality  
12 training. But I struggle with that as well  
13 because of course we are supposed to make some  
14 recommendations at the end of all of this on  
15 what to do. And that is why I asked the  
16 question because it is the recommendation  
17 well, okay, we are going to substitute the  
18 training for the experience or maybe we need  
19 to make a recommendation that hey, you have  
20 got to track these folks for a career.

21 PROF. HILLMAN: So, to do that, we  
22 need benchmarks and we need your help with

1           this. First, how can we select best to do  
2           this? How long does it take them to be good  
3           at it? And how much does it cost?

4                   MS. MOSLEY: You know that is a it  
5           depends answer, really. I mean how long --

6                   PROF. HILLMAN: But we can't do  
7           that. I understand. There are ranges in  
8           there, right? I mean how long should someone  
9           be in an apprentice role before they are in  
10          the lead, for instance? How much training  
11          should they get through before they are in the  
12          chair?

13                   MS. MOSLEY: It really does. You  
14          have got offices that are large offices where  
15          they may be preparing for ten cases a week for  
16          trial and that person, obviously, is going to  
17          get more experience than a person who is in a  
18          rural jurisdiction where they may only have --

19                   PROF. HILLMAN: Then, how many  
20          trials do you need?

21                   MS. MOSLEY: It really --

22                   PROF. HILLMAN: It depends on the

1 type of trial. How many simple versus how  
2 many complex?

3 MR. STRAND: Well, we have got  
4 attorneys right now their first trial, their  
5 first jury trial is an alcohol-facilitated  
6 sexual assault.

7 MS. JAUS: Oh, good God.

8 MS. MOSLEY: In a small rural  
9 jurisdiction that can happen.

10 MR. STRAND: Well, in a rural  
11 jurisdiction but also in some of our others.

12 MS. MOSLEY: Yes.

13 MS. KRISTIANSOON: In  
14 Philadelphia, my first jury was a rape. My  
15 very first jury was a rape and not an easy --  
16 I had no -- typical no evidence.

17 MS. MOSLEY: And in our office, it  
18 was much more -- well, I am not saying that it  
19 wasn't there but in our office, there was no  
20 way that your first trial would have been  
21 anything other than a misdemeanor with a co-  
22 counsel and all that. It was a lot

1           structured. And you stayed in misdemeanor for  
2           a certain period of time before you went to  
3           felony. You went to felony as what they  
4           called a number three, so you are a junior in  
5           felony, you got some more trials. You came  
6           back down and you were chief of the  
7           misdemeanor and then you supervised the other  
8           two misdemeanor prosecutors. Then you went  
9           back up to felony and then you were like the  
10          next level of felony 2. And then you had to  
11          work your way up to becoming a felony chief.  
12          Then you could become a division chief, et  
13          cetera.

14                   MR. STRAND: But that is in a  
15          large jurisdiction.

16                   MS. MOSLEY: Yes, exactly, that  
17          was a large jurisdiction.

18                   MR. STRAND: In the jurisdiction I  
19          live in, they haven't had a sexual assault  
20          trial in four years.

21                   MS. MOSLEY: Wow.

22                   MR. STRAND: And I have a college

1 town right there.

2 MS. KRISTIANSSON: Well, where are  
3 you? Let's all move there.

4 MR. STRAND: That is in Missouri,  
5 in Raleigh, Missouri. But there is a reason  
6 for that. It is because they don't have  
7 experience, because the police don't have the  
8 training, because they don't understand sexual  
9 assault. When the sexual assaults are  
10 reported, they don't believe them because it  
11 doesn't fit.

12 MS. KRISTIANSSON: But that goes  
13 back to training.

14 MR. STRAND: Exactly. So it goes  
15 back to training. So, we have got prosecutors  
16 that have been prosecuting for four, five,  
17 ten, fifteen years --

18 MS. KRISTIANSSON: And they have  
19 never tried a rape.

20 MR. STRAND: -- and they have  
21 never tried a rape. So, that is the quandary  
22 that we are in.

1 MS. KRISTIANSSON: And this is not  
2 abnormal. We were just training in Bucknell,  
3 Lewisburg, Pennsylvania. They have one of the  
4 highest reported rates of sexual assaults on  
5 campus. And they were wonderful about  
6 sharing. They are at one in three. One in  
7 three at Bucknell. And their prosecutor came  
8 to the training for five minutes and everyone  
9 in law enforcement said we bring cases to this  
10 office all the time. They won't take them.

11 MR. STRAND: Absolutely. As I go  
12 across the country, I hear that time and time  
13 again. I haven't gone to a training yet where  
14 the police don't come to me and say look, I  
15 have got exactly the case you talked about.  
16 They are refusing.

17 MS. KRISTIANSSON: Right. And we  
18 do hear the opposite; sometimes, we do.

19 MR. STRAND: Right.

20 MS. KRISTIANSSON: Right but that  
21 is a training issue. That is a training issue  
22 because you are never going to get any

1           experience.

2                   MR. STRAND: But those prosecutors  
3 say we have got plenty of experience.

4                   MS. KRISTIANSOON: Right. We  
5 also, and I am sure you hear this all the  
6 time, Candace, we are not -- those aren't  
7 winnable cases, so we are not taking those  
8 cases.

9                   MR. STRAND: Right.

10                  MS. KRISTIANSOON: And of course  
11 the response is, when is the last time you  
12 tried one of those? And what is your  
13 definition of winnable?

14                  PROF. HILLMAN: So, you are  
15 actually answering, although you are refusing  
16 to. So, someone should not -- the complex  
17 sexual assault cases, which we actually can  
18 define if we take. I mean they warrant a  
19 seasoned prosecutor.

20                  MS. MOSLEY: In a perfect world,  
21 yes.

22                  PROF. HILLMAN: No, no, no, in the

1 world that we have.

2 MS. MOSLEY: I am just saying you  
3 would want somebody, yes, you would want a  
4 seasoned prosecutor who has dealt with issues  
5 like a recanting victim that has used experts,  
6 that had challenges with unique defenses, yes.

7 PROF. HILLMAN: And you could  
8 easily come up with a list of those things  
9 that make it complex. The --

10 MS. KRISTIANSSON: Delayed  
11 disclosure, no physical evidence --

12 MS. JAUS: Intoxication, --

13 MS. KRISTIANSSON: Right.

14 MS. JAUS: -- drug-facilitated  
15 rape.

16 MS. KRISTIANSSON: Right.

17 MS. JAUS: But it is not just that  
18 because you are back to what Russ is saying.  
19 If people don't want to take the cases or  
20 there is a mindset against the cases, then  
21 they are not going to be taken. And if people  
22 are saying well if I can't win this case, then

1 I am not going to take it, so I am not going  
2 to do anything, it is a lot of ingredients.  
3 It is the training. It is the attitude and it  
4 is your experience in court. It is the  
5 supervision in court. It is a lot of  
6 different. It is not just one thing.

7 MR. STRAND: It is also the  
8 political environment.

9 MS. JAUS: Exactly. Because if  
10 your office doesn't want to take a case that  
11 they can't that they can't lose, that is crazy  
12 that they are not making arrests in a college  
13 town or in Bucknell. That is a horrifying  
14 story.

15 MR. STRAND: Well, where I work,  
16 they prosecute bad check cases because that is  
17 how they get elected. You know, the business  
18 community says you are going to prosecute  
19 these cases and they take every single one.  
20 But they won't take the others because the  
21 accused might be a student, the son or  
22 daughter of somebody else. So, there is a lot

1 of considerations.

2 BG DUNN: But fortunately that  
3 doesn't apply to the military and the military  
4 prosecutors.

5 MS. JAUS: Not any more.

6 MR. STRAND: Right, which is not  
7 an issue.

8 BG DUNN: I mean just in terms of  
9 they are not elected.

10 MR. STRAND: Correct.

11 BG DUNN: You don't have that  
12 issue. You may have an in and out and some  
13 experience issues but you also have, I think  
14 we have had quite a bit of testimony and I am  
15 sure we will have more this afternoon when we  
16 talk about the military training but we do  
17 have some evidence that there are senior  
18 prosecutors and oversight, and assistance to  
19 military counsel, and at least a recent focus  
20 on sexual assault, if not a long-term focus on  
21 it.

22 PROF. HILLMAN: Let me check in on

1 the time, Dillon. Where are we on the time  
2 and where do we want to wrap this up?

3 MR. FISHMAN: So, we are over  
4 time. But I am not sure if our other folks  
5 have arrived.

6 COL HAM: I just checked on that,  
7 Dillon. We have two folks who are on a train  
8 and stuck because there are electric lines  
9 down over the Delaware River. They should  
10 have arrived at Union Station. So, they  
11 should be here.

12 So the bottom line is it is okay  
13 that we are running a little bit late because  
14 they haven't been here.

15 MR. FISHMAN: Did you have a  
16 question?

17 PROF. HILLMAN: Okay. I did. Did  
18 you want to add something, though? Go ahead.

19 MR. FISHMAN: I was just going to  
20 follow up on what General Dunn was saying.  
21 This afternoon, some of the military folks  
22 will come in and talk about the training that

1           they are doing. Are there any best or  
2           promising practices you would recommend that  
3           we ask them about or ask if they have adopted?  
4           Again, because the report that has to be  
5           written requires them to do this comparison  
6           and we realize it is imperfect.

7                       MS. MOSLEY: I would ask them if  
8           they are doing any hands-on training. Are  
9           they using demonstrations? Are they allowing  
10          them to be in workshops to sit down in smaller  
11          groups and talk and share, and talk about the  
12          issues? Are they doing performance exercises?  
13          I would ask that question.

14                      MR. FISHMAN: And so you all can  
15          partially answer some of those questions,  
16          right? Because you have had military folks  
17          participating.

18                      MS. MOSLEY: Let me tell you  
19          something. The military folks that we have  
20          had at our hands-on training are the best  
21          attendees because they are like sponges. You  
22          can't be too critical. You can't -- I mean

1 really they are much more receptive to the  
2 hands-on training than some of the civilian  
3 prosecutors because of the structure that they  
4 come up in. They really, they want to learn.  
5 They are eager. That has been my experience.

6 MS. KRISTIANSSON: They are a  
7 pleasure to train. They are, yes.

8 PROF. HILLMAN: So, the same  
9 interpretive what we should be looking for,  
10 hands-on attentive to the effectiveness of  
11 this. What about who should be prosecuting  
12 these kinds of cases? Can you talk about  
13 that? How would you select for prosecutors to  
14 improve how we do in this arena? How we do a  
15 better job seeking justice, not getting  
16 conviction rates pumped up.

17 MS. KRISTIANSSON: I think one of  
18 the things that Ronnie mentioned and we have  
19 already mentioned is when we were talking  
20 about attitude. You can basically train  
21 almost anybody. You can, with help, get that  
22 person trial experience. But you really want

1           somebody who is interested in seeking justice.  
2           You really want somebody who, whether or not  
3           that person is present currently as someone  
4           who is totally getting it, wants to get it,  
5           wants to really do the right thing.

6                       MS. JAUS: Who is interested in  
7           these types of cases. I don't think that  
8           everyone should try them.

9                       MS. KRISTIANSOON: Specifically  
10          interested in sexual assault cases.

11                      MS. JAUS: I agree completely.

12                      MS. KRISTIANSOON: Right.

13                      MR. STRAND: It should be  
14          voluntary.

15                      MS. KRISTIANSOON: Absolutely.  
16          Right.

17                      MS. JAUS: It should be voluntary.

18                      MS. MOSLEY: And that believes in  
19          victim autonomy because it is so crucial. You  
20          have got some incredibly talented prosecutors  
21          who should only be trying homicide cases  
22          because they can't work with -- yes, because

1 the victim is not alive.

2 MS. KRISTIANSOON: You can pick up  
3 on some of this by asking certain questions  
4 even during an interview. You will hear  
5 victim blaming language or other things. And  
6 those people, we shouldn't necessarily take  
7 them off the list but they are going to need  
8 some training before they can get back on  
9 track.

10 You know words like oh, the victim  
11 is terrible. Oh, she was drinking. Oh, she  
12 was this. Oh, she was that. Those people  
13 should not be trying those cases or handling  
14 them. They don't have the right attitude.  
15 And I think that people should handle these  
16 cases who want to and who really have the  
17 right mindset or else they are just going to  
18 trash the cases.

19 MS. MOSLEY: The other thing you  
20 can't forget is that everybody is a human  
21 being and that they come into it with whatever  
22 their personal issues are. You know, maybe I

1 shouldn't say this but I am going to say this.  
2 I mean there are prosecutors who are  
3 batterers, who are -- we know this. Well, all  
4 I am saying is you can't discount that. And  
5 you can't turn your head away from a red flag  
6 that you see there because there could be some  
7 other issues.

8 PROF. HILLMAN: You mentioned  
9 specifically that national training was a --  
10 you saw that as a significant benefit and the  
11 integration of people. What about military-  
12 only training and segregating military  
13 training for purposes of preparing prosecutors  
14 to work within the specialized military  
15 justice system in which they are prosecuting  
16 these cases? What do you think about that or  
17 should they be integrated?

18 MS. MOSLEY: I think that there is  
19 a time and place for each. We had a sexual  
20 assault course in Savannah and we had almost  
21 200 attendees. We had a huge number of  
22 military prosecutors there. And it was so

1           beneficial for even the civilian prosecutors  
2           to hear the challenges they dealt with and for  
3           them to hear the challenges of the civilian  
4           prosecutors because then you know you are not  
5           in this alone.

6                         It is a different dynamic.  There  
7           are times when maybe you just need the  
8           military training but I think it is really  
9           beneficial to be there with other people who  
10          are doing the same -- dealing with the same  
11          challenges and that they can share with,  
12          discuss with, and even after the training,  
13          network with again.  Hey look, I just had this  
14          come up.  Hey look, I just had this come up.  
15          I think it is just really important to have  
16          that at some point.  It doesn't mean that it  
17          has to be there.  You can't do it for all,  
18          obviously.  But I think it is really important  
19          to have that mix.

20                        MS. KRISTIANSOON:  I totally agree  
21          with Candace.  And at the end of the day,  
22          these cases are really all the same, which is

1           why we can take what we do here and take it to  
2           Cameroon, Uganda, Fiji and anywhere else.  
3           They are all the same issues.

4                     MR. STRAND:   The vast majority of  
5           the issues are the same but some of the  
6           statutes are different.

7                     MS. KRISTIANSSON:   Right, issues  
8           are the same.

9                     MR. STRAND:   Yes, especially like  
10          the alcohol-facilitated.

11                    MS. KRISTIANSSON:   Right, which is  
12          why we would need the military-specific  
13          training.

14                    MR. STRAND:   Right.

15                    MS. KRISTIANSSON:   Right.

16                    MR. STRAND:   I went up to Michigan  
17          one time to do some training.   I was talking  
18          about alcohol-facilitated.   I was talking  
19          about what I would see clearly as a crime and  
20          they all looked at me like she wasn't passed  
21          out.   What are you talking about?   And so  
22          there are some differences but I would say 90

1           percent are --

2                           MS. JAUS: Well also the  
3 collateral of conduct. Is that what it is  
4 called?

5                           MR. STRAND: Misconduct, yes.

6                           MS. MOSLEY: Misconduct, yes.  
7 That is very different than the civilian  
8 system. That is a very big difference.

9                           MS. KRISTIANSOON: Yes, they need  
10 both. They need both.

11                           MR. STRAND: Yes. But we do learn  
12 from both. And that actually expands because  
13 some of the times when we bring our military  
14 training to the civilian organizations, it  
15 actually entices them and encourages them to  
16 get some changes in the law. And then they  
17 say oh, well, that is a good idea. So, we are  
18 making some changes there. So, that  
19 collective training can be helpful as well.

20                           PROF. HILLMAN: Did you get to  
21 finish the things that you wanted to  
22 highlight?

1 MS. KRISTIANSSON: I think most of  
2 the other things that I was going to say came  
3 up in Q and A. So, I think we are good.

4 PROF. HILLMAN: I'm not sure we  
5 are good but I do think we have made progress.

6 Does anybody have more questions  
7 on this?

8 MR. STRAND: Do you have any  
9 recommendations for -- because both of you  
10 worked with the military. Do you have any  
11 recommendations that you would want us to  
12 consider? Because we have to make  
13 recommendations to the larger panel, to the  
14 Secretary of Defense and to the Congress. Do  
15 you have any recommendations for funding,  
16 research, training, whatever?

17 MS. MOSLEY: My number one would  
18 be hands-on training. I have said that  
19 numerous times. But also, one of the things  
20 that I think is really important, in a lot of  
21 prosecutors' offices, we have victim  
22 advocates. It is really important to have

1 multi-disciplinary training at some point in  
2 time. It is so important for people to  
3 understand how the whole prosecution team  
4 works together.

5 There were things that sometimes  
6 happen with prosecutors where we thought we  
7 were doing the best we could and we were  
8 actually risking her life. So, it is really  
9 important to have that multi-disciplinary  
10 faction to it as well.

11 MS. KRISTIANSOON: I would say  
12 specific to the military that we have the  
13 short-term and fluctuating assignments and  
14 that is the antithesis of really what we need  
15 to have if we are going to be able to develop  
16 good sexual assault prosecutors.

17 MS. JAUS: So maybe ask for their  
18 thoughts on the fact that that is the way it  
19 is and what they think we could do to remedy  
20 it.

21 PROF. HILLMAN: Can I ask a  
22 question on the far side of that? And that is

1           some of the most experience prosecutors'  
2           offices that we have talked to and heard from  
3           folks and they have said they don't have a  
4           burnout problem because of the support. And  
5           one of the justifications for maintaining the  
6           frequent turnover and transiency is that  
7           people can't do this, most people can't do  
8           this for the long term. That it is better for  
9           people not to be in this role. What is your  
10          perspective on that?

11                   MS. MOSLEY: That is a it depends.  
12           It really does. There are prosecutors who  
13           only want to do sexual assault cases for their  
14           entire career and then there are some that  
15           shouldn't be in there for a long period of  
16           time. It really does, it depends on the  
17           individual, their passion. And also, it is  
18           the makeup of that -- it really it is not  
19           something that you could just pinhole. It  
20           just isn't.

21                   I was the type of prosecutor where  
22           I was in general trials and, to me, that was

1 boring. I felt like I wanted to fight for the  
2 underdog, so I went into domestic violence at  
3 a time when nobody wanted to be there. It was  
4 unheard of for anybody to stay as long as I  
5 did. I stayed for four years and that was  
6 just unheard of. Of course now, today, that  
7 is totally different but back then, that was  
8 just unheard of. Like how can you work with  
9 those people? I mean it was just horribly  
10 frowned upon. Why would a good prosecutor go  
11 to that division?

12 So, it is just really, it really  
13 depends on the person. It really does.

14 PROF. HILLMAN: So you would allow  
15 them to self-select, essentially.

16 MS. MOSLEY: To a certain point.  
17 To a certain point. Obviously, with  
18 supervision and watching them and having  
19 someone watch their interaction, not only with  
20 the victims but with your investigators as  
21 well.

22 COL HAM: One of the issues

1 raised, ma'am, at Fort Hood, that session that  
2 Russ acting chaired, they had the SVPs there  
3 and one of the issues they raised about what  
4 is the pace and the travel, since they are not  
5 only assigned to that one installation, it was  
6 more the travel for the length of their term.

7 MR. STRAND: That is because there  
8 are so few and they are just constantly on the  
9 road, constantly just overwhelmed. And they  
10 don't have any organic support as far as  
11 emotional, professional, oversight.

12 MS. MOSLEY: That is a different  
13 dynamic, too, than civilian prosecutors, the  
14 travel and being the person who goes and does  
15 the --

16 BG DUNN: But there is also a  
17 resourcing piece to that.

18 MR. STRAND: If there were more  
19 they wouldn't travel.

20 BG DUNN: If there were more, then  
21 the travel would be better contained. It  
22 would be geographically contained, therefore,

1           --

2                           MS. JAUS: I also think it was  
3           unrealistic for them to conclude the other  
4           prosecutors that there was very little burn.  
5           I think that is crazy. I have been doing as  
6           a prosecutor for 30 years. I ran the sex  
7           crimes division for like 25. There is  
8           burnout. People get burned out. I mean, it  
9           is crazy to think that they don't. People  
10          leave the job. Not everyone stays or else  
11          there would never be any movement. But I  
12          think that some people are, as Candace is  
13          saying, are incredibly committed and  
14          passionate but there are people who do burn  
15          out and I think that it is the same as the  
16          military. But I really believe that the only  
17          people who should handle these cases are  
18          people who want to because that would minimize  
19          the burnout.

20                          MR. STRAND: Well, there is also  
21          another factor. If you look at burnout of  
22          these specific cases, as opposed to burnout

1           being in the criminal justice track, even  
2           going back from prosecution, defense, and  
3           things like that, as opposed to be taken out  
4           for an operational role for two or three  
5           years, and for legal assistance for two to  
6           three years, that might undermine the whole  
7           process. But being a criminal justice track  
8           may not create the burnout itself, working  
9           these specific cases for some probably will.

10                   MR. BRYANT: Is that tied into the  
11           military's promotional system --

12                   MR. STRAND: It is.

13                   MR. BRYANT: -- when you take a  
14           look and see where has this military attorney  
15           been? What has he done? What has he seen?

16                   MR. STRAND: Well, it is a  
17           perception.

18                   MR. BRYANT: Maybe that is what  
19           needs to change also.

20                   MR. STRAND: Right. The mindset  
21           has to change to where if you are sitting on  
22           it -- now, promotions within the Corps, the

1 JAG Corps, are specific. The people that sit  
2 on those boards are generally JAGs. But the  
3 mindset is, well, this person hasn't done --

4 BG DUNN: No, that is not true in  
5 all services.

6 MR. STRAND: Right not --

7 BG DUNN: The Army has separate  
8 promotion boards.

9 MR. STRAND: Right but not all the  
10 ones do.

11 BG DUNN: But you know, --

12 COL HAM: There are three line  
13 officers and three judge advocates on the  
14 boards and I have sat on many.

15 BG DUNN: Right, separate boards.  
16 Okay.

17 MR. STRAND: So, it hurts because  
18 to be a well-rounded officer --

19 BG DUNN: But the Marine Corps is  
20 not.

21 MR. FISHMAN: Marine Corps, you  
22 are a line officer.

1           BG DUNN: The Marine Corps is  
2           there. They have no separate boards for judge  
3           advocates. So, but that is all -- I mean  
4           assignment issues. I mean you know you can't  
5           --

6           MR. BRYANT: It is an issue in  
7           terms of having a military career, sexual  
8           assault or violent crimes prosecutor if they  
9           want to make a career, a 20- or 30-year career  
10          and they know they need to rotate through all  
11          the different aspects.

12          BG DUNN: Right.

13          MR. BRYANT: And I think that is  
14          probably true in a lot of the larger civilian  
15          offices, yours, mine. When we are looking for  
16          supervisors, we want a supervisor who has seen  
17          the whole -- what is the word I am looking for  
18          -- gambit of other crimes so that they can  
19          supervise.

20          BG DUNN: Right. And you also  
21          have a volume issue in that.

22          MR. BRYANT: Sure.

1                   BG DUNN: In your case, that is  
2 what you did. In a large metropolitan area,  
3 there is a huge volume. In the military --

4                   MS. JAUS: Thousands of cases.  
5 Thousands of cases.

6                   BG DUNN: Right. Right and that  
7 is with the military assignment system in the  
8 places that you are working, that is not the  
9 case. I mean, even sitting at a huge  
10 installation, you are not going to have a  
11 thousand sexual assault cases in a year. I  
12 mean, you are not going to have a thousand  
13 cases in a year.

14                   I mean there are all sort of  
15 factors. But what you have to remember,  
16 though, is it is not a location issue because  
17 you can do the same job at different  
18 locations. So, you developed an expertise.  
19 You can move to Fort Hood as the other person  
20 who is there is leaving with that expertise.  
21 So, you can manage that expertise issue.

22                   If the issue is as you move up in

1 the military generally, you move away from a  
2 hands-on practice, as a general rule and you  
3 become a supervisor and a leader and  
4 responsible for the training and the oversight  
5 supervision, the mentoring, making sure that  
6 the more junior have the more senior with them  
7 in court.

8 But as the Staff Judge Advocate of  
9 Fort Bragg, I mean I had 100 lawyers working  
10 for me and I was not in a courtroom.

11 MR. STRAND: There is also the  
12 perception of what criminal justice looked  
13 like. Back when I came in in the '70s, that  
14 was the place that you wanted to be and that  
15 changed.

16 BG DUNN: And the Army still is.  
17 And the Army still is. You have got a service  
18 culture at play there. I mean you can never  
19 hurt yourself in the Army with too much  
20 prosecution experience. I don't know about  
21 the Air Force, the Navy, the Marine Corps,  
22 whether you can hurt yourself with too much

1 prosecution experience.

2 You can hurt yourself in the Army  
3 with too much contract law experience, for  
4 sure. But whereas, the Air Force has a much  
5 more expansive and accepting view of contract  
6 law attorneys than the Army does.

7 But certainly in the Army, there  
8 is no prejudice against prosecutors or defense  
9 counsel.

10 MS. FRIED: I think when you are  
11 young a JAG Military Justice is what they are  
12 looking for. I think as you get to be a  
13 Lieutenant Colonel, then I think they are look  
14 for someone who has got a little bit more  
15 experience because now you are looking to get  
16 an SJA.

17 BG DUNN: We are managing people  
18 and their careers. And you are managing an  
19 entire installation, all legal issues that  
20 arise. You know, administrative, contract,  
21 labor, criminal.

22 MS. KRISTIANSOON: I still think

1           they should be able to opt out of sexual  
2           assault and they should have to opt into it.  
3           I mean, even think about the prosecutors in  
4           even the large urban offices across the  
5           country, I would guess more than half of them  
6           never tried a sexual assault case, even if  
7           they had been prosecutors for a long time in  
8           their office. I can think right now of one.  
9           Yes, it could be in those offices, they can  
10          opt out.

11                   MS. JAUS: Of course. In Oakland,  
12           which is a gigantic place, one of the biggest  
13           offices in the entire country, we have people  
14           who specialize only in sexual assault child  
15           abuse, domestic violence. It is not for  
16           everyone but it is with some people and they  
17           can opt in and they can opt out and they do  
18           burn out. There is a burnout.

19                   MS. KRISTIANSSON: Right.

20                   BG DUNN: Yes, but the problem is,  
21           if you only have four of those cases a year --

22                   MS. JAUS: Of course.

1           BG DUNN:  -- you can't very well  
2           opt out of them if you have two prosecutors.

3           MS. KRISTIANSOON:  Right.  And  
4           certainly we see that in many jurisdictions  
5           across the country.

6           BG DUNN:  Yes, and then that is  
7           where the sort of traveling assistance comes  
8           in and the training, et cetera.  I mean it is  
9           not that you go to Fort Bragg and you stay  
10          there your entire life.  You know, that is not  
11          the way it works in the military, although  
12          some people do try.

13          PROF. HILLMAN:  We are faced with  
14          trying to build a really specialized capacity  
15          within a system that isn't designed to deter  
16          and prosecute sexual assault.  And this is a  
17          really tough niche to build and support, and  
18          reward, and identify within each of these  
19          different, not one, but --

20          MR. STRAND:  Yes, you don't want  
21          to tell a promising prosecutor, hey, we want  
22          you to specialize in this but the farthest you

1           are going to go is major. And then when we  
2           have boards, you are going to have to probably  
3           get out before your 20, which currently is  
4           potentially the culture.

5                        PROF. HILLMAN: Absolutely. And  
6           this is an early in-career sort of experience,  
7           notwithstanding the circuit riding SVPs that  
8           we have right now, who really are the lions of  
9           the military bar in many ways right now, who  
10          are out there rescuing us in this way. But it  
11          is hard to see that as a sustainable solution,  
12          given resource limitations and the constraints  
13          it imposes on them.

14                      So, I think what -- Colonel Ham,  
15          Dillon just stepped out. But I think we are  
16          going to wrap up, then. That is the  
17          suggestion. Do you have anything that you  
18          want to add? Does anybody want to add a last  
19          question here before we break for lunch?

20                      I want to thank you. This was  
21          tremendously helpful and I have more questions  
22          than answers and that is always a good thing.

1 MS. MOSLEY: Feel free to email if  
2 you have got any follow up. That can be  
3 helpful with any resources or anything.

4 PROF. HILLMAN: Do you have your  
5 information in here?

6 MS. MOSLEY: Dillon has it and  
7 Janice has it, yes.

8 (Whereupon, the foregoing meeting  
9 went off the record at 11:41 a.m. a lunch  
10 recess was taken.)

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1 we overlap in some ways and we were on the  
2 train together in the vortex.

3 So, my name is Lisa Wayne and I am  
4 a long-time criminal defense lawyer. I have  
5 never been anything but a criminal defense  
6 lawyer. I come from the Colorado State Public  
7 Defender System, which is one of the best  
8 public defender systems in the country and  
9 also one of the best trained public defender  
10 systems in the country.

11 I am also a military brat. My  
12 father is a retired colonel in the Air Force.  
13 He was a professor at the Air Force Academy.  
14 So, I have a little bit of a protective bent  
15 toward the military and the way things are  
16 done.

17 The backdrop of this, in terms of  
18 what we think is good training and best  
19 practices, I have to be very honest that I  
20 think that the military does a lot right. And  
21 the scrutiny that has come upon the military,  
22 in many ways, is politically driven and not

1 really based in fact. And I have looked a lot  
2 comparatively at the system, the prosecutions,  
3 the front-ending of prosecutions because that  
4 is where the cases really begin in the  
5 investigatory phase and how they are front-  
6 ended. And we could take a lot from the  
7 military court system and apply it to our own  
8 criminal justice system.

9 So, with that said, though, the  
10 training is really the paramount focus, I know  
11 for you all, and I know Yvonne and I have a  
12 lot to do.

13 I was the Training Director in  
14 Colorado in the Public Defender System for  
15 many years. I have tried hundreds of cases.  
16 I have had thousands, probably, sex offender  
17 clients from sex assault on children to sex  
18 offense with adults to child pornography. My  
19 practice, at this point, is mainly federal, 75  
20 percent federal, a lot of child pornography,  
21 but I also do state cases. A lot of young  
22 kids at college age are accused of sex

1           assaults, cadets from the Air Force Academy  
2           and other installations. And I teach lawyers  
3           all over the country on sex offenses.

4                       And a lot of your people, who have  
5           actually started to come to our trainings at  
6           the National Association of Criminal Defense  
7           Lawyers, I think in Savannah we had like 20 to  
8           25 people from the military at the training.  
9           So, I am seeing an increase in that, which is  
10          a good sign to me, and they have a lot of  
11          questions on a lot of things about their own  
12          training. So, that is great.

13                      And so that is kind of the  
14          backdrop for me in terms of what I bring to  
15          the table here. And I am a true believer and  
16          there is a lot that we can do in terms of  
17          training the lawyers.

18                      So, Yvonne.

19                      MS. YOUNIS: Good afternoon or  
20          morning. I don't know what time it is but we  
21          are here. Yes, we are here.

22                      My name is Yvonne Younis and I am

1 with the Defenders Association of  
2 Philadelphia. It is not really a public  
3 defenders' office. It is a nonprofit that is  
4 not a city. We are not city workers. We are  
5 private workers.

6 And I have been working there  
7 since '89. I have done nothing else except  
8 public defender work. And what happens is, in  
9 our office we have about 120 lawyers, some of  
10 them are sort of Chinese walled-off into our  
11 Child Advocate Unit. And what they do is they  
12 are assigned by Dependency Court. So that if  
13 they need to have a dependency lawyer or an  
14 advocate for a child, they are assigned there.  
15 And I really don't know what they do except  
16 that they live on the ninth floor of our  
17 office and they do dependency work because  
18 they don't interact with the criminal side.

19 My office is in the middle of  
20 doing a transition for the first time in 40  
21 years of reorganizing how we are assigning  
22 cases. And we are doing that and the DAs are

1           doing that at the same time. So what we are  
2           doing is taking the City of Philadelphia and  
3           we are dividing it up geographically. And I  
4           am the supervisor for all the cases that come  
5           out of Center City, North Philadelphia and  
6           some other areas you wouldn't necessarily know  
7           about. I assign the cases. I get the cases.  
8           I supervise the lawyers. I train the lawyers.

9                         For the last eight or nine years,  
10           before I got this job, what I did is I did all  
11           of the pretrial preparations, pretrial  
12           conferences for all of the sex cases that came  
13           through the City of Philadelphia and all of  
14           the serious family violence cases.

15                        One of the things, Philadelphia is  
16           its own little -- how it works is like  
17           Massachusetts. They have got a two-tier  
18           system. You have got your Misdemeanor Court.  
19           You have got your Felony Court. And if you  
20           don't -- I can't explain it. You just have to  
21           experience it because it doesn't make sense  
22           but that is how it works.

1                   And the way most of our training  
2                   occurs is we don't -- I don't travel. I have  
3                   traveled around the country but most of my  
4                   training is very one-on-one or small group  
5                   training within the office. So, it isn't  
6                   general for the most part. It is like all  
7                   right, what is the theory in this case. I  
8                   don't care what is the general theory  
9                   floating. I mean in this case, what is the  
10                  theory?

11                  Now, before our attorneys get  
12                  their first rape jury cases, rape cases, and  
13                  I did the math on this and I think it is  
14                  pretty accurate, they have tried over between  
15                  1200 and 1400 trials. All right? Because  
16                  with Misdemeanor Court, you have all the MC  
17                  Court. I know you are looking at MC Court,  
18                  which is the Misdemeanor Court and Waivers  
19                  Court. Now, those are judge trials. Okay?  
20                  Like I said, just if you have any questions  
21                  ask because Philadelphia has its own way of  
22                  doing this.

1                   So, they have done all of  
2                   misdemeanor cases. They have done felony  
3                   judge trials, which mostly consist of the less  
4                   serious drug offenses, purse snatching, the  
5                   less serious felonies. They have been through  
6                   juvenile twice, for the most part, and then  
7                   they have done about three or four juries that  
8                   are in -- I don't want to say unimportant but  
9                   simpler in nature, either you know you have a  
10                  standard drug case, a gun case, a robbery ID  
11                  case, that type of thing. Because the way we  
12                  teach it is, if you are not going to give --  
13                  if you would not give that lawyer a homicide  
14                  case, you can't give him a rape case. It is  
15                  very serious.

16                  And one of the issues that really  
17                  needs to be trained thoroughly, and it is in  
18                  our office, is SORNA. If you are not -- it is  
19                  one of the disasters as far as a defense  
20                  attorney that has come upon trying sex cases.  
21                  And what SORNA is -- if you guys know this,  
22                  let me know -- what it basically is is it is

1 the Megan's Law, the federal Megan's Law. In  
2 order to get federal money, the state has to  
3 agree to adopt the federal SORNA Law. What it  
4 stands for, I don't know. But it is --

5 PARTICIPANT: Sex Offender  
6 Registration and Notification Act. Is that  
7 right?

8 MS. YOUNIS: We call it something  
9 else but yes, that it is its official name.

10 But it is really important that  
11 when you train anybody that you understand  
12 what SORNA involves.

13 MS. JAUS: But don't you have a  
14 state SORNA?

15 MS. YOUNIS: Not anymore. We used  
16 to have a Megan's Law.

17 MS. JAUS: Right.

18 MS. YOUNIS: But then our  
19 legislature decided that we wanted the federal  
20 money more than we wanted --

21 MS. JAUS: Oh, I see.

22 MS. WAYNE: Adam Walsh trumps

1 everything.

2 MS. JAUS: Oh, okay, because in  
3 New York we just use the regular SORNA.

4 MS. WAYNE: Yes, but you still  
5 have to register federally.

6 MS. YOUNIS: And so you can wind  
7 up getting a good plea deal on the initial  
8 case if your client is going to jail. Because  
9 in Pennsylvania, for example, and this is  
10 state law, it is not federal law, but if you  
11 don't register, you are looking at between a  
12 two to four and five to ten-year mandatory  
13 sentence for not registering. So even though  
14 you might get probation or you might get a  
15 little sentence on an indecent assault case,  
16 you are going to more jail time for not  
17 registering than you would do for what the  
18 underlying case is.

19 And I have talked to a lot of  
20 prosecutors in Philadelphia and we have all  
21 kind of admitted that when we read what you  
22 have to do, we don't really understand it

1           thoroughly and we are giving these to a lot of  
2           people who are not literate. And one of the  
3           examples I give, just so that this is very  
4           clear on the importance of explaining this to  
5           your clients is, one, there is a section in  
6           there, this was Megan's Law but it is in SORNA  
7           also, which says you need to report a change  
8           in employment.

9                           Well, Philadelphia has a lot of  
10           candy factories, so what a lot of them do is  
11           they lay off everybody in June and then they  
12           rehire all those same people in September  
13           because they close the factory down. Well,  
14           one of my clients didn't register that he was  
15           laid off because when you hear change in  
16           employment, what he thought that meant was a  
17           new job. And he was looking at three to six  
18           years in jail on that.

19                           So, take the time to train  
20           everyone about it. It influences every other  
21           aspect of training. You really need to, as  
22           boring and as complicated and nobody really

1           wants to learn it, you need to know it. And  
2           I don't know how Colorado is on that.

3                   MS. WAYNE: Yes, and I think you  
4           are going to hear from somebody about the  
5           collateral consequences of sex offenses. I  
6           mean, they are so intense around the country,  
7           anything from not being able to get a school  
8           loan, if you take a misdemeanor hit, to a  
9           municipal ordinance. So, there are a lot of  
10          collateral consequences.

11                   But it ends up going back to what  
12          Yvonne and I both agree on and that is the  
13          training of lawyers and how to get them  
14          trained and who should actually be doing these  
15          cases. Because we look at these cases as if  
16          they are just as serious as any kind of murder  
17          case. These are peoples' lives.

18                   So, when you have a sex offense in  
19          the state or in the fed, this is someone's  
20          life and they are looking at the rest of their  
21          life. So, in Colorado, we are very draconian,  
22          in some ways. We believe in progressive pot

1 laws but if you commit a sex offense, you are  
2 going away for the rest of your life, period,  
3 end of story. There is no in-between there.

4 So, we have some pretty draconian  
5 laws in place and that is probably most of the  
6 country is like that anymore. And so what it  
7 requires is this rigorous training on the  
8 front-end of lawyers and who are the people  
9 who should really be trying these cases on  
10 both sides. And when I was starting to  
11 compare the systems, you know, one of the  
12 things that I saw that some of the military  
13 branches have instilled is this career  
14 litigation track. And I endorse a career  
15 litigation track because I think what that  
16 does is that not only are you drawing in the  
17 lawyers that have a true interest or maybe a  
18 passion in one side or the other, but you are  
19 also allowing them to specialize in an area  
20 that demands a specialty. It is not something  
21 to dabble in as a lawyer because it is  
22 complicated, it is such a layered specific

1 area of criminal defense. Look, I try  
2 mortgage fraud cases. I try tax cases. I try  
3 very complicated cases. These are as  
4 complicated as any white collar case that I  
5 have. And the reason is because of all the  
6 underlying layers that I am going to talk to  
7 you about that I think needs to be trained.

8 Number one is forensics. Your  
9 lawyers have to be trained in the area of  
10 forensics and we just don't see enough of it.  
11 NACDL is just now coming out with the help of  
12 Barry Scheck who is really pushing this in our  
13 forensics committee. We are going to open a  
14 forensics college through Cardoza Law School,  
15 which is long overdue, to train lawyers on how  
16 to do DNA. Right? How to look at a rape kit  
17 and what is the integrity of the chain of  
18 custody. And how do you look at a chain of  
19 custody that a lot of lawyers have no idea  
20 what happens when a woman goes to the  
21 emergency room and how it is prioritized when  
22 she comes into the emergency room.

1                   That is not only important for the  
2                   prosecution side to recognize it and be  
3                   sensitive to it but it is important for the  
4                   defense so that they aren't caught up in a red  
5                   herring of something that shouldn't be  
6                   litigated, something that I shouldn't be  
7                   talking about in my theory of the case, that  
8                   I am going after a red herring that shouldn't  
9                   be talked about and ends up losing my  
10                  credibility in a defensible case.

11                  So, I need to understand the  
12                  forensics. What is the DNA really like? When  
13                  I get a hit that says my client is 1 in 20  
14                  million, what does that really mean? Do I  
15                  have a mixed sample? Do I have someone who is  
16                  from a biracial background where there may be  
17                  an issue on the sample? What is the integrity  
18                  of the lab? We know there is problems with  
19                  the labs. Right? We know that as  
20                  investigators. Right? And so, I need to hire  
21                  the best investigators and the best experts on  
22                  my side to be able to go through with that.

1                   So, even though I get trained, I  
2                   certainly don't rely on my own expertise when  
3                   I am cross-examining some DNA expert but this  
4                   is their area. But I certainly have some  
5                   foundation from that training so that I can  
6                   pick up what I then need to do to go to a  
7                   supervisor, or in private practice, to go to  
8                   my client and say I need \$50,000 for an  
9                   expert. And that is the luxury of private  
10                  practice is when I am in private practice, I  
11                  have clients who pay me a lot of money to get  
12                  a lot of experts. And it shouldn't be any  
13                  different if I am in the military and it  
14                  shouldn't be any different if I am poor. And  
15                  so the forensics of these cases is so key in  
16                  terms of misidentification.

17                  How do drugs mix with someone's  
18                  perceptions and their observations, if they  
19                  have a mental health history and they are  
20                  taking drugs that are prescribed to them? If  
21                  I go out and binge drink, how does that affect  
22                  how I act out sexually? It may be negative

1           for me, it may be helpful to the defense. I  
2           don't know those things but I certainly need  
3           the background and I need the training to spot  
4           it. Prosecutors need it and I need it because  
5           that allows me to have a, frankly, intelligent  
6           conversation with my prosecutors and a  
7           credible conversation saying hey, did you know  
8           if you mix Paxil and you have seven shots that  
9           this is what happens, that sometimes that  
10          causes some people to be over-sexualized?  
11          That may be an issue in my case that I need to  
12          know.

13                        MS. JAUS: Lisa, you said that  
14                        Colorado has fantastic training. Don't they  
15                        have these kind of CLE classes for the defense  
16                        bar for preparing them for DNA and forensics,  
17                        and all the things you have to know about the  
18                        labs all over the place?

19                        MS. WAYNE: I think what Yvonne  
20                        said is right on, and that is, it is general  
21                        training. So, I am training the masses. And  
22                        when you go to these colleges, these small

1 colleges, it is one-on-one training, so we let  
2 20 to 30 lawyers come and we invite them. And  
3 it is much more of a one-on-one and you are  
4 doing it a week at a time. So it is intensive  
5 training and that is a lot different,  
6 obviously, than someone speaking to me for an  
7 hour.

8 MS. JAUS: Right.

9 MS. WAYNE: It is like going to  
10 the college when we were prosecutors and when  
11 you are defense lawyers, the criminal defense  
12 college is two weeks of hands-on training that  
13 I am really getting it and then it is really  
14 instilled in me as a lawyer. And I just think  
15 it is key.

16 And I don't care. Here is what I  
17 always say when everybody talks about the  
18 money, money, money because money is always an  
19 issue. I get it. But what we do on the  
20 front-end, saves us money on the other end.  
21 It really does. So, the better lawyers we  
22 have, the better results we are going to get

1 in terms of the appeals, people who are  
2 wrongfully convicted, people who are coming  
3 back. I mean it is just a no-brainer to me.  
4 If we are trained right on the front-end, both  
5 sides, we are going to have better results.  
6 So the forensics is key to me.

7 And can you tell I feel strongly  
8 about that? Because you know what? Nothing  
9 is worse to me than watching a show like  
10 someone who is exonerated because they find  
11 out 25 years later about the DNA, that we  
12 either didn't get it or nobody understood it,  
13 or they didn't look at it and somebody  
14 shouldn't have done 25 or 30 years. I mean  
15 that is ridiculous in this day and age. We  
16 ought to know how to do this right. And it is  
17 just as much the defense's obligation as it is  
18 the prosecution's obligation.

19 And I think the military has the  
20 ability to do that. I really do. So that is  
21 one.

22 COL HAM: Lisa, may I ask a

1 question? You mentioned SORNA. Has there  
2 been any case law on ineffectiveness of  
3 counsel who fail to properly advise of SORNA  
4 requirements? Is that an issue?

5 MS. YOUNIS: It hasn't come up,  
6 the best that I know of. Our appeals unit  
7 does it. And in fact, I believe in the  
8 Superior Court they just won a fantastic case  
9 which said like a lot of the people that I had  
10 some years ago before we adopted SORNA, they  
11 had accepted guilty pleas to like statutory  
12 sexual assault or something like that, just  
13 specifically because it didn't involve  
14 registering. And then when SORNA came in,  
15 they said oh well, guess what guys, you need  
16 to register. And our appellate from my office  
17 won a decision that said if somebody accepted  
18 a plea to avoid it, you can't then  
19 retroactively go back and make them register.  
20 And I think that is the first time since  
21 Megan's Law has come up that they have said  
22 anything that it can't be retroactive. So,

1           that came out. That was in our favor.

2                       As far as ineffectiveness goes, it  
3           hasn't, the best I know, come up yet. Our  
4           office is pretty good about really letting  
5           them understand they need to explain all of  
6           it.

7                       COL HAM: Because one of the  
8           issues that military defense counsel faces 50  
9           states. So, there is some military case law  
10          and there is a requirement and I don't know  
11          how the plea works in Philadelphia, or  
12          Pennsylvania, or Colorado, the requirement for  
13          the military judge to have the defendant  
14          acknowledge on the record that he has been  
15          advised of the consequences of the plea but  
16          that is it. There is no additional colloquy  
17          as to this particular state or whatever.

18                      MS. WAYNE: I think that it is  
19          going to be considered a Padilla issue, okay?  
20          I mean, it is the same thing. It is analogous  
21          to that. And so the Rule 11 advisement, the  
22          constitutional advisement when they ask you

1           about collateral consequences, no lawyer in  
2           the world can anticipate every collateral  
3           consequence. But this is a substantive issue  
4           and I think if it comes up, it would be like  
5           a Padilla issue that the lawyer, someone has  
6           to advise you of your immigration issues as a  
7           result of your plea and this is the same kind  
8           of thing. And so that is how I would see it.

9                   COL HAM: And the military court  
10           has held that they have to advise them.

11                   MS. WAYNE: That is why you do  
12           some things right. I mean, I think that is  
13           right on. A defense lawyer can't overlook  
14           that.

15                   Yvonne has a great specialty on  
16           this interview process that is key that I  
17           don't see the military lawyers doing.

18                   MS. YOUNIS: Let me just give the  
19           basic overview is when our attorneys get to do  
20           for the second time, they get in a small group  
21           of people, maybe about ten or fifteen and they  
22           meet weekly just on sex cases, not on any

1 other type of case. Just on sex cases, you  
2 know to discuss them, to learn things about  
3 them. One of the things like when I spoke on  
4 it was you know I know this isn't the issue  
5 here but motive for a child to lie about being  
6 sexually assaulted and things like that.

7 But because they are a very small  
8 group, which to me is the key in all training  
9 on this, is small group. You can give general  
10 but then small group one-on-one. Because what  
11 they can do then is apply it to cases they  
12 have and think about it.

13 And one of the main things that  
14 you need to talk about with your lawyers, and  
15 I would say as an example, is the interview  
16 process. And I spent a lot of time talking to  
17 our lawyers about you are about to interview  
18 somebody on a sex case. The world has  
19 changed. Because first of all, we are a  
20 culture we don't like talking about sex. We  
21 talk about it all the time on the one hand but  
22 on the other hand, we are very uncomfortable

1 with it because we are getting all these mixed  
2 messages. So, you are going to have to go to  
3 somebody that you don't know and start to talk  
4 about this very personal issue.

5 You need to know I am not a  
6 touchy-feely lawyer. I am just like I'm your  
7 lawyer, this is the story. This is our  
8 relationship is the law. But some of the  
9 things that you need to understand is,  
10 particularly in consent cases, a lot of times  
11 defendants do not tell you key facts, not  
12 because they are being evasive but because  
13 they don't understand the importance of those  
14 facts. And so we train our people when you  
15 are talking about a consent case, you need to  
16 talk to this guy -- I am assuming it is a guy.  
17 We also have women rape people but I am just  
18 using it --

19 MS. WAYNE: Rarely. Rarely.

20 MS. YOUNIS: So, what happens then  
21 is we say you need to talk to them. You need  
22 to first say I need you to tell me everything

1           and let me decide what is important or not.  
2           We talk to them about you have got to go like  
3           a movie clip by clip. After you had sex, did  
4           you stay in the bed? Yes or no? After you  
5           got out of the bed, what did you do? And if  
6           you go through often it enough you are going  
7           to find that there is this great point in  
8           there where he said something to his wife  
9           named Matilda. Oh, you don't go down on me as  
10          good as Natasha does. And he has no  
11          understanding that that is why he has falsely  
12          been accused of rape is that he called the  
13          wrong name because they don't see that as a  
14          motive. Just all those little tiny relational  
15          things.

16                           And the interview is where it  
17          starts, is being willing to take all that time  
18          to go through everything. What did you do,  
19          specifically? And you have to kind of go  
20          through it all with them because that is  
21          usually where motive lies. And motive is very  
22          key in defending sexual assault cases because

1 most of the time, these people have a prior  
2 relationship with each other. Okay? And so  
3 it is more complicated than robbery of  
4 somebody you don't know on the street.

5 The second part to that is a lot  
6 of times in Philadelphia -- I don't want to  
7 say a lot of times -- we get cross-racial  
8 issues. We get issues of African American men  
9 who are being accused by white women of raping  
10 them. Now, if there is anything we are less  
11 comfortable talking about than sex, it is  
12 cross-racial discussion about cross-racial  
13 rape. You have got to teach people how to be  
14 comfortable talking about this.

15 Now, I learned it because I lived  
16 through bussing in Boston. And you can't put  
17 somebody back there and learn it but that is  
18 where I learned it. And in some senses, I am  
19 not saying this is something you argue in  
20 court. We are not talking about that because  
21 you don't have to argue it because it is  
22 floating all over the place anyway. I am

1 talking about your interview with your client.  
2 You have to be able to bring up the topic of  
3 race or you will not have credibility with  
4 them.

5 And be clear. You say I may not  
6 wind up discussing this in the courtroom but  
7 it is going to influence what type of jury we  
8 are going to pick, how people are going to  
9 view this, who is going to have more  
10 credibility and all of these things that we  
11 know shouldn't be this way but it is the way  
12 it is. So basically when people come to me  
13 with this, what we do is one-on-one, we set up  
14 interviews with African American attorneys, if  
15 that is the situation, so that people can  
16 practice talking about it.

17 Now, one of the true blessings in  
18 my office is I think it is one of the places  
19 in this country where we have a lot of inter-  
20 racial conversation about racism and not just  
21 like being our own personal, which is not  
22 something that is done a lot. You are going

1 to have to think about how you are going to  
2 train people on this issue because it isn't  
3 going to go away. It is going to come up.

4 And when I was thinking about  
5 talking with military and I would think, and  
6 I don't know this because my father is World  
7 War II and that is as far as we go, is an  
8 issue of rank and if that is an uncomfortable  
9 issue to talk about or like the trust or  
10 distrust because you have a white female  
11 coming in talking to this defendant and there  
12 are all types of concerns they have.

13 MR. FISHMAN: Have you  
14 experienced, I would suggest that maybe male-  
15 on-male sexual assault might be analogous,  
16 equally uncomfortable for some military  
17 members, for example.

18 MS. YOUNIS: Yes, I could see  
19 that, too.

20 MR. FISHMAN: Have you seen that  
21 kind of thing?

22 MS. YOUNIS: Well in Philadelphia,

1 no. I mean, it is very open. So but it is  
2 that type of situation where there has to --  
3 you know the lawyer can feel uncomfortable  
4 talking about it. And if the lawyer is  
5 feeling uncomfortable talking about it, the  
6 defendant will not talk to you about it.

7 MR. STRAND: So what you are  
8 saying is that defense attorneys get the  
9 proper training in interviewing or not.

10 MS. YOUNIS: The way we have it is  
11 I give general overviews on something. And  
12 then most of the time what we do is we send  
13 our lawyers to the prison, which is where all  
14 of the rape people are because of the bail, we  
15 send them to the prison with a senior attorney  
16 and they sit and they watch the interview.

17 And that is I guess, if there is  
18 anything I want you to leave here with, that  
19 is really where the defenses come in. There  
20 is no way you can -- you have got to do it  
21 one-on-one. It is labor intensive. It is  
22 time intensive. It is the only way I would

1 trust. You know if my brother were arrested  
2 on rape, it is the only type of lawyer -- that  
3 is how I would want my lawyer, his lawyer  
4 trained is that one-on-one because you want to  
5 see the interaction between the attorney and  
6 the defendant and how that works. And most of  
7 the attorneys, when I have talked about them,  
8 they have told me that that was what was the  
9 most helpful was just watching a senior  
10 attorney talking to them. And again, by  
11 senior, Philadelphia, at least they did for a  
12 while, has the least plea bargains of any  
13 major city in Philadelphia. So, they are  
14 getting loads of trial training but they  
15 haven't talked about this yet.

16 MS. WAYNE: There is training,  
17 too. There is client interview training. And  
18 the reality of it is this, too, not everybody  
19 should do these cases.

20 I mean it is not for everybody. I  
21 mean I get asked all the time how can you be  
22 a woman and do these cases, and I do a lot of

1           them. And I believe very strongly I am a  
2           pretty tough woman, too, and believe in a lot  
3           of that but it has nothing -- not everybody  
4           should do them. That is the bottom line.

5                        So the military, there should be a  
6           choice. That is why I said the passion part  
7           is either prosecuting or defending, you really  
8           want to do this. Because you can't -- not  
9           everybody can talk about it. Not everybody  
10          wants to sit around and talk about vaginal  
11          openings and the size of your client's penis  
12          that may have caused injuries. That is an  
13          important part of whether there is force or  
14          trauma. I mean, that is a hard thing.

15                       I am a Catholic girl. I don't  
16          like talking about it but I know that I have  
17          got to have a comfort level with my clients  
18          and you have got to do it. And this is when  
19          an investigator is really important and that  
20          kind of comes into this. The next thing is  
21          these lawyers have to have investigators. You  
22          cannot do it alone and particularly in the

1 client interview session. Because a lot of my  
2 investigators, I have ex-FBI agents that work  
3 for me, I have ex-cops that work for me and  
4 they have a natural ability of not only being  
5 able to have, you know, know those  
6 interrogation good issues but they can also  
7 sometimes deal with the client that isn't  
8 going to like me because I am a woman, period.

9 If I had an appointed case, they  
10 don't want a woman and they don't want a black  
11 woman. They go I have got a double whammy  
12 here. I am accused of rape, wrongfully  
13 accused. I have got a woman and I have got a  
14 black woman. So then you have got an  
15 investigator that is able to back you, so  
16 there is a balance. And a lot of them are  
17 male investigators. Sometimes they are female  
18 investigators but I see fewer female  
19 investigators on sex assault, doing sex  
20 assault on the defense side. I don't know  
21 about the prosecution side.

22 So but the investigator has to be

1 at the front-end from the get-go, going after  
2 the interviews. I can't tell you how many  
3 cases pre-indictment I have had dismissed  
4 because my investigator got out and did the  
5 ground work that the cops couldn't do, that  
6 law enforcement didn't have the resources to  
7 do it right and that he or she did and we got  
8 cases never indicted or never brought in. So,  
9 it is huge.

10 And I was reading that I don't  
11 think you all assign investigators to the  
12 defense. And that doesn't make sense. You  
13 can't be effective. You cannot provide  
14 effective assistance of counsel to your client  
15 without an investigator.

16 MR. STRAND: How does that work,  
17 specifically in Colorado or if you know of  
18 other areas? What percentage of defense  
19 attorneys will have their own investigator or  
20 have access to an investigator, whether it is  
21 a public defender or whether it is a private  
22 defense attorney?

1 MS. WAYNE: Right, 100 percent.

2 MR. STRAND: Okay.

3 MS. WAYNE: I don't know a lawyer  
4 in the country that does sex offenses without  
5 an investigator, except in the military.  
6 Really, there is no such thing.

7 In Colorado when I was a public  
8 defender for 13 years, we had a whole office  
9 of investigators. Every sex offense case had  
10 an investigator. That was a top priority  
11 because it is a triage, right? Misdemeanors  
12 are here. The sex offenses and the homicides  
13 are up here. We had an investigator.

14 As a federal lawyer who takes CJA  
15 cases, I have incredible resources. I can  
16 have one, two, three investigators if I want  
17 to. You get them appointed, they are assigned  
18 immediately. In private practice, I get the  
19 phone call, I call my investigator, and my  
20 investigator is there right by my side.

21 So, it is no different when the  
22 prosecutor begins the investigation or there

1 is an accusation. They are there with their  
2 investigators and the victim's advocates and  
3 all their resources. So, there has to be,  
4 obviously, the balance. And it is incredible  
5 to me that you could ever do these cases  
6 without an investigator.

7 MR. STRAND: So, if I am a client  
8 of yours and you are a private attorney and I  
9 can't afford an investigator --

10 MS. WAYNE: Then you are probably  
11 not my client.

12 MR. STRAND: Okay.

13 MS. WAYNE: In private practice,  
14 if you retain a private lawyer, part of doing  
15 that in private practice is then I have to  
16 hire all the resources for you, separately  
17 than my own fee. So, I hire the investigator.  
18 I hire my experts. That is why I am private  
19 practice. These are very expensive cases. It  
20 is not unknown to be a million dollars to  
21 defend these kind of cases.

22 MR. STRAND: But if I am not

1 indigent and I can't get a public defender and  
2 I can't afford that expert, what do I do?

3 MS. WAYNE: You may have a  
4 problem. I mean, there are states where a  
5 private lawyer can say judge, they didn't  
6 qualify for the public defenders' office and  
7 I am asking the court to fund the  
8 investigator. That is hard.

9 California, actually you can do  
10 that. San Francisco, the city of San  
11 Francisco has an excellent public defenders'  
12 office. Jeff Adachi does an incredible job  
13 out there. But you if you go to San Mateo, it  
14 is a different -- Contra Costa, it is a  
15 different world. So, I bet you will probably  
16 see in Contra Costa lawyers, people that don't  
17 have investigators. I don't know. I am  
18 assuming that is why you are smiling. You  
19 don't want to indict their system but I know  
20 that is true in California.

21 MR. BRYANT: In Virginia, you are  
22 only going to get a guaranteed a motion for an

1           investigator on a capital murder case. It is  
2           going to be extremely rare for the defense to  
3           be able to get a court appointed investigator  
4           for anything but capital murder.

5                        And I know dozens and dozens of  
6           defense attorneys who don't have their own  
7           investigators. It depends on whether or not  
8           they get a client who can afford that  
9           investigator. They are in that middle level.  
10          On the upper level, the big firms are going to  
11          have either an in-house investigator or  
12          somebody they call on constantly. But the  
13          middle level firms and the smaller practices,  
14          they don't have that and they are not charging  
15          that kind of fees either.

16                       MS. WAYNE: It is ineffective. If  
17          you are talking about a client who is looking  
18          at a life sentence, like they are in Virginia,  
19          I don't see how you can sleep at night not  
20          having investigated the case. I don't  
21          understand that.

22                       So, that is the defense lawyer's

1           problem. They should be pushing that and they  
2           should be standing their ground on it.  
3           Because ultimately, that becomes an appellate  
4           issue. I mean it just does. And  
5           constitutionally, those people are being  
6           deprived due process, period.

7                        So, I know that happens. I know  
8           it happens in the south, Alabama, Georgia. We  
9           know that it is happening but it doesn't mean  
10          it is right. And I want the military to be at  
11          front of what is right, not on the back of it.  
12          So, I hope that we don't track any of those --  
13          I mean, look, we know that there are  
14          injustices all over the country in the  
15          civilian setting.

16                        PROF. HILLMAN: So, help me to  
17          push a little further on what you said. Jeff  
18          Adachi is a terrific guy and there are lots  
19          of problems with this, with going to the court  
20          and asking for funding, no matter where you  
21          are right now, given the state of funding for  
22          the courts in California right now. So, the

1           likelihood of getting, it is just a really  
2           steep hill.

3                       But you said something, you talked  
4           about how important the investigator is. Not  
5           only does the military defense counsel not  
6           have an investigative arm, but the military  
7           defense counsel needs to go through the trial  
8           counsel in order to get approval for resources  
9           in order to go there. So, what about that  
10          extra piece of it?

11                      MS. WAYNE: Well, it is like when  
12          you get appointed on the CJA counsel. So, CJA  
13          is the federal appointment list, which has  
14          gone through sequestration and we are having  
15          also a go at it. So, our judges are  
16          scrutinizing and really asking a lot of these  
17          same questions. Okay? And this is what has  
18          happened with us is that again, it becomes a  
19          standing your ground, is you can force me to  
20          go to trial and be ineffective and I will  
21          continue to make a continuous record. It  
22          really is up to us to resist this because it

1 is our clients' lives. Say you don't have to  
2 give me the money. They will ultimately --  
3 something has got to give. The prosecution  
4 has either got to give in terms of how they  
5 are prosecuting the cases and there have to be  
6 more settlements, something has got to give  
7 but not at the defendant's life. And so, if  
8 standing the ground and being really united  
9 and it really is fighting the court, and trust  
10 me, I fought the court a lot on those issues  
11 of funding, and ultimately -- it is hard. And  
12 ultimately, they don't know what to do with  
13 you but they give you the money because nobody  
14 wants a record of -- and this is about making  
15 the record by the lawyers. As long as they  
16 are making the adequate record of this is why  
17 I need it, not just to hang out with an  
18 investigator and go to a site to visit  
19 someplace cool. I need an investigator for A,  
20 B, and C and this is why it is relevant to my  
21 theory of the case. And if I don't have it,  
22 this is the prejudice that will occur in my

1 case. That is the record and the absence.

2 COL HAM: You do those ex parte?

3 MS. WAYNE: Absolutely, ex parte  
4 so that the prosecution isn't hearing what  
5 your side is. Absolutely.

6 COL HAM: Do you know the federal  
7 citation for the ex parte? I don't mean to  
8 put you on the spot.

9 MS. WAYNE: The federal citation?  
10 I am not the appellate lawyers.

11 COL HAM: Is it by statute that  
12 you do this ex parte?

13 MS. WAYNE: Yes, absolutely. And  
14 that is statewide, too. So whenever I want --  
15 you know one of the things we are going to  
16 talk about is getting access to restrictive  
17 records that the government lawyers need to be  
18 trained on. That is, getting the mental  
19 health records of the alleged victim, piercing  
20 the rape shield, being trained on how to do  
21 that stuff. That is something that they are  
22 not trained on and those are all things that

1           are done ex parte. Meaning, I give an offer  
2           of proof to my judge saying, this is why I  
3           need it. I am not on a fishing expedition.  
4           I am not out there to throw out salacious  
5           facts about the alleged victim. It is  
6           relevant to my case because A, B, and C. And  
7           it is the same kind of training.

8                       MS. JAUS: Rape shield piercing is  
9           ex parte?

10                      MS. WAYNE: It depends on what the  
11           theory is. It depends on if it is a mental  
12           health issue, if you think she has opened the  
13           door to something that they are not -- yes,  
14           absolutely. But that is -- you know, I get  
15           where you are coming from. It is not always.

16                      If I am going to ask to pierce the  
17           rape shield, meaning if I want to bring in the  
18           alleged victim's prior sexual history because  
19           it is relevant to something in my case like  
20           prior false accusations she has made before  
21           just like on my case, that is piercing the  
22           rape shield. But sometimes I may want to go

1 after records before I ask to pierce that rape  
2 shield because I know she has a prior history  
3 that the government may not be aware of. I do  
4 it ex parte. And that is being trained.  
5 Right? Your lawyer has got to know that.  
6 Because you know why? Defense lawyers,  
7 particularly, we feel they have made us feel  
8 like we are the bad guys because we want to  
9 know all this stuff about the alleged victim.  
10 But statistically, men can be wrongfully  
11 accused of sexual assault more than any other  
12 crime. It is the easiest accusation to make  
13 and the hardest to defend, the hardest to  
14 overcome. That is what the public needs to  
15 know before they start indicting the military  
16 and all this stuff.

17 Yvonne, I am talking too much.

18 COL HENLEY: I think most defense  
19 counsel, at least in my experience as a judge,  
20 they don't have difficulty arguing the  
21 relevancy, A, B, C, D. It is the next  
22 question. I am curious whether you have the

1 same standard. Why can't you do it? Why do  
2 you need an investigator? Why can't you do  
3 it, defense counsel? And that is the case law  
4 in the military. The judge is going to ask.  
5 That's fine. Assuming relevancy, why do you  
6 need an investigator and you can't do it  
7 yourself? Do you have the same standard?

8 MS. WAYNE: Why I need an  
9 investigator to get records and interview  
10 nurses and doctors and make myself eyewitness  
11 in the case?

12 COL HENLEY: That is my question.  
13 What is the standard that the judge looks at?

14 MS. WAYNE: It is an ethical  
15 standard. It is an ethical standard in terms  
16 of not only making the lawyer the witness in  
17 the case. Let's say I get record and talk to  
18 a nurse and that nurse, who I subpoena, then  
19 tells a different story at trial? Who is the  
20 witness to that? Me. I now can't be on the  
21 case because I have to take myself off because  
22 I have become a witness to her inconsistent

1 statement.

2 MR. BRYANT: Well, aren't you  
3 going to interview the witnesses, your  
4 witnesses before trial anyway? After the  
5 investigator has found them, you are going to  
6 call them in or go to them one way or the  
7 other.

8 MS. WAYNE: With my investigator  
9 always present. We never interview witnesses  
10 on our own in civilian practice. It is  
11 unethical. The ABA standards are clear on  
12 that. That is like a number one rule in  
13 civilian practice is never making yourself a  
14 witness in a case.

15 MS. JAUS: Also, if you are  
16 canvassing as a defense attorney for witnesses  
17 who may have heard or seen something at the  
18 scene, that would be very hard for the actual  
19 lawyer to do. You need to someone. If you  
20 have to go out at night, et cetera, you really  
21 need an investigator for that.

22 MS. WAYNE: And usually, a good

1 lawyer is going to follow their investigator  
2 but again, it is that impartial second party  
3 that is doing the investigation and you are  
4 putting them up just like the prosecutor puts  
5 up the cop. They don't put themselves up to  
6 testify about the case. They may know just as  
7 much about what the victim said or not or may  
8 have been on the scene. They don't put  
9 themselves up on the stand.

10 MR. BRYANT: Well, nobody's  
11 talking about -- I think we all understand and  
12 agree you don't become a witness in the case.  
13 That is --

14 MS. WAYNE: Well, that is why --

15 MR. BRYANT: -- on either side.

16 MS. WAYNE: Yes.

17 MR. BRYANT: But at some point,  
18 you are going to interview the witnesses  
19 yourself.

20 MS. WAYNE: You hope that you can  
21 be able to do that, yes.

22 MR. BRYANT: It's just like what

1           you said about when your family defense  
2           attorney is interviewing the client, you also  
3           have to, I would think, start with now, if you  
4           are going to tell me you didn't do this at all  
5           and there is some alibi defense, then fine.  
6           But if you are going to tell me here is what  
7           happened by my girlfriend is going to say I  
8           wasn't there, I can't put you on the stand at  
9           that point. My license is not worth your  
10          case. So, I assume that you are getting into  
11          that in the beginning also.

12                        MS. YOUNIS: Well, actually, that  
13                        is not true because -- that is absolutely not  
14                        true.

15                        MR. BRYANT: Really?

16                        MS. YOUNIS: First of all -- no.  
17                        No, it is not an ethical problem because first  
18                        of all, it goes back to what I said about  
19                        interviewing. Do you know how many times I  
20                        have self-defense cases that start out with I  
21                        wasn't there? Because they don't know they  
22                        have a defense of self-defense. They are

1           putting through their mind, they are telling  
2           you initially what they interpret the law to  
3           be. So, the witness, as far as calling the  
4           witness about what they are going to say or  
5           not going to say --

6                   MR. BRYANT: But if they maintain  
7           the position all the way up to trial that yes,  
8           I did it but my girlfriend is going to say I  
9           was somewhere else --

10                   MS. YOUNIS: Are we talking about  
11           calling the witness as an alibi?

12                   MR. BRYANT: We are talking about  
13           calling the defendant. You can't put a -- you  
14           can't let your defendant knowingly commit  
15           perjury. That is unethical, I hope everywhere  
16           in the United States, even in Colorado.

17                   MS. YOUNIS: Well, the thing about  
18           it is this. First of all, let me just -- the  
19           big presumption in all of defense work is that  
20           your client is lying to you.

21                   MR. BRYANT: I did it for eight  
22           years.

1 MS. YOUNIS: I know, that is what  
2 I am saying. DAs think it. Judges think it.  
3 We think it.

4 So, if they are lying to you all  
5 the time, you don't know when they are lying  
6 to you because a lot of times -- and again, it  
7 goes back to interviewing. They are really  
8 telling you what they're interpreting the law  
9 to be. They are not telling you what actually  
10 happened. That is why you have to do it. I  
11 have had a lot of cases like that where you  
12 interview and what is everybody's first  
13 response? I wasn't there.

14 MR. BRYANT: Well, they are not  
15 stuck with that. I think you misunderstood my  
16 question. We are talking about the defendant  
17 taking the stand.

18 MS. YOUNIS: Yes, I got it.

19 MR. BRYANT: And when you are  
20 doing that initial interview, it seems to me,  
21 at least, with the defendant, if they are  
22 going to say yes, I did it. I did this, but

1 my sister is going to testify that I was at  
2 her house watching TV and I am going to take  
3 the stand and say she had motive to say this.  
4 At that point, doesn't the defense attorney  
5 have to say well, you are not going to take  
6 the stand if you maintain that position with  
7 me because my license is not worth your  
8 perjury.

9 MS. YOUNIS: No, because there are  
10 three -- the issue is whether I can call the  
11 witness, not the defendant. Because there are  
12 three questions. This is how I explain it to  
13 them. There are three decisions the  
14 defendants make. Everything else I am making.  
15 We just get that out of the way, how witnesses  
16 are called and all this. One, is how you are  
17 pleading. If you are pleading guilty or not  
18 guilty. Now, in Pennsylvania, the  
19 Commonwealth, you have got a right to a jury  
20 trial to the extent if you want a jury trial,  
21 you have the absolute right. And three, if  
22 you are going to testify.

1                   No one can take that right away.  
2                   That is what it is. And if they don't  
3                   testify, the colloquy on the record is that it  
4                   is their choice not to testify.

5                   MS. WAYNE: But the ultimate  
6                   question is we are not offering up perjured  
7                   testimony. Nobody does that. The government  
8                   can't do that.

9                   MR. BRYANT: That is all I am  
10                  saying is when you interview the defendant the  
11                  first time, during the interview --

12                  MS. WAYNE: No, but you don't  
13                  offer up perjured testimony and I think that  
14                  this is where we are having the  
15                  misunderstanding. We are talking about an  
16                  adversarial system. Okay, we are not talking  
17                  about an equal balanced system. So, the  
18                  reason I need an investigator is because it is  
19                  proof beyond a reasonable doubt. Can the  
20                  government prove the case? My investigator is  
21                  my arm to dismantling the government's case or  
22                  finding the links or the absences of the

1 evidence. Okay? So, it is not, you don't  
2 build a case or defend a case around a client.  
3 It is what the government can prove.

4 But the bottom line is you were  
5 asking it because I have the sense you don't  
6 think that they need investigators. And it is  
7 dismantling the government's case. I need  
8 that and I need an independent person to do  
9 that.

10 MR. BRYANT: I wasn't addressing  
11 the whole investigator issue at that point at  
12 all when I went back to what her initial  
13 statement about the interview of the client in  
14 the beginning. That is all.

15 MS. WAYNE: Well, you are not  
16 saying we offer up perjured testimony.

17 MS. YOUNIS: No, what I am saying  
18 is in the first interview, what is the key?  
19 The first interview.

20 MR. BRYANT: Yes or no? If the  
21 client says to me, I am going to take the  
22 stand, Mr. Bryant, and I am going to say I did

1 not rape her and my sister is going to say  
2 that is because I was watching TV with her,  
3 but yes, I did rape her, in Philadelphia or  
4 anywhere else in the country, that defense  
5 attorney can't let that defendant testify "I  
6 didn't rape her," can he?

7 MS. YOUNIS: They can testify.  
8 You can't argue it. That is what the law is.  
9 I mean that is what the law is. We don't like  
10 it. That is the law.

11 MS. WAYNE: That is the law.

12 MS. YOUNIS: The other thing is I  
13 want to make really clear, I want to make  
14 really clear --

15 MR. BRYANT: In Virginia, you are  
16 going to lose your license.

17 MS. WAYNE: No, that is not the  
18 law.

19 MR. BRYANT: You are going to lose  
20 your license in Virginia.

21 MS. JAUS: No, you can testify  
22 that.

1 MS. WAYNE: You just can't argue  
2 it.

3 MS. YOUNIS: You can't argue with  
4 your questions.

5 MS. JAUS: They could change their  
6 story five times, as long as they are  
7 testifying to it.

8 MS. WAYNE: Yes, that's right.

9 MS. JAUS: You could advise them  
10 otherwise.

11 MS. WAYNE: Yes, that's right.

12 MS. YOUNIS: The other thing about  
13 that is, first, this is not a one-interview  
14 case, right? You are talking about like about  
15 six interviews.

16 PROF. HILLMAN: Can I just ask,  
17 since we are getting a verbatim transcript,  
18 let's try to just talk one at a time. Dillon,  
19 did you want to add something?

20 MR. FISHMAN: No, I didn't want to  
21 add anything. I just wanted to make sure that  
22 we are addressing the topics we need for

1 training.

2 MS. WAYNE: About training?

3 MR. FISHMAN: Yes, this is the  
4 experts on training.

5 MR. STRAND: So on the topic on  
6 training, when you talk about investigators,  
7 right now the military uses quote/unquote  
8 "independent investigators." They don't work  
9 for the prosecutor. They don't work for the  
10 commander. Would there be an issue if the  
11 defense has a request on any particular item  
12 to have a way to go to NCIS, OSI, and CID and  
13 ask them to get those documents, ask them to  
14 do these interviews, even with the defense  
15 attorney there and thing like that or do they  
16 need their own specific independent  
17 investigator? That is question number one.

18 Question number two, could  
19 paralegals do the bulk of that, as opposed to  
20 criminally trained? Although it may not be  
21 optimum but could a paralegal attempt to fill  
22 that gap in some way?

1 MS. YOUNIS: It depends on the  
2 type of investigation because I think in our  
3 office, first of all, we don't have any  
4 resources. Just the thought of that much  
5 money for an investigator my head is spinning.  
6 But it depends on the type. We have  
7 paralegals that if you are going to do a phone  
8 interview, and I don't know this one way or  
9 the other way, but what I do know is that it  
10 might be an issue of insurance. I don't know  
11 if certain insurance companies say that the  
12 investigator -- like I know, for example, our  
13 investigators cannot drive us anywhere. So  
14 when we go on the scene in North Philly of a  
15 shooting or of a drug deal or something, we  
16 have to meet them up there. And that is an  
17 insurance issue. So, that might be something  
18 that is involved in it as well.

19 MS. WAYNE: So, in terms of  
20 paralegals, I have a paralegal and my  
21 paralegal is limited to research, to the  
22 pleadings, to being my second hand when I am

1 in a trial, particularly a long, heavy-laden  
2 document trial. She, and it is a female but  
3 there are plenty of male paralegals, she has  
4 a very limited purpose in my practice. And  
5 her expertise, and I want to be very clear,  
6 investigators have an expertise. They are  
7 trained in investigation. They are trained to  
8 talk to people. They are trained to do  
9 interviews. They are trained to be able to  
10 testify on the stand. Their credibility is  
11 the credibility of my case. So, that is why  
12 I like to hire the best investigators, in case  
13 I need to put them up. They can hold their  
14 water just like an agent can, a CIA agent or  
15 whatever might be against me. So, I want  
16 someone as equally trained as the government.  
17 Because juries consider that. And the weight  
18 of that, obviously, goes to the weight of the  
19 credibility of my case.

20 So, my paralegal is trained in a  
21 very different way than my investigator is.  
22 And again, I can't tell you how much it means

1 on my cases when I was a public defender in my  
2 heavy duty cases and private practice in my  
3 CJA cases. I couldn't do these cases without  
4 the help of my investigator. So, it is really  
5 a second lawyer, they just don't go to law  
6 school.

7 MS. JAUS: In what percentage of  
8 your cases would you say the investigator has  
9 uncovered information that has really changed  
10 the case? You said that you don't get  
11 an indictment or really turn the case over.

12 MS. WAYNE: And this is great  
13 because I have a recent case. So, I had a kid  
14 who was in -- I can't remember in college in  
15 the military. What is it? You are getting  
16 ready to go into the military.

17 MS. JAUS: ROTC?

18 MS. WAYNE: Yes, ROTC. How can I  
19 not remember that? In ROTC. The women and  
20 the men were in ROTC. They had a party and  
21 everybody was drinking and it got out of hand.  
22 And my kid kind of came from a Christian

1 Academy in Colorado Springs, a really great  
2 kid. He hadn't had much to do with alcohol  
3 and really got very drunk.

4 The next morning, they wake up,  
5 people are unclothed. It is kind of the  
6 typical what happened last night. And she  
7 says so and so raped me. And she is in ROTC  
8 as well. And her friends say you need to go  
9 to SANE, which is the Sex Assault Nurse  
10 Examiners, which is one of the forensic  
11 trainings that you have to know about this Sex  
12 Assault Nurse Examiner stuff.

13 And she does the rape kit, which  
14 is done, according to the protocol, which is  
15 dictated by the Justice Department and most  
16 states follow it. And it comes back that  
17 there is semen and she had obviously had had  
18 sex. And it gets to law enforcement and they  
19 are getting ready to arrest my kid. And he is  
20 going to look at life because it is,  
21 obviously, with force against her consent.  
22 And she is adamant. She appears to be a very

1 good witness, consistent statement.

2 And my investigator goes and talks  
3 to all the kids at the house and the police  
4 haven't really talked to everybody. And we  
5 find out everybody because my kid is able to  
6 say who was at the party and the other ROTC  
7 members. And lo and behold, someone had a  
8 phone. And my investigator gets the phone,  
9 which I couldn't do. I wasn't out there doing  
10 this on the front-end. I am in court and he  
11 finds the video of her on top of him having  
12 sex. He is completely passed out and she is  
13 attempting to get him erect so that she can  
14 have sex with him.

15 We get the video, take it, take it  
16 to law enforcement, take it to the DA's office  
17 and save his life, period. Because you know  
18 what? If we hadn't had the video, nobody knew  
19 what happened at that party because everybody  
20 was drunk, including her. I think she was  
21 drunk, too, and she was probably mortified.

22 And then we had to deal with the

1 consequences of ROTC and the collateral  
2 consequences of that. That was three months  
3 ago and he would have looked at life.

4 And even if I had been successful  
5 in the case, it would have been hundreds of  
6 thousands of dollars later for his family.  
7 That was my investigator.

8 So, that is just a recent example.  
9 I have a lot of them. I feel like I am a good  
10 lawyer but I am as good as my investigator is,  
11 I really do.

12 MS. JAUS: So you would say like  
13 50 percent of the time?

14 MS. WAYNE: Yes, I would say 50  
15 percent of the time. Yes, 50 percent of the  
16 time. And I rely on that investigator, too,  
17 when I am in a trial. I am calling him and I  
18 have called him on many a cases about prior  
19 inconsistent statements that have come out  
20 through the course of interviews that he has  
21 done with a number of witnesses.

22 And I mean I think he is great but

1 I think all investigators who are trained can  
2 do the same thing.

3 COL HAM: Do you routinely  
4 interview the victim in the case or no?

5 MS. WAYNE: I wish. So, you don't  
6 have a right to interview victims. In New  
7 Mexico, actually, you have a right to take a  
8 deposition. It is incredible. So you  
9 actually get to interview in a civil, almost,  
10 setting but most states, we don't. The  
11 prosecution usually shields us from being able  
12 to do that. So, often, it is cold. If you go  
13 to trial on these cases, you have never talked  
14 to them in person. They usually shut you off,  
15 even when your investigator is going out  
16 there.

17 And that is the second part of  
18 training, is called motions litigation. If  
19 the defense does not know how to litigate  
20 motions and sometimes those motions may have  
21 to do with calling the victim and putting them  
22 on the stand, in terms of attacking certain

1 substantive issues, so let's say hearsay  
2 statements, mental health issues. I am going  
3 to say it is an identification case, it is not  
4 a consent case, the defense has the right to  
5 put on the alleged victim in a prior hearing  
6 under the law, which the federal case is U.S.  
7 versus Telfair but all states. And it is our  
8 burden and you can put them on and that is an  
9 opportunity to be able to cross-examine before  
10 trial.

11 And I have seen cases collapse  
12 because the prosecutor looks at you and goes,  
13 I haven't had a chance to talk to her.  
14 Because they have hundreds of cases, too. I  
15 didn't have a chance to talk to her and she is  
16 not very credible. We are going to get rid of  
17 this case.

18 So, that is key, the motions  
19 litigation and training the lawyers on the  
20 motions litigation.

21 PROF. HILLMAN: So, you have  
22 returned to what I think our staff actually

1 was trying to get us back to.

2 MS. WAYNE: I know. That is why I  
3 kept going to that training.

4 PROF. HILLMAN: I appreciate that.  
5 Colonel Ham, your question went there, too.

6 So, you have set out some of the  
7 topics on which training has to happen,  
8 investigation, interviewing techniques,  
9 motions practice. What about the way in which  
10 -- it needs to be conducted one-on-one, you  
11 have set that out.

12 I have a specific question about  
13 something Yvonne said and then a larger sort  
14 of question. And the specific one is, in  
15 terms of one-on-one training and the  
16 supervisor's relationship, the experienced  
17 attorney's relationship to the novice  
18 attorney, is it that the novice attorney needs  
19 to watch this happen and watch the  
20 relationship develop between the lawyer and  
21 the client or other subject of the interview?  
22 Or is it that the inexperienced party needs to

1 get feedback on his or her performance in that  
2 or is it both? Do you see what I mean?

3 MS. YOUNIS: Yes.

4 PROF. HILLMAN: When you described  
5 that, I wasn't sure quite what you meant.

6 MS. YOUNIS: No, I was unclear. I  
7 apologize for that. When it comes to rape  
8 cases, it is for the inexperienced person to  
9 watch the experienced person do the interview,  
10 so that first of all, they can get comfortable  
11 with discussing this topic, and second of all,  
12 there are certain ways just when you talk to  
13 defendants that you can make them comfortable.  
14 It is for them to watch you.

15 And then it is also it is what we  
16 try to do -- what happened in our office, it  
17 was really amazing. It spontaneously happened  
18 from the lawyers, themselves. They meet once  
19 a week in a small group to brainstorm. And so  
20 then you know you have really new lawyers,  
21 experienced lawyers, everything else. And  
22 that has been really helpful. But again, the

1 emphasis is on small. Like I would say maybe  
2 about eight people go there.

3 And the other thing we spend a lot  
4 of time with and are always saying is go and  
5 watch an experienced attorney try a case. And  
6 a lot of times, people don't understand that  
7 that is part of training is the watching of an  
8 experienced attorney do a cross-examination of  
9 a rape victim because otherwise, they don't  
10 learn. You know fine, you have this theory  
11 but they don't know how to execute it. And  
12 that watching is part of training. It is a  
13 really important part of training that I think  
14 a lot of times people view that as oh, they  
15 are just sitting around wasting time. They  
16 are not working.

17 But both myself and my assistant,  
18 we really encourage all of our lawyers to say  
19 go. This person is on trial. If your return  
20 work comes to me a day late, I don't care. Go  
21 watch them now. Go. And then we can talk  
22 about what happened or they can talk about it.

1           And I think that is part of training which  
2           normally is not viewed as training but is  
3           really important to them. And they really  
4           learn a lot from watching somebody, again,  
5           with more experience execute cross-  
6           examination. And then it helps them. You  
7           know they go back and they have their little  
8           possession of marijuana case. But it helps  
9           them because they have seen somebody do it.  
10          Otherwise, it is just all abstract and you are  
11          having people that don't learning from people  
12          that don't know and then that becomes a  
13          problem.

14                    BG DUNN: Do you also, when that  
15          young attorney, the young attorneys watch an  
16          experienced attorney do an interview or two or  
17          three, and now that young attorney is going to  
18          interview his or first rape victim. So is  
19          there an experienced attorney who then watches  
20          that interview or, we call it second chair,  
21          second chairs the process?

22                    MS. YOUNIS: It depends on the

1 attorney, the specific attorney. And you know  
2 how I think it is, a lot of times you can tell  
3 by how they are reacting or how they are  
4 interacting or asking questions, you know if  
5 that is a person that is ready to do an  
6 interview or if it is somebody that you are  
7 not quite sure about. And I have had  
8 attorneys come to me and say can you come up  
9 to the prison with me and help? I am having  
10 trouble with this defendant.

11 BG DUNN: Which all kind of ties  
12 back into your strong perspective of your one-  
13 on-one small group training process constantly  
14 where the senior help the junior and the  
15 junior seek mentoring.

16 MR. STRAND: Prosecuting  
17 attorneys, they have the National District  
18 Attorneys Association, they have all these  
19 national organizations, state organizations,  
20 they get money from the Department of Justice,  
21 Attorney Generals for training and things like  
22 that. How would that compare with what

1 defense attorneys get in some of the  
2 organizations, some of the funding that goes  
3 into training? How would you compare what  
4 prosecuting attorneys get, compared to what  
5 defense attorneys get across the board?

6 MS. YOUNIS: In juvenile, I think  
7 it is more equal because there are a lot of  
8 programs out for juvenile justice. It is not  
9 that equal in the other matters. I can't  
10 really give a number on it. You know, I just  
11 don't know.

12 We try to get grants on some  
13 things like that and sometimes we have been  
14 successful and sometimes we haven't been. But  
15 in Philadelphia, it is just the disparity kind  
16 of -- you know like I said, we are a nonprofit  
17 organization.

18 MR. STRAND: Right.

19 MS. YOUNIS: So, it is a little  
20 different. We are not city workers. We don't  
21 get to have that tie-in to the city money in  
22 that way. We do our own CLE training and we

1 have people come in. And when I have needed  
2 an expert, for the most part, it has come out  
3 of our budget for the year. You know one time  
4 I needed a DNA expert and so we go to our  
5 supervisor and they sign off on it.

6 I think that Homicide has gone to  
7 the judges and gotten some extra money but I  
8 have never been in a situation where it has  
9 gone to the point where we didn't get it out  
10 of our own budget.

11 BG DUNN: What is your  
12 compensation like for your attorneys, compared  
13 to the state prosecutors?

14 MS. YOUNIS: Well, since 2001 we  
15 have been told we are going to get parity.  
16 And the worst is the ones, do you know like  
17 that middle ground, right when they are really  
18 becoming useful, like you can really hand them  
19 anything, the last time I talked to someone  
20 like that I believe it was like a \$20,000  
21 disparity, around in there. As I said, those  
22 numbers change on what it is.

1                   And it is also that the DAS, they  
2                   have what do you call it when you retire.  
3                   They have pensions. We don't have pensions.  
4                   We are a nonprofit. It all goes back to that  
5                   we are nonprofit, so we don't get city  
6                   benefits.

7                   MS. WAYNE: It is dictated  
8                   geographically.

9                   BG DUNN: Now, what is it like in  
10                  Colorado?

11                  MS. WAYNE: We are well-funded.  
12                  We are well-funded because it is a state  
13                  system. So, it is dictated geographically.  
14                  It is dictated by county. If you go to the  
15                  south, the disparity is incredible.

16                  In the federal system, it is  
17                  pretty equal in terms of the federal defenders  
18                  and the United States Attorney office. And  
19                  so, really, it is dictated geographically. If  
20                  you are in a rich jurisdiction, you have  
21                  pretty equal funding. If you are in a poor  
22                  county or a rural county, it is not at all.

1                   PROF. HILLMAN: So we are getting  
2 late on time here. Are there things you  
3 didn't get to because of our barrage that you  
4 would like to make sure we --

5                   MS. WAYNE: I liked that barrage.  
6 It is kind of like being in court --

7                   PROF. HILLMAN: Yes, it is.

8                   MS. WAYNE: -- trying to convince  
9 a judge who doesn't want to --

10                  MS. YOUNIS: Let me say one of the  
11 things to train that is really important that  
12 also you know you can begin from the  
13 beginning. But it one of the most important  
14 things to make sure they don't make a mistake  
15 is to know the difference between the  
16 Commonwealth case and the defense case.  
17 Because I mean a lot of times when people are  
18 talking, if you are supervising them and they  
19 wind up talking to you, they are taking some  
20 of the prosecution case and they are taking  
21 some of the defense case and they are putting  
22 it together. And what people don't learn,

1           which our office really emphasizes all the  
2           time is you first prep out of the Commonwealth  
3           case. Is there a theory in the Commonwealth  
4           case? And then you can go to what the defense  
5           is.

6                         Now, when you are experienced, of  
7           course, you can read everything the defendant  
8           says and then you can prep out of the  
9           Commonwealth case. But when people are new,  
10          what we tend to do is when they get the case,  
11          we have vertical representation so we don't  
12          have a case all the way through. We get  
13          assigned to courtrooms and whatever case goes  
14          to that courtroom, we try it.

15                        And what happens with it is that  
16          when somebody first gets a rape case, the way  
17          I do it and the way I know a lot of people in  
18          my office do it, we take the defendant's  
19          interview from them. We say here is the  
20          police paperwork. Go away, read it, and tell  
21          me what is funny about it. You know, what do  
22          you get from that? And that is part of really

1 teaching theory that is overlooked a lot. And  
2 then they get confused about what it is. Then  
3 we go back and we give them the defendant's  
4 interview and then we take it from there.

5 But that real critical, critical  
6 reading of the Commonwealth case is, again, it  
7 is a one-on-one because it is fact-specific.  
8 But that is well worth, right from the  
9 beginning, training all lawyers, not just  
10 military lawyers but all lawyers. And if they  
11 can learn that right from the first possession  
12 case, right from the first simple assault,  
13 that will follow them through the rest of  
14 their career. And then when they come to  
15 doing rape cases, it will be one less thing  
16 they need to learn. So, I would really  
17 suggest that that is something that is  
18 emphasized from the very beginning and then it  
19 will help them throughout their time in court.

20 MS. WAYNE: Yes, and for me, I  
21 think again, it just goes back to these are  
22 some of the most important cases that your

1 lawyers have. And they are handling people's  
2 lives that affect people, both sides, the  
3 alleged victim and the defendant. And I think  
4 the ability of your lawyers to actually have  
5 the time and the resources to dedicate to  
6 defending these cases and prosecuting them the  
7 right way. So, they shouldn't be handling  
8 hundreds of them at a time. They should be  
9 able to have the luxury of really studying the  
10 case, knowing the case, and really  
11 understanding what it is about if it involves  
12 drugs, if it involves DNA, if it involves the  
13 forensics that we are talking about, if it  
14 involves the social media issues,  
15 triangulation, cell tower locations, all the  
16 things that you have to know that they have  
17 that time to really dedicate themselves to  
18 being good lawyers on these kind of cases and  
19 knowing if they want to do them. If they  
20 don't want to do them, you shouldn't force  
21 them. I get it is the military and you don't  
22 always get to say yes to everything but these

1 are specialized cases and if you don't like  
2 your client, if you don't like the kind of  
3 accusation, you shouldn't be involved in doing  
4 the cases. You can't be a good advocate. And  
5 that is a hard one. I think that is a hard  
6 one. So, that is kind of my part.

7 And thank you so much for helping  
8 us, for having us here. Because you know  
9 what? This is huge, I think and I am really,  
10 I feel proud of being related to the military  
11 in this way, that we are really doing the  
12 right way. It makes me feel good to have my  
13 USAA insurance.

14 (Laughter.)

15 MS. WAYNE: So, that is my part.  
16 I knew you would like that one.

17 MS. YOUNIS: I just wanted to say,  
18 as I said every case that is in your room, you  
19 try. That is our how our office works. You  
20 don't get to --

21 MS. WAYNE: I disagree with that  
22 one.

1 MS. YOUNIS: Yes, I know.

2 MS. WAYNE: You don't get to do  
3 that as a PD, I get it.

4 MS. YOUNIS: Yes, we don't have  
5 that option. So I just appreciate if you  
6 needed to give it to people that don't want to  
7 try them.

8 MS. WAYNE: It is the clients that  
9 don't appreciate it.

10 PROF. HILLMAN: It is probably  
11 good to note on something on which we don't  
12 all agree. That makes it clear.

13 But really thank you for your time  
14 and your insight on all this.

15 MR. FISHMAN: We can take a few  
16 minute break.

17 PROF. HILLMAN: Yes.

18 MR. FISHMAN: Five minutes?

19 PROF. HILLMAN: Yes.

20 (Whereupon, the foregoing meeting  
21 went off the record at 1:11 p.m. and went back  
22 on the record at 1:22 p.m.)

1                   PROF. HILLMAN: Thanks to  
2                   everybody for coming back after our only  
3                   double-length break, which is a new record, I  
4                   think, shortening the breaks.

5                   Thanks to each of you for coming  
6                   to talk to us today. Your perspectives are  
7                   critical. And I was just saying to Colonel  
8                   Ham, the pace and the flow of information has  
9                   been really high on this from the time that we  
10                  started, but we are getting closer to seeing  
11                  the shape of what might be ultimately where we  
12                  are headed in understanding and collecting  
13                  information, making some recommendations on  
14                  it. And I appreciate you coming to us at this  
15                  point in the process, as we are getting hotter  
16                  and the weather is getting colder, closer to  
17                  an answer on some of these things.

18                  So, I think we will just go in the  
19                  order that is listed here. So, should we  
20                  start with Colonel Calarco?

21                  LTC CALARCO: Great. Thank you,  
22                  ma'am. Ma'am, gentlemen, ladies.

1                   So just a few things that I wanted  
2                   to tell you as we begin here. First, I want  
3                   you to know that some of the things I am going  
4                   to talk about I am a direct product of, in  
5                   that I was a FLEP. I went through OBC and all  
6                   the other courses that I am going to talk  
7                   about for just a brief moment here. And I was  
8                   an SVP for three years and I am now the Chair  
9                   of the Criminal Law Department and now have  
10                  the opportunity to see other young judge  
11                  advocates go through it. So, I kind of have  
12                  been on both sides. Now, I presented for you  
13                  and hopefully you have an opportunity to see  
14                  it, but a training calendar that shows you all  
15                  the different kinds of training that we do at  
16                  the legal center and school. And of course,  
17                  I work only on the cool side. Well, there is  
18                  the training pyramid but the training calendar  
19                  should look something like this. And I know  
20                  that it was provided to you. And it is not  
21                  necessary for you to look at it right now if  
22                  it is not readily available.

1                   But what I wanted to tell you is  
2                   we do three different Officer Basic Courses  
3                   each year and you also were provided the  
4                   curriculum that we use to teach the Officer  
5                   Basic Course. And like all of our advocacy  
6                   courses, it is a blend of not just lecture.  
7                   Lecture is actually one of the smaller parts  
8                   of it at this point. But every lecture is  
9                   followed by either a student problem-solving  
10                  session, where an instructor will walk a  
11                  student through a problem and teach them how  
12                  to apply what they have learned or, in many  
13                  other cases, a workshop where students will  
14                  meet in small groups. So, they are not just  
15                  learning the law but immediately after they  
16                  have learned the law, they are learning how to  
17                  apply the law to a set of facts.

18                  Now, the facts that they work  
19                  through throughout the course are the Archie  
20                  case, the Sergeant Archie case. And the  
21                  Sergeant Archie case is a sexual assault case  
22                  and that has been provided to you, too, the

1           Sergeant Archie scenario, hopefully, and it  
2           has been provided to you. If not, we will  
3           certainly make it available.

4                   The Sergeant Archie scenario was  
5           purposely built so that students would have to  
6           make decisions between whether or not to  
7           charge this as a sexual assault or a rape.  
8           There are 412 issues involved. There are  
9           prior inconsistent statements involved. There  
10          is a SANE exam where there are vaginal  
11          injuries. All of the kinds of very typical  
12          things that you would expect to see at a  
13          contested court-martial.

14                   COL HAM: This is, where? This  
15          the basic course, which is who?

16                   LTC CALARCO: This is starting  
17          with the basic course, which are brand new --  
18          yes, ma'am, brand new judge advocates. And  
19          so, either FLEP Officers or officers that were  
20          on active duty in some other branch that came  
21          through a Funded Legal Education Program,  
22          direct commissionees, or ROTC Officer if that

1           went on NDAA and are now coming through the  
2           Officer Basic Course.

3                           And so --

4                           MR. FISHMAN:   So, every Army  
5           lawyer has to go through this.

6                           LTC CALARCO:   Every Army lawyer  
7           must come through the Officer Basic Course.

8                           And so the sexual assault case is  
9           the background for all of their training.  And  
10          so, all of the student problem-solving session  
11          workshops and then graded exercises will  
12          revolve around this Sergeant Archie sexual  
13          assault scenario.

14                          PROF. HILLMAN:   And how long has  
15          that been the case, that this has been the  
16          core of this?

17                          LTC CALARCO:   Oh, gee, ma'am, I  
18          just got there this summer.  But I believe  
19          this has been going on at least a third year.

20                          COL HAM:    I believe it was  
21          starting 2005.

22                          LTC CALARCO:   Okay.

1 COL HAM: It was not the Archie  
2 case. But since 2005, the entire basic course  
3 revolved around a sexual assault scenario.  
4 The prior, the old, old, old 120, the original  
5 Article 120.

6 So, and the graded exercises now  
7 are all what they do on their feet, in a mock  
8 trial in a courtroom. So after they get done  
9 with the lecture and they have an opportunity  
10 to get on their feet and be evaluated by the  
11 Army subject matter experts, the professors at  
12 the school, then their grade will come as a  
13 result of what they do in a graded exercise  
14 mock trial, where they will have the  
15 opportunity to either do an opening, a  
16 closing, cross-examination, direct  
17 examination. And the culminating event for  
18 the Officer Basic Course is breaking them into  
19 two sections and then each section being able  
20 to spend an entire day basically working  
21 through an entire trial.

22 Now, not everybody gets to do

1 every component of the trial but that is not  
2 dissimilar to how you would try a case with a  
3 partner anyway. So, they all get to do some  
4 aspect of the trial and get the immediate  
5 feedback.

6 COL HENLEY: Have you been able to  
7 identify any correlation between how well or  
8 poor they did in the basic course and this  
9 exercise and what they eventually do in the  
10 field?

11 LTC CALARCO: No. At this point,  
12 we are not really able to identify that. But  
13 we can do that in some aspects with regard to  
14 the next course I would like to talk to you  
15 about, which is our Intermediate Trial  
16 Advocacy Course.

17 COL HAM: How many days of  
18 training are they getting in the basic course?  
19 Criminal law training, because it is not only  
20 training in criminal they are there for.

21 LTC CALARCO: Criminal law  
22 specific training is usually about three and

1 a half weeks, ma'am. Usually about three and  
2 a half weeks. It was a little bit less  
3 because of some calendar issues during the  
4 last block but it typically is about three and  
5 a half weeks.

6 BG DUNN: Out of the total course  
7 being ten-ish weeks?

8 LTC CALARCO: About ten weeks,  
9 yes, ma'am. Yes, ma'am.

10 BG DUNN: So about a third.

11 LTC CALARCO: Yes, it tends to be  
12 very heavy on criminal law. The criminal law  
13 portion of the OBC is the longest portion.

14 The next course, I would like to  
15 tell you just a little bit about is the  
16 Intermediate Trial Advocacy Course. We do  
17 that twice a year, once at the end of October  
18 and once usually beginning in the end of  
19 February. It is a two-week long course. Now,  
20 the goal here is that after judge advocates  
21 graduate from the Officer Basic Course if they  
22 go on to active duty, they will hopefully at

1           some point in their first or second  
2           assignment, get assigned as a trial or defense  
3           counsel. After they get that assignment, they  
4           are expected within the first six months to  
5           come back to the school, preferably after they  
6           have tried a case or two, usually as a second  
7           chair and come through the intermediate trial  
8           advocacy course. This is a two-week long  
9           course. It uses the exact same Archie  
10          scenario but we throw a few more curve balls  
11          into it, so we continue to build on it. We  
12          are getting to the point now with the folks  
13          coming back for the ITAC are seeing the  
14          scenario for the second time. And they go  
15          through a more intense and focused trial  
16          advocacy program that starts with, on day two,  
17          them actually having to be taped doing a  
18          closing argument.

19                        So, they get the packet. They  
20                        come on day two. They get taped. And then  
21                        immediately go with the professor back to an  
22                        office and we look at the closing argument.

1 We work through it with them and we tell them  
2 what the strengths and weaknesses in their  
3 personality, their argument, what the flaws  
4 might be. And then we do that again at the  
5 end of the course.

6 So, then they go through training.  
7 They get exposed to experts like Dr. Lonsway.  
8 Mr. Strand, I think, I don't know if you have  
9 ever been to the ITAC. I think you have. And  
10 so they really get exposure to some of the  
11 finest that we can bring in to tell them about  
12 an offender and victim behavior and they work  
13 their way through it again, doing a lot of  
14 small group problem-solving workshops and then  
15 graded event exercises, as they complete the  
16 two-week training.

17 And this is where, in response to  
18 your question, sir, at this point, they are  
19 already in a trial or defense counsel spot  
20 before they come to the course. More than 90  
21 percent of them are. Some of them are just  
22 waiting to get in.

1                   So, we oftentimes do have some  
2                   feedback both before and afterward from their  
3                   command, from their Staff Judge Advocate  
4                   Office requesting or giving us information  
5                   about how well they did with the course or how  
6                   well they do after the course. And this is  
7                   also the point at which we start to really see  
8                   a lot of connectivity between the students and  
9                   the faculty. After the students leave, they  
10                  are going right into advocacy positions. So,  
11                  they do reach back to the school and they  
12                  reach out to TCAP and our HQEs and other  
13                  resources that they have made contact with  
14                  during this course. So, we get a little bit  
15                  of feedback during that.

16                  At the graduate course, it really  
17                  is more of a -- it is not as much trial  
18                  advocacy. But what we do talk with the grads  
19                  about, and the graduate course is a year-long  
20                  course where graduates come in August and they  
21                  stay through May, and they leave with an LL.M.  
22                  in Military Law and to the extent that we talk

1           about criminal law with them, it is in more of  
2           a managerial mode. So, they learn how to  
3           evaluate cases pretrial but also work with  
4           young counsel to help evaluate especially  
5           complex cases. And they learn post-trial,  
6           too, in their second semester. But the  
7           pretrial portion starts immediately with  
8           myself, my vice chair, and a couple of other  
9           professors who focus on the sex assault  
10          portions of our training, having a discussion  
11          with them to draw out their views about sexual  
12          assault.

13                           Then, we have them watch "The  
14          Invisible War" and then we have a discussion.  
15          And this is meant specifically to get them to  
16          do some inward looking to kind of determine  
17          where they are on this topic. So then as we  
18          go into talking with them about how to help  
19          their younger counsel evaluate cases,  
20          especially sexual assault cases and how to  
21          guide young trial counsel through those kinds  
22          of things, they have done some self-reflection

1           about where it is they are coming from. And  
2           it is surprising to see where they begin and  
3           how their views change as we go through the  
4           course.

5                         One of the newer courses we just  
6           began this year is a Special Victim Counsel  
7           course. Now, I know we are not here to talk  
8           about training special victim counsel, but I  
9           do want to mention it because TCAP has come to  
10          the school to conduct the new prosecutor  
11          course, which is just for that, new  
12          prosecutors. And we don't do that training  
13          from the Criminal Law Department. The school,  
14          TCAP, does do that training.

15                        But I mention the special victim  
16          counsel course because we are working with  
17          TCAP to try to overlay some of these courses.  
18          So, say for example, the next time there is a  
19          Sexual Assault Trial Advocacy course that TCAP  
20          puts on at the school, we are going to run  
21          that simultaneously with the Special Victim  
22          Counsel course. The benefit in this kind of

1 training, and I wanted to throw it out to you  
2 is when we do these courtroom scenarios now,  
3 you will actually have trial counsel, defense  
4 counsel who are there to train in their  
5 advocacy skills. And say, for example, during  
6 the 412 motion that they do a mock hearing on,  
7 there will actually be a Special Victim  
8 Counsel in the room representing the victim in  
9 that case.

10 So, I think that the benefits of  
11 having the overlap in training will yield good  
12 results when they go out to the field.

13 Those are the courses I wanted to  
14 highlight for you. And then just a couple of  
15 other things, if I may, I wanted to say. None  
16 of this is meant specifically to send a trial  
17 counsel or defense counsel out to the field  
18 with no oversight whatsoever to try cases. I  
19 don't think that would be the case in any  
20 jurisdiction, hopefully not. What we do in  
21 the basic course is meant to give a trial  
22 counsel or defense counsel the fundamentals in

1 all of the things, and you can look at the  
2 curriculum and see that we cover all of the  
3 basics of trial advocacy and the rules that  
4 correspond to them, so that with the other  
5 resources that they have, their chief of  
6 justice, their deputy SJA, their SJA, their  
7 special victim prosecutor, TCAP, our HQEs and  
8 reach back to the school, with all of those  
9 resources I think, in addition to the training  
10 they get, they are very, very well-suited to  
11 go out there and start trying cases  
12 immediately. Now, I am certainly not  
13 suggesting that you would send a counsel by  
14 himself to try a contested sexual assault case  
15 sitting at the table by himself but we don't  
16 do that and we never have done that. You have  
17 a Special Victim Prosecutor sitting with them.  
18 You have a Chief of Justice evaluating their  
19 case.

20 And I just want to give you a  
21 couple of anecdotes from my own experience.  
22 As an SVP, I tried a murder case and it was

1           against a civilian defense attorney with a lot  
2           of experience. Now, the trial counsel from  
3           that brigade had not tried a contested trial  
4           before but had been through some of this  
5           training and had me there to coach him. He  
6           participated in interviewing all of the  
7           witnesses. He worked extremely hard and he  
8           did not sit next to me during the course of  
9           the case. He did the opening. He did the  
10          direct and cross-examination of witnesses and  
11          he assisted through all phases of the trial.

12                        Now, I tell you that not just to  
13          demonstrate to you that we use trials to give  
14          people experience. Certainly, they get  
15          experience when they try cases. I had him do  
16          that because through the amount of training he  
17          had and the effect that had on him, plus the  
18          oversight and preparation that he put into it,  
19          he was ready. He was ready.

20                        And one other anecdote I would  
21          like to give you is recently, in fact the last  
22          case that I tried in May of 2012 was a double

1 murder trial that had been tried four times by  
2 civilian prosecutors, resulting in two  
3 mistrials and two hung juries. And we tried  
4 that against the two civilian defense counsel  
5 who tried the case in the State Court. And  
6 they came into the Military Court. My co-  
7 counsel, I had two co-counsel, one had tried  
8 one case, one had ten contested cases under  
9 her belt. And again, I tell you this to  
10 demonstrate that even though that might be  
11 viewed as a lack of experience, with this  
12 training, oversight by the HQEs, assistance  
13 from me, I was there to be the more  
14 experienced counsel on the case, the Captain  
15 who had only done ten contested cases prior to  
16 that, she did all of the -- there was  
17 scientific evidence, three or four probably  
18 more than that scientific evidence witnesses,  
19 she took all of those. She worked with the  
20 family. She worked with two children who were  
21 there watching their mother get murdered. She  
22 did things that you might not expect somebody

1 with that level of experience to do. But with  
2 this training and the proper oversight, she  
3 was able to do that. And we won a case that  
4 the civilian prosecutor couldn't win in four  
5 tries.

6 The last thing that I will leave  
7 you with, and this is a comment from someone  
8 in the last Officer Basic Course, and I wanted  
9 you to have this comment because I think it is  
10 relevant to what I understand I have been  
11 asked to talk about today.

12 "I am a criminal prosecutor in my  
13 civilian life and I have been through many  
14 similar subject matter training and advocacy  
15 courses. This was, by far, the best I have  
16 ever experienced. It was an excellent balance  
17 between the two.

18 And the US v. RT exercise was  
19 astonishingly effective as a teaching tool.  
20 The evidence and circumstance of that exercise  
21 made the outcomes completely dependent upon  
22 the student's advocacy skills and, because of

1 that, has served the courses very well.

2 My only recommendation to the  
3 192nd OBC is to try to get as much as sleep as  
4 you can in Ad Law because you won't in Crim  
5 Law."

6 PROF. HILLMAN: Can you explain  
7 this?

8 LTC CALARCO: Yes, ma'am. Okay,  
9 so if you have the training pyramid in front  
10 of you, you will see at the very -- okay. I  
11 will give everyone a second. There it is.

12 If you have the training pyramid  
13 in front of you, you will see at the very  
14 bottom is the Judge Advocate Officer Basic  
15 Course and that is the course I was describing  
16 to you all judge advocates must take when they  
17 first enter the course, regardless of whether  
18 they were on active duty before or this is  
19 their first experience.

20 You will see Defense Counsel 101  
21 on the left and the new prosecutor course on  
22 the right. And ESSAP is a sexual assault

1 prosecution. It is a TCAP course and I can't  
2 remember the entire acronym. But it basically  
3 is a sexual assault prosecution course.

4 So before they come back to ITAC  
5 and start -- well, actually before they begin  
6 their work as an advocate either on the  
7 prosecution or the defense side, they will go  
8 to one of those two courses.

9 They will then work as an advocate  
10 either on prosecution or defense for  
11 approximately six months before they come back  
12 for the Intermediate Trial Advocacy Course,  
13 which is the ITAC.

14 Now, if you move to the next  
15 shaded level up on the pyramid, you will see  
16 DCAP regionals and TCAP regionals. And this  
17 is where both DCAP and TCAP go out to the  
18 field and teach regional classes that are  
19 designed to magnify the training impact of the  
20 prior courses and to cover new material, such  
21 as changes in the law.

22 The next level up, the National

1 Center for Missing and Exploited Children and  
2 Advance Trial Communications, neither one of  
3 those is specific to trial or defense. Either  
4 trial or defense could go to either one of  
5 those courses.

6 One of the other courses I talked  
7 about was the Sexual Assault Trial Advocacy  
8 Course, which is the orange box on the right.  
9 Now, this is put on by TCAP and it is meant  
10 both for trial and defense. And this was the  
11 course I described to you we thought would go  
12 great to overlap with these Special Victim  
13 Counsel Course. Some of these other courses,  
14 the NACDL courses, I actually cannot speak to  
15 how often DCAP is running those or sending  
16 people to them at this point.

17 Defense Counsel 201 is the next  
18 iteration in training for defense counsel.  
19 The USACIL Course that is on the right, the  
20 United States Army Criminal Investigation  
21 Laboratory Course is not specific to trial or  
22 defense counsel and actually takes place at

1 the laboratory, where folks can go and learn  
2 more about how the laboratory works, talk with  
3 the scientists and discuss those kinds of  
4 issues as they come up as testimony at trial.

5 The Military Justice Managers  
6 Course is the next one up on the right. Now,  
7 that is a course I did not cover and we have  
8 all the military justice managers. And those  
9 are folks who are going out to be Chief of  
10 Justice and their teams come back to the  
11 school in Charlottesville for a week and we  
12 discuss issues about managing trial counsel.

13 Not all of that is advocacy based.  
14 Some of it is post-trial work but a lot of it  
15 is discussion about how you manage your trial  
16 counsel as they prep cases and evaluate cases  
17 and draft charge sheets and all those things.

18 The career prosecutor course on  
19 the left is not something that we run but it  
20 is a course that we do send counsel to. It is  
21 a prerequisite to go to the career prosecutor  
22 course, if you are going to be a Special

1           Victim Prosecutor. And so some of the  
2           training I received and they are still doing  
3           as a Special Victim Prosecutor is to go to the  
4           Career Prosecutor Course, to go to sexual  
5           assault response training, to intern or do on-  
6           the-job training for two weeks in a civilian  
7           jurisdiction. I did mine in Nashville, since  
8           I was stationed in Clarksville, Tennessee but  
9           folks have done it in Chicago, Los Angeles.  
10          And basically, you go into a sexual assault  
11          prosecution section of a district attorney's  
12          office and you shadow them for two weeks. You  
13          see what they do and you go to their meetings  
14          and you meet the Sexual Assault Nurse  
15          Examiners that they work with and the police  
16          officers and investigators that they deal  
17          with. And then that is meant for us to take  
18          those ideas back to our home installations.

19                   MS. JAUS: I come from a civilian  
20          DA's office. I had somebody doing that for  
21          two weeks. I think I is a very good idea, but  
22          if I could just say something.

1 LTC CALARCO: Please, ma'am.

2 MS. JAUS: Two weeks is just not  
3 enough. You really need a longer time.  
4 Because he didn't get to see -- it was in the  
5 summer and he was very frustrated because he  
6 didn't get to see enough. I mean it is a  
7 very, very good idea but just having the  
8 experience just this past summer, you really  
9 need to give someone more time so they see a  
10 trial, they could go around. Two weeks is  
11 just not enough time.

12 LTC CALARCO: I wonder, ma'am, if  
13 I may, how long would you suggest? Because I  
14 will certainly take this back.

15 MS. JAUS: Double the time, at  
16 least because a trial in and of itself takes  
17 two weeks. And so for him, he just didn't get  
18 -- it was great. He came. We introduced him.  
19 We walked around. And he didn't get to --  
20 just by the time we finished the introductions  
21 and explaining, he was leaving because two  
22 weeks is just not long enough.

1                   It is a great idea. I just  
2                   wanted to say that.

3                   LTC CALARCO: I will admit that.  
4                   I had the same sentiment when I left my two  
5                   weeks with a gentleman named Brian Holmgren in  
6                   Nashville. And unfortunately, the cases are  
7                   stacking up as you are doing the training but  
8                   the training is essential.

9                   COL HAM: How long would you  
10                  suggest, ma'am, a month?

11                  MS. JAUS: I would say at least  
12                  four weeks. A month at least because to see  
13                  a trial and go to the hospital and meet the  
14                  SANE examiner, just to see the whole thing.  
15                  I mean by the time he figured out where his  
16                  desk was and met everybody and all that, he  
17                  was gone.

18                  It is just not enough time but it  
19                  is a great idea. It was a great program but  
20                  we didn't get the chance to teach him  
21                  anything.

22                  MR. FISHMAN: Colonel, just so

1           that we are clear on this record, which we are  
2           making, too, where is that done, that program?  
3           And how is it available? How do people get  
4           connected with it?

5                       LTC CALARCO: Okay, so the Special  
6           Victim Prosecutor program, there are currently  
7           23 Special Victim Prosecutors and they get  
8           selected from among the best trial litigators  
9           we have. Preferably, you have been both a  
10          trial counsel and defense counsel. Many  
11          people have been a senior trial counsel and a  
12          senior defense counsel as well. So, they  
13          really, they certainly have prosecutorial  
14          experience and many have defense experience as  
15          well.

16                      And after you get selected to go  
17          into one of those billets, this is one of the  
18          training prerequisites.

19                      Now, the way that we were able to  
20          and I don't know if it worked this way in your  
21          office, ma'am, the way I know I was able to do  
22          it is Sandy Tullius, one of our HQEs, knew

1           somebody in that office.

2                   MS. JAUS:  Yes, same thing.

3                   LTC CALARCO:  So, we just called  
4           and asked the office if they would allow one  
5           of our trial counsel to come there for a  
6           couple of weeks and do some on the job  
7           training and they said yes.

8                   MR. FISHMAN:  Just a quick follow-  
9           up.  Has the Army considered expanding that  
10          beyond the SVP for other either prosecutors or  
11          defense attorneys?

12                   LTC CALARCO:  I don't think so,  
13          sir.  I don't think we have -- I would say the  
14          purpose of it initially was to give the SVPs  
15          that experience so that when they went back to  
16          the installations they serve and then they  
17          could disseminate the experience into what  
18          they are doing.

19                   LTC CALARCO:  I think I talked  
20          about the SVPs.  Oh, the SVPs are also  
21          required to teach the conference and they go  
22          to, I talked about the SVP on the job

1 training. You see LL.M.s there and that is  
2 the LL.M. that folks could, at the graduate  
3 course that I discussed briefly --

4 COL HAM: Or civilian.

5 LTC CALARCO: They can get a  
6 civilian LL.M., right. So, there is a  
7 civilian LL.M., too, although that is only a  
8 couple per year that go and get civilian LL.M.

9 The Best Practices Seminar is  
10 actually where I came from. That is going on  
11 this week and all of the SJAs come into Fort  
12 Belvoir. It used to be in Orlando, Fort  
13 Belvoir this year. Considering the weather,  
14 not everybody was particularly happy about  
15 that. So, they are at Fort Belvoir right now.  
16 And this is SJAs sitting around with Colonel  
17 Mulligan, our Chief of Crim Law and I think  
18 you have heard from him at least once. And  
19 talking about best practices in criminal law,  
20 and I was there yesterday and I left briefly  
21 today but I will tell you -- if I could give  
22 you feedback from that, it would be our SJAs

1 are extremely interested and knowledgeable  
2 about what it takes to make sure the folks in  
3 our office are building good trial counsel.  
4 And the prosecution of these kinds of cases is  
5 extremely important to them.

6 Now, that is something probably  
7 all of you know but I pass that sentiment  
8 along to you, having spent all of yesterday  
9 hearing them discuss it and having had the  
10 privilege of discussing it with them, at least  
11 briefly.

12 The MJ Course is the Military  
13 Judge's Course and that is only for judges.  
14 The Worldwide CLE is when all the JAG Corps  
15 leadership -- and that is in the top right --  
16 all the JAG Corps leadership comes back to  
17 Charlottesville for a week. It is hosted by  
18 the Judge Advocate General and she will spend  
19 the entire week there. And they talk about  
20 certain military justice issues, as well as  
21 other prevailing issues in our practice. And  
22 then there is a Staff Judge Advocate Course.

1                   So, that is everything I wanted to  
2                   tell you, at least initially. Are there any  
3                   other questions?

4                   MR. STRAND: The qualifications to  
5                   teach JAG school, you know, present as a  
6                   professor, I am assuming that all of you are  
7                   experienced trial counsels. You are selected,  
8                   just like with the SVP program. Is it  
9                   competitive? Are you interviewed ahead of  
10                  time? I mean, what are the qualifications for  
11                  the professors at the school that train these  
12                  young and middle-aged lawyers?

13                  LTC CALARCO: Sir, I can only  
14                  speak to my department. So this was my first  
15                  go around with it as the Chair for Crim Law.  
16                  This last summer, as were making selections,  
17                  I probably interviewed in excess of 16 judge  
18                  advocates, each of whom would not even have  
19                  put their name in the hat, had they not had  
20                  significant criminal law experience and we  
21                  chose three.

22                  So, it is extraordinarily

1 competitive. A lot of people want to come but  
2 our marching orders in this regard are very,  
3 very clear. These are the folks who every new  
4 judge advocate are going to be exposed to and  
5 who will shepherd our middle managers, our  
6 majors through the graduate course. And so,  
7 the best of the best is all we have.

8 MR. STRAND: Okay.

9 BG DUNN: And I should probably  
10 get up from here and go over to there when I  
11 say this but as the former Chief of Personnel  
12 for the Army JAG Corps, I can tell you that  
13 for somebody to get into Lieutenant Colonel  
14 Calarco's position requires the personal  
15 thumbprint of the Judge Advocate General,  
16 based on a request from the school after an  
17 evaluation, and a high level of personal  
18 involvement. And although there is a culture  
19 in the Army at other schools of the best and  
20 the brightest not being on the faculty, that  
21 is not in fact the case at the Army Judge  
22 Advocate General School from a personnel

1 perspective.

2 And the graduate course, which  
3 Lieutenant Colonel Calarco mentioned a couple  
4 of times, is the only ABA accredited military  
5 course. It is accredited by the ABA for the  
6 LL.M. that it issues.

7 (Laughter.)

8 COL SPATH: I'm a graduate.

9 (Laughter.)

10 BG DUNN: From the amount of  
11 effort that is put into putting people on that  
12 faculty is pretty high level focused.

13 COL HAM: And what is not on here,  
14 kind of some of it is but it is not spelled  
15 out. There is a whole level of training for  
16 appellate counsel as well for specialized  
17 courses. That doesn't deal with the trial  
18 level, so a lot of it is not on here.  
19 Absolutely outstanding.

20 LTC CALARCO: Yes, ma'am. A  
21 couple of other courses that don't appear on  
22 here but are extremely important are the

1 Senior Officer Orientation wherein lieutenant  
2 colonels and mostly full-bird colonels who are  
3 moving into battalion and brigade commands  
4 come to the school for a week of legal  
5 orientation. Now, that is central to the way  
6 that I train trial counsel. And the reason  
7 that is is because I get an opportunity to  
8 tell the Army senior commanders at that course  
9 how we train trial counsel and get their  
10 feedback. And they get an executive version  
11 of the Archie scenario, sexual assault  
12 scenario, and we talk with them about it. And  
13 it is very interesting to see and refreshing  
14 always what their view is and how they look at  
15 it much differently than an advocate would.  
16 The judge advocates obviously look at it  
17 relatively clinically and they are trying to  
18 pull out the things that are important for  
19 trial, and what the issues are, and what the  
20 evidentiary issues may be and how they are  
21 going to advocate, either for trial or  
22 defense.

1                   The commanders are worried about  
2                   the command climate and good order and  
3                   discipline and what kinds of conversations  
4                   they need to have with their trial counsel to  
5                   make sure that they are doing the right thing  
6                   when it comes to making decisions about sexual  
7                   assault cases.

8                   The component of commanders, both  
9                   in that course, as well as, and I believe we  
10                  have 47 general officers who are about to move  
11                  into, who are becoming general officers, many  
12                  of them moving into general court-martial  
13                  convening authority positions where they would  
14                  make decisions on referring cases to court-  
15                  martial. The feedback we get from them and  
16                  the interest that they have in these scenarios  
17                  with regard to how they effectively maintain  
18                  good order and discipline and how they  
19                  interact with their JAGs is essential. And  
20                  what it proves to us each and every time is  
21                  the system doesn't work without commanders  
22                  having ownership over it and maintaining that

1           accountability for what happens in their  
2           command. It is something that, at least, in  
3           my view, and this is just Calarco speaking now  
4           in my opinion, in my opportunities to interact  
5           with these folks is something that cannot be  
6           replaced by judge advocates. It is essential  
7           that the commanders, when you see the  
8           difference in their point of view and the  
9           command sergeants major and how they want to  
10          deal with these problems and fix command  
11          climate issues, should there be any in the  
12          unit, it is a critical component of what we do  
13          in assisting them and maintaining order in  
14          disciplinary units.

15                    PROF. HILLMAN: Let's have a  
16                    couple of questions and then we have to move  
17                    on. So, General Dunn?

18                    BG DUNN: My question, and I would  
19                    like actually each of you to address this as  
20                    you go down, it is fairly simple. We have  
21                    heard a lot of testimony from prosecutors and  
22                    civilian defense counsel about their

1           incredibly large caseloads. At least my  
2           experience is in the military, that is  
3           moderated considerably. So, if you could just  
4           give me an idea of when you were an SVP, how  
5           many cases were you managing? And just  
6           ballpark your average trial counsel is  
7           juggling about how many cases that are really  
8           going to trial. I am not talking about the  
9           Article 15 stuff.

10                   LTC CALARCO: Yes, ma'am. As an  
11           SVP, I had three different installations, Fort  
12           Campbell, Fort Leonard Wood, and Redstone  
13           Arsenal. And with those combined, I probably  
14           had anywheres between 50 to 75 special victim  
15           cases. So either sexual assault or domestic  
16           violence type cases that were in some phase of  
17           investigation with a view towards heading  
18           towards court-martial at any given time.

19                   I had, generally speaking, had in  
20           excess of 20 cases or around 20 cases that  
21           were past the referral stage. And I will  
22           assume that not everybody necessarily knows

1           what referral is. But referral is when it has  
2           been to the general officer and he has decided  
3           that case will go forward to a normally  
4           general court-martial.

5                       Now, that would be, as a special  
6           victim prosecutor in my jurisdiction, the  
7           folks down at Hood or at Fort Bragg probably  
8           have a bigger caseload. And then there are  
9           some others who might have a bit of a smaller  
10          one.

11                      Trial counsel in general, I would  
12          say probably about half that. At any given  
13          time, maybe 20 or so cases in the hopper at  
14          some phase, with a view towards potentially  
15          going forward towards court-martial. And I  
16          would say for most trial counsel, it would be  
17          rare to have greater than ten and probably  
18          greater than five that are past the referral  
19          stage at any given time.

20                      Now, these all aren't sexual  
21          assault cases either. For the SVPs, it is  
22          just special victim cases and for the trial

1           counsel, it could be any kind of case.

2                       Now of course in the bigger  
3           jurisdictions that will fluctuate and in the  
4           smaller jurisdictions, it could be much fewer.  
5           I am trying to give you a ballpark average.

6                       MR. BRYANT:   The question I had is  
7           are the Army JAGs -- the same question for all  
8           the military.  Are there courses in the  
9           civilian realm that they are free to go to or  
10          have access to go to, training courses?

11                      LTC CALARCO:   Yes, sir.

12                      MR. BRYANT:   Are they encouraged  
13          to go to those?

14                      LTC CALARCO:   Absolutely.  It does  
15          depend somewhat on the fiscal restraints.  So  
16          there wasn't much of that going on this last  
17          October.

18                      But yes, absolutely, there is  
19          great encouragement for them to go and most of  
20          that is arranged through TCAP or DCAP?  
21          Through TCAP and DCAP.  And I listed some of  
22          these, the National -- NCMEC, National Center

1 for Missing and Exploited Children course is  
2 not something that we put on but we send  
3 people to. The career prosecutor course is  
4 another example of courses.

5 MR. BRYANT: So that is the NDAA's  
6 National District Attorneys Association  
7 prosecutors.

8 LTC CALARCO: Yes, and folks do go  
9 to that as well. Yes, sir.

10 MR. FISHMAN: Colonel Calarco, did  
11 you answer General Dunn's question regarding  
12 defense counsel as well? I'm sorry, I didn't  
13 hear that.

14 LTC CALARCO: I'm sorry, ma'am. I  
15 thought it was only geared towards  
16 prosecutors.

17 Defense counsel, I think it  
18 fluctuates so much, depending on your  
19 installation. But I would think that most  
20 defense counsel, it is going to be higher than  
21 the trial counsel, obviously, because there  
22 will be fewer defense counsel at the

1 installation. So, I would imagine defense  
2 counsel is probably closer between ten or so  
3 cases that are past referral or near the  
4 referral stage.

5 It is much harder for me to gauge  
6 for defense counsel how many cases might be in  
7 the investigation stage that will come to them  
8 because they don't know that yet. Because as  
9 you know, until charges are at least  
10 preferred, it is not in their purview.

11 BG DUNN: But I think what I am  
12 getting at is they are not juggling a hundred  
13 clients at a time.

14 LTC CALARCO: No, that is  
15 absolutely true.

16 BG DUNN: They may be at the trial  
17 level juggling ten to twenty.

18 LTC CALARCO: Ten to twenty is  
19 probably an accurate number.

20 BG DUNN: At the Article 15 level,  
21 they may be juggling another 15 or 20.

22 LTC CALARCO: I think that is

1 accurate, yes, ma'am.

2 PROF. HILLMAN: Okay, thanks,  
3 Colonel Calarco. That is hugely helpful.

4 We will move to the Air Force  
5 section of our program. Mr. Houghland, do you  
6 want to start and we will just and we will  
7 just -- or do you have a different order?  
8 That's just fine.

9 COL THEURER: Yes, ma'am.  
10 Actually, I will talk primarily. These  
11 gentlemen will be talking at the subsequent  
12 panel but they are -- I will kind of explain  
13 it a little bit.

14 I am Colonel Ken Theurer. I am  
15 the Commandant down at the Air Force Judge  
16 Advocate General School. And how the Air  
17 Force is set up is kind of interesting. We  
18 provide mostly in-resident resident training  
19 down at Maxwell, as well as out in the field  
20 and also through online education.

21 Colonel Spath runs our Training  
22 and Inspections Directorate. Actually, he is

1 out in the field to make sure that in fact the  
2 training that we are providing is effective  
3 out in the field. And Mr. Houghland works  
4 along with him as the Chief of Training in the  
5 Air Force.

6 So, it is kind of an integrated  
7 process. We deliver the product. They go out  
8 in the field and make sure that in fact we are  
9 delivering what we promised to deliver. So,  
10 there is a feedback mechanism.

11 At the Judge Advocate General  
12 School, we have most of our courses, I would  
13 say more than any other area, military justice  
14 is what we focus on. Our very basic course,  
15 our Judge Advocate Staff Officer Course is the  
16 nine-week course that every Air Force judge  
17 advocate has to pass in order to later become  
18 certified as a judge advocate.

19 One of the things we started in  
20 the last couple of year was it used to be when  
21 you graduated from JSOC, that is our basic  
22 course, you were certified to serve as the

1 trial or defense counsel and as long as the  
2 Judge Advocate General would certify you upon  
3 graduation.

4 A decision was made a few years  
5 ago to ensure that in fact our young trial and  
6 defense counsel are getting in a courtroom  
7 that they would not become certified until not  
8 only did they graduate from the basic course  
9 but they actually demonstrated proficiency in  
10 the courtroom. So, in order to become  
11 designated and certified as the judge  
12 advocate, you have to pass the basic course.  
13 You have to go out in the field. You have to  
14 perform every phase of the court-martial out  
15 in the field and a military judge and the  
16 staff judge advocate have to agree and submit  
17 your name up to DC for our young judge  
18 advocates to become certified as trial and  
19 defense counsel.

20 But the training that we give them  
21 down at school is our course, our basic course  
22 is nine weeks. Of that four and a half weeks

1 or 130 hours of education is military justice.  
2 One of the things we found over the years is  
3 that when we teach military justice, we have  
4 often and almost always used sexual assault as  
5 the fact scenario, for a couple of reasons.  
6 One, is we do a lot of those type of cases out  
7 in the field but more importantly, it covers  
8 every aspect of litigation that you would  
9 want. In other words, we can use expert  
10 witnesses. We can do DNA. You can use drug  
11 cases. In other words, everything that they  
12 will face out in any type of case often comes  
13 up in a sexual assault case. So, it gives our  
14 young judge advocates experience with  
15 primarily expert witnesses in all the more  
16 complicated rules of evidence.

17 The way we conduct the training is  
18 very similar to the Army school. We do have  
19 some plenary lecturers but that is just to get  
20 them back up to speed to things they should  
21 have learned in law school.

22 Most of our training is done in a

1 seminar setting with seven or eight students  
2 and an instructor for example, who would be  
3 doing hearsay drills or something like that.  
4 They will get up. The other side will object.  
5 The instructor can provide direct feedback.

6 In addition as kind of a  
7 culmination, we do three real advocacy  
8 exercises. So, we do a discharge board, an  
9 administrative discharge board and then we do  
10 two court-martials. So during those, they  
11 actually have to demonstrate, beginning to  
12 end, the ability to advocate on their feet and  
13 perform. And they are given a lot of feedback  
14 not only from their fellow classmates but from  
15 the instructors and the instructors who can  
16 dial in and see via camera every courtroom in  
17 the Judge Advocate School. So, they get more  
18 feedback than they probably want. And they  
19 have to demonstrate proficiency at every phase  
20 of trial.

21 That just gets them out to the  
22 field and it gives them an opportunity to

1 actually perform in the field, to do trials  
2 and to convince their staff judge advocate and  
3 the military judge so that they can make it.  
4 They would be sufficient to act on their own.

5 But that is just the first  
6 training. They then come back for the trial  
7 and defense advocacy course. And that is  
8 another two-week course done at the school.  
9 Normally, we see students, I have seen young  
10 students come through as soon as six months,  
11 seven months after the basic course but  
12 ordinarily, it is between one and two years  
13 out in the field experience that they come  
14 back for the more advanced course. And that  
15 deals, once again, with a sexual assault  
16 scenario. It deals with expert witnesses.

17 Once again, it deals with  
18 drilling. We use a kind of an NDAA method  
19 primarily for -- in other words, they  
20 demonstrate, we either film them or we give  
21 them direct feedback. In fact we are running  
22 one of those courses this week. Colonel Spath

1 will be down there helping us teach that this  
2 week.

3           Once again, it is a sexual assault  
4 scenario. The one we use in the basic course  
5 differs from the one we use for subsequent  
6 courses. So, we use a fairly simple, low-  
7 level one at the basic course and then a more  
8 complex fact scenario for later courses.

9           After that, there is now something  
10 called an Advanced Trial Advocacy Course. And  
11 that course actually, we use a contractor, a  
12 Mr. Karton comes in. He is a contractor.  
13 That is really based on let's say kind of the  
14 art of advocacy. It is developing themes and  
15 theories and weaving your theme and theory  
16 through litigation. In other words, it  
17 teaches them how to communicate effectively  
18 with a panel or the jury.

19           In addition, there are -- and all  
20 of these courses are trial and defense. We  
21 don't differentiate, although we do breakout  
22 sessions as we go through it so that they are

1 working with experienced prosecutors or  
2 experienced defense counsel. The course is,  
3 essentially, the same whether you are a trial  
4 counsel or a defense counsel.

5 In addition, we have courses that  
6 are more focused and specialized. For  
7 example, we have a defense orientation course.  
8 If any of our young judge advocates are going  
9 to go be a defense counsel, they need to go  
10 through a defense orientation course prior to  
11 assuming those responsibilities.

12 We also, I noticed Colonel Calarco  
13 talked about both sides, trial and defense.  
14 In the Air Force, we actually say three sides  
15 because we actually also train our special  
16 victims counsel to actually advocate in the  
17 courtroom, specifically in pretrial hearings  
18 in 412, 513, 514 type hearings. And when we  
19 put the special victim counsel, two of those  
20 days are actually hands-on interviewing  
21 victims and then we actually going through  
22 motion practice, doing 412 hearings, doing 513

1           hearings. Because our special victim counsel  
2           tend to be very young and perhaps don't have  
3           a lot of courtroom or trial experience, nor  
4           does their job necessarily require a lot. But  
5           we want to make sure that they do understand  
6           412 very well, that they understand 513, 514,  
7           and their limited role they can perform well  
8           in the courtroom. And we have had some  
9           success with that. The school, in particular,  
10          has actually spent a lot of time working  
11          victims counsel issues. We, at least lately,  
12          have performed the role of the appellate  
13          counsel for our victim counsel, taking the  
14          cases up through CAAF last summer out of our  
15          school.

16                        In addition to sexual assault, we  
17          do something called an Intermediate Sexual  
18          Assault Advocacy Course. And one of the  
19          things we are blessed with is we have  
20          tremendous reserve faculty. A lot of our  
21          reserve faculty are state felony judges. They  
22          are assistant U.S. Attorneys and state

1 prosecutors and defense counsel. Well, they  
2 can be reserve faculty. They come in and they  
3 help us put on something. It is called a  
4 training -- it is the TRIALS program, we call  
5 it but it stands for Training by Reservists in  
6 Advocacy and Litigation. It was, I guess, an  
7 effort to come up with an acronym to spell  
8 trials.

9 But anyway, they have married that  
10 up with this Intermediate Sexual Assault  
11 Litigation course, which is a three-day course  
12 that specializes in sexual assault. And then  
13 the TRIALS program comes in and has them once  
14 again do that. But the great thing about this  
15 course is that we do it out in the field.  
16 They are our traveling road show. And so they  
17 get a chance to bring our prosecutors from  
18 D.C. out there and then we bring our  
19 reservists in and they teach them. And then  
20 they have them demonstrate. And once again,  
21 we use the NDAA method with that. We film  
22 them and then we show them their films and how

1           they could improve themselves.

2                       The most recent course we have  
3           added is we have actually added something  
4           called an Advanced Sexual Assault Advocacy  
5           Course. That was a chance for us, actually,  
6           we realized that one of our things was related  
7           to the ability to team, to work with the other  
8           members of -- for example, working with law  
9           enforcement.

10                      And so in our Advanced Sexual  
11           Assault Advocacy Course we bring in OSI  
12           agents. We bring in our senior defense  
13           counsel, and we bring in our senior trial  
14           counsel, specifically the ones that are  
15           designated as SVU trial counsel. And for one  
16           week they come down to the school the three of  
17           them, the OSI and then the counsel. And we  
18           begin a case cradle to grave.

19                      On Monday morning we bring in, we  
20           use our victim advocates, they are usually  
21           civilians assigned to installations, someone  
22           who has a lot of experience dealing with

1 victims of sexual assault. And they play the  
2 role of a victim and they sit through an  
3 initial interview with OSI. The trial counsel  
4 can watch. They can provide feedback. We  
5 have experts come in, observe it via film or  
6 via video and then give them feedback. You  
7 know, how did that go?

8 It also allows the trial counsel  
9 then to build on that interview and team with  
10 our OSI agents. And then the same thing, they  
11 provide discovery to the defense counsel, who  
12 then does an interview with the victim later  
13 on.

14 And we just move it during the  
15 course of the week using forensic  
16 psychiatrists, psychologists, SANE nurses and  
17 the victim. And then we just focus on the  
18 specific phases of trial that would come about  
19 as a result. And so it is a very hands-on,  
20 very, very intense training.

21 Because it requires so much time  
22 per student, we limit it to only our SVU,

1           senior trial counsel, and our senior defense  
2           counsel because it is really just the room and  
3           the ability to do that much hands-on training  
4           and work with experts that closely, all the  
5           way through the course of a week.

6                         We ran that course for the first  
7           time last summer. We think it went very well  
8           and we plan to continue to running that on an  
9           annual basis.

10                        We have a bunch of additional  
11           courses, much like the Army that also touch on  
12           advocacy. For example, we have a military  
13           justice administration course, for chiefs of  
14           justice. In every one of our courses, we  
15           always focus on sexual assault because we  
16           found that the practitioners, chiefs of  
17           military justice, staff judge advocates, they  
18           really need to understand victim behavior  
19           because in essence, they are the ones who are  
20           going to make the decision which cases go to  
21           trial, how are you going to handle them.  
22           Also, they deal a lot with the victims as

1 well. So, we incorporate sexual assault  
2 training with that course and with our staff  
3 judge advocate courses. Well, every judge  
4 advocate who is going to serve as a staff  
5 judge advocate at any level, has to go through  
6 a two-week course prior to assuming those  
7 responsibilities. And whenever they are  
8 reassigned as a staff judge advocate, they  
9 have to go through the training again. And  
10 during that, at least two days are devoted to  
11 dealing with sexual assault cases because they  
12 are probably the most demanding. And  
13 depending on the amount of military justice  
14 experience our staff judge advocates have, we  
15 want to make sure that they are up to speed,  
16 that they understand the state of the law and  
17 what is at stake.

18 We also do the Joint Military  
19 Judges Annual Training Course down there and  
20 during that, our military judges are also  
21 provided training in areas of sexual assault  
22 and dealing with expert witnesses.

1                   Most recently, the Air Force did a  
2                   Sexual Assault Prevention and Response Summit  
3                   down at Maxwell Air Force Base back right  
4                   before Christmas. And once again, it was a  
5                   chance to get all of our, both our SPCM and  
6                   GCM-level staff judge advocates together in a  
7                   room. There was about 240 folks there. And  
8                   we focused specifically, once again, on victim  
9                   behavior. And we brought in experts, Dr.  
10                  Campbell, Meg Garvin out there. So, very  
11                  well-known experts in victimology to come out  
12                  and explain to them, make sure that our folks  
13                  understand a lot of the behavior of victims,  
14                  sometimes counterintuitive to people who don't  
15                  deal with it on a regular basis. So, we made  
16                  sure that they were all exposed to that type  
17                  of training.

18                  At the Judge Advocate General  
19                  School, our military justice staff are almost  
20                  invariably, they are what we call graduated  
21                  senior trial or defense counsel and they form  
22                  the core of our military justice faculty.

1           Some of our defense perhaps are only served as  
2           area defense counsel. So not all of them are  
3           senior defense counsel but our prosecutors  
4           have served as senior trial counsel. Two of  
5           them are graduated from our SVU program or  
6           three of them are graduated SVU senior trial  
7           counsel. And so that is where we get the  
8           expertise there. And in addition, we augment  
9           it with our reserve faculty.

10                   In addition, when we find we don't  
11           have the expertise, which often is the case,  
12           especially we moved in areas, for example,  
13           with victim counsel, we have gone up to the  
14           civilian community and we invite them in. We  
15           bring them down, anyone who is willing to come  
16           down to Montgomery, Alabama, we invite. We  
17           bring them down there and we form a lot of  
18           contacts with the civilian community that we  
19           use as well.

20                   I have a summary of all these  
21           courses. I would be glad to submit a copy of  
22           our curriculum and the courses that we offer

1 down at the Judge Advocate General School.

2 PROF. HILLMAN: Colonel, we would  
3 be grateful for the summary of the courses so  
4 that we could look at that. It is a lot to  
5 keep up with.

6 Well, we are going to hear more.  
7 Colonel Spath, did you want to speak at the  
8 next panel?

9 COL SPATH: I am here for the next  
10 panel as well. I mean, if you have any  
11 questions for me, I am glad to answer them.

12 PROF. HILLMAN: Okay. I have one  
13 small questions, based on the span of training  
14 and the sort of development progress that you  
15 set out.

16 So the certification, you have  
17 inserted the certification process after the  
18 basic course, before you certify your trial  
19 and defense counsel. How long before they get  
20 that? What is average?

21 COL THEURER: All right, it  
22 depends. You know all of our installations

1           have different military justice caseloads.  
2           General Harding, as a minimum, would expect  
3           that they demonstrated three. But normally,  
4           the normal package has seven to nine court-  
5           martials before they become certified.

6                         But under the manual, for example,  
7           a special court-martial does not require a  
8           certified trial counsel. Now, we would never  
9           send an uncertified counsel into any court of  
10          any kind. So, they would be second chairs.  
11          So they will second chair up until they become  
12          certified. Even then -- but even though, I  
13          can't imagine a sexual assault trial where we  
14          are not going to have a senior trial counsel  
15          and specifically an SVU on it.

16                        The benefit to us really is it  
17          forces a staff judge advocate to make training  
18          a priority. In other words, he will want, he  
19          or she will want all their folks certified.  
20          And so, they are going to force perhaps the  
21          reluctant staff judge advocate into a  
22          courtroom. And the reason why that benefits

1 is because later, you know, 15 or 20 years  
2 down the line, no matter what their background  
3 is, they are going to probably end up being a  
4 staff judge advocate, even if they were a  
5 contracts attorney or anything else. They  
6 will be in a position where they will be  
7 providing a commander advice on criminal law,  
8 criminal processes. So, we want to ensure  
9 that they get it, they understood that they  
10 sat there. Even if perhaps they aren't the  
11 world's best trial counsel, they are not going  
12 to be in there by themselves. But later on,  
13 when they are giving advice, they at least  
14 have some type of experience and sufficient  
15 experience that as an organization we can rely  
16 on their judgment in criminal justice  
17 processes. And that is perhaps the idea  
18 behind it.

19 COL HENLEY: Have you had  
20 individuals not certified as trial counsel?

21 COL THEURER: It has taken -- I  
22 think we have had about two years now. Has

1 every single one who has gone through it  
2 become certified? The answer is we understand  
3 it could take up to four years.

4 COL HENLEY: Okay.

5 COL THEURER: If you are in an  
6 installation, for example, if you were in a  
7 contract installation that had all civilians  
8 and five military guys and there was never a  
9 court-martial, the staff judge advocate would  
10 probably send them temporary duty somewhere  
11 else to get some trials in. There is no  
12 expectation that every graduate of the basic  
13 course would become certified in their first  
14 assignment because our first assignments are  
15 ordinarily two years. But by the end of four  
16 years, we expect them all to be certified.

17 COL SPATH: There have been some  
18 packages sent up and are sent back declined by  
19 the Judge Advocate General for certification.

20 COL THEURER: Correct.

21 PROF. HILLMAN: That is what I  
22 wondered. So there is some washout.

1 COL THEURER: Oh, absolutely.

2 COL SPATH: There is some of them  
3 that go back and then they can continue to  
4 gain skills and gain experience. But there  
5 have been some that have been sent back.

6 COL THEURER: The military judge  
7 is not going to sign off until they feel  
8 comfortable with it.

9 COL HENLEY: Okay, so it requires  
10 a military judge --

11 COL THEURER: And a staff judge  
12 advocate.

13 COL HENLEY: -- and the SJA to  
14 both agree?

15 COL THEURER: Either one could,  
16 essentially, stop it.

17 COL HENLEY: Okay. And I assume  
18 for defense counsel, they are already  
19 certified before they walk into defense  
20 position.

21 COL THEURER: They would never --  
22 how we do it in the Air Force, I think it is

1 the same in the Army, nobody could serve their  
2 initial time as a defense counsel. And so you  
3 would have to be certified to be selected.

4 And ordinarily what we have found  
5 is our defense counsel tend to be more  
6 experienced in general because they are at  
7 least on their second assignment, prior to  
8 becoming a defense counsel.

9 PROF. HILLMAN: Okay, thank you.  
10 So, we have the Navy on the airwaves, despite  
11 being the Navy, today.

12 So, Commander McEwan, I don't know  
13 if you or Colonel Cadwalader want to go first.  
14 Do you have a preference on that?

15 LT COL CADWALADER: Yes, ma'am.  
16 This is Lieutenant Colonel Cadwalader. I will  
17 speak first.

18 Good afternoon, ladies and  
19 gentleman. I am the Executive Officer of the  
20 Naval Justice School up here in frozen Rhode  
21 Island. And I will provide you a brief  
22 overview of our school and then I am going to

1 turn over the floor to Lieutenant Commander  
2 Justin McEwen who is our Military Justice  
3 Department Head, who will discuss specific  
4 military justice and trial advocacy training  
5 that we provide related to sexual assault.

6 Our mission here at NJS is three-  
7 fold. First, we train sea service judge  
8 advocates and that is judge advocates from  
9 Navy, Marine Corps and Coast Guard, and other  
10 legal personnel, including enlisted personnel  
11 in order to promote justice and ensure the  
12 delivery of quality legal advice.

13 Second, we train commanders and  
14 other senior officers who are not lawyers in  
15 the practical aspects of military law to  
16 enable them to perform their command staff  
17 duties.

18 Third and finally, we train other  
19 personnel such as collateral duty legal  
20 officers to assist in the sound administration  
21 of military justice.

22 Our headquarters, as I mentioned,

1 is in Newport, Rhode Island. In addition, we  
2 have two detachments, one in San Diego,  
3 California, and one in Norfolk, Virginia,  
4 which are areas of large Navy fleet  
5 concentration. These detachments offer  
6 valuable training in locations for large  
7 portions of our military population to attend  
8 legal training.

9 At all three locations, we have a  
10 total of 64 Navy, Marine Corps, and Coast  
11 Guard judge advocates, legal support  
12 personnel, and civilians on our staff.

13 As reflected in our mission, NJS  
14 offers training for varied audiences. For our  
15 sea service legal personnel, we offer  
16 essential level training for judge advocates  
17 from the three sea services. In addition, for  
18 Navy enlisted legalmen, and for Marine Corps  
19 enlisted legal service specialists.

20 Our accession training for judge  
21 advocates is a ten-week long course, delivered  
22 three times per year that prepares them for

1           their first tour as judge advocates,  
2           regardless of the service, and regardless of  
3           the position that they will assume. They  
4           receive training not only in military justice  
5           but also in civil and operational law.

6                     Our Navy legalmen attend an 11-  
7           week course, which provides ten ABA approved  
8           credits towards a paralegal degree. In  
9           addition to military-specific training, the  
10          curriculum includes four college-level courses  
11          that are sponsored by Roger Williams  
12          University in Bristol, Rhode Island and taught  
13          by our NJS officer instructors.

14                    The Marine Corps Legal Service  
15          Specialist Course is also an 11-week course  
16          which consists of training in military  
17          justice, post-trial review, and legal  
18          administration.

19                    NJS also offers a variety of  
20          specialty courses for sea service legal  
21          personnel. These courses cover a wide range  
22          of legal topics and are delivered in-person

1 through our online training and through a  
2 combination of in-resident and distance  
3 learning. Legal personnel from other services  
4 are eligible for these courses.

5 I mentioned previously part of the  
6 NJS mission is to train commanders and other  
7 senior officers in the practical aspects of  
8 military law to enable them to perform their  
9 command and staff duties. To accomplish that  
10 mission, we offered a senior officer course.  
11 This three-day course provides Navy and Marine  
12 Corps commanding officers, executive officers,  
13 and officers in charge with instruction in  
14 military justice to include sexual assault  
15 case disposition, among other legal topics.  
16 The course is required for all Navy O6  
17 officers en route to command. The courses are  
18 offered in seven locations throughout the  
19 fleet. There is a similar two-day course for  
20 senior enlisted leaders.

21 The third part of our mission is  
22 to train other personnel to assist in the

1 sound administration of military justice. In  
2 furtherance of that mission, we offer several  
3 courses at our two detachments for non-legal  
4 personnel performing legal duties. The three-  
5 week legal officer course prepares non-lawyer  
6 officers assigned to perform legal functions  
7 for a command that is not large enough to  
8 warrant assignment of a full-time judge  
9 advocate. For example, onboard destroyers,  
10 frigates, cruisers, aviation squadrons, and  
11 infantry battalions.

12 We also offer a two-week course  
13 for legal clerks, for normally enlisted  
14 personnel administrative ratings assigned to  
15 assist legal officers as a collateral duty.  
16 A similar course is offered in Newport for  
17 Coast Guard yeomen assigned to work in a legal  
18 office.

19 I will conclude with explaining  
20 the process by which we manage our training.  
21 NJS is guided by a Board of Advisors in  
22 determining what type of training is provided

1 and how our budget is allocated. The Chairman  
2 of the Board is the Commander of Naval Legal  
3 Service Command Rear Admiral Crawford and the  
4 Vice Chairman is the Commanding Officer of  
5 Naval Justice School. Other members consist  
6 of subject matter experts and primary  
7 stakeholders from all three services. Courses  
8 are developed and revised each year based on  
9 current demands of practice areas throughout  
10 the fleet.

11 With that as background, I will  
12 now turn over the floor to Lieutenant  
13 Commander McEwen, who is our Military Justice  
14 Department Head to cover courses relevant to  
15 sexual assault.

16 LCDR McEWEN: Good afternoon and  
17 thank you for the opportunity to discuss with  
18 you the specific training related to sexual  
19 assault at the Navy Justice School.

20 Briefly, on my background, I have  
21 completed three litigations tours, including  
22 as a defense counsel, and most recently a

1           senior trial counsel for Europe, Africa, and  
2           Southwest Asia. And in addition to those  
3           litigation tours, I just recently completed  
4           civilian LL.M. in trial advocacy and I am a  
5           member of the Navy's military justice  
6           litigation career track.

7                         The military justice department is  
8           one of three departments here at the Naval  
9           Justice School. And as the Military Justice  
10          Department Head, my primary responsibility is  
11          to manage and implement all of the military  
12          justice training that NJS delivers.

13                        Now, while the military justice  
14          curriculum is robust and comprehensive, it is  
15          by no means the only training that legal  
16          practitioners within the sea services receive.

17                        Specifically, the trial and  
18          defense commands themselves throughout the  
19          world, as well as the subject matter experts,  
20          the TCAPs and the DCAPs, as well as a trial  
21          judiciary routinely provide other training to  
22          the practitioners in military justice.

1                   Now, as Lieutenant Colonel  
2                   Cadwalader has already discussed, the training  
3                   mission of NJS is broad and diverse both in  
4                   subject matter taught, as well as the various  
5                   students that receive that instruction.

6                   The military's response to sexual  
7                   assault from prevention to adjudication,  
8                   however, provides the backdrop for much of the  
9                   training that we provide here at NJS and  
10                  crosses over into virtually all subject  
11                  matter, whether discussion issues related to  
12                  victim's legal counsel during a legal  
13                  assistance lecture or how to advise a  
14                  commander on sexual assault cases while  
15                  operating in foreign deployed environments, no  
16                  other military justice topic impacts or  
17                  transcends the curriculum more than sexual  
18                  assault.

19                  Some of the specific training that  
20                  we provide here is, and I will discuss those  
21                  specifics now, much like the Army's basic  
22                  course, we have the basic lawyer course, which

1 is the accession course for all judge  
2 advocates in the sea service. It is a ten-  
3 week course and 57 percent of the curriculum  
4 is military justice related. And it is  
5 through this course that Navy, Marine Corps,  
6 and Coast Guard attorneys are ultimately  
7 certified under Article 27(b) of the Uniform  
8 Code of Military Justice to be able to try  
9 cases in court.

10 During the BLC, judge advocates  
11 receive extensive training on several sexual  
12 assault related topics. Students are taught  
13 the substantive criminal law under Article 120  
14 and 125 of the UCMJ, the rules of evidence  
15 related to sexual assault. They are also  
16 provided extensive instruction on how to  
17 advise convening authorities related to sexual  
18 assault issues. They learn about victims and  
19 witness assistance programs. They learn about  
20 victims' rights, how to provide legal  
21 assistance to sexual assault victims, and the  
22 role of the victim's legal counsel in the

1 process.

2 One of the final milestones of the  
3 BLC is a fully contested mock trial that is  
4 judged and graded by sitting military judges  
5 of the Navy and Marine Corps trial judiciary.  
6 Also, Coast Guard judges participate as well.

7 For the mock trial, 50 percent of  
8 the students who are assigned a sexual assault  
9 case and are required to write and litigate  
10 Military Rules of Evidence 412 motions, those  
11 students who are not assigned as counsel to  
12 the sexual assault contested case are assigned  
13 witness roles. So, therefore, they are  
14 exposed to many of the issues related to  
15 sexual assault cases.

16 We also have other courses that  
17 happen throughout the year. A week-long  
18 course -- these are the refresher courses,  
19 much like the Army and the Air Force have  
20 already discussed. Two of the courses we have  
21 are the trial counsel and defense counsel  
22 orientation courses. And these are really

1 courses that are designed to give the  
2 substance of the law related to their incoming  
3 jobs, whether they are trial counsel or  
4 defense counsel. The course incorporates both  
5 substantive lectures and also practical  
6 exercises.

7 Now, during these courses on the  
8 trial side, trial counsel receives  
9 instructions on how to charge sexual assault  
10 cases and how to manage cases throughout the  
11 process. On the defense side, they focus on  
12 expert consultants and witnesses, along with  
13 how to effectively interview clients.

14 The next course that a judge  
15 advocate would go to in their career process  
16 of learning litigation is the basic trial  
17 advocacy course. Now, this is a one-week  
18 practical exercise course that is designed for  
19 the new judge advocates without any trial  
20 experience or those who are returning to trial  
21 experience after a time away from litigation.

22 The course is designed to develop

1 the important trial advocacy skills the judge  
2 advocates need in their first billet, such as  
3 direct examinations, cross-examinations,  
4 closing or opening statements, closing  
5 arguments, and laying evidentiary foundations.  
6 These cases are both lectures, as well as  
7 practical exercises, where the students get up  
8 on their feet and participate in trial  
9 advocacy exercises.

10 Now, we do have some specific  
11 sexual assault related courses that are very  
12 intensive on the trial advocacy side.  
13 Specifically, we have a course called  
14 prosecuting alcohol-facilitated sexual  
15 assaults. This is a one-week advanced trial  
16 advocacy course that includes substantive  
17 lectures by experienced civilian counsel on  
18 various aspects of prosecuting alcohol-  
19 facilitated sexual assaults.

20 The course focuses heavily on the  
21 expert issues that arise in alcohol-  
22 facilitated sexual assaults. It is very

1 heavily focused on the expert witness issues  
2 and the expert issues that are involved in  
3 those kind of cases. Teams of experienced  
4 prosecutors both inside and outside of the  
5 military provide feedback to the students  
6 after each of these different exercises.

7 The Navy has been presenting this  
8 course to prosecutors for the past several  
9 years. Originally NJS taught a combined trial  
10 and defense litigation sexual assault case  
11 course but found that the course is best  
12 presented separately. And so what we have  
13 done, we have broken out the course into  
14 another course called defending sexual assault  
15 cases. Like the prosecutors course, this is  
16 a one-week advanced trial advocacy course that  
17 includes both lectures by experienced counsel  
18 on various aspects of defending sexual assault  
19 cases, as well as practical exercises.

20 Again, some of the basic lecture  
21 topics include discovery, voir dire, use of  
22 experts, impeachment, opening statements,

1 closing arguments, direct and cross  
2 examination. It also incorporates trial  
3 advocacy exercises during which the  
4 participants conduct mock trial exercises.  
5 And again, teams of experienced instructors  
6 both inside the military and outside provide  
7 constructive feedback immediately after the  
8 students participate in the evolution.

9 This next week coming up, the  
10 Naval Justice School will host its first  
11 Victims Legal Counsel Course. This is a  
12 certification course that is modeled after the  
13 Air Force certification course held last year  
14 and will cover a wide variety of topics,  
15 including ethics for victims legal counsel,  
16 working with sexual assault victims, and the  
17 scope of representation of victims legal  
18 counsel, just to name a few of the topics.

19 Though not NJS sponsored, last  
20 August the Navy also held its inaugural  
21 Special Victims Capability Course which was  
22 primarily focused on adult sexual assault and

1 over 260 attendees, including judge advocates,  
2 paralegals, victim advocates and victims legal  
3 counsel, attended.

4 Finally, the Naval Justice School  
5 continues to actively develop its online legal  
6 education content, some of which is focused on  
7 sexual assault. Judge advocates throughout  
8 the fleet log onto the Naval Justice School,  
9 can log on 24 hours a day, seven days a week  
10 and get access to one-hour primer courses on  
11 a myriad of topics related to sexual assault.

12 An example of the kind of topics  
13 that you can get online are how to fund  
14 experts, Article 32 guide courses, sexual  
15 assault initial disposition authority, just to  
16 name a few. And as I speak, we are in the  
17 process of developing several more of those  
18 online courses that are really designed to  
19 provide a primer for those who just need some  
20 quick subject matter expertise on the various  
21 topics.

22 Now, the training that I have just

1 discussed just provides a basic overview of  
2 the training that the school provides. In the  
3 past, we have held other courses, such as the  
4 Senior Trial Counsel and Senior Defense  
5 Courses, Intermediate Trial Advocacy, Advanced  
6 Trial Advocacy, and Effective Communication  
7 Skills Courses. And we also provide several  
8 other ad hoc trainings as needed. But those  
9 are just a basic overview of what NJS provides  
10 as far as the sexual assault training.

11 PROF. HILLMAN: Thank you,  
12 Commander McEwen and Colonel Cadwalader. Are  
13 there questions from the panel for any of the  
14 folks?

15 MR. BRYANT: I have the same  
16 question that I had for the Army and I didn't  
17 get an answer from the Air Force but that is  
18 my fault.

19 Are Navy JAG officers given the  
20 opportunity to supplement training with  
21 civilian legal training courses?

22 LCDR McEWAN: They are. And you

1 know I can kind of give you my personal  
2 anecdotal experience. I think I have attended  
3 at least five civilian prosecutors courses  
4 throughout my career from the Prosecuting  
5 Online Predators Course, Prosecuting Drug  
6 Crimes Course that was put on by the NDAA, the  
7 Northwestern Prosecutors Course, just to name  
8 a few of the courses that I have been to.

9 But again, these are all subject  
10 to fiscal restraints but the way the budgets  
11 are set up is that the various commands have  
12 regional training budgets and usually there is  
13 opportunities or money available for counsel  
14 to attend these civilian courses.

15 And so the answer to that question  
16 is yes.

17 MR. BRYANT: Thank you.

18 COL HENLEY: Is there any  
19 discussion amongst the schools towards  
20 consolidated training, leaving aside whether  
21 or not to consolidate the schools themselves,  
22 but to consolidate the sexual assault

1 training. And if not, why not?

2 COL THEURER: There are actually,  
3 yes. There are examples, for example, where  
4 we do training at other -- for example, the  
5 Navy has a Prosecuting Complex Crimes Course  
6 that we send Air Force attorneys to. The most  
7 recent time we ran the Special Victims Course,  
8 we ran it for all the services. There were  
9 attendees from all the services.

10 The biggest problem you end up  
11 having when people talk about consolidating  
12 things, they forget the logistics problem,  
13 when you are talking about the number of  
14 attorneys in the services. So there isn't  
15 really much gain. When we have a throughput,  
16 I think all of us would agree that the  
17 schools, our curriculum runs 52 weeks a year.  
18 Well, there is two weeks that we don't have  
19 courses running down there and we run nearly  
20 at capacity.

21 So, if for example, we could never  
22 do a basic course where you could fit every

1           Army, Navy, and Air Force person in the same  
2           building. I mean it is just -- because it is  
3           not the size of a classroom. I mean you could  
4           build a giant classroom and have a thousand  
5           people there. It is the seminars and the  
6           courtrooms. And so what you are really  
7           talking about when people suggest  
8           consolidation, I think they forget the  
9           logistics footprint of that because it is not  
10          building a bigger classroom. It is building  
11          a bazillion courtrooms and it is staffing it  
12          with faculty. Because when you are talking  
13          about a seminar, ultimately we will have two  
14          instructors in there with ten students. So,  
15          even if we created this giant course, just the  
16          logistics and getting all the instructors  
17          there as well.

18                         So, we have looked at it and we  
19           do, for example, I have Army faculty on staff.  
20           The Army School has Navy and Air Force faculty  
21           on staff. So, not only do we share staff, we  
22           also share students. Virtually every class we

1 run, we have students from the various  
2 services at that. For example, right now with  
3 our trial defense course going on there, when  
4 I walked out there was Coast Guard students in  
5 there.

6 COL HENLEY: I guess since we are  
7 sexual assault training, it seems each service  
8 has their own unique sexual special victim  
9 prosecutor course. Do you teach things  
10 differently in each service or is there  
11 overlap?

12 LCDR McEWAN: There is definitely.  
13 And I will just speak for us. So, we have two  
14 Marines in my department and obviously they  
15 work at the Naval Justice School. And while  
16 I haven't been there long enough to really do  
17 that much reaching out on my own yet to the  
18 Air Force, I am familiar with the fact that we  
19 do reach out to the Air Force. In fact, when  
20 we had our first Special Victim Counsel  
21 Course, we had an Air Force captain who had  
22 been a special victim counsel in the Air Force

1           come and talk about lessons learned. Like I  
2           said, we have two Marines on the staff. We  
3           have, at any given time, approximately I think  
4           seven or so Air Force folks in the graduate  
5           course and 15 Marines that are in the graduate  
6           course.

7                           And so, we do, sir, share ideas  
8           and lessons learned and concepts with the  
9           other services that we certainly do  
10          incorporate into our training.

11                          Now, a consolidated training where  
12          we all get together for the same course --

13                          COL HENLEY: Whether or not you  
14          consolidate the training if you are all  
15          teaching or training off of the same course  
16          syllabus, I guess that is my question is what  
17          is different amongst your various  
18          qualifications?

19                          COL THEURER: Well there is  
20          actually an institutional, something called  
21          ISLRC and maybe one of these gentlemen may be  
22          able to tell me what it stands for. But

1           essentially it is the commandants at each of  
2           the three schools we meet and we share  
3           curriculum. We talk about what is different,  
4           what is the same. And so we do.

5                         And there are areas, for example,  
6           not in sexual assault, but in other areas  
7           where we said you know what, it doesn't make  
8           sense for the Air Force and the Navy to run  
9           the same course that perhaps the Army runs  
10          better and they have the capacity to do  
11          everything.

12                        So, we do consolidate where it  
13          makes sense. We share. We certainly share  
14          information but there is also a certain  
15          benefit to having different takes and  
16          different approaches and then sharing the  
17          information because we do find that we learn  
18          a lot from each other. I mean we learn a lot  
19          from how -- when we see how the Navy or for  
20          the Army. I can tell you that is particularly  
21          true when we share faculty members. I mean,  
22          it is having, for example, right now, my

1           Acting Chief of my Military Justice Division  
2           in fact is an Army officer doing a great job  
3           who also brings in a different -- the culture  
4           of the services are, I would say, somewhat  
5           different is probably maybe understating.

6                         But it really does, it creates  
7           real insight into different ways of  
8           approaching the same problem. And I think  
9           there is a certain benefit to having separate  
10          ways, where we develop different ideas and  
11          then sharing best practices and making sure  
12          that we each are doing the best that we can.  
13          And I think that is pretty much how we are set  
14          up at this point.

15                        COL HAM: Mr. Strand?

16                        MR. STRAND: From the Navy side,  
17          you mention what the Naval Justice School is  
18          doing. Are you also going to talk about the  
19          TCAP and DCAP or are they going to be  
20          represented?

21                        LCDR McEWEN: It is my  
22          understanding from looking at the agenda that

1 the highly qualified experts are going to be  
2 available for the next panel. I mean, I would  
3 speak to some of that.

4 Some of these courses that I have  
5 already mentioned, for example, the Basic  
6 Trial Advocacy Course, a lot of those are  
7 taught in coordination with the various either  
8 TCAP, DCAP, or Code 20, which is our Military  
9 Justice Headquarters.

10 So, basically what happens is NJS  
11 provides logistical and we also provide  
12 instructional support but the subject matter  
13 experts help develop and build the curriculum  
14 for these various courses.

15 MR. STRAND: Okay, thanks.

16 COL THEURER: Mr. Bryant, you  
17 asked about the civilian training. I just  
18 wanted to make sure you got an answer from the  
19 Air Force as well.

20 Like the other services, we also  
21 attend civilian training. It is interesting  
22 in that the responsibility for training

1 resides at the base level staff judge advocate  
2 and through their OT&E function, Organize  
3 Train and Equip function, for example through  
4 the member of the Air Force and through the  
5 major commands. In other words, they are  
6 charged with making sure that the folks that  
7 work for them are trained.

8 And so, base level staff judge  
9 advocates will send their trial counsel off  
10 for particular training. If you are in a  
11 specialized, for example, if you are serving  
12 as a defense counsel, a senior trial counsel  
13 you will -- I served several times as a  
14 defense counsel and, for example, I attended  
15 the ABA course on defending capital cases  
16 because the Air Force didn't offer a course  
17 like that. And Colonel Spath can explain as  
18 well that more of the training is done with a  
19 lot of our prosecutors but the same. It is  
20 usually handled not through the schools but  
21 through the owning organization.

22 MR. BRYANT: Thank you.

1                   PROF. HILLMAN: I have one maybe  
2                   last questions, just before we lose our Army  
3                   and our Navy reps, in particular, since we  
4                   have the Air Force yet in the next panel here.

5                   Commander McEwen, you mentioned  
6                   that the sexual assault part of your  
7                   curriculum impacts and transcends it. And all  
8                   of you talked about the centrality of sexual  
9                   assault scenarios and the training that you  
10                  are doing from the beginning of your building  
11                  of the JAG Corps in each branch of service.

12                  Is there backlash or fatigue about  
13                  that, in your experience?

14                  LCDR McEWEN: You know, I don't  
15                  think so because really, from my perspective  
16                  at least, and I have been an SJA as well as a  
17                  litigator, I mean these are the issues that  
18                  counsel are going to be facing. So, I think  
19                  at least from the student's perspective and  
20                  the critiques and the feedback that I have  
21                  received is that they understand that. They  
22                  get that. And they also recognize that this

1 is just what the reality of much of what they  
2 are going to be doing.

3 And so the attitude that I have  
4 found is really kind of embracing the  
5 opportunity to discuss these. These counsel  
6 are really looking to be best equipped to  
7 handle whatever circumstances, whether it is  
8 in the courtroom or advising a commanding  
9 officer on their obligations.

10 So, I would say no. I haven't  
11 felt like there is any fatigue.

12 PROF. HILLMAN: Thank you.

13 LTC CALARCO: In the Army, I would  
14 say if there is, it is with our middle  
15 managers. So, our majors who go to the  
16 graduate course, but only from a resource  
17 perspective. They are now facing having to  
18 make sure that they can resource Article 32  
19 Officers, special victim counsel, and this is  
20 coming from within the entire office, not just  
21 the justice part but it is resource intensive.

22 So, from a resource perspective,

1 looking at the number of personnel that are  
2 going to be consumed with sexual assault  
3 related issues is not something -- it fatigues  
4 them only because they want to do well and  
5 they want to accomplish the mission and that  
6 is going to be a difficult thing to wrap their  
7 brains around as they go into an era that is  
8 going to be different as a middle manager,  
9 than what they saw their middle managers do  
10 when they were captains and they were coming  
11 up through the system.

12 At the trial level, however, I  
13 would say no. These folks, they are bright  
14 and ingenuitive and they want to try cases.  
15 And these are some of the most complex issues  
16 that they will have to wrestle with as they  
17 prepare for and try cases. And frankly, they  
18 love it.

19 PROF. HILLMAN: Okay, thank you.

20 COL THEURER: Professor, I would  
21 say going back even when I went through the  
22 basic course, we used the sexual assault

1 scenario. And as an educator, if I had to  
2 just create a fact pattern that would teach a  
3 litigator everything that would possibly  
4 happen in a court, I think sexual assault  
5 forms a good basis because it really covers  
6 all aspects of it.

7 Do they become fatigued with it?  
8 I think our basic students may tell us after  
9 listening to not only doing it but watching  
10 other students doing it. They are probably  
11 fatigued by the fact pattern but not the type  
12 of course.

13 We are able to recruit some of the  
14 best and smartest young attorneys coming into  
15 the JAG Corps right now, primarily probably  
16 because of the economy. They are Type A  
17 personalities and they don't want an easy  
18 case. They want something that is going to  
19 challenge their legal skills and sexual  
20 assault presents fact patterns that are  
21 extremely challenging.

22 PROF. HILLMAN: Thank you for

1           that.

2                       MR. STRAND: In my sense, also,  
3           from what I have seen you do in the training  
4           in all of the services, at each level of  
5           training, whether it is officer basic, whether  
6           it is intermediate, whether it is advanced,  
7           you are looking at different aspects of that  
8           as well, more advanced aspects and you can  
9           actually build upon what was given before and  
10          then build on that, even if the fact pattern  
11          is the same. Is that correct?

12                     LTC CALARCO: Absolutely true, in  
13          the Army. And one example I will just give is  
14          at the basic course, they really are learning  
15          the fundamentals. And then when they come  
16          back for the intermediate trial advocacy  
17          course, they bring some of the same experts.

18                     My colleagues from the Air Force  
19          talked about Dr. Lonsway, Angie McCown, some  
20          others -- Mr. Strand, as I mentioned, who come  
21          in because they give that more advanced  
22          perspective on issues that deal with victim

1 behavior and offender behavior and those  
2 complexities that really make these the most  
3 difficult kinds of trials.

4 And so certainly, we continue to  
5 build as we go.

6 COL THEURER: Mr. Strand, if you  
7 had the chance to observe the basic course,  
8 when they are doing their first trial, I mean  
9 our goal is to get them to get in there, to  
10 make it through a trial and not have a  
11 mistrial. I mean really, you are trying to  
12 have them be able to get through the script,  
13 just the formality of getting through a trial.  
14 And so, they are learning how to do an opening  
15 statement, how to do a closing argument, how  
16 to swear a witness in. And so, the level,  
17 although it is the same fact pattern, what  
18 they are teaching at each level is very, very,  
19 very different. And our expectations of our  
20 students are vastly different between the  
21 basic course and, perhaps, our advanced sexual  
22 assault course.

1                   PROF. HILLMAN: Okay, thank you.  
2                   Thanks to our phone guests, too. I am  
3                   grateful for your patience in holding with us.  
4                   And we will take a break and come back when we  
5                   can line up the next group here. Thanks so  
6                   much.

7                   (Whereupon, the foregoing meeting  
8                   went off the record at 2:43 p.m. and went back  
9                   on the record at 2:58 p.m.)

10                  PROF. HILLMAN: Thank you,  
11                  everybody. Some return players, other new  
12                  faces. We are grateful for your time and  
13                  attention this afternoon. Because we are  
14                  running a little late, you have had to wait  
15                  and I regret that. And so we don't keep  
16                  anybody here too long, let's just try to set  
17                  out what we are aiming at here.

18                  If we take about 75 minutes for  
19                  this session, an hour and 15 minutes that  
20                  would work, I think to get the perspective  
21                  from each of the services here. If we could  
22                  aim for about 15 minutes from each of the

1 services here, which leaves lots of time for  
2 the Marine Corps, I have to say. So, if you  
3 could just expand at great lengths.

4 And we don't have actually any  
5 Navy folks here. You will have to speak on  
6 their behalf. Oh, you are? So, we had it --  
7 so you are not on. So then it will. So, we  
8 will give the Marine Corps slightly less time  
9 but we will give the Navy 15 minutes, then,  
10 too because you are both representing the  
11 Navy. Okay.

12 So, let's just start from the left  
13 and move across here. And if you discussed  
14 amongst yourself how to split up the time, we  
15 are happy to go with that allocation of time  
16 that you have. So, Mr. O'Brien, are you first  
17 for us?

18 MR. O'BRIEN: Yes, ma'am. I  
19 probably should start by saying I am appearing  
20 in my individual capacity and my remarks  
21 reflect my own thoughts and opinions and  
22 certainly should not be attributed to the

1 Chief of the Trial Defense Service or any  
2 other judge advocate.

3 Before assuming my current  
4 position, I served in the Army on active duty  
5 for 26 years. And 18 of those 26 years were  
6 as a judge advocate. I served as a prosecutor  
7 for two years. I spent a total of six years  
8 as a defense counsel serving as senior defense  
9 counsel, regional defense counsel and then as  
10 a Deputy Chief of the Trial Defense Service.  
11 I served as a military trial judge for five  
12 years and I also taught at the JAG school for  
13 two years.

14 After retiring from active duty, I  
15 assumed my current position and I have been  
16 doing this for three years now.

17 I have had absolutely no regrets  
18 about retiring and becoming a member of the  
19 Defense Counsel Assistance Program. The role  
20 of the defense counsel is more important today  
21 than at any time in the history of the Uniform  
22 Code of Military Justice.

1                   At its inception, UCMJ was  
2 criticized for its lack of due process. The  
3 Military Justice Acts of 1968 and 1983  
4 addressed those criticisms and created a fair  
5 system to properly balance the need for  
6 discipline in the force and the accused's  
7 right to a fair trial.

8                   In my opinion, the UCMJ has  
9 suffered some ill-conceived and hasty  
10 amendments over the last seven years that  
11 threaten to upset this balance and the threat  
12 is not to tip the balance in the favor of the  
13 accused.

14                   Despite these changes, defense  
15 counsel flourish. Defense counsel continues  
16 to succeed, despite public statements by  
17 elected officials seemingly intended to affect  
18 court personnel and to threaten more changes  
19 if the perceived problem isn't fixed. I am  
20 proud to support the Army defense counsel who  
21 practice in a venue that is increasingly  
22 hostile to soldiers accused of certain

1 offenses.

2 The defense counsel is the last  
3 safeguard against injustice. And our defense  
4 counsel are, generally, inexperienced when  
5 they assume their duties. And so it is  
6 imperative that we compensate for this lack of  
7 experience through training. And I am happy  
8 to appear here today to answer your questions  
9 and to talk about our training programs.

10 PROF. HILLMAN: Thank you. Mr.  
11 White?

12 MR. WHITE: I am Ronald White.  
13 Again, I am also appearing in my individual  
14 capacity. I work with Mr. O'Brien in Army  
15 DCAP and I appreciate you all letting me come  
16 and give you my own thoughts.

17 Beginning in 1968, I served 32  
18 years on active duty. I have been a private,  
19 a sergeant, an artillery officer, a judge  
20 advocate. I finished my service with 54  
21 months as a military judge. I have been a  
22 prosecutor and a defense counsel, staff judge

1 advocate, OTJAG crim law.

2 When I retired, I worked at the  
3 Court of Appeals for the Armed Forces for two  
4 years and I worked at the Military Commissions  
5 for four years.

6 I have been with the Defense  
7 Counsel Assistance Program for almost two  
8 years. And I am in one of the two GS  
9 positions that are colloquially referred to as  
10 HQEs, although we are actually GS employees.

11 As you heard from the Colonel, we  
12 divide our time between just-in-case and just-  
13 in-time training. I won't go in-depth on  
14 that, since she did. We have several courses  
15 that we teach. We will do a couple more at  
16 the end of this month.

17 The HQEs, also, we are responsible  
18 for a couple of very important aspects of our  
19 training. We prepare written products  
20 offering advice on current events and issues.  
21 In fact, last Friday we sent out a 30-some  
22 page analysis of the 2014 NDAA, just those

1 provisions related to the military justice  
2 aspect, along with recommendations in how to  
3 handle it and plans and schemes.

4           Primarily, though, we also assist  
5 defense counsel in one-on-one or one-on-two  
6 training, usually privileged case-related  
7 stuff that can be in the form of emails, phone  
8 calls, face to face. We frequently review or  
9 provide written products to counsel in the  
10 field. It can range from something as simple  
11 as citations of authority to proposed voir  
12 dire questions, briefs, proposed arguments.  
13 We frequently discuss strategy on cases with  
14 counsel.

15           And our training, I have to say,  
16 is largely driven, as it should be, by the  
17 types of cases we see. Too frequently, at  
18 least in the two years I have been there, we  
19 see overcharging and prosecutorial  
20 overreaching. If a statute prohibits the  
21 touching of the buttocks then it would also be  
22 a crime to touch the stomach. If possession

1 of child porn violates the statute, then so  
2 must possession of child erotica and so forth.

3 I think many a counsel that we see  
4 seem to be in a competition to create  
5 appellate issues. I always thought that was  
6 TDS job but we are getting some help these  
7 days.

8 In many cases, though, the  
9 willingness to push the envelope on that side  
10 gives our counsel and opportunity to win on  
11 some of the more important cases. And so our  
12 training tends to focus on that, on sometimes  
13 taking care of that which isn't important and  
14 moving on to that which is.

15 This year, our training efforts  
16 will definitely be affected by the NDAA  
17 statute, both as to the intended and  
18 unintended consequences of that law. Frankly,  
19 if SJAs were recommending litigation of weak  
20 cases before NDAA, we could get a whole new  
21 meaning. That is going to make both our short  
22 and long-term training easier in one regard

1           because this is the defense work  
2           counterpunches. Rather than repeatedly coming  
3           up against a well-constructed case with  
4           acquittals being rare, we are repeatedly  
5           seeing young defense counsel getting  
6           acquittals at an unprecedented rate that  
7           energizes them. It gives them some training  
8           and it has the unintended consequence, I  
9           think, sometimes while you are giving those  
10          counsel experience, you are also sometimes  
11          convincing the court members that they don't  
12          necessarily need to trust the government case  
13          that they see coming forward. I do think  
14          there is a drop in confidence that we are  
15          seeing sometimes in court members in what they  
16          expect to see from the government.

17                   Our training efforts have to  
18          differ from those of what you would see in  
19          state and federal defense organizations to  
20          account for the comparatively low level of  
21          evidence in many of the sexual offenses now  
22          being tried by court-martial. This is not to

1           scoff at cases in which there has been great  
2           harm, shattered dignity, and ruined lives.  
3           But all too often, it is obvious that either  
4           or both parties were guilty of drunken sex to  
5           both be charged under the nebulous 2012  
6           Article 120 or the proof is so weak that any  
7           comparison with cases tried in state and  
8           federal court just isn't worth making. So,  
9           our training methods don't mirror those that  
10          you will see in the civilian world.

11                         Just to mirror what Mr. O'Brien  
12          said, we are seeing an unprecedented level of  
13          influence. I think everybody knows that.  
14          Statements from officials that in the past  
15          would have just not been made are being made.  
16          We are feeling the effect of those down to  
17          individual trials. Individual judges are  
18          making some rulings that we wouldn't have seen  
19          in the past.

20                         We have a serious national problem  
21          of non-consensual sex offenses. We have  
22          soldiers who are committing serious sex

1 offenses and deserve to be convicted and  
2 punished. That is the problem but it seems  
3 that dismantling the military justice system  
4 has been the answer. And from our opinion, it  
5 is not. I think we are moving ever closer in  
6 both sex related cases to the Supreme Court  
7 1969 criticism of our courts-martial as being  
8 quote "marked by the age-old manifest destiny  
9 of retributive justice."

10 Thank you. Those are my personal  
11 thoughts.

12 PROF. HILLMAN: Thank you, Mr.  
13 White. Ms. Tullius.

14 MS. TULLIUS: Hi, I am Sandra  
15 Tullius. Thank you for the opportunity to  
16 come here. I don't know if I am speaking on  
17 my personal behalf but it is going to be a  
18 little different than what you just heard.

19 I have been a prosecuting attorney  
20 for almost a quarter of a century. I began my  
21 career in a little four-person shop up in  
22 northeastern Connecticut. I moved to direct

1 a statewide statutory rape unit for the entire  
2 State of Connecticut and finished my time as  
3 a Connecticut prosecutor in its state capital  
4 for the Judicial District of Hartford. I  
5 have, in my time, prosecuted everything from  
6 barking dog complaints to capital felony  
7 murder.

8 I spent ten years as an adjunct  
9 faculty at Eastern Connecticut State  
10 University, where I taught sociology and  
11 criminal law classes.

12 During my career as a prosecutor,  
13 I was able to teach and train for both our  
14 local prosecutors annually and also at the  
15 national level with the National District  
16 Attorneys Association on many, many occasions.  
17 This was trial advocacy training, as well as  
18 areas of child abuse, domestic violence,  
19 computer-facilitated crimes, homicide, sexual  
20 assault. I am also a certified police trainer  
21 and taught at our local and state police  
22 academies and trained our Department of

1 Children and Families, medical and other  
2 professionals with regard to sexual assault  
3 and child abuse.

4 I have helped develop curriculums  
5 for courses conducted in partnership with the  
6 Connecticut Sexual Assault crisis service and  
7 wrote portions of a manual on how to  
8 investigate and prosecute crimes involving  
9 sexual assault.

10 In 2009, July of 2009, I left my  
11 position as a Senior Assistant State's  
12 Attorney and joined the Army. There were  
13 three of us at the time, myself, Ms. Healy  
14 Ryan, and also Mr. Roger Caniff. Ms. Healy  
15 Ryan and I are the remaining, at this time,  
16 two standing HQEs and we are really busy. We  
17 are really busy.

18 We decided to split up our time  
19 talking about what we do. So, I want to talk  
20 a little bit about some of the more hands-on  
21 stuff that we engage in.

22 When we began in 2009, the Army

1 had introduced the first Special Victim  
2 Prosecutors Program. At its induction, there  
3 were six SVPs, prosecutors that were and still  
4 are hand-picked by TJAG and identified because  
5 of their unique abilities as trial attorneys,  
6 trainers, and mentors for trial counsel that  
7 are around the world. That six has now grown  
8 to 24 SVPs and again, their jurisdiction spans  
9 the globe. Some of our busier jurisdictions,  
10 we have actually now assigned two SVPs to a  
11 single jurisdiction.

12 They range in rank from captain to  
13 lieutenant colonel and they are tasked with  
14 the prosecution of sexual assault, child  
15 abuse, and domestic violence cases. They work  
16 under the auspices of Trial Counsel Assistance  
17 Program and they are an additional asset to  
18 the local installation. And they are in their  
19 billets for three years, which is something  
20 that is different than the usual trial counsel  
21 spots. So, they become sort of the historical  
22 aspect of that and, as we are learning, Ms.

1 Ryan and I are also, we are becoming that  
2 history, too.

3 The SVPs, some of them have co-  
4 located themselves with the CID and in fact in  
5 one installation up at JBLM, which is Joint  
6 Base Lewis-McChord up in Seattle, a SHARP  
7 Resource Center has been developed by a former  
8 SVP, a Lieutenant Colonel Rob Stelle and that  
9 is actually a one-stop shop. It is a true  
10 justice center for victims where they can come  
11 into one place and it is law enforcement, the  
12 victim advocates, the trial counsel, the SVP.  
13 There are places for counseling. There are  
14 places for interviews and medical folks are  
15 there as well. So, it is a one-stop shop for  
16 a victim to come in and to deal with a  
17 potential case.

18 Our SVPs are part of their  
19 installation SARTs and they just are utilized  
20 as the subject matter experts around the  
21 installation.

22 Our SVPs have developed their own

1 trainings. And I don't know if Colonel  
2 Calarco talked about this at all.

3 PROF. HILLMAN: A little bit.

4 MS. TULLIUS: Okay. They call  
5 them SARTs and the SARTs bring commanders and  
6 others involved in a sexual assault case into  
7 one place and they, for two to three days,  
8 they actually have a training that starts and  
9 finishes how a sexual case -- how a sexual  
10 assault complaint makes its way through the  
11 system. So they hear from each of the  
12 distinct disciplines that are involved in a  
13 particular case, what they do, where they are  
14 located, what their particular roles are.

15 There will also be practical  
16 exercises and this is training that is done  
17 for commanders on a particular installation  
18 or, the most recent one that I attended  
19 actually with Mr. Strand, was for all of  
20 USAEUR, so all of the Europe commanders were  
21 there. And it was very rewarding to have a  
22 one-star general and also a command sergeant

1 major come up and indicate that it was the  
2 best training that they had attended in their  
3 many, many years in the Army. So, it was  
4 really an overview of how a case goes, also  
5 talking about offender characteristics, victim  
6 behavior issues, et cetera, et cetera, et  
7 cetera.

8 I work with TCAP. TCAP is the  
9 Trial Counsel Assistance Program and we  
10 provide the training to the field.

11 There are two of us, as I said,  
12 two HQEs at TCAP. We have a chief and a  
13 deputy. We also have five experienced  
14 captains that are part of TCAP and we also are  
15 a part of the government appellate division.  
16 So, we also have the resources that are  
17 available to us through there. TCAP, our  
18 mission is to train, train and assist trial  
19 counsel around the world. We, on a daily  
20 basis handle email and telephone calls from  
21 trial counsel just asking questions on how do  
22 I lay a foundation for this or some of the

1 more intricate issues that may arise in a  
2 criminal case.

3 But it is not just answering a  
4 question. These are folks that are a lot of  
5 times in crisis when they are calling. They  
6 are in the middle of a trial and a judge has  
7 just put them on the spot with something. And  
8 they have an hour or two or maybe a day to  
9 answer a question. And so, they are using the  
10 resources that are available to them and it is  
11 not just their senior trial counsel, their SVP  
12 or their chiefs of justice. They are calling  
13 on TCAP and saying, hey, can you help us.

14 And that is what we do. We get  
15 back to them. We answer their questions and  
16 we kick around the issue. We send them  
17 motions if they need a motion. We send them  
18 written product if they need the written  
19 product. But we answer those questions. So,  
20 that is just sort of what we do on a daily  
21 basis.

22 We all carry a BlackBerry. We are

1 on-call basically 24 hours a day because it is  
2 unfortunate for those folks in Korea that need  
3 to get us in the middle of the night. We  
4 answer their calls. So, we are there for them  
5 and that is one of the things that we strive  
6 to do.

7 The Trial Counsel Assistance  
8 Program is also the data bank for the trial  
9 counsels. We send out TCAP Expresses, which  
10 we cover the topics that are hot, court  
11 decisions that might have an immediate impact  
12 on the field. We do a quarterly newsletter.  
13 We also started a new site on the milBook  
14 Suite for trial counsels, which has many  
15 topics. We collect data from the field, put  
16 up resources, as far as experts, voir dire  
17 questions, et cetera, et cetera. We are also  
18 in the process of uploading some of the  
19 vignettes that cover advocacy exercises as  
20 just a simple how to. So if somebody needs to  
21 again, how do I lay a foundation for a  
22 picture? They can actually watch a how to on

1 the computer.

2 We conduct outreaches. An  
3 outreach is basically what an installation  
4 wants it to be. This is when they take one of  
5 us, either Ms. Ryan or myself and one or two  
6 training officers. And we go out and we spend  
7 a week at an installation with their trial  
8 counsel, with oftentimes law enforcement, and  
9 generally their paralegals.

10 Our outreaches have taken us  
11 around the globe. Both Ms. Ryan and myself  
12 have found ourselves in Iraq, Afghanistan,  
13 Korea, Japan, and I think we have hit every  
14 installation in the continental United States.  
15 I actually just got back yesterday morning  
16 from Alaska. It was warmer there.

17 PROF. HILLMAN: Just so Ms. Ryan  
18 has enough time, I just wanted to just queue  
19 the time for you.

20 MS. TULLIUS: Okay. The other  
21 thing we do, is we do -- Ms. Ryan and I also  
22 do direct assistance on cases, where we will

1           actually go and hopefully give those trial  
2           counsel our expertise, some of our expertise  
3           in putting together a trial. These are not  
4           just the high-profile cases. We will assist  
5           them on any case where they need us to come  
6           and help them. And we will start with  
7           investigation and follow it all the way  
8           through the trial itself, sit behind the bar  
9           and actually give advice and work with the  
10          trial counsel throughout the course of the  
11          trial itself. Which, I know for both of us  
12          being old trial dogs, that is a lot of fun  
13          because it is getting back in the courtroom,  
14          even though we are not standing in front of  
15          the bar, but it is actually helping with the  
16          presentation of sexual assault and other  
17          cases.

18                       COL HAM: Ms. Tullius, may I ask  
19                       you a quick question?

20                       MS. TULLIUS: Sure.

21                       COL HAM: How would you, based on  
22                       all your civilian experience and now your

1 military experience, how would you compare the  
2 training that you see judge advocates get,  
3 compared to training that either you gave or  
4 that you received as a civilian counsel?

5 MS. TULLIUS: Well, I can tell you  
6 that when I came into prosecution, I was given  
7 a stack of files. My first day, I am given a  
8 stack of files. I am given a statute book and  
9 I am told to read these and go and watch other  
10 people in court and on Thursday, you will have  
11 your first trial.

12 So that was kind of the way it  
13 started. I was very fortunate I had really  
14 good mentors that I was able to look to and I  
15 try and now give that back myself. But as  
16 time went on, we developed some training. A  
17 lot of the training was self-generated, where  
18 I would go to the NDAA myself. But I have to  
19 say that once the National Advocacy Center  
20 closed up for state prosecutors, it really  
21 took a bite because we did not have the  
22 resources to send state prosecutors.

1                   There is an annual two-day  
2                   training that Connecticut prosecutors get and  
3                   other than that, we are finding workspace so  
4                   we will have a training on how to interview  
5                   kids.

6                   But for the most part, what I am  
7                   seeing here in training just for our young  
8                   trial counsel and our SVPs, is huge, compared  
9                   to anything that I ever got in the civilian  
10                  context. So, it has been a lot of fun for me.  
11                  I used to be a teacher before I was a lawyer  
12                  and so it is fun to get back into the teaching  
13                  as well as the assisting on the cases.

14                  PROF. HILLMAN: Thank you. Ms.  
15                  Ryan?

16                  MS. RYAN: Good afternoon. My  
17                  name is Bridget Ryan and I am one of the two  
18                  prosecution HQEs for the Army. I took this  
19                  position almost five years ago after 16 years  
20                  with the Cook County State's Attorney's  
21                  Office, which is in Chicago, where it is  
22                  actually colder. They actually closed school

1           until Wednesday, which is unprecedented.

2                       During my tenure as a prosecutor  
3           there, just like Ms. Tullius and as you will  
4           hear from Ms. Scalzo, we have tried everything  
5           from, I say petty theft, she says dog bites --  
6           I think she might say traffic, I'm not sure,  
7           all the way through to murder. I found out  
8           pretty early on that my passion was domestic  
9           violence and sexual assault, so I spent most  
10          of my 16 years in violence against women  
11          crimes.

12                      I eventually became one of the  
13          supervisors of the Domestic Violence Division  
14          and ended my career in Cook County as the  
15          Violence Against Women Policy Advisor to the  
16          elected State's Attorney. So, I dealt with  
17          all of the policy level actions lobbying laws,  
18          things like that, and advised him on  
19          everything that had to do with the Domestic  
20          Violence Division and the Sexual Assault  
21          Division.

22                      During my time as a prosecutor

1           there, I was lucky enough to have met Ms.  
2           Scalzo, who at the time was working for NDAA,  
3           and I rode her coattails quite efficiently, as  
4           she was, and I know she will talk about it,  
5           doing a lot of really good curriculum  
6           development. So, I was able to be a part of  
7           that faculty under her tutelage.

8                         I mention that only because I  
9           haven't had an original idea since like 1987.  
10          So, I just surround myself with really smart  
11          people. When I came to the Army, we actually  
12          took the model of the National Institute on  
13          the Prosecution of Sexual Violence. We worked  
14          with AEquitas and I know that you heard from,  
15          I believe, Chris Mallios earlier. And we  
16          developed the military institute on the  
17          prosecution of sexual violence. And since  
18          then, I have morphed it into what we call  
19          ESSAP, which is the Effective Strategies for  
20          Sexual Assault Prosecution.

21                         We have about 400 trial counsel at  
22          any time that we have to train. So you can

1           imagine that our actual training calendar is  
2           very robust. Once a judge advocate is  
3           identified as a trial counsel or about to be  
4           a trial counsel, we work very hard to get them  
5           into one of two basic courses, the  
6           intermediate trial advocacy class, which is  
7           probably what Colonel Calarco talked about,  
8           which is at the school or a TCAP class, which  
9           is called the New Prosecutors Course.

10                   The New Prosecutors Course has two  
11           components. The first component is Trial  
12           Counsel 101, where we teach them about how to  
13           advise a commander, admin separation boards,  
14           discovery, just kind of the nuts and bolts of  
15           how to be a trial counsel.

16                   The second part, though, is the  
17           part that I love the most, and that is the  
18           ESSAP portion. And in that portion, we teach  
19           young trial counsel before they have the  
20           ability to form any type of like bad habits or  
21           bad opinions about these cases. We try and  
22           beat it out of them, for lack of a better

1 word. We all come to these cases with biases.  
2 I know I did as a young prosecutor. It wasn't  
3 until an advocate came up and hit me upside of  
4 the head and told me what are you doing. I  
5 know you care but you are not going about it  
6 the right way.

7 So, we bring in some of the top  
8 experts in the country in forensic psychiatry,  
9 Sexual Assault Nurse Examiners, and we teach  
10 them about what it means to a victim, how to  
11 deal with victim dynamics, how to look at an  
12 alcohol-facilitated sexual assault in a  
13 special way because those are the cases that  
14 we are seeing.

15 COL HAM: How long is the course?

16 MS. RYAN: It is five days total.

17 So, it is not a trial ad class. It is  
18 basically all about attitude. It is about a  
19 paradigm shift in the way that you look at a  
20 case and basically telling them you can get --  
21 you don't have to look at this case and think  
22 I can't get past this. As I like to say,

1           there is no bad facts. There is only  
2           challenging facts and that is what try and get  
3           across to them during this.

4                       After that, if you look at kind of  
5           our pyramid, the next type of training that we  
6           would have for someone who is interested in an  
7           SVP track or just a sexual assault track is a  
8           sexual assault trial advocacy class. It is a  
9           two-week class that is conducted with DCAP.  
10          So, we have got defense counsel and trial  
11          counsel, where they work with one fact pattern  
12          and they do plenary sessions, intermixed with  
13          actual advocacy exercises. So it is the first  
14          time we actually get them up on their feet and  
15          we tell them, learn how to put a picture in.  
16          Learn how to chain of custody. Learn how to  
17          do character evidence. Learn how to pick a  
18          jury. We make them actually get up and do  
19          that. So, that is a two-week class that is  
20          very well staffed with all of the top military  
21          justice people, in my opinion, in the Army,  
22          the RDCs, the Regional Defense Counsel, and

1 the SVPs, the senior trial counsel, the senior  
2 defense counsel, and obviously, all of DCAP  
3 and TCAP.

4 We have a lot of other trainings  
5 that actually go right to it. And I will  
6 just, off the top of my head, we have got the  
7 advanced advocacy, which is more of a form of  
8 communication, so it is not really trial ad.  
9 It is just how to learn to communicate within  
10 the courtroom. One of them is taught by an  
11 actor, another one is taught by Edie  
12 Youngquist who is out of, I believe, Pima  
13 County. Neither one are lawyers but they do  
14 teach them very good communication skills.  
15 And I think that this especially important in  
16 these types of cases in sexual assault.  
17 Because what we teach them, especially  
18 starting in ESSAP is, in order to effectively  
19 get the panel to understand what this person  
20 went through that night, you have got to  
21 recreate the reality. And I think that the  
22 best way to do that is through communication

1 in the courtroom. So we find that those  
2 particular courses can be very, very helpful  
3 in terms of developing advocacy skills for  
4 these young trial counsel that are actually  
5 finding themselves trying a sex case.

6 We have four regional conferences  
7 that usually have specific bents. One will be  
8 child abuse and child sexual abuse, one will  
9 be domestic violence and intimate partner  
10 sexual assault. One will be complex  
11 litigation, where we will talk about multiple  
12 accused or multiple victims. So, there is  
13 always an aspect in our four regional  
14 conferences where we are trying to get  
15 something out there.

16 Also another joint training we do  
17 is the expert symposium, where will bring in  
18 all the top experts in the country about  
19 things like sex offender characteristics, PTSD  
20 and TBI, false confessions, toxicology,  
21 computer forensics. We do a plenary and then  
22 we have an opportunity for each side to break

1 out so they can ask their own particular  
2 questions and don't have to worry about asking  
3 in a mixed group.

4 PROF. HILLMAN: Thank you, Ms.  
5 Ryan. I am afraid we are going to have to ask  
6 you to answer the questions, too, for the rest  
7 of what you would like to say, just to make  
8 sure we have time for the other folks. But I  
9 appreciate all that work and we will hear from  
10 you now, Ms. Scalzo.

11 MS. SCALZO: Professor Hillman,  
12 distinguished members of the panel, good  
13 afternoon and thank you for the opportunity to  
14 discuss trial counsel training with you.

15 My name is Teresa Scalzo. I am in  
16 my 24th year of practicing law. I began my  
17 career in Northampton County, Pennsylvania,  
18 where I spent two and a half years as a public  
19 defender and nearly five as a prosecutor. I  
20 handled everything from traffic to homicide  
21 but my primary role was as Chief of the Sex  
22 Crimes Unit.

1                   After serving as a prosecutor, I  
2                   worked for the National District Attorneys  
3                   Association for six years first as their  
4                   policy attorney, and later as the Director of  
5                   the National Center for the Prosecution of  
6                   Violence Against Women.

7                   I then spent two years at OSD  
8                   SAPRO as their Senior Policy Advisor and  
9                   finally moved to Navy JAG in 2009, where I was  
10                  initially in the Criminal Law Policy Division  
11                  OJAG Code 20 and I am now the Deputy Director  
12                  of our Trial Counsel Assistance Program.

13                  During my time at the National DAS  
14                  Association, I developed or oversaw the  
15                  development of five national courses for  
16                  prosecutors. Two of the courses, Sexual  
17                  Assault Trial Advocacy and Evidence-Based  
18                  Prosecution were trial advocacy courses for  
19                  the National Advocacy Center. Sexual Assault  
20                  Trial Advocacy was, in fact, the first  
21                  national trial advocacy course focused solely  
22                  on non-stranger sexual assault.

1 I oversaw the development of two  
2 courses funded by the Department of Justice  
3 Office on Violence Against Women, the National  
4 Institute on the Prosecution of Sexual  
5 Violence and the National Institute on the  
6 Prosecution of Domestic Violence. I developed  
7 a course called Sexual Assault Prevention and  
8 Response Training for JAG Officers.

9 In addition I was the course  
10 director of at least a dozen other courses,  
11 including faculty development for the National  
12 Advocacy Center. I served on the Curriculum  
13 Development Committee for the National  
14 Advocacy Center, the National Juvenile Justice  
15 Prosecution Center, and the National Traffic  
16 Law Center. I have lectured at more than 200  
17 conferences across the nation, including  
18 training with all of the services.

19 In addition to my experience as a  
20 trainer, I have published numerous articles,  
21 book chapters, and manuals primarily on  
22 prosecuting sexual assault.

1                   In 2007, while at the National DAs  
2                   Association, my manual "Prosecuting Alcohol-  
3                   Facilitated Sexual Assault" was published by  
4                   the National DA's Association in partnership  
5                   with the Department of Justice. I am also  
6                   major contributing author for the Pennsylvania  
7                   bench book on sexual violence.

8                   Working at the National DA's  
9                   Association taught me a lot about the  
10                  effective training of prosecutors because at  
11                  that time, we did a research and evaluation  
12                  unit that assessed each course to determine if  
13                  it was effective in meeting the course  
14                  objectives. All the civilian courses  
15                  mentioned above were evaluated and honed until  
16                  they reached the maximum level of  
17                  effectiveness. Unfortunately, the research  
18                  unit at NDAA no longer exists and, as I  
19                  mentioned earlier, the state-side of the  
20                  National Advocacy Center is closed.

21                  The institutes that were developed  
22                  during my tenure at the National DAs

1 Association are now being run by AEquitas. I  
2 believe Ms. Kristiansson discussed them  
3 earlier today.

4 The current training being offered  
5 to Navy trial counsel is as effective as any  
6 offered in the civilian world. Prosecuting  
7 Alcohol-facilitated Sexual Assault is our  
8 premier trial advocacy class and it is focused  
9 on sexual assault and run at the Naval Justice  
10 Center and its primary audience are,  
11 obviously, the sea service prosecutors.

12 I designed the curriculum and  
13 modeled the course after Sexual Assault Trial  
14 Advocacy, one of the National Advocacy Center  
15 courses. The original focus of the course was  
16 the consent defense. It has been expanded to  
17 have a stronger emphasis on alcohol, due to  
18 its high prevalence in our cases.

19 The Naval Justice School  
20 contracted with AEquitas to provide expert  
21 faculty, in addition to the Navy and Marine  
22 faculty, which ensures that students receive

1 training from our nation's experts. We bring  
2 in experts to play the various roles in the  
3 trial advocacy exercises, including Sexual  
4 Assault Nurse Examiners, NCIS agents, victim  
5 advocates, toxicologists and forensic  
6 psychiatrists.

7 Now that the state side of the  
8 National Advocacy Center is closed, I am not  
9 aware of any national level trial advocacy  
10 courses focused on sexual assault prosecution  
11 currently being offered, which makes  
12 comparison to civilian training quite  
13 difficult. However, as I stated, this course  
14 is very similar to the course that we used to  
15 run at the National Advocacy Center.

16 As the panel learned previously,  
17 our trial counsel also attend a two-week  
18 Special Victims Investigation Unit Course at  
19 either Fort Leonard Wood or with NCIS at the  
20 Federal Law Enforcement Training Center. This  
21 course is very similar to the Institutes now  
22 being run by AEquitas in the way it educates

1 people about trauma and its impact on victims  
2 and the way it debunks the fallacy of sexual  
3 assault myths.

4 Finally, TCAP hosts webinars on  
5 various relevant topics through the year and  
6 we visit every trial shop once a year for on  
7 the ground interactive training on areas of  
8 current need, as well as hands-on assistance  
9 with cases.

10 In addition to the more formal  
11 training mentioned above, TCAP provides daily  
12 case consultation and assistance to our trial  
13 counsel worldwide. In this way, we are able  
14 to mentor and train our counsel in a way  
15 specific to the cases that they are handling.  
16 We maintain a SharePoint website where sample  
17 motions and briefs are available, as well as  
18 links to training and other resources in a  
19 discussion board where counsel can reach out  
20 to their colleagues.

21 We assist with victim interviews,  
22 provide advice in trial strategy, and provide

1 other expert assistance as needed.

2 I am proud to say that in my five  
3 years with the Navy, I have seen an immense  
4 improvement in the way these challenging cases  
5 are handled. I believe our training and the  
6 establishment and resourcing of TCAP is one of  
7 the primary reasons for this improvement. I  
8 look forward to answering your questions.

9 PROF. HILLMAN: Thank you. Mr.  
10 Puckett.

11 MR. PUCKETT: Good afternoon.  
12 Nice to see you again, Dean Hillman.

13 I am Neal Puckett, the highly  
14 qualified expert for the Navy Defense Counsel  
15 Assistance Program. I am in my 30th year of  
16 the practice of military or federal law,  
17 federal criminal defense law and my 60th year  
18 of life experience. I have five  
19 grandchildren.

20 During my 20 years in the Marine  
21 Corps, I served as an intelligence and  
22 counter-intelligence officer, a military

1 defense counsel, a prosecutor, an advisor to  
2 a general court-martial convening authority.  
3 I also served five years as a military judge.

4 In addition to my bachelor's and  
5 law degrees, I hold an LL.M. in criminal law  
6 and a master's degree in national security and  
7 strategic studies from the Naval War College.

8 I have supervised both prosecutors  
9 and defense counsel and defended a capital  
10 murder case. Upon my retirement in 1997, I  
11 served 14 months as an assistant federal  
12 public defender in Pensacola, Florida,  
13 defending felony cases in federal court.

14 I launched a solo practice in  
15 military criminal defense law in the spring of  
16 1999, gradually building it into a four-  
17 attorney firm and continued defending  
18 servicemembers facing courts-martial until I  
19 was hired by the Navy into this HQE position  
20 in December of 2012.

21 Before accepting the HQE position,  
22 I presided over 542 cases as a military judge

1 and litigated a total of 646 as a prosecutor  
2 or defense counsel.

3 Commander Don King, my boss, DCAP  
4 Director, provided detailed information on  
5 formal and informal training of defense  
6 counsel assigned to sexual assault cases last  
7 month in Austin. So, I won't re-cover that  
8 information.

9 This afternoon, I will address the  
10 necessary level of experience for defense  
11 counsel assigned as lead counsel to sexual  
12 assault cases, as well as best practices for  
13 training those counsel. I will close by  
14 noting training challenges faced by the Navy  
15 defense bar. The views I express, of course,  
16 are my own and no one else's.

17 As a Marine Corps Judge Advocate,  
18 I was privileged to have benefited from ample  
19 training opportunities and budget which  
20 allowed us to attend many military and  
21 civilian continuing legal education seminars.  
22 This was back in the '80s. I can recall

1           spending two weeks at the University of  
2           Houston Law School, attending the career  
3           prosecutors course offered by the National  
4           College of District Attorneys. Others  
5           included week-long seminars, including  
6           prosecuting drug cases, trial strategy and  
7           techniques, and prosecution of violent crime.

8                       As a defense counsel, I attended  
9           courses in defending drug cases, latest trends  
10          in use of forensic evidence and defending  
11          sexual assault cases, which were offered by  
12          the National Association of Criminal Defense  
13          Lawyers or similar organizations. I also  
14          attended several courses at the Army JAG  
15          school in Charlottesville and the Naval  
16          Justice School in Newport, Rhode Island.

17                      During my last tour, I attended a  
18          four-day capital litigation defense course at  
19          the Naval Justice School in preparation for my  
20          capital defense case during my last tour in  
21          the Marine Corps.

22                      Today, our counsel must get by on

1 much smaller training budgets for reasons we  
2 all understand. That means it is up to those  
3 of us in the training business to make  
4 opportunities we still have the very best they  
5 can be. We have to stretch our dollars. I  
6 believe that the training provided to our  
7 defense counsel at various stages in their  
8 tenure as litigators is robust, effective, and  
9 sufficient to meet their continuing legal  
10 education needs, so long as we are able to  
11 continue to fund the trips that are necessary  
12 for that training.

13 I also believe that best practices  
14 in litigation training must include on-site,  
15 hands-on, eyes-on training of counsel in the  
16 manner DCAP provides during our mobile  
17 training team visits, also described by  
18 Commander King.

19 Teaching counsel litigation  
20 concepts and then having them practice those  
21 concepts under the watchful eye of an  
22 experienced litigator and their peers,

1           optimally with an actual current case at that  
2           command is mission essential in the  
3           development of effective courtroom advocates.  
4           This training cannot be provided by recording  
5           and posting videos on a website and expecting  
6           a counsel to sit at his or her desk in front  
7           of a computer monitor and acquire any kind of  
8           skills. It will just never work that way.  
9           There simply has to be an acknowledgment that  
10          advances in technological capabilities which  
11          save money, of course, cannot replace  
12          fundamental principles of human performance  
13          training, which means live action practice and  
14          critiques. Computer training never survives  
15          the first distraction. You wouldn't learn to  
16          fire a weapon from a computer monitor. What  
17          we teach is how to use the weapons of  
18          litigation, thus, my nickname, weapons expert.

19                    Although a small number of defense  
20          counsel have litigation experience prior to  
21          joining the Navy, not very many; most officers  
22          rotating out of their initial assignments as

1 judge advocates, which is kind of a trip  
2 through all of the functional areas so they  
3 get acquainted with what the Navy JAGs do,  
4 coming out of their initial assignments have  
5 yet to litigate a criminal trial. And that is  
6 two years' worth of just tiptoeing through the  
7 tulips, if you will.

8 DSO supervisors, Defense Service  
9 Office supervisors factor this lack of  
10 experience into detailing decisions, of  
11 course, providing careful supervision and even  
12 a more seasoned litigator to sit second chair  
13 when it is appropriate. Each DSO has officers  
14 qualified in the Military Justice Litigation  
15 Career Track Program in the Navy, who provide  
16 support as well, but there is no substitute  
17 for experience, as in most walks of life.

18 I can tell you from my 30 years of  
19 experience in military law that there is no  
20 such thing as a lawyer who is competent to  
21 handle solo his or her first trial if that  
22 first trial is a sexual assault case,

1           regardless of how many one has observed or how  
2           many administrative discharge boards one has  
3           conducted during their training program.

4                         In my opinion, no counsel should  
5           be detailed by him or herself to a client  
6           facing a sexual assault charge, unless that  
7           counsel has litigated at least ten contested  
8           trials as part of a defense team, more than  
9           half of which should have been sexual assault  
10          cases. That level of experience is often  
11          attained in the Navy only after serving 18  
12          months as a defense counsel because of the  
13          relatively low number of caseloads that they  
14          are carrying.

15                        In general, I believe that so long  
16          as our defense clients are provided with at  
17          least one experienced counsel for every sexual  
18          assault case, they are being effectively and  
19          competently represented. But we have seen  
20          several cases where an inexperienced counsel  
21          has been assigned alone to a sexual assault  
22          case and those cases have raised appellate

1 issues of ineffective assistance of counsel,  
2 potentially resulting in reversing the  
3 conviction.

4 As in other services, Navy defense  
5 counsel get good training and experience and  
6 become competent only to then move on to other  
7 assignments, often outside the courtroom.  
8 Thus, there is a continual need for training  
9 from the new batch of defense counsel we get  
10 every year, along with refresher training for  
11 those still in or returning to those trial  
12 assignments.

13 Last year we had to wait until a  
14 couple of days before each of our planned  
15 mobile training team visits to find out  
16 whether the travel would be approved due to  
17 funding constraints and many of the visits  
18 were delayed until the end of the fiscal year.  
19 Now admittedly, that was caused by  
20 sequestration but with shrinking budgets, I am  
21 concerned that there will be a call for  
22 eliminating our current best practices concept

1 of on-site, hands-on, eyes-on training of our  
2 defense counsel in the various critical skills  
3 they need to effectively represent their  
4 clients, merely to save money.

5 So our primary challenge for the  
6 future is continuing to find the resources to  
7 fund the critical training required to  
8 maintain the proficiency and all of the skills  
9 required to defend those sailors and Marines  
10 accused in our most complex and challenging  
11 cases, those alleging sexual assault.

12 I look forward to answering your  
13 questions.

14 PROF. HILLMAN: Thank you.  
15 Colonel Spath.

16 COL SPATH: Thanks, Professor  
17 Hillman, members of the panel.

18 Let me give you a brief  
19 introduction. I know you have got my bio  
20 submitted, so I won't go into a lot of detail  
21 but I know I am wearing a uniform here, unlike  
22 everybody else, at least for this part.

1                   I came in serving as an ADA in the  
2                   Bronx. So, I have some experience about what  
3                   it is like to be in a big city and I will tell  
4                   you, I think anyone here who has been a  
5                   prosecutor knows that since I was there young,  
6                   I did lots of small cases, not litigated,  
7                   guilty pleas. That is what they did in the  
8                   Bronx with young counsel. And I never gained  
9                   the experience there that I would have gained  
10                  in the Air Force. I would have, if I had  
11                  stayed there for 15 or 20 years because that  
12                  is when they probably would have sent me in to  
13                  litigate my first sexual assault. I know that  
14                  and I can see that and there is probably some  
15                  benefits to that practice, but I would suggest  
16                  that there is some benefit to ours as well.  
17                  And that is, that we get young energetic  
18                  people in the courtroom early with experienced  
19                  people to train them. So the Air Force was  
20                  kind enough to do that form, which is why I  
21                  came in, because I saw my future in the Bronx  
22                  with DUIs and some other lovely people.

1                   I have been a base level  
2                   prosecutor. I have been an area defense  
3                   counsel. I have been a regional prosecutor.  
4                   I have been a chief regional prosecutor. I  
5                   had the pleasure of serving as a regional  
6                   judge and a chief regional judge in the  
7                   Pacific, our largest geographic region and,  
8                   frankly, one of our busiest.

9                   Along with that, I have taught  
10                  down at the JAG School almost annually since  
11                  1995. And in cases or courses that involve  
12                  sexual assault and the litigation of sexual  
13                  assault, I have even taught with some people  
14                  here on the panel at a variety of cases. I  
15                  have put together conferences advocating and  
16                  dealing with sexual assault issues.

17                  So, I believe I have the  
18                  background. The Air Force took me away from  
19                  the judiciary briefly. We have heard some  
20                  discussion about how that happens in a normal  
21                  career progression. But I would assert to you  
22                  that there are people like me out there in the

1 military. I have spent 17 of my 22 years in  
2 litigation and I am not alone in the Air  
3 Force. I think Colonel Christensen has  
4 probably talked to you. He has a similar  
5 background. Colonel Eller in the Air Force  
6 has a similar background. I don't speak to  
7 other services. I don't know. I think it is  
8 out there and I think you can build it. But  
9 when I hear we don't have a career track, I  
10 agree we do not have a career track formally  
11 but there are those people out there and we  
12 are there to train and make sure that other  
13 people show up in our place when we retire,  
14 which of course for me is coming soon. I have  
15 two grandchildren.

16 So, as you look towards the end of  
17 your career, you are there to help. So the  
18 Air Force has made me the Director of Training  
19 and Readiness. I think the important part to  
20 understand what that offers because we don't  
21 have a TCAP program by name and we don't have  
22 a DCAP program by name is we have it in

1 practice. And this training and readiness  
2 concept that we have come up with and we have  
3 put my predecessor, who had a significant  
4 amount of litigation experience and myself in  
5 there. It gives you an interesting view  
6 because you all have already heard about the  
7 robust training programs offered by the  
8 different military services and that they  
9 overlap. I know you have heard it through  
10 other people before today and then you heard  
11 it right before I came in here to talk.

12 That comprehensive training  
13 program that was described to you in the Air  
14 Force and the other services is multi-  
15 disciplinary and I think it offers better  
16 training than exists typically in a civilian  
17 environment, again, because of dollars.  
18 Because while we are under stress for dollars  
19 in the federal government, we typically have  
20 more than state counterparts. That is been a  
21 fact for a long time with my friends who are  
22 there and then just by experience there and

1           our time there.

2                       Our counsel are almost  
3 continuously in training. And I think it is  
4 critical that they stay in training. If those  
5 dollars are cut, that is where the damage is  
6 going to come from to any prosecution or any  
7 defense.

8                       We also have, as you know,  
9 experienced advocates. We have our senior  
10 trial counsel, senior defense counsel, and we  
11 have our special victims counsel, and then we  
12 have our special unit prosecutors who deal  
13 with sexual assaults. Those are experienced  
14 advocates who have been through these training  
15 programs and they have the experience to train  
16 young counsel when they are sitting there as  
17 their first chair. We would never send  
18 anybody into a courtroom to litigate a sexual  
19 assault case by themselves, at least in the  
20 Air Force. Again, I hope that doesn't happen  
21 elsewhere. I am not going to speak to the  
22 other services.

1                   What my job then is, is to go out  
2                   and inspect at each base the provision of  
3                   legal services. We inspect all legal  
4                   services, not just military justice, but a key  
5                   component of what we inspect is legal services  
6                   related to military justice. So, we look at  
7                   the cases at each base as we go there. We go  
8                   there approximately every two years. And I  
9                   get a chance to see the records of trial. And  
10                  I get a chance to see the cases that they have  
11                  prosecuted and defended, and I get to  
12                  interview all the counsel there during the  
13                  inspection, which someone from my division  
14                  does that if I don't go.

15                  What we get to do with that is  
16                  then see if what you heard from Colonel  
17                  Theurer, the training that they are providing  
18                  is actually what is being demonstrated in the  
19                  field as competence. I saw Mr. Houghland in  
20                  here earlier. He assists with developing  
21                  those standards for the field, telling a  
22                  school, telling other people who do training,

1           because it is not just at the school, here is  
2           what we need in the field. And then my  
3           division goes out and assesses whether or not  
4           that is what they are getting and then we  
5           fine-tune it. And I think that feedback loop  
6           is unique in the Air Force right now and I  
7           think it really gives us some insight into how  
8           we practice military justice.

9                        I am not here to tell you that  
10           every case the Air Force prosecutes is done  
11           perfectly. I am not here to suggest to you  
12           that there is not problems that exist in any  
13           prosecution or defense role. They are  
14           everywhere. There are political pressures.  
15           There is reality. There is funding. There is  
16           cases that should or shouldn't go to trial.  
17           There is everything that goes into that and we  
18           all know it.

19                       I am here to tell you, though that  
20           having sat in all those different roles and  
21           having as a trial judge watched the practice,  
22           the military justice system is very strong.

1           And I don't say that because I am wearing a  
2           blue uniform, I am not going to get promoted  
3           again, I assure you. I promise. I promise,  
4           I promise. If I do, you can call me back here  
5           and tell me I lied. It won't happen. I am  
6           not going to get promoted again. I have  
7           nothing -- I am leaving the service at some  
8           point sooner than later, I think, and I can  
9           honestly tell you that the practice of  
10          military justice is strong and our advocates,  
11          over time, develop the experience they would  
12          gather in a civilian capacity. They don't get  
13          it originally. They certainly don't have it  
14          initially because the pace of practice is  
15          different. But the difficulty of some of  
16          those cases and the complexity of our cases  
17          are every bit the same as they are in a  
18          civilian capacity. And as we get people put  
19          against that in trial and defense roles, they  
20          develop the skill set that I know all of you  
21          have seen and they have the capability of  
22          doing that.

1                   So, I certainly look forward to  
2                   answering your question in a personal capacity  
3                   or you tell me which one you want. If you  
4                   want a personal opinion, I will give that to  
5                   you. If you want the Air Force opinion, I  
6                   think I can do that as well.

7                   Thank you.

8                   PROF. HILLMAN: Thank you for your  
9                   multiple hats. Ms. Coyne.

10                  MS. COYNE: Good day distinguished  
11                  panel members. Thank you for inviting me to  
12                  participate in this very important work. My  
13                  name is Kathleen Coyne. I am the sole highly  
14                  qualified expert for the entire Marine Corps  
15                  Defense Services Organization. I have been an  
16                  attorney since 1982. That is 32 years, for  
17                  those of you who are counting and I think that  
18                  puts me up on everybody in the room.

19                  I have practiced criminal defense  
20                  exclusively throughout my practice as both a  
21                  federal and state public defender in New York,  
22                  Pennsylvania, and California, where I was

1           named Public Defender of the Year.

2                       As a career public defender, I  
3           practiced in both small rural branches and  
4           major metropolitan areas of Philadelphia and  
5           San Diego. I have personally represented  
6           thousands of clients on charges from simple  
7           misdemeanors to capital murder.

8                       I have been qualified as the  
9           Strickland Expert in the area of ineffective  
10          assistance of counsel related to those accused  
11          of sex offenses in both state and federal  
12          court. I personally designed, stood up and  
13          supervised a training unit designed to  
14          transition junior misdemeanor attorneys to  
15          felony practice in a major public defenders'  
16          officer. I am a frequent trainer at public  
17          defender training venues in both California  
18          and nationally.

19                      I have been asked to defend the  
20          training of defense counsel to effectively  
21          represent servicemembers accused of sexual  
22          assault and to contrast that with best

1 practices that are currently employed in  
2 civilian defender offices. While the views I  
3 express are my own, they are informed by a  
4 lifetime spent in criminal defense.

5 At a minimum, I am going to ask  
6 this panel to make four key changes to equip  
7 the Marine Corps DSO to meet the challenges  
8 before us. One, you need to establish, you  
9 need to recommend -- I ask you to recommend  
10 funding and establishing an independent Marine  
11 Corps DSO training budget, including travel  
12 funds for the HQE. You also heard from  
13 Captain Shinn in Texas. He is the officer in  
14 charge of our DCAP program. He and I are it  
15 for the Defense Services Organization in the  
16 Marine Corps.

17 And I also recommend that you  
18 recommend budgeting for off-the-shelf civilian  
19 litigation skills programs, which I am going  
20 to talk about.

21 You should recommend lengthening  
22 the duration of the DSO assignment for defense

1           counsel and our support staff. Right now,  
2           support staff do 9 to 12 months and defense  
3           counsel do approximately 18 months. In the  
4           Marine Corps, this is aggravated by the fact  
5           that our, unlike the rest of the services, not  
6           only do our attorneys cycle in and out of  
7           litigation billets, they cycle in and out of  
8           line command billets. So, an individual may  
9           spend 20 years in the Marine Corps of which  
10          six are in litigation. So, I suggest at least  
11          lengthening the duration of the assignment or  
12          possibly establishing a litigation track  
13          within the Marine Corps, which I know is not  
14          the Marine Corps' opinion because they are  
15          pretty vehemently opposed to that.

16                    I would ask that you recommend  
17          standing up a dedicated conflict-free  
18          investigative unit within the defense services  
19          organization. I know Captain Shinn addressed  
20          that and it is a desperate need.

21                    And also I suggest that you  
22          recommend reforming the military subpoena

1 process to allow defense counsel to issue  
2 subpoenas for witnesses and evidence.

3 In my 32 years as a public  
4 defender, I have been privileged to work with  
5 some of the finest, most accomplished criminal  
6 defense attorneys in the country. And the  
7 dedicated defense counsel of the DSO yield to  
8 no one in their zeal, their passion, their  
9 devotion to defending the accused Marine or  
10 sailor and their commitment to defending the  
11 constitution, one client at a time. What they  
12 notably lack is litigation experience and  
13 adequate resources to do the job we have asked  
14 them to do.

15 The DSO is the smallest defense  
16 command. We have 72 judge advocates and 26  
17 enlisted support. The average level of trial  
18 litigation experience for defense counsel  
19 including senior defense counsel and including  
20 prosecution and defense experience is just 14  
21 months.

22 The expected time in a DSO billet,

1 as I said was 18 months. That is up from 9 to  
2 12 month, which was the previous assignment  
3 but it is still entirely too brief to  
4 adequately train defense counsel to approach  
5 civilian standards of defense practice and  
6 that is despite equally dire consequences to  
7 the accused, which have lifelong consequences,  
8 particularly in an era where sex offender  
9 registration and sexually violent predator  
10 laws take over after the service of a  
11 completed sentence.

12 It is not unusual for DSO counsel  
13 with three years of experience -- I misspoke  
14 -- three months of experience to be assigned  
15 to defend serious sexual assault charges. In  
16 a comparably sized public defense  
17 organization, attorneys begin trial experience  
18 in a misdemeanor unit spending from one to  
19 three years in daily litigation practice  
20 before assigned simply felony. It is not  
21 unusual for public defenders to take three to  
22 five years of daily litigation to have

1 sufficient felony practice to receive a  
2 serious rape case.

3 The DSO does not have that  
4 ability. It is in a constant state of  
5 personnel turnover. DSO defense counsel are  
6 already transferring out of the DSO at a  
7 period of time when on the civilian side they  
8 would just be assigned low level felony cases.

9 The DSO has attempted to rise to  
10 the challenge by creating the Defense Counsel  
11 Assistance Program and authorization of my  
12 single position. But we don't have the budget  
13 dedicated to training or including even  
14 necessary travel for myself or Captain Shinn  
15 to train and consult with attorneys.

16 By comparison, in the Marine  
17 Corps, the prosecution trial counsel have  
18 access to three HQE positions, two of which  
19 have already been filled, all of which are co-  
20 located in the regions where they occur. So  
21 that means that in the Western Region, for  
22 example, Gretchen Means, who is the TCAP HQE

1 can travel to each of those locations. She  
2 can observe daily frequent in-court  
3 observation of trial counsel and have daily  
4 contact with them. The prosecution HQE  
5 routinely reviews every sexual assault charge  
6 within ten days of referral. Every sexual  
7 assault case within then days of referral.  
8 And I have submitted with my documents  
9 MARADMIN Directive which provides for that.

10 As the DSO's only HQE, I am  
11 located in the San Diego area. Theoretically,  
12 my business day overlaps from Okinawa to the  
13 East Coast. Realistically, I take calls 24/7.

14 But my contact with defense  
15 counsel is largely limited to telephone  
16 consultations, despite a three to one salary  
17 savings from the prosecution to the defense,  
18 I don't have access to travel or train or a  
19 budget that isn't controlled by our LSSS,  
20 which is responsible for the prosecution of  
21 cases and which is frequently conflicted with  
22 DSO priorities.

1                   Because of the steady influx of  
2                   inexperienced defense counsel, we are in a  
3                   constant state of training on basic  
4                   substantive practice. We have little time and  
5                   meager resources to conduct litigation skills  
6                   training, which, to echo Mr. Puckett, relies  
7                   on in-court observation and immediate  
8                   feedback, as well as simulated skill drills.  
9                   Despite the fact that this is the recognized  
10                  best practice and routinely a part of civilian  
11                  criminal defense training.

12                  The DSO has one single, all-hands  
13                  training sexual assault training annually. It  
14                  is coming up in February this year but we have  
15                  no budget for the training. We have no budget  
16                  to send our staff. We have no budget to fly  
17                  teachers in, beyond what we can beg or borrow  
18                  from other sources.

19                  I immediately have become familiar  
20                  with the concept of cross-org LOAs. And I can  
21                  assure you that they are the bane of my  
22                  current existence. Funding has to be cobbled

1 together from a variety of sources and the  
2 result is that we frequently, again to echo  
3 Mr. Puckett, do not know far enough in advance  
4 to effectively plan if we will even have funds  
5 to cover the attendance of our staff or our  
6 trainers.

7 My travel here to this panel is a  
8 key illustration. As soon as I became aware  
9 that I was going to be presenting before this  
10 panel to take advantage of the fact that  
11 someone else is going to pay my way to the  
12 East Coast, I immediately called our National  
13 Capital Regional RDC and our Eastern Regional  
14 RDC and said, look, can we cobble together  
15 some training, bookending the conference. As  
16 a result, I trained yesterday at Quantico. I  
17 am leaving tonight for Paris Island. I am  
18 going the following day to Camp Lejeune. I am  
19 returning here on Friday to fly out on your  
20 dime on Saturday.

21 (Laughter.)

22 MS. COYNE: So, I am creative if

1 nothing else.

2 So other DSO scheduled training  
3 opportunities include three RDC two-day  
4 trainings and twice a quarter or half-day  
5 senior defense counsel training.

6 A difficulty with relying on these  
7 training opportunities is that they rely on  
8 the RDC, the regional defense counsel, and  
9 the senior defense counsel to provide those  
10 trainings. Our senior defense counsel,  
11 because of the emphasis of the Marine Corps on  
12 the role of judge advocates as generalists,  
13 including services line officers, the average  
14 litigation experience for our senior defense  
15 counsel is only three and a half years. Some  
16 of that may have been prosecution experience.  
17 And because of the intermittent nature of  
18 litigation assignments of the Marine Corps,  
19 those conducting the training may not  
20 themselves have recently tried many cases or  
21 have any recent litigation and litigation is  
22 a perishable skill. It is a use it or lose it

1 proposition.

2 While the HQE, myself, is best  
3 able to conduct this kind of litigation  
4 training, which should be accomplished in the  
5 smaller settings of the regional defense  
6 counsel, the DSO doesn't have a travel budget  
7 that makes it possible. So, unless something  
8 radically changes, the DSO is never going to  
9 be able to obtain the litigation experience  
10 and skills which are routine in public  
11 defenders' offices and which our clients need  
12 and deserve.

13 With respect to cutting edge  
14 litigation training, there are many ready-made  
15 off-the-shelf civilian opportunities but  
16 without a reliable training budget, we can't  
17 send anyone to them. An example I will give  
18 you is in October NACDL put on a four-day  
19 conference in Savannah defending the  
20 indefensible, defending sexual assault crimes,  
21 including child molest, stranger and  
22 acquaintance rape. I got excited. I called

1 Captain Shinn. I said we have got to send  
2 some of our guys to this. He said, no, it is  
3 in the first two weeks of October. We won't  
4 have any money. I went wait a minute, that is  
5 the beginning of the fiscal year. He said to  
6 me yes, but even though it is the beginning of  
7 the fiscal year, we won't get a cash drop  
8 until December.

9 So, a wonderful, ready-made  
10 training opportunity we don't have to spool  
11 up, taught by experienced litigators right on  
12 topic, and we can't send a single attorney to  
13 it.

14 The National Criminal Defense  
15 College Trial Practice Institute in Macon,  
16 Georgia offers two-week sessions, small groups  
17 according to trial experience. They perform  
18 daily litigation exercises. A similar program  
19 is offered on the West Coast in San Diego by  
20 the Institute of Criminal Defense Advocacy.  
21 The National Association of Criminal Defense  
22 Lawyers, NACDL, the National Defenders

1 Association, many state and federal public  
2 defenders' offices offers top-notch courses,  
3 criminal defense work, trial skills, to all  
4 levels but we can't take advantage of any of  
5 those because we can't fund training, despite  
6 the fact that participation in these trainings  
7 would elevate the level of practice that we  
8 desperately need and ought to be routinely  
9 available.

10 Since starting with the DSO, I  
11 have done a lot of individual consults with  
12 defense counsel, predominately about sexual  
13 assault cases but I have been only been able  
14 to conduct in-court observation of individuals  
15 in the Western Region. In fact the Pacific  
16 Region constitutes a major problem because we  
17 are scattered between Hawaii and Okinawa and  
18 our regional defense counsel could not get  
19 funding to travel from his location in Okinawa  
20 to his other location in Kaneohe. Never mind  
21 bring the HQE or a training package out. We  
22 tried doing a lecture series in November and

1 through DCO, Defense Connect Online. We lost  
2 the connection twice in an hour-long lecture.  
3 So, it presents other training difficulties.

4 I have only observed courtroom  
5 litigation aboard MCAS Miramar, Camp  
6 Pendleton, and MCRD San Diego. There is no  
7 substitute for the immediacy of observation  
8 and constructive feedback in trial training.  
9 It is a routine component.

10 My observation of these young  
11 attorneys reveals passionate, committed, but  
12 inexperienced attorneys trying very serious  
13 cases and making a lot of new attorney  
14 mistakes that are routinely beaten out of  
15 public defenders in misdemeanor practice  
16 before they ever see their first felony.

17 I have begun creating a series of  
18 litigation drills with defense counsel but  
19 deploying the drills requires someone with  
20 experience and training to go, as the Navy  
21 DCAP has been able to do and deploy them. You  
22 can't teach this by video teleconference. By

1           its very nature, litigation is a learned by  
2           doing process.

3                       The Navy DCAP travels twice each  
4           year to four locations for three days of  
5           training a piece. In 2013, the Navy Law  
6           traveled to 17 locations and provided 220  
7           hours of instruction. Nothing approaching  
8           this has been feasible within our fiscal  
9           restraints. We would have liked to have added  
10          a litigation skills component to our one-week  
11          DSO training but there is not enough time to  
12          do so and still cover the substantive issues  
13          that our new attorneys need with their steep  
14          learning curve that they have.

15                      HQE travel should be set on a  
16          semi-annual basis to each region, just like  
17          the Navy's. Sufficient funding should also  
18          include resources to either send DSO judge  
19          advocates to these outside litigation training  
20          or to create and deploy a similar program, at  
21          least on an annual basis within the DSO.

22                      As previously addressed by Captain

1 Shinn's December remarks to the panel in  
2 Austin, the lack of dedicated defense  
3 resources and an inability to subpoena  
4 documents are a huge problem for the defense.  
5 In each of the four public defenders' offices  
6 that I have worked in the past 31 years, urban  
7 and rural, state and federal, investigators  
8 were an integral part of the office. In San  
9 Diego, 36 investigators support 160 attorneys.  
10 In San Diego Federal Defenders' Office where  
11 I also worked, 16 investigators served 61  
12 attorneys. The DSO has 76 attorneys. We have  
13 zero investigators.

14 If in each region we had just two  
15 investigators, that is staffing at half the  
16 level of our civilian counterparts, it would  
17 be an orders of magnitude increase in our  
18 ability to effectively represent our clients  
19 and it would enhance the fair administration  
20 of justice.

21 You know the recent sexual assault  
22 interest on the part of Congress has resulted

1 in a huge resourcing on the prosecution side.  
2 You have heard the prosecution TCAPs talk  
3 about how often they contact their trial  
4 attorneys, where they go. When you add  
5 regional trial teams, when you add complex  
6 trial teams, when you add sexual assault  
7 response centers, when you add the VLC, you  
8 are putting an incredible amount of weight on  
9 one side of the scales without comparable  
10 resourcing on the other side.

11 Defense counsel have no power of  
12 subpoena in the military justice system.

13 PROF. HILLMAN: Ms. Coyne, I am  
14 going to -- just so that the panelist have a  
15 chance to ask you some questions, I am just  
16 going to ask you to pause there --

17 MS. COYNE: Okay.

18 PROF. HILLMAN: -- in what is one  
19 of the grim statistics that you put out, among  
20 many there. So, questions for this group of  
21 experts?

22 COL HAM: A lot of you have no

1 military experience. And I am interested in  
2 your response to the perception or allegation  
3 or whatever you want to call it that the  
4 military does not take sexual assault  
5 seriously.

6 I am just asking for your  
7 response. I am sure you have all heard it and  
8 that commanders don't take it seriously. And  
9 I am interested in your response to that  
10 comment, allegation, whatever you want to call  
11 it -- perception.

12 PROF. HILLMAN: Ms. Tullius?

13 MS. TULLIUS: Well, as I have gone  
14 around, I think -- I say we now, we take it  
15 very seriously. I actually was quite  
16 impressed when I came into this position to  
17 see the response. And I think the Army took  
18 hold early on in having special victim  
19 prosecutors as far back as 2009 starting to  
20 really dig into this issue.

21 I think that commanders are now  
22 receiving training and I think they are

1 interested. I have sat in on SARTs, where the  
2 commanders are climbing over one another to  
3 advise the CG as to what they are doing and  
4 how they are treating their soldier. And I  
5 have had office calls with generals on  
6 installations where they have talked about how  
7 can we be better? Can we get more lawyers?  
8 Can we get more investigators? How can we do  
9 this better? How can we stop this problem?

10 So, I think they are fully  
11 engaged. And it is not just another crime  
12 which, unfortunately, in the civilian  
13 prosecution system, sometimes it is another  
14 part of your day. This is a focus.

15 PROF. HILLMAN: Can I just follow-  
16 up and maybe put a point on that question?  
17 How will we know when we are doing better?  
18 You were talking about training specifically.  
19 How will we know we have better training  
20 happening on the ground? How will we be able  
21 to tell?

22 MS. TULLIUS: Evaluation, like we

1 used to do at the National Advocacy Center.  
2 There is well --

3 PROF. HILLMAN: No, no, tell me.  
4 Evaluation of what? And who should do it and  
5 what would we evaluate? And what would we  
6 look for to know that we actually have higher  
7 quality -- sufficient quality of  
8 representation on all three sides of this  
9 process we have set up?

10 MS. TULLIUS: We used actual  
11 researchers. And what we did was we had  
12 curriculum committees that would come up with  
13 what the objectives of the course were. And  
14 you are determining are you are measuring  
15 knowledge or attitude change, depending on  
16 what your goal was.

17 PROF. HILLMAN: So that is the  
18 training. But what about what is happening in  
19 the courtroom? Because we are talking about  
20 litigation as a skill that can only learned  
21 through practice, the experience that you all  
22 have in the courtroom, which is what has led

1           you to be able to bring that.

2                         So, you are talking about the  
3           effectiveness of the course and learning  
4           outcomes and that sort of thing. But what  
5           about what is happening on the ground?

6                         MS. TULLIUS: AEquitas actually is  
7           sponsoring the Department of Justice funding  
8           AEquitas, I think it is National Counsel of  
9           Juvenile Family Court Judges to answer that  
10          very question. They are trying to determine  
11          how do you measure success beyond convictions.  
12          So, it's something that hasn't been done  
13          because right now, the Department of Justice  
14          is doing it. So hopefully, we will get to be  
15          part of it. They have asked.

16                        MS. COYNE: May I make a  
17          suggestion? You know one of the ways that we  
18          do it in the public defenders' offices that I  
19          have been in is observation and assessment by  
20          senior litigators. Now, you can take that out  
21          of the Army or the Navy, or the Marine Corps,  
22          Air Force and ask civilian public defenders to

1 do an assessment by random observation of  
2 trials over a -- you do it as a longitudinal  
3 experience. You spend six months viewing X  
4 number of trials. You develop a rubric for  
5 what you want to see. Can they lay a  
6 foundation? They can cross-examine? Can they  
7 introduce character evidence? Are they  
8 effective in argument? Are they -- you know,  
9 it can be done and I believe that it should be  
10 done.

11 MR. BRYANT: Excuse me. Wouldn't  
12 military judges be the best ones to ask  
13 whether that is being done? Because they are  
14 the ones that observe it trial, after trial,  
15 after trial.

16 COL SPATH: I think there is a  
17 number, though, there is a number of different  
18 audiences that you are talking about. One is  
19 are commanders taking it seriously and how are  
20 you going to measure that. Unfortunately, we  
21 get caught up in the news report of a  
22 commander who maybe we think didn't take it

1 seriously and that one case drives decision-  
2 making on the hundreds of decisions where  
3 commanders are getting it right.

4 So, you have got to find a way to  
5 look at anecdotal, everyone has anecdotes but  
6 you have to find a way to look at it over  
7 time. Frankly, commanders have been taking it  
8 seriously. Does that mean every single time  
9 commanders are taking it seriously? Of course  
10 not, because we are not perfect.

11 So I mean, are they taking it  
12 seriously? Yes. You see that by the money  
13 they are spending because every dollar they  
14 are spending on training, every dollar they  
15 are spending on new programs is dollars coming  
16 out of whatever mission set that particular  
17 service is involved in.

18 MR. BRYANT: But is that prior or  
19 is that now since the survey?

20 COL SPATH: I think if you go back  
21 and look at historical numbers of prosecution  
22 of sexual assaults, you will see that a number

1 of cases were going to trial all along. They  
2 were going to trial. I mean I was trying them  
3 myself back in 1991 and 1992.

4 So, people were taking it  
5 seriously. Has there been a change now?  
6 Probably. I think that would be a natural,  
7 that there is more focus on it and there is  
8 more time being spent.

9 If your question is a focus on  
10 counsel and how are we going to measure them,  
11 first you have to define the capability. We  
12 have all done that as prosecutors and defense  
13 counsel. Can you cross-examine? Can you  
14 direct examine? Can you enter evidence? We  
15 can go down the long list. But then you have  
16 to measure that capability and there is lots  
17 of way to measure that capability. Direct  
18 observation is a great way to do it. We all  
19 know that. Otherwise, frankly, ground truth  
20 is in those records of trial. You should look  
21 at the records of trial to get an assessment.  
22 You have experts on the panel who know what is

1 a good cross-examination and a poor cross-  
2 examination, a good direct examination, and a  
3 bad direct examination.

4 Look at those records and you will  
5 see that. And once you define the capability,  
6 then you measure are we meeting those  
7 capabilities and do you have an assessment  
8 system, I hope like the Air Force is well on  
9 its way to implementing, where you go and look  
10 at those and whether we are meeting those  
11 capabilities.

12 MR. BRYANT: I had asked you  
13 military judges to -- should they be surveyed,  
14 too, whether they are seeing an increase in  
15 the ability to introduce foundational evidence  
16 and that sort of thing?

17 COL SPATH: Yes. They absolutely  
18 should. I think they are, in some cases.

19 MR. PUCKETT: We do that, sir, in  
20 the Navy.

21 MR. BRYANT: I'm asking because I  
22 didn't know.

1                   MR. PUCKETT: Yes, sir. Yes, sir,  
2                   we do that but I think -- ma'am I think that  
3                   the question is based on currency because we  
4                   have got a moving target. If we measure the  
5                   effectiveness of all of our counsel on both  
6                   sides every year, next year we have a  
7                   different field of players. And the year  
8                   after that we have a different field of  
9                   players. And the year after that we have a  
10                  different field of players.

11                  So, in terms of the operators of  
12                  this system, they are constantly changing,  
13                  which makes all of our roles absolutely  
14                  critical to all the services because we need  
15                  to train the new batch every year. So, as  
16                  long as we are giving best training methods to  
17                  the new batch every year, we are going to do  
18                  the best we can to keep everybody capabilities  
19                  up but I don't think there is an objective  
20                  measure as to whether or not the system as a  
21                  whole, over time is improving in addressing  
22                  the problem because the players are constantly

1 changing, including the military judge.

2 MR. BRYANT: I know they change  
3 also. Can I just add this? And not to any  
4 particular person but is that on a case by  
5 case basis? At what point are the judges  
6 being surveyed about the performance of  
7 defense and prosecution?

8 COL SPATH: The Air Force are  
9 doing a certification process. Those are  
10 juniors, so they are not going to be doing the  
11 sexual assault cases. But we are assessing  
12 them almost on a checklist, can they do the  
13 basic skills from cross-examination to closing  
14 argument and entering evidence.

15 For the more senior, the judges  
16 are doing case reports at the end of every  
17 case, where they describe the performance of  
18 counsel and they describe issues that they  
19 have. Those could be cross-fed better but we  
20 are engaged in those discussions now with the  
21 Air Force trial judges about I don't want  
22 their deliverable work product. I don't want

1 to know why they may certain decisions. It  
2 doesn't matter. What I want to know is in our  
3 role how are counsel performing? What are  
4 they doing well and what are they doing  
5 poorly? And is any of that trend data where  
6 you can see developing over time there is  
7 problems?

8 BG DUNN: Is that for prosecutors  
9 or did they only do that for defense counsel?

10 COL SPATH: They do it for both.

11 BG DUNN: They do it for both.

12 That is very interesting.

13 PROF. HILLMAN: Ms. Ryan?

14 MS. RYAN: I think there is two  
15 things going on here. I think you can look at  
16 counsel, defense or trial counsel from a  
17 purely advocacy state. I think that is  
18 problematic when you are talking about  
19 prosecutors. I think you need to look at how  
20 they are doing with the victims. How they are  
21 protecting the victims.

22 So, now I am talking as Bridget

1 Healy Ryan. I would do victim surveys. I  
2 want to know how those victims felt because at  
3 the end of the day, if that victim is worse  
4 off than the day before she met you, you did  
5 not do a good job.

6 MS. JAUS: I completely agree with  
7 that. I think one of the measures is whether  
8 the victim feels that he or she got justice.  
9 Did they feel they were treated justly and did  
10 they receive justice. I think that is an  
11 extremely important --

12 COL SPATH: They are doing, at  
13 least in the Air Force, I think some of the  
14 other services started it, they are doing some  
15 of those. The only issue I have, having been  
16 to the SAPR Summit and listened to the experts  
17 there, is some of the victims are starting to  
18 feel a bit of survey fatigue because they are  
19 getting with through the VWAC program, are you  
20 satisfied with the VWAC program. Through the  
21 SVC program, are you satisfied with the SVC  
22 program. Through their trial counsel

1 representation, are you satisfied with our  
2 process.

3 So I know in the Air Force we are  
4 talking about we need to come up with what we  
5 want to ask them and then we need to ask it,  
6 rather than ping multiple times the same  
7 audience, because I can't imagine what that  
8 might be like.

9 BG DUNN: Well because, too, I  
10 think maybe what you want to get at is how the  
11 victim perceives the process and feels, in the  
12 end, which has many components. Because your  
13 average victim has no idea about prosecutorial  
14 talent or defense counsel talent or any of  
15 that.

16 COL SPATH: Yes, ma'am.

17 BG DUNN: And based on other  
18 testimony we have heard in the victim arena,  
19 if you develop some sort of system where the  
20 victim understands what is going on and has  
21 the proper contact, even if in the end the  
22 prosecutor sits down and says we cannot take

1           this case to trial and here is why, we have  
2           had some testimony that you still have sort of  
3           positive victim feedback on that process  
4           because they understood it and they went  
5           through it.

6                   COL SPATH: We have been seeing  
7           that even when they go through and the result  
8           isn't what they would have hoped for.

9                   BG DUNN: Right, where there is an  
10          acquittal.

11                   COL SPATH: If they had been  
12          supported through the process, even if there  
13          is an acquittal, even if they get a sentence  
14          they were not expecting, their feedback on the  
15          process has been good.

16                   MS. JAUS: But if they are treated  
17          fairly, they should know that there is always  
18          a chance of an acquittal. There is no such  
19          thing as a sure thing. They should understand  
20          any case could be won or lost.

21                   COL HAM: But the devil's advocate  
22          position is that I mean you can have a

1 satisfied victim and the prosecutor did a  
2 terrible job. You can have a satisfied  
3 accused and the defense counsel did a terrible  
4 job. You can have a happy commander and his  
5 advisor is terrible.

6 PROF. HILLMAN: True. Isolating  
7 these variables --

8 MR. STRAND: I think we can look  
9 it at three ways and then we can digest it  
10 however way we want. But it is the concerns  
11 that I have and maybe you have and I think  
12 that is what I hear you sharing is one,  
13 sustainability programs. I mean even -- I  
14 know you need more money and direct resources  
15 and everything else but sustaining these in a  
16 budget constrained environment that is only  
17 going to get worse, number one. Number two,  
18 you are advocating increases in reporting, you  
19 are giving increases in reporting with no  
20 increases in resources and personnel. We saw  
21 a 50 percent increase this year. Hopefully we  
22 will have a 300 percent increase over the next

1 three or four years but we are not increasing  
2 resources.

3 And then the third thing that I  
4 think is touching all of this is are we  
5 getting any research. Do we even have any  
6 research finding to research what our best  
7 practices are doing, what our training is  
8 doing, satisfaction. Researchers can answer  
9 those questions but none of us, correct me if  
10 I am wrong, have any budget for good quality  
11 research.

12 MS. SCALZO: Don't you all have  
13 research books, like the Navy books that the  
14 sex offenders study?

15 MR. STRAND: They do particular  
16 pieces of research but sexual assault per se  
17 really doesn't look at this holistically.  
18 They look at little pieces here and there but  
19 holistically I think we need to get an answer.

20 So, those are the three concerns  
21 that I see that maybe you want to address.

22 MS. COYNE: Well, one of the

1 things that has struck me, because I have only  
2 been on the job six months. So, for a while  
3 before this happened, I was an outside  
4 spectator. And even as an outside spectator,  
5 I kind of am right -- and I know that I mean  
6 don't repeat to my boss I said this but in a  
7 way, I believe that some of Congress'  
8 complaints are justified. In the surveys we  
9 are getting, it is really not helpful to call  
10 everything from harassment to aggressive  
11 violent rape, leaving the complainant beaten  
12 and unconscious, sexual assault. We don't  
13 know what we are talking about.

14 The first principle is identify  
15 the problem. And so I think that the problem  
16 is is a first causes problem. I know that  
17 everyone has said well, the increase in  
18 reporting is because we are doing a better job  
19 telling people come forward but we still don't  
20 know what we are measuring. And I think that  
21 is a huge problem.

22 And I think that we have, I mean,

1 we have stood up on the prosecution side of  
2 the ledger a lot of programs, including the  
3 VLC program. And I have got to tell you,  
4 there is nothing in the civilian world where  
5 complainants of crimes get appointed a  
6 personal attorney independent of the  
7 prosecutor to represent their interest in a  
8 criminal case.

9 MS. JAUS: No, I think there is  
10 one in Arizona. Because we had a speaker at  
11 one of these meetings.

12 MS. COYNE: Well, in the Marine  
13 Corps, the VLC has been detailed that they  
14 have been told it is not limited to a sexual  
15 assault complainant. It is complainant of any  
16 crime can request and obtain a VLC.

17 MS. SCALZO: You raise a good  
18 point, though, about the kinds of cases that  
19 we are seeing and the increase. One of the  
20 reasons why it is almost impossible to measure  
21 is in the civilian world, the crimes are very  
22 different and a lot of the cases that we

1 prosecute would not have been criminal in  
2 Pennsylvania, where I was a prosecutor.

3 So, it is very hard to compare  
4 when you are not talking about the same  
5 actions.

6 MS. COYNE: Most civilians, if you  
7 told them that we were prosecuting people for  
8 adultery --

9 MS. SCALZO: But not even that, a  
10 text crime.

11 COL SPATH: Before you do that, it  
12 is not that simple a problem. When somebody  
13 says that, and they go oh, are you out of your  
14 mind? Yes, we are if we care who is sleeping  
15 with who. If a squadron commander is at home  
16 and he deploys an airman and he has sex with  
17 that airman's wife, the impact on that airman  
18 in the deployed location is so atrocious and  
19 so unique to the military, you have to do  
20 something. Good order and discipline.

21 PROF. HILLMAN: Fortunately, we  
22 don't have to answer that question.

1 I want to take one more question.  
2 Colonel Morris, did you have something you  
3 wanted to --

4 COL MORRIS: Yes. Several of you  
5 have said the commanders are taking it even  
6 more seriously. And with that in mind, you  
7 know the courts told us years ago you can't  
8 litigate command influence in the air but we  
9 know there really can be command influence in  
10 the air and that in all kinds of ways,  
11 messages waft in to people's judgment cycles.

12 So, a question just as close to it  
13 as you all are, does it cause you any  
14 concerns? And if so, where might it be  
15 manifested? Certainly, a rape case, the only  
16 place to go would be to a GCM. So, it  
17 wouldn't necessarily affect a disposition  
18 there in terms of level of court. But might  
19 it affect whether you go forward or not? Is  
20 there a reluctance to discharge a weak case  
21 because of the worry that everybody is going  
22 to watch you? And if so, then are there some

1 collateral impacts on the seriousness with  
2 each a truly serious case can grab somebody's  
3 attention.

4 So, has anybody picked up  
5 anything, just based on the intensity of the  
6 effort in our recent times?

7 MS. COYNE: By report, we are  
8 seeing recommendations from the investigating  
9 officer at Article 32 not to go forward being  
10 overborne by the command.

11 So, a commander is sending an  
12 investigating officer to do an Article 32 --

13 MR. PUCKETT: And they are  
14 lawyers.

15 MS. COYNE: And they are lawyers  
16 now. And they are saying we don't believe  
17 this case should go forward and there is an  
18 explanation for why. It is not just like in  
19 prelims in San Diego where the judge says  
20 "dismissed" and doesn't have to tell you  
21 anything. They have a reason and a rationale  
22 and a report of all the evidence and analysis.

1           And the commanders, the current command  
2           climate by report anecdotal but palpable is  
3           that commanders are saying I can't get in  
4           trouble for pushing this forward and that is  
5           where it is going.

6                   MR. O'BRIEN: I can do her one  
7           better. I have an Article 32 investigation  
8           officer's report in my office from Fort  
9           Leonard Wood from, I think, last summer, where  
10          the young major said this case should not go  
11          to trial; however, in the current political  
12          climate, it should go to a GCM. I'm not  
13          kidding. I have that report in my hands. Is  
14          it palpable? Absolutely.

15                   MR. WHITE: In the past, I have  
16          had the chance to litigate a big case as a  
17          defense counsel in UCI and then presided over  
18          on as a judge. In the 20 some years, that was  
19          the big two I was involved with. But now we  
20          are teaching a one-hour block of instruction  
21          on UCI and Article 120 cases in most of our  
22          most recent week-long standup platform

1 training. We have never devoted an hour to  
2 that in the past. We are helping with  
3 numerous motions. It is out there.

4 And the question usually is, and  
5 your distinction between apparent and that  
6 which is in the air and that which is on the  
7 ground, the real connection is what can we do  
8 locally? We know we have got lots of stuff  
9 here nationally. It is all over the place.  
10 We also have the apparently lawful influence  
11 being exerted by senators over the Sword of  
12 Damocles being dangled over convening  
13 authorities. But can you connect that to the  
14 ground? And that is where it is becoming  
15 palpable.

16 We are seeing the messages that  
17 are put out by the Chief of Staff and the  
18 Secretary of the Army saying we are going to  
19 hold you accountable, talking to senior  
20 leaders. Those are dripping their way down  
21 into the battalion conference rooms and we are  
22 now seeing the level at which those are

1 pervading not so much just convening authority  
2 decisions but our concern is the court  
3 members. Are we being held accountable?

4 I am a battalion commander, I am a  
5 brigade commander, I am told by the Chief of  
6 Staff of the Army that I am going to held  
7 accountable. What does that really mean for  
8 me?

9 MR. STRAND: But haven't  
10 commanders always been held accountable? I  
11 mean as far as -- what are they saying be held  
12 accountable for? Is that where the message  
13 gets muddy?

14 MR. WHITE: Exactly. That is  
15 where the message -- and these are  
16 videotaping, you can look at them. These are  
17 the things that the Chief of Staff, Secretary  
18 of the Army said during the program. There is  
19 a sexual assault problem.

20 In one sentence they say we really  
21 need to hold you accountable for what you do.  
22 Two sentences later they talk about and we

1 really need to get the conviction rate up.  
2 Well, it is not too tough to make a connection  
3 there.

4 So, what is the message? What are  
5 members hearing? We are making some traction  
6 in getting additional voir dres and getting  
7 additional panel questionnaire answers.

8 So, your question is well put. It  
9 is certainly at a much higher level than I  
10 have ever seen on any particular offense. I  
11 don't know where it is headed. I don't know  
12 how it is going to be calmed down or tamped.  
13 And I don't know what the most recent efforts  
14 in the NDAA are going to do if anything but  
15 pour gasoline on that fire.

16 MS. SCALZO: But if that is true,  
17 then that means a lot of our JAG trial counsel  
18 are unethical. Because just like a civilian  
19 prosecutor, every military trial counsel has  
20 an obligation not to prosecute if there is not  
21 probable cause. And they are obligated to  
22 tell the military judge. So, if that is true,

1 the lawyers are failing.

2 So, I respectfully disagree. I  
3 don't see that. And in maybe in every case  
4 that we recommend not to go forward, our CO,  
5 who is an O6, signs it in conjunction with a  
6 consultation with TCAP. We are not having  
7 that kind of problem because we are exercising  
8 control of the lawyers at a high level to  
9 advise the convening authorities and to give  
10 them the cover that they need.

11 MS. COYNE: Well, I know I have  
12 consulted on three cases recently where trial  
13 counsel recommended the case not go forward.  
14 The IO recommended the case not go forward.  
15 And the case is going forward.

16 So, I am just going to say, yes, I  
17 agree they have an ethical obligation but they  
18 are military officers.

19 PROF. HILLMAN: That is right.  
20 They are in the military. And there is a  
21 hierarchy in the military. There is a rank  
22 structure in the military and they are

1 military officers as well as attorneys. And  
2 if there is a dual set of goals to the  
3 military justice system, there are a dual set  
4 of responsibilities to those attorneys who are  
5 in the service -- each branch of the service  
6 as well.

7 MS. COYNE: Right.

8 PROF. HILLMAN: This is a  
9 challenge for us.

10 If you have any other thoughts or  
11 ideas or numbers or predictions that you want  
12 to send to us, please send them to Dillon.  
13 And I am grateful for all of your insight and  
14 attention to this on what is a long afternoon  
15 for us.

16 So, thank you for coming.

17 (Whereupon, the foregoing matter  
18 went off the record at 4:28 p.m. and went back  
19 on the record at 4:34 p.m.)

20 PROF. HILLMAN: We are grateful to  
21 have you at the end of our day here, Ms.  
22 Bayliff, to share your expertise with us on

1           this critical topic that we keep circling  
2           around. So, please help us out.

3                       MS. BAYLIFF: Thank you. And I  
4           will try to be as entertaining as possible  
5           because I understand you have had a long day.  
6           But, I don't know that this topic does really  
7           lend itself to that completely.

8                       But I really appreciate having the  
9           opportunity to speak to you. I am both an  
10          attorney and an educator. I have been a  
11          lawyer for 28 years and in March I will  
12          celebrate my 26th year of working on sexual  
13          assault. So, I always tell people I don't dye  
14          my hair because after all these years, I have  
15          earned every single one of these gray hairs.

16                      So, I have worked on this issue in  
17          lots of capacities, both with civilian and  
18          military populations. I started as a hotline  
19          crisis counselor in March of '88. Most  
20          relevant I think to what we are talking about  
21          today is that for 14 years I have provided  
22          technical assistance to judges, prosecutors,

1 and other criminal justice professionals  
2 across the country on sexual assault and the  
3 intersection of domestic violence and sexual  
4 assault.

5 I work with the American  
6 Prosecutors Research Institute and we  
7 developed a comprehensive four-day curriculum  
8 for prosecutors which we then took on our  
9 traveling road show around the country. I  
10 developed many, many curricula for judges on  
11 this topic. And one of my jobs as we train  
12 judges and prosecutors was to summarize the  
13 case law in each jurisdiction about sexual  
14 assault. So, in addition to giving myself a  
15 very lovely case of PTSD or vicarious trauma,  
16 it also gave me a pretty good feel about what  
17 the law is around the country.

18 Right now, I am working with the  
19 Women's Rights Legal Organization educating  
20 judges and I am also doing trainings and  
21 consultations all over the country on these  
22 issues.

1                   My experience specific with the  
2                   military, I have worked with the military for  
3                   ten years. I was the first chief of the Air  
4                   Force's Sexual Assault Prevention and Response  
5                   Program. I worked as -- I was one of the  
6                   highly qualified experts hired to work with  
7                   Mr. Strand and the CID and I have worked  
8                   really with all of the services on their  
9                   sexual assault prevention and response  
10                  efforts. So, I think it gives me an  
11                  interesting perspective because I have looked  
12                  at these issues for a long time, both in the  
13                  civilian world and the military.

14                  So, Mr. Fishman made it quite  
15                  clear he wants me to talk about training  
16                  prosecutors, so I will do that. But this  
17                  isn't really just simply a training issue.  
18                  There are some structural issues that are tied  
19                  to training prosecutors that I think also need  
20                  to be addressed.

21                  And I want to start by  
22                  acknowledging these are extremely difficult

1 cases to investigate and prosecute. So, you  
2 know, as I said, I have earned all these gray  
3 hairs. I know this is not an easy task.

4 The British Home Office did a  
5 fantastic study on sexual assault in the  
6 United Kingdom and they have a great summary  
7 that said the solution to this problem is  
8 relatively simple. We need to shift the focus  
9 from investigating as an exercise in  
10 skepticism focused on discrediting the alleged  
11 victim to enhanced evidence gathering and case  
12 building. So, my number one suggestion in  
13 terms of training would be, we need to focus  
14 more on offender and offender behavior. There  
15 has been some incredibly important research  
16 done by the Navy on perpetrators in the  
17 military. And what that research shows is  
18 that if you look at an individual rape that is  
19 perpetrated, we have a 95 percent chance that  
20 that rape is perpetrated by a serial rapist.  
21 So, we really have to shift from focusing on  
22 discrediting victims to looking more at

1 offenders and offender behavior. We need to  
2 look for other victims. We need to gather  
3 prior similar evidence that is critically  
4 important in addressing these types of cases.

5 We also need to look at this from  
6 the offender's point of view. We have to stop  
7 focusing on what victims wore or what they  
8 drank and we have to start looking at the  
9 offender's actions, grooming, isolating  
10 victims, all of that.

11 We decided, after educating judges  
12 all over the country for many years, that it  
13 was so important to shift the focus that we  
14 switched the agenda for our entire curriculum  
15 where we started by talking about offenders,  
16 rather than focusing, as so many trainings do,  
17 solely on victims.

18 Another important thing we need to  
19 do in educating prosecutors in the military is  
20 we have to make sure they understand the  
21 dynamics that are unique to sexual assault in  
22 the military. There are some very significant

1 differences. As I am sure all of you know,  
2 most of these sexual assaults are military on  
3 military. The Navy Research Study on  
4 Offenders, now that just dealt with Navy  
5 recruits. So, obviously, we can't extrapolate  
6 across the entire military. But that research  
7 showed that that particular subset of  
8 perpetrators committed assaults at twice the  
9 rate of civilian undetected rapists. So, we  
10 really have to look more at military  
11 perpetrators.

12 And I think one of the key  
13 differences I have noticed, since I know you  
14 are the comparative systems group, one of the  
15 key differences I have noticed is I think  
16 there is even more resistance to seeing a  
17 military member as a perpetrator because this  
18 is a person you are quite literally putting  
19 your life in his hands. And I think the  
20 cognitive dissonance is even stronger than in  
21 some of the clean cut college students I used  
22 to see when I was the Assistant Director of

1 the Bolder County Rape Crisis Team.

2 There are also significant  
3 differences for military victims. One is that  
4 they come into the military with staggeringly  
5 higher rates of prior sexual victimization.  
6 Now, the reason that is important is because  
7 statistically it makes them much more likely  
8 to be victimized again. In addition, there is  
9 some inherent coercion built in because of the  
10 military hierarchy. So, there all sorts of  
11 dynamics that are very different that we have  
12 to make sure people understand.

13 Another key area that we need to  
14 focus on is the neurobiology of trauma. Once  
15 again, this is an issue we weren't originally  
16 covering when we educated judges and  
17 prosecutors around the country but we ended up  
18 including that as an entire portion because  
19 there is groundbreaking research being done on  
20 the impact on the brain of trauma and  
21 especially the impact on traumatic memories.

22 So, what we now know from

1 research, and I know this is not new  
2 information to Mr. Strand, because he has  
3 incorporated into his courses, but what we now  
4 know is that traumatic memories are actually  
5 stored and retrieved differently than non-  
6 traumatic memories. Now, that doesn't in any  
7 way mean they are not valid memories. But  
8 what we now know is what was often seen as  
9 inconsistent statements by victims is really  
10 very strong evidence of trauma. And so, we  
11 have to start thinking about that when we  
12 educate on how to interview, how to  
13 investigate, and how to question witnesses.

14 So the traditional way of  
15 questioning witnesses was with an expectation  
16 that they would come back with a sequential  
17 narrative account of what happened to them and  
18 that is simply not possible, given what we now  
19 know about traumatic memories. So, what we  
20 have to do is we have got to take this brain  
21 research and apply it in how we train  
22 investigators and prosecutors about how to

1 question witnesses. Because once again, these  
2 memories are not invalid. They are just  
3 stored and retrieved very differently. And we  
4 need to tailor our systems to that, instead of  
5 keep trying to fit victims into this little  
6 who, what, when and where narrow box of  
7 providing us with a sequential narrative  
8 because that is very, very difficult.

9 And what we also need to do is  
10 take what we have learned about the  
11 neurobiology of trauma and apply it across the  
12 board in our systems to provide what is now  
13 being called trauma-informed services. Now,  
14 I understand that is the buzzword now but what  
15 we mean by that is we need to look at our  
16 systems and figure out how to modify them in  
17 order to make them more accessible for victims  
18 of trauma. So, how it is often described is  
19 we need to ask victims what happened to you,  
20 as opposed to what is wrong with you.

21 Now, one example of how we can  
22 make this work is what we always called the

1           continuance defense. And I know, Mr. Bryant,  
2           you have seen this quite a bit as a  
3           prosecutor, these constant requests for  
4           continuances in these types of cases.

5                       I am going to read you a good  
6           quote. We got this from a therapist who was  
7           one of the faculty members in our judge  
8           training faculty. And this was from one of  
9           her clients who explained the impact of these  
10          constant continuances. She said, "I finally  
11          went crazy. They would tell me these dates  
12          and I would never have a trial. What they  
13          started doing was tell me that there would be  
14          a trial but we are not so sure when we could  
15          get the courtroom. So, I would dress for a  
16          trial. I would go to work dressed in my court  
17          dress because you only get one chance to make  
18          a first impression and I had my court dress.  
19          And then they would call me by noon and I  
20          would know there wasn't going to be a trial.  
21          I would go home. I would change so I wouldn't  
22          ruin my court dress. And this went on. It

1           happened several times.

2                         And finally I got hysterical and I  
3           called the victim witness office out of the  
4           DA's office and said I am not coming in. You  
5           can send a police car for me. I'm not coming.  
6           I have had it with you. I don't care what  
7           happens anymore. I was hysterical.

8                         Repeating this story is always  
9           funny to me when I think of myself as a raving  
10          lunatic because the attack didn't do it to me.  
11          The system did it to me. I was under control  
12          for the attack but the system made me crazy."

13                         So, that is just one example of  
14          what I am talking about about trauma informed  
15          services, really working with prosecutors  
16          about these types of issues and the impact of  
17          these issues on victims.

18                         We also really need to work with  
19          prosecutors to --

20                         MR. BRYANT: Excuse me. Is that  
21          something that you also address when you are  
22          training the judges?

1 MS. BAYLIFF: Yes.

2 MR. BRYANT: Because it is judges  
3 who grant continuances.

4 MS. BAYLIFF: Yes, absolutely.  
5 Definitely. And as you well know, it is hard  
6 for people to take ownership on these issues  
7 but yes, you can trust me on that. Actually,  
8 this quote we used in our judicial education  
9 curriculum.

10 MR. BRYANT: Thank you.

11 MS. BAYLIFF: Okay. We also need  
12 to educate prosecutors about how to rebut the  
13 he said/she said kind of thinking. Now, I  
14 would point out to this group that term is not  
15 used in any other crime, other than sexual  
16 assault and the legal system is particularly  
17 designed to make credibility determinations,  
18 but for some reason, that is a very popular  
19 phrase in sexual assault cases. How we rebut  
20 that is, once again, we focus on offenders'  
21 actions. Because what we now know from all  
22 the research is that these cases are really

1 usually he said/they said, as opposed to he  
2 said/she said, if we find these other victims  
3 who are oftentimes out there. We also can  
4 look at things like victim's post-assault  
5 behavior to look at evidence of trauma to get  
6 past this sort of he said/she said kind of  
7 thinking.

8 We need to address false reporting  
9 and the reality of it and what we really know,  
10 as opposed to what our gut tells us or what we  
11 think we know.

12 We need to protect victims'  
13 privacy to the greatest extent possible.  
14 Research going back to the early '90s shows  
15 that is one of the key reasons victims don't  
16 report or they don't continue with the  
17 criminal justice system is because of the  
18 violations of their privacy. It comes up in  
19 many issues. It comes up in rape shield  
20 issues, which is where evidence of victims'  
21 prior sexual history is brought in. It comes  
22 up in lots of issues related to privilege,

1           medical, psychological, victims' services, all  
2           those types of relationships are jeopardized  
3           when those types of privileges aren't  
4           respected.

5                         Now, I know from having done this,  
6           both in the civilian and the military world,  
7           that these privileges, some of them, like the  
8           victim advocate privilege is much newer, and  
9           they are not as strong or not as accepted as  
10          they are in some civilian jurisdictions. But  
11          when we are talking about this issue in the  
12          military, particularly with the retaliation  
13          and the ostracizing many victims are subjected  
14          to, we have got to, as much as possible,  
15          protect their privacy.

16                        Another important area is we need  
17          to teach prosecutors how to work with these  
18          special victims counsel. This, as far as I am  
19          concerned, the use of civil attorneys in  
20          criminal cases to raise issues about rape  
21          shield privilege privacy is one of the most  
22          profound and innovative changes I have seen in

1 the criminal law in all the years I have been  
2 doing this. I am thrilled that the current  
3 NDAA has institutionalized this. We have been  
4 doing this in the civilian world for a long  
5 time but on a much more ad hoc basis. And I  
6 am hoping that the military, now that it is  
7 institutionalized, will become a leader here  
8 but we need to embrace it and not end up  
9 fighting over turf, which is unfortunately  
10 what I have seen happen a lot of times when  
11 civil attorneys appear in criminal cases in  
12 the civilian world.

13 Another thing that is critically  
14 important is the special victim counsel need  
15 to have standing to represent victims during  
16 the investigation and prosecution of these  
17 cases and to assert their rights, such as  
18 these privacy and privilege rights. Now, that  
19 standing was affirmed by a Military Court of  
20 Appeals but I was really concerned when I  
21 looked at the 2014 NDAA and it sort of seems  
22 like turn that issue over to this response

1 panel for recommendations.

2 So, I would highly recommend that  
3 you support that these attorneys have standing  
4 in the criminal case because otherwise, it is  
5 kind of a symbolic -- it is going to be kind  
6 of a symbolic thing if they can't do what  
7 lawyers are trained to do, which is protect  
8 the rights of their clients.

9 Another key area that is important  
10 to address is that of the use of expert  
11 witnesses. As everybody on this panel knows,  
12 you are all very experienced in this issue,  
13 belief in myths and stereotypes is very strong  
14 in sexual assault cases. Jurors, panel  
15 members often need assistance to understand  
16 the reality of these crimes. A couple  
17 examples, so in the medical context, the lack  
18 of injury. There is an expectation that rape  
19 victims will be severely internally injured,  
20 which is not the case in most cases but jurors  
21 don't understand that.

22 Also, there is some psychological

1 issues that require expert explanation, such  
2 as delayed reporting or subsequent contact  
3 with the perpetrator. And there are all sorts  
4 of difficult issues that come up in alcohol-  
5 facilitated assaults.

6 But prosecutors need to not only  
7 know the importance of using experts, they  
8 need to be taught how to pick the right  
9 experts. So, just an example. I called  
10 everyone I knew to prepare for this to see  
11 what their ideas were and I spoke a medical  
12 expert who testifies frequently in both  
13 civilian and military trials. And she said  
14 that she was recently called and asked to be  
15 an expert witness in a military trial to  
16 testify as to counterintuitive behavior on the  
17 victim's part, delayed reporting and that sort  
18 of thing. But she is a medical expert. There  
19 was no medical evidence in that case and there  
20 was no medical issue. So she said you know,  
21 I can write my own cross-examination. I am  
22 not the right person. So, we need to educate

1           them about not only how important expert  
2           witnesses are but how to pick the right one.

3                   MS. JAUS:  But she wouldn't be  
4           able to be qualified as an expert.

5                   MS. BAYLIFF:  Exactly.

6                   MS. JAUS:  She wouldn't have the  
7           credentials, so she couldn't even get to the  
8           cross-exam.

9                   MS. BAYLIFF:  I mean she could  
10          probably qualify in some instances just to  
11          talk about victim behavior, but you are right.  
12          And that is the whole point.  She wasn't the  
13          right person to be called.

14                   We also need to teach prosecutors  
15          they have got to carefully prepare these  
16          experts.  A 15-minute call or something is  
17          just not enough.  They need to really work  
18          closely with these experts in order to use  
19          them effectively.  And they also need to  
20          tailor their strategy to their location.

21                   So, an example of that was there  
22          was a case involving a medical exam in a small

1 base in Korea, where they had no cameras. So  
2 a defense expert was asked, a defense expert  
3 from the U.S. was asked to testify that the  
4 exam didn't meet the standard of care. So,  
5 the prosecution needed to have a good medical  
6 expert to talk about that you could still do  
7 an effective forensic exam without a camera.  
8 So, we just need to make sure that they  
9 understand not only the importance of using  
10 medical experts but how to use them  
11 effectively.

12 We also need to address male  
13 victims. That is an issue has been addressed  
14 to some extent in the military but not as  
15 much. And it is very important because we  
16 know that there are lots of them and we know  
17 that there are also a lot of complications for  
18 male victims as a result of homophobia, Don't  
19 Ask, Don't Tell, all that sort of thing.

20 In addition, we need to think  
21 about we need to stop thinking about these  
22 issues of interpersonal violence as stove

1 pipes. We need to, for example, look at the  
2 intersection of sexual and domestic violence.  
3 As one of the judges who served as our faculty  
4 said, if a partner is controlling, abusive,  
5 and violent in the kitchen, the living room,  
6 and in public, why would he stop the abuse at  
7 the bedroom door? But oftentimes we treat  
8 domestic violence and sexual assault as  
9 different crimes and we don't look to the  
10 overlap.

11 Another important area is the use  
12 of language, the language that prosecutors  
13 use. I have been training on this topic all  
14 over the country for the last several years  
15 and it is particularly important for  
16 investigators and prosecutors because their  
17 language sets the narrative of the case.

18 I became really obsessed with this  
19 issue as a result of work I did in the Kobe  
20 Bryant case. I was one of the lawyers who  
21 represented the victim advocate and the rape  
22 crisis team in the Kobe Bryant case. Despite

1 the fact Colorado had very strong privilege  
2 law, the Kobe Bryant team went after the  
3 individual victim advocate and the tiny Eagle  
4 County Resource Center Rape Crisis Team. And  
5 as I sat in that courtroom, I watched how  
6 skillfully his defense team captured the  
7 narrative of that case. It is where the use  
8 of the term accuser came into the nomenclature  
9 and it was so skillful, I started thinking  
10 about we have got to start thinking about the  
11 language we use.

12 So, just to give you just a real  
13 summary of what I am talking about, for  
14 example, we use the language of consensual sex  
15 all the time to describe assaultive acts. We  
16 talk about victims having sex with their  
17 perpetrators. We talk about victims  
18 performing oral sex on their perpetrators.  
19 And we don't think of the word picture that  
20 creates, which does not in any way show the  
21 reality of the crime.

22 So, I am just going to give you an

1 example from the Georgia Appellate Courts.  
2 The judicial language project did a study of  
3 Georgia Appellate opinions and looked at how  
4 they discussed sex assault on a child. And  
5 over and over again, the Appellate Courts used  
6 the term "perform oral sex" to talk about a  
7 child being victimized by an adult  
8 perpetrator.

9 So, the Judicial Language Program  
10 at the New England School of Law wrote to the  
11 Chief Justice of Georgia and the Chief Judge  
12 of the Court of Appeals, pointed this out.  
13 Then the Chief Justice said thank you. We  
14 will be more mindful of our language.

15 They did a subsequent study a year  
16 later and found they had actually changed how  
17 they wrote about it. So, instead of talking  
18 about a child performing oral sex on the  
19 perpetrator, one opinion said the defendant  
20 attempted to anally rape the victim, orally  
21 sodomized and put his penis in the victim's  
22 mouth. Now, that creates a very different

1 word picture than if we talked about a child  
2 performing oral sex on an adult.

3 We use victim-blaming language all  
4 the time and we use what I have called the  
5 invisible perpetrator. We talk about violence  
6 against women as an abstraction, where there  
7 is no perpetrator in the picture. We also  
8 talk about violence against women as a mutual  
9 act, as opposed to a deliberate act  
10 perpetrated by one person on another.

11 So for example, we talk about  
12 violent relationships. It is not the  
13 relationship that is violent. It is the  
14 batterer. But that suggests mutuality and it  
15 is sort of leads the perpetrator out of the  
16 picture.

17 We commonly use phrases like Emma  
18 is a battered woman, where we have then  
19 defined Emma completely by the status of being  
20 battered but her batterer is nowhere in the  
21 picture, as opposed to using language like  
22 Jacob beat Emma. So, it creates a very

1 different thing and I think this is a topic  
2 that we don't think about enough when we are  
3 educating prosecutors but is one that is  
4 extremely important.

5 My next sort of item on the  
6 agenda, if I were creating the ideal course  
7 for prosecutors is Article 32 hearings. Now,  
8 since you are the Comparative Systems Panel,  
9 I will tell you this is one of the areas where  
10 I think the military system needs a lot of  
11 work. These Article 32 hearings, from my  
12 experience are free-for-alls. It is like the  
13 wild, wild west. A lot of times you don't  
14 even have a lawyer running them. There are no  
15 rules and rape shield is violated like crazy.

16 This is also another thing that  
17 the NDAA requires the Judicial Services Panel  
18 to address and one that I think really needs  
19 some attention from this panel, as well.

20 These hearings need to be  
21 conducted by experienced lawyers or judges and  
22 I think they need to be more probable cause

1           hearings, rather than this just sort of free-  
2           for-all under the guise of discovery, which is  
3           what is happening now. And I think we only  
4           need to look at the recent Naval Academy case  
5           to see a particularly egregious example of  
6           what I am talking about.

7                         Now, I was asked to address  
8           prosecutors, which you will say, Dillon, I  
9           did. But I didn't see anywhere where judges  
10          were included in this. So I want to just put  
11          my little plug in that we need to remember  
12          that in addition to educating prosecutors and  
13          investigators, we have got to include judges.  
14          As far as I know, my organization, the  
15          National Judicial Education Program, is the  
16          only organization that has ever done education  
17          on this topic for military judges. We did a  
18          program for the Interservice Military Judges  
19          Seminar in January of 2009 but from I know,  
20          that is the one and only time that all of the  
21          trial judges have addressed this issue.

22                         Now you all know way more than I,

1 those of you who have served in the military,  
2 there is this constant rotation and turnover.  
3 So one program in 2009 is certainly not enough  
4 for judges who, like you said, have a lot of  
5 power and a lot of say in these cases.

6 Now there are some other  
7 systematic issues that I think are tied to  
8 training because, as we all know, this can't  
9 be fixed by training alone. We need to have  
10 prosecutors who are experienced, well-trained,  
11 and well-suited for this work. This is not  
12 for the faint-hearted and this is not an area  
13 for baby lawyers.

14 One big difference I noticed  
15 between civilian and military systems is,  
16 except for really small jurisdictions, for  
17 most civilian jurisdictions prosecutors have  
18 sort of they start with misdemeanors and they  
19 work their way up to serious felony cases.  
20 They don't usually just start right off the  
21 bat doing one of the most difficult kinds of  
22 cases there is to do. There are also lots of

1 specialized prosecutors in this area now who  
2 work on the issue of sexual assault.

3 When I first started working with  
4 the military in I think it was around 2003,  
5 the process was very inexperienced lawyers  
6 would come out of JAG school and start as  
7 prosecutors. Once they started figuring out  
8 what to do, then they would become defense  
9 attorneys.

10 Now, I know that the services have  
11 made some progress in changing that to some  
12 extent, but not enough. These cases are very  
13 difficult and you cannot do this as a junior  
14 captain without a lot of trial court and  
15 litigation experience. I know some services,  
16 for example, the Navy, is looking at creating  
17 a military justice or a litigation track,  
18 where lawyers, JAGs will not be penalized for  
19 sticking with this area and it won't have a  
20 negative impact on their career. But we  
21 really need to change this system where you  
22 have the least experienced lawyers prosecuting

1           some of the most difficult types of cases  
2           against much more experienced military defense  
3           counsel plus, in addition, oftentimes,  
4           civilian defense counsel as well.

5                     Another systemic issue that I  
6           think it is important for you all to look at  
7           is that the constant rotation, and this is  
8           kind of related to what I was just speaking  
9           about, the constant rotation of attorneys  
10          requires constant training but it is really  
11          training the same thing over and over.

12                    So, here is a quote from one  
13          military prosecutor I spoke to. She said, "We  
14          really never get beyond Sexual Assault 101,"  
15          and we are setting our prosecutors up to fail  
16          by the structure the way we have done it.

17                    I also think it is important for  
18          prosecutors to work more closely with  
19          investigators and with medical personnel. And  
20          I know that the 2013 NDAA requires the  
21          establishment of special victim capabilities  
22          and that is critically important. And I know

1 the Army, in the course that Mr. Strand has  
2 developed and teaches works on this kind of  
3 cross-training and joint training. And I  
4 think that is important, too, not only so  
5 people understand each other's roles better  
6 but so that they form more of a sense of  
7 teamwork and collaboration.

8 And we also need to do a thorough  
9 evaluation of training. We have got to stop  
10 doing training that in our gut we think works  
11 but we don't really have any evidence that it  
12 does make a difference. Because as we know,  
13 for example, from the training of  
14 investigators, we have got to undo some really  
15 bad training we have been doing in the past  
16 about how to interview victims, trauma  
17 victims.

18 We also need to include victim  
19 satisfaction surveys in part of this  
20 evaluation. We often don't go to the victims  
21 to find out their experience of the system.  
22 And from my experience of having worked with

1 victims for almost 26 years, they are quite  
2 expert in telling us what worked and what  
3 didn't work through the process.

4 And then victims need standing to  
5 assert and protect their rights. As I  
6 mentioned earlier, you, being the Response  
7 System Panel as a whole, has been asked to  
8 give a recommendation regarding whether these  
9 special victim counsels, their roles should be  
10 expanded to include legal standing to  
11 represent victims during investigative and  
12 military justice proceedings. And I think  
13 that is critically important. And that is one  
14 of the main points I hope you will take away  
15 from my presentation today is that this is an  
16 incredibly strategy, this special victim  
17 counsel, but if we don't give them the  
18 standing that they need, then how are they any  
19 different from the victim witness person, the  
20 SART, the victim advocate, all these other  
21 people who can advise victims about the  
22 process and the resources and that sort of

1            thing? We need to let these lawyers be  
2            lawyers and get in there and really protect  
3            their privacy and these rights that are being  
4            given to victims. Otherwise, it really just  
5            becomes symbolic law.

6                        So, I also think it is important,  
7            and I would suggest, that you also recommend  
8            victims should be afforded the standing to  
9            assert violations of their new victims' rights  
10           as well.

11                       So in closing, because you all  
12           look really tired and I hope it is not just  
13           too late for you to hear what I am saying, but  
14           I want to acknowledge that you have an  
15           extremely difficult job and there is lots of  
16           well-orchestrated very skillful pressure to  
17           protect the status quo. I sat in on the two-  
18           day Response System Panel on the role of  
19           commanders and it was quite interesting to  
20           observe.

21                       So, but I think what is also  
22           important for you to know is there is a lot of

1           mistrust of this system on the part of victims  
2           and those who work with them. Some of it is  
3           tied to the fact that it is the accused's  
4           chain of command that makes all the decisions  
5           but it is there and it is very real and has an  
6           impact on whether victims come forward. And  
7           it is important for us to realize that for a  
8           victim, and I think particularly a military  
9           victim, to report a sexual assault is an  
10          extreme act of courage. But it also is a  
11          window of opportunity for us to look for these  
12          other victims and hold these serial predators  
13          accountable. And we really have a duty to  
14          protect those who offer to give their lives to  
15          protect us.

16                        So, in closing, I would just like  
17          to read a quote to you from an article about  
18          sexual assault in the military that I think  
19          really captures this. "Those who join the  
20          military clearly recognize that it is  
21          dangerous and that there are risks; however,  
22          most risks would come from an outside enemy.

1           Unfortunately for many servicemembers, the  
2           greatest risk comes from the person serving  
3           next to them, above them, or the system at  
4           large. Those who serve their country have the  
5           right to know that the system that works so  
6           hard to protect others is also protecting them  
7           from those within it."

8                         So, thank you very much for your  
9           attention after a long day and I would be  
10          happy to answer any questions, if you are  
11          still capable of formulating them.

12                        BG DUNN: I have just one sort of  
13          administrative question.

14                        MS. BAYLIFF: Yes?

15                        BG DUNN: How long did you serve  
16          as the head of the Air Force SAPRO program, in  
17          what years?

18                        MS. BAYLIFF: Two and a half years  
19          from 2005 to 2007.

20                        BG DUNN: Okay. All right, so you  
21          ended your tenure in 2007.

22                        MS. BAYLIFF: Right.

1                   BG DUNN: And then you have done  
2 ongoing work with the various services.

3                   MS. BAYLIFF: Right. And then I  
4 worked with the Army HQE program after that in  
5 2009, maybe. And I have worked with all the  
6 other services as well.

7                   BG DUNN: Right. Thank you very  
8 much for the very valuable perspective.

9                   PROF. HILLMAN: You are not too  
10 late to make an impression.

11                   MS. BAYLIFF: Okay, good.

12                   PROF. HILLMAN: And I speak for  
13 myself and I am sure for others, too.

14                   Do others have questions? I will  
15 just ask. Since you have had experience with  
16 different services, the different branches and  
17 we have just had an array of the  
18 representatives from the different services,  
19 do you see different solutions that need to be  
20 implemented in each or distinctive problems in  
21 each?

22                   MS. BAYLIFF: You know that is a

1 hard question. I think it is very difficult  
2 to just do a one-size-fits-all in training in  
3 that sort of thing. I think that is difficult  
4 but I think that there can be some structural  
5 things that should apply to all the services.  
6 But I also think the services should be given  
7 some leeway in how they implement it just  
8 because you look at the size of the Army and  
9 the Marines.

10 So, I think that there should be  
11 some very specific overarching principles,  
12 guidelines, requirements, but that the  
13 services should be given some leeway to figure  
14 out the best way to implement it because there  
15 is a lot of resistance of just things being  
16 imposed on the services from DoD and it can be  
17 counterproductive sometimes.

18 PROF. HILLMAN: Right. Thank you.

19 COL MORRIS: Can I ask a quick  
20 question? You mentioned the concept of  
21 traumatic memories being stored and retrieved  
22 differently. Maybe everybody else has seen

1           this stuff but do you know, or could you maybe  
2           send us offline the most recent or best  
3           scholarship on that. Do you know in  
4           particular an article or two that might --

5                       MS. BAYLIFF: If you look at -- I  
6           know that Mr. Strand has quite a bit but if  
7           you look at Rebecca Campbell, she is a Ph.D.  
8           professor. She has a terrific webinar that is  
9           online and I will look. Colonel, I will get  
10          that information to you.

11                     MR. STRAND: It is the National  
12          Institute of Justice. It is very good.

13                     MS. BAYLIFF: She has a very  
14          fantastic maybe 45 minutes to one-hour webinar  
15          on the neurobiology of trauma.

16                     We also have, we have a DVD of Dr.  
17          David Lisak doing a 45 minute presentation on  
18          neurobiology of trauma that we used for  
19          judges. Now, it is a little bit out of date  
20          but I am happy to get that DVD to you as well.

21                     Rebecca Campbell's webinar is  
22          quite recent and it is readily available and

1           it is just absolutely fantastic.

2                       COL MORRIS:   And speaking of  
3           Lisak, you did mention that -- that is his  
4           study, right?  The Navy study, the 95 percent  
5           serial rapists?

6                       MS. BAYLIFF:  No, that study is  
7           done by the Naval Research Institute.  That is  
8           Stephanie McWhorter and Lex Merrill.  So that  
9           is Navy but it is compared with David Lisak's  
10          study of undetected rapists on college  
11          campuses.  So, the military study shows  
12          perpetration rates of about 13 percent.  
13          David's study over 20 years shows perpetration  
14          rates of 6.8.  So that is where I got the  
15          number where I said the military rates were  
16          twice that of the civilian studies.

17                      COL MORRIS:  Has there not been  
18          some revision to his work?

19                      MS. BAYLIFF:  Who, David Lisak's?

20                      COL MORRIS:  Yes.

21                      MS. BAYLIFF:  No.

22                      COL MORRIS:  I was thinking that

1 he had revised his.

2 MR. STRAND: Well the RAND study  
3 for the Air Force actually kind of  
4 complemented that as well. And then Voller  
5 and Long did some research a couple of years  
6 ago. They kind of took from that. And then  
7 there is a recent study that I just was  
8 looking at that kind of builds off of that  
9 undetected, basically looking at the offender  
10 that is never caught.

11 What Claudia said is very true.  
12 We are used to catching them and thinking that  
13 is the only thing that has happened. And so  
14 all the new research has really shown very  
15 strongly, even based on Gene Abel's stuff back  
16 in the '80s, kind of complemented all that.  
17 There is just a plethora of research that show  
18 how serial in nature these folks are.

19 MS. BAYLIFF: Right. And like  
20 Russ said, there is a lot of research on  
21 incarcerated rapists. And that used to be all  
22 our research and that is what we drew all our

1 conclusions about. What is important about  
2 David's research -- and I have worked closely  
3 with him since the mid-'90s, he is one of the  
4 faculty members for our judicial training and  
5 when we train prosecutors. What is important  
6 with David's research and why I compare his  
7 with the Navy studies is they are both  
8 undetected samples. They are men who have  
9 perpetrated rape, the vast majority of them  
10 perpetrated serial rape over a course of time  
11 and were not caught. They are close to the  
12 same age. So that is why I think you can make  
13 some valid comparisons, even though,  
14 obviously, we can't extrapolate based on  
15 studies of naval recruits across men in the  
16 military in general.

17 But I think that is probably some  
18 of the most important research that has been  
19 done on sexual assault in the military and it  
20 shows some very troubling results.

21 COL HAM: When you say rape, Ms.  
22 Bayliff, what do you mean? Because you just

1 used the word rape and you used the word  
2 sexual assault. I understand that these  
3 studies are about rape.

4 MS. BAYLIFF: Yes. In David  
5 Lisak's research, he uses a very narrow  
6 definition of forcible rape and attempted  
7 rape. The Navy study uses the same, talks  
8 about rape --

9 COL HAM: So are we talking  
10 penetrative offenses by the use of force?

11 MS. BAYLIFF: Yes.

12 COL HAM: So, are these studies  
13 also applicable to non-penetrative offenses  
14 without the use of force, which are also  
15 called sexual assaults in the military?

16 MS. BAYLIFF: Well, Colonel Ham,  
17 there is some fascinating research and, once  
18 again, this has been done with both  
19 incarcerated and David Lisak did this research  
20 with his undetected rapist that shows there is  
21 much more crossover than we originally  
22 thought.

1                   We used to think sex offenders fit  
2                   in categories. So, if you had an incest  
3                   perpetrator, you kept him away from his kids  
4                   but he wasn't risky to others. Or if you had  
5                   someone who was exposing himself or something,  
6                   that was considered not that big a deal. What  
7                   we have learned over the years since I started  
8                   doing this work, both with incarcerated  
9                   offenders and undetected offenders is there is  
10                  much more crossover than we used to see --  
11                  than we used to think there was.

12                   So for example, in David Lisak's  
13                  research, he looked at not only the forcible  
14                  rape or attempted forcible rape, he looked at  
15                  physical assault of partners, physical and  
16                  sexual assault of children. So he looked at  
17                  kind of the gambit of interpersonal violence  
18                  but the number I use, the 6.8 percent, he is  
19                  talking about a very narrow definition of  
20                  forcible rape or attempted rape.

21                   MR. STRAND: Yes, and in David's  
22                  research, he actually lists also other sex

1 offenses. The same thing with Voller and  
2 Long. They had the rapists and then they had  
3 the sex offenders.

4 MS. BAYLIFF: Right.

5 MR. STRAND: And so all of the new  
6 research is looking at both categories and  
7 finding significant crossover with them.

8 COL HAM: I guess my question is  
9 directed to we have so many offenses -- we  
10 just heard from one of the HQEs. He said I  
11 couldn't prosecute these in my state because  
12 they are not offenses. But is there a danger  
13 of extrapolating these concepts to all of what  
14 the military in its vast definition of sexual  
15 assault, considers sexual assault?

16 MS. BAYLIFF: Well, I think that  
17 is why you have to go back to that he said/she  
18 said, he said/they said kind of thing. We  
19 need to really investigate these and we need  
20 to look for other sexual offenses when we have  
21 an accused before us or doing these  
22 investigations. Because I am not saying that

1 everything that has been determined about  
2 forcible rapists who commit forcible rape can  
3 be extrapolated to someone who sexually  
4 assaults someone on the METRO or something  
5 like that. But what I can tell you, that we  
6 know much more now than we ever did before, is  
7 that we really need to look at these offenders  
8 or these accused very carefully and very  
9 thoroughly because there is much more  
10 crossover than we knew.

11 So, if you look at Dr. Lisak's  
12 sample, for example, those are college kids.  
13 They are relatively young. And he found so in  
14 the 76 men who fit in his category of serial  
15 rapist, they disclosed to him a 1,045 of  
16 interpersonal violence. And these are college  
17 kids. So, they are relatively young.

18 So, I don't know that we have a  
19 complete answer to your question but what we  
20 do know is there is much more crossover than  
21 we ever realized before.

22 PROF. HILLMAN: And the

1 comparative piece, just to maybe put on this,  
2 the comparative piece is especially  
3 challenging because we are not only talking  
4 about very grave sex offense, rape, to lesser  
5 sex offenses. We are also talking about in  
6 the military system things that do not  
7 constitute sex offense, but for in the  
8 military context.

9 In the Lackland Air Force Base set  
10 of scandals, which after were there, we  
11 realized, at least I did, more clearly that  
12 what was being prosecuted there was not what  
13 would be a sex offense outside of the military  
14 context.

15 So, I don't think that actually is  
16 the overlap that you see in -- and the  
17 supporting work that actually -- but it is --

18 MS. BAYLIFF: I'm not sure --

19 PROF. HILLMAN: In other words --

20 MS. BAYLIFF: When you say you  
21 don't see it is the overlap, I don't know that  
22 we know that.

1 MR. STRAND: Well, I think the  
2 difference that we saw at Lackland was more of  
3 a, if you could put it into a category,  
4 constructive force as far as the perception of  
5 the system, the authoritative type of force,  
6 as opposed to what Dr. Lisak talks about in  
7 other sex offenses will be prosecuted in any  
8 jurisdiction; indecent acts, indecent assaults  
9 and those kinds of things.

10 PROF. HILLMAN: Right.

11 MR. STRAND: But at Lackland, that  
12 is not what we were talking about there. It  
13 wasn't the indecent acts and indecent  
14 assaults. Some of them were indecent acts but  
15 it was more of the constructive force, if you  
16 look at it through the military authority.

17 PROF. HILLMAN: Or simply a  
18 violation of orders that I am not sure there  
19 was even constructive force. But it was  
20 debauchery, essentially that was outside the  
21 bounds of what the Air Force considers non-  
22 criminal. So, it was made criminal.

1                   And that is where you get into not  
2                   the gradations of categories of sex offense  
3                   but actually into the gradations of sexual  
4                   behavior that leads us to language problems  
5                   that you actually point to in how prosecutors  
6                   talk. And this is a problem when we actually  
7                   cast the circle too big in those instances, if  
8                   we are talking about identifying perpetrators  
9                   and ending the sexual assault and related  
10                  problems.

11                  MS. BAYLIFF: Right. But even if  
12                  you limit it to contact sexual assault, I mean  
13                  there is still a significant problem and there  
14                  is still a significant amount of crossover.

15                  I mean I understand what you are  
16                  saying but we just need to be careful that is  
17                  not used as an excuse to minimize what is  
18                  really a serious problem.

19                  So for example on the Navy study,  
20                  one of the reasons why that is so important is  
21                  they looked at those recruits coming in, then  
22                  they followed them and they looked at them

1           again in six months or a year later. And even  
2           the Navy researchers say their numbers under  
3           estimates because the people who admitted to  
4           committing assaults then they came into the  
5           Navy were the ones who were most likely to  
6           drop out during the subsequent follow-up  
7           studies. And statistically what we know from  
8           looking at this behavior, since it is an  
9           offense that is committed in a serial nature,  
10          even the Navy researchers themselves were  
11          concerned that their numbers were under-  
12          reporting. And once again, Colonel Ham, going  
13          to you point, they were talking about rape,  
14          not sexual assault in the broad gambit that it  
15          is often addressed in the military.

16                    BG DUNN: But their initial  
17          research was talking about rape that those  
18          recruits committed before they came into the  
19          Navy.

20                    MS. BAYLIFF: Correct. Right, but  
21          then they looked at them six months and a year  
22          later and found that some of them continued to

1           perpetrate rape.

2                   BG DUNN: Right. But the initial  
3 numbers are pre-service.

4                   MS. BAYLIFF: Right. Oh yes, of  
5 course because it is when they are coming in.

6                   BG DUNN: Right.

7                   MS. BAYLIFF: Yes, it is when they  
8 are coming in.

9                   MR. STRAND: I need to understand  
10 when you are talking about standing for the  
11 special victims counsels.

12                   MS. BAYLIFF: Okay.

13                   MR. STRAND: What do you mean by  
14 standing?

15                   MS. BAYLIFF: Okay, so here is  
16 what I mean by that. And here is how I think  
17 these attorneys have the most impact. And  
18 let's go back to the Kobe Bryant case because  
19 that is a perfect example. So, I was not in  
20 any way involved in the prosecution of that  
21 case. I was a civil attorney contacted by the  
22 rape crisis team and the victim was very

1 concerned about. The rape crisis team was  
2 really concerned and the victim advocate were  
3 concerned about protecting their records and  
4 protecting that relationship.

5 So what I did was I came to the  
6 criminal case and intervened, filed a motion  
7 to ask the court to allow me to come in to the  
8 process to raise these issues about protecting  
9 the victim's privilege with respect to the  
10 rape crisis team and the victim advocate.

11 Now, when we first started doing  
12 this work, courts would go what are you doing  
13 here? You are a civil lawyer. You can't come  
14 into a criminal case. You don't have  
15 standing. You don't have a role here. But we  
16 were able to, the court allowed us to come in  
17 and make our arguments with respect to that.

18 So, how this would come up in  
19 these military cases, and I am trying to  
20 remember the facts of the Air Force case that  
21 led to the ruling from the Appellate Court.  
22 But one of the special victim counsel raised

1 an issue about protecting the victim's privacy  
2 in some way. And I can't remember at this  
3 point what exactly it was. Say it was her  
4 medical records or her therapy records or  
5 something like that. And if I remember  
6 correctly, the trial judge said you can't come  
7 into this criminal case. The only people who  
8 have standing in a criminal case are trial  
9 counsel and defense counsel. But that case  
10 was appealed and the Court of Appeals for the  
11 Armed Services, I believe, was the court that  
12 said yes, at least in the pretrial process,  
13 this attorney could come in and raise these  
14 issues.

15 So see, it is whether the right to  
16 raise issues in an Article 32 hearing and it  
17 didn't get to the point for that case of  
18 actually coming into the trial.

19 So, I am not saying that these  
20 attorneys can ask questions of witnesses,  
21 object in the middle of court, but they have  
22 been given standing in the civilian world in

1 a lot of jurisdictions to raise these privacy  
2 issues, to raise issues to protect victims  
3 prior sexual history.

4 Now a lot of times, trial counsel  
5 can do that and I think often has an  
6 obligation to. But it can get kind of touchy  
7 where, going back to the Kobe Bryant case, you  
8 know the question of should the prosecutor  
9 assert the rights of this private community  
10 rape crisis team.

11 Other ways it comes up, Russ, is  
12 when a defense attorney issues a subpoena for  
13 a victim's therapy records. So, who gets the  
14 subpoena? The therapist. The therapist is  
15 there. I can't give these records. I have a  
16 privilege. But someone has to assert that  
17 privilege. And that is what is so fantastic  
18 about these special victim counsel because  
19 these are trained lawyers who can assert that.  
20 Otherwise, normally, a victim would have to  
21 hire a private attorney, a therapist would  
22 have to hire a private attorney, and that is

1 really burdensome and difficult.

2 So, that is what I mean by  
3 standing.

4 MR. STRAND: Do you think it is  
5 complicated in the military because of  
6 collateral misconduct in some way?

7 MS. BAYLIFF: Well, I mean if you  
8 look at the NDAA, how they talk about that,  
9 the special victims counsel, from my  
10 understanding reading it, can't act as defense  
11 counsel if the victim is subject to criminal  
12 prosecution but they can facilitate getting  
13 that victim to the defense counsel if they  
14 need to.

15 MR. STRAND: So, here is a  
16 scenario and this is, I think, one of the  
17 biggest fears in criminal justice in the  
18 military. You have a victim witness counsel  
19 or victim -- somebody --

20 MS. BAYLIFF: Special victim  
21 counsel.

22 MR. STRAND: -- special victim

1           counsel that is notified by the victim  
2           advocate right away that victim has a victim  
3           advocate and a special victims counsel before  
4           they go to their first interview.

5                         Hypothetically, that special  
6           victims counsel and the victim advocate are in  
7           the interview. There is underage drinking.  
8           The agent has to get information about  
9           underage drinking. I mean it is part of the  
10          thing. She was intoxicated. He was  
11          intoxicated to the point that is part of the  
12          key parts of the case. So then the special  
13          victims counsel says wait a minute, you don't  
14          have to answer that. Let's take a break here.

15                         That may torpedo the entire case.  
16          And we just talked about the serial nature of  
17          it. So, are we going to stop investigating?  
18          Are we going to be thwarted in that  
19          investigation during that interview?

20                         MS. BAYLIFF: Well I mean this is  
21          kind of getting outside of my lane here but it  
22          is my understanding that if there are criminal

1           implications, you have to do an advisement of  
2           rights anyway.

3                   MR. STRAND:   We do.

4                   MS. BAYLIFF:   So I don't see where  
5           having a special victim counsel is going to  
6           change that process.

7                   MR. STRAND:   Without clear  
8           guidance, there has also already been  
9           anecdotal things where special victims counsel  
10          has called the agents and said my client is  
11          not talking to you.

12                   MS. BAYLIFF:   Right.

13                   MR. STRAND:   What is that all  
14          about?

15                   MS. BAYLIFF:   Well I mean that is  
16          their right not to talk to the -- obviously,  
17          then the case --

18                   MR. STRAND:   We can't investigate  
19          it.

20                   MS. BAYLIFF:   Right.

21                   MR. STRAND:   Well, I mean we can,  
22          especially if there is other victims or other

1           circumstances --

2                       MS. BAYLIFF: Right.

3                       MR. STRAND: -- but it certainly  
4 makes it difficult.

5                       MS. BAYLIFF: Right.

6                       MR. STRAND: So I think as we talk  
7 about a standing and everything else, I think  
8 there has to be clear guidelines on where that  
9 begins and where it doesn't. And really  
10 thoughtful guidance on making sure that it  
11 doesn't morph into a defense attorney for the  
12 victim and a thwarting of the investigation.

13                      MS. BAYLIFF: Well, I mean, once  
14 again, it is really the victim's right,  
15 whether the victim has counsel or not, to  
16 decide whether to continue to move forward,  
17 with some exceptions. But that is really  
18 their right anyway. And how these attorneys  
19 have been used certainly in civilian world is  
20 primarily in addressing the privacy type  
21 issues. That is really how rape shield  
22 privilege, access to medical records, access

1 to therapy records, that is victim advocate  
2 privilege. That is how they have been used in  
3 most instances.

4 MR. STRAND: Okay. And if I could  
5 just pick your brain on one other thing  
6 because your brain is good to pick. It is  
7 full of good stuff.

8 Some of the stuff that we have  
9 heard from other communities is if the victim  
10 in this particular community, somebody in  
11 Community A goes and they want to make a  
12 report, they can talk to the police. And if  
13 after talking to the police detective or  
14 whatever, they don't want to forward with the  
15 investigation, the police will stop the  
16 investigation. The benefit is if they talk to  
17 the investigator, they may, instead of being  
18 told by somebody else you don't have to talk  
19 to the police, they actually get to meet the  
20 police and make their own, probably a more  
21 informed decision.

22 What would be your opinion if we

1 changed the restrictive reporting to where  
2 they could still have a restricted report  
3 after they spoke to the police and made  
4 another determination of whether they want to  
5 go forward with the investigation? How would  
6 you feel about that?

7 MS. BAYLIFF: I don't think that  
8 would be -- I don't think that would be a good  
9 idea. I think that really complicates it  
10 legally. I mean, how do you un-ring that  
11 bell? You are a criminal investigator and all  
12 of a sudden you say I don't know this  
13 information?

14 MR. STRAND: No, it is not that  
15 they don't know it. They just won't  
16 investigate it.

17 I mean in the civilian communities  
18 that came forward and talked about it, in fact  
19 there was a presentation in Texas where it  
20 seems to be working out extremely well for  
21 them. I think it is just a change in mindset  
22 maybe for the military because right now we

1 are so staunch if an agent knows about  
2 something they have got to.

3 But we have already kind of  
4 cracked that nut a little bit to where if I am  
5 an agent at a sexual assault review board and  
6 I put two and two together for the victim  
7 advocate, now I know there is a victim and I  
8 know there is a crime, I can't use that, even  
9 though I know there was a crime committed. I  
10 know there was a victim. It is just expanding  
11 that a little bit.

12 MS. BAYLIFF: And I know that you  
13 want to get the bad guys. I mean I have known  
14 you forever. I know what your motivation is  
15 but what I can tell you is that victims choose  
16 restrictive reporting very deliberately for a  
17 reason. And that is because they do not want  
18 others to know. And I think to put that type  
19 of pressure on them will have them not come  
20 forward and do the restrictive reporting more  
21 because there is so much suspicion and  
22 mistrust and word gets out. And I honestly

1 don't -- I would not think that would be a  
2 good solution just because there is so much  
3 mistrust right now. And people from my  
4 experience, from being the Chief of the Air  
5 Force program and really choose restricted  
6 reporting very deliberately. Now some of  
7 them, after they get the support and that sort  
8 of thing switch. But when they see what  
9 happens oftentimes to victims who do come  
10 forward, it fosters this level of mistrust and  
11 I would not suggest just because -- and I  
12 would have to think about it more. I mean  
13 this is just not something I was prepared to  
14 talk about but I just am trying to figure out  
15 how legally you would un-ring that bell. I  
16 just would have to think about it more.

17 MR. STRAND: Right. I can say  
18 there is stuff from Ashland PD on some of  
19 their stuff and we can have a conversation.

20 MS. BAYLIFF: I mean the other  
21 thing is kind of what is the point? We used  
22 to have what was called anonymous reports in

1           Boulder, where you could call, the rape crisis  
2           team could call and say so and so came in.  
3           She doesn't want to talk to you but this guy  
4           at this fraternity did this. So here you have  
5           these totally frustrated cops who can't do  
6           anything with the information.

7                   MR. STRAND: But it is like in a  
8           drug investigation. And what Ashland is doing  
9           with some of that and some other police  
10          departments, they are actually using it for  
11          crim intel and they are actually starting to  
12          investigate that person and finding other  
13          victims, even without this victim being part  
14          of it.

15                   MS. BAYLIFF: Right. But I still  
16          --

17                   BG DUNN: And then they have got  
18          her contact information. So, if another two  
19          victims show up over the next six months, they  
20          can circle back around to this victim and say  
21          you made this report to us, we haven't  
22          investigated it. However, we now have two

1 more victims, would you like us to open this  
2 case now?

3 MS. BAYLIFF: I know wouldn't you  
4 cause a lot of heartburn about tainting that  
5 if you go to one witness and say you have  
6 these other witnesses? I know there has been  
7 a lot of discussion about that. I am just not  
8 seeing an effective way to use this anonymous  
9 reporting.

10 It really boils down to it is the  
11 victim's choice and I really think we need to  
12 leave it there. But I would have to look at  
13 it more closely and think about the legal  
14 issues.

15 PROF. HILLMAN: So thank you for  
16 taking time to talk with us. I think we are  
17 not going to do the last part of the session  
18 that was on here. We are going to pause after  
19 this.

20 I can't help to take advantage of  
21 the opportunity to say one more piece about  
22 language here. I wonder if what we want to

1 say is not that victims mistrust the system as  
2 it is that they lack faith in it. And here is  
3 the distinction in my mind. For a commander  
4 to be able to protect the victim through this  
5 process, the commander needs to be a deity.  
6 It has to be a thing that can actually resolve  
7 all the personal and social and professional  
8 conflicts that are inevitable in a workplace  
9 community violation of this order.

10 And does this sound like -- does  
11 this ring like a distinction to you? It is  
12 not that victims believe their commanders are  
13 not interested or not ready to stand up for  
14 them or that the system is completely bankrupt  
15 and corrupt, they just look at what is out  
16 there and they say this is not a place where  
17 I can actually move safely and, therefore, I  
18 am going to step back. And that seems to me  
19 more like this thing that is lack of faith  
20 than it is a lack of trust in a process that  
21 we are trying to fix.

22 MS. BAYLIFF: But Professor

1 Hillman, this has just been one of my really  
2 big frustrations in this whole role of the  
3 commander stuff. It isn't the victim's  
4 commander who is making the decisions. And  
5 that is the distinction that I think we are  
6 missing here. It is the accused's chain of  
7 command.

8 Now sometimes, fortuitously that  
9 maybe the same but it is the accused's. And  
10 I get this example from Russ, I have heard him  
11 use this for years. If you have a guy who  
12 works for IBM and he rapes somebody, you don't  
13 go to that guy's boss at IBM and ask him what  
14 should happen to him because there is an  
15 inherent conflict there.

16 So, I think the distinction I  
17 would suggest is that we need to be careful  
18 when we are talking about the commander's role  
19 that we are acknowledging it is the chain of  
20 command, the accused's chain of command who  
21 makes all of the decisions throughout the  
22 process. And that to me is the really

1 critical distinction.

2 COL HAM: What you are talking  
3 about for victim support, it is going to be  
4 the victim's chain of command. The victim's  
5 chain of command is responsible for taking  
6 care of the victim.

7 MS. BAYLIFF: Right but if you are  
8 talking about mistrust or lack of faith in the  
9 system, it is critically important to  
10 acknowledge that the decisions about the  
11 criminal case and a lot of the negative  
12 publicity about General Franklin in the Air  
13 Force and General Helms in the Air Force is  
14 because they overturned a conviction and they  
15 were in the perpetrator's chain of command.

16 So the distinction I think that is  
17 important in terms of trust is that the legal  
18 decisions that are made in the civilian system  
19 by prosecutors are made by the accused's chain  
20 of command and that is what I think we have to  
21 acknowledge and that is where, from my  
22 personal experience and just from having done

1           this with military for ten years, that is  
2           where a lot of this mistrust or lack of faith  
3           comes from. And there is other issues,  
4           collateral misconduct.

5                       MR. STRAND: Do you think raising  
6           the level to a much higher level has changed  
7           any of that?

8                       MS. BAYLIFF: No.

9                       PROF. HILLMAN: Okay, we can't  
10          stop but we have to pause. So, thank you.

11                      MS. BAYLIFF: Thank you.

12                      PROF. HILLMAN: So we are going to  
13          be in recess here and we will take up this  
14          last topic via email. That is what I think.  
15          Is that okay with you, Colonel Ham?

16                      COL HAM: If we can explain what  
17          we have done.

18                      PROF. HILLMAN: Yes.

19                      COL HAM: One minute?

20                      PROF. HILLMAN: Yes, please do.

21                      COL HAM: After discussion with  
22          Judge Jones, all of the subcommittee staff

1           were directed to go through your terms of  
2           reference for the subcommittees and identify  
3           all the issues that have arisen in the public  
4           hearings and your subcommittee hearings that  
5           fall under those terms of reference. The idea  
6           is not to somehow send any kind of hint that  
7           the subcommittee should address those by a  
8           recommendational finding, but they are just  
9           topics that we thought would be a start  
10          because we have got to get you to the point  
11          where you feel like you can start deliberating  
12          and making findings and recommendations.

13                        As you may or may not know, the  
14          National Defense Authorization Act of 2014  
15          limited, cut the panel's time to 12 months.  
16          We already knew that was going to happen and  
17          the Secretary of Defense had already put in  
18          writing that he requested the panel to finish.

19                        That means, for all practical  
20          purposes, the subcommittees, including your  
21          subcommittee, have to report out to the full  
22          panel in April, which means the subcommittee

1 needs to complete its work in March, which is  
2 rapidly approaching. There is still a lot  
3 more planned for the subcommittee to do and  
4 that the subcommittee needs to do but we  
5 thought that it might help you to start  
6 thinking about your deliberations to come up  
7 with a list of issues that we could circulate  
8 for you to look at and add to -- subtract  
9 whatever you wanted to do. And then set up a  
10 schedule by teleconference or in-person  
11 meetings where you can start doing down with  
12 whatever list you decide is the appropriate  
13 one to start attacking, if that makes sense.

14 MR. STRAND: I would recommend --  
15 I saw your note on maybe a teleconference to  
16 start. I am not sure a teleconference is  
17 good. I think being in person, just like they  
18 were saying, to kind of discuss these issues  
19 and everything else. We can just plan either  
20 an extra day or time in some of our meetings  
21 to do that. I would feel more comfortable in  
22 person to do that.

1                   PROF. HILLMAN: So noted. When is  
2                   our next meeting?

3                   COL HAM: Well, right now there is  
4                   a recently scheduled public meeting for the  
5                   full panel which is on January 30th. I don't  
6                   know if there is any capability of planning  
7                   another subcommittee meeting around that. I  
8                   know your schedules are pretty tight.

9                   The next in-person meetings are  
10                  scheduled for February.

11                  MR. STRAND: We have 11 February  
12                  and 25 February, right?

13                  MR. FISHMAN: And we could easily  
14                  set more time.

15                  MR. STRAND: We have Comparative  
16                  Systems Subcommittees on the 11th and the 25th  
17                  of February and the 11th of March.

18                  COL MORRIS: Well, I am missing  
19                  those emails somehow. I am not getting those  
20                  --

21                  MR. FISHMAN: It is on that  
22                  attachment.

1 COL MORRIS: Oh, the matrix, okay.

2 PROF. HILLMAN: Would you send it  
3 again, just a short email with the dates,  
4 specifically? Can you do that for us?

5 MR. FISHMAN: Absolutely. The  
6 other thing I was going to ask, though, is do  
7 we want to, in the interim, set up a time to  
8 do this telephone conference? We never  
9 selected a date for next week to do a  
10 telephone conference.

11 So do we want to defer that? Is  
12 that what I am sort of hearing? You want to  
13 do an in-person meeting on the next -- devote  
14 some time to that. I don't know if the group  
15 is opposed to doing deliberations.

16 MR. STRAND: What have we got  
17 planned for the 11th, do you know?

18 MR. FISHMAN: The 11th is  
19 sentencing. It is primarily devoted to  
20 sentencing.

21 MR. STRAND: And the 25th?

22 MR. FISHMAN: The 25th is set up

1 for deliberations.

2 MR. STRAND: Okay.

3 BG DUNN: Russ, do you have VTC  
4 capability where you are?

5 MR. STRAND: I do but I am hardly  
6 ever there.

7 BG DUNN: Yes. And how about you?  
8 Do you have?

9 PROF. HILLMAN: Well, it depends.  
10 There were barriers last time to --

11 BG DUNN: Oh, civilians mixing  
12 with the military.

13 MR. FISHMAN: You can't talk to  
14 each other.

15 BG DUNN: Do you have VTC here?

16 COL HAM: Quote "on order."

17 BG DUNN: Okay, you have it. But  
18 you are going to get one that you can  
19 eventually talk to the civilians. But that  
20 doesn't help us for next week.

21 COL MORRIS: March 11th, I have  
22 got. What are the --

1 MR. FISHMAN: I'm sorry. February  
2 11th and February 25th.

3 COL MORRIS: And the 26th.

4 MR. FISHMAN: I don't think it is  
5 the 26th. I can go check.

6 COL MORRIS: 11th and 20 what,  
7 fifth?

8 MR. FISHMAN: The 25th.

9 PROF. HILLMAN: And then March  
10 11th is the next one.

11 COL MORRIS: I have got the March  
12 11th.

13 MR. STRAND: And Fort Lewis is  
14 off?

15 COL HAM: Because the judge  
16 elected to schedule a previously unscheduled  
17 public meeting, we are going to have to move  
18 that.

19 MR. FISHMAN: And we haven't  
20 decided when.

21 BG DUNN: So we have February  
22 11th, RSS.

1 MR. STRAND: And the 25th of  
2 February.

3 BG DUNN: And February 25th, RSS,  
4 here.

5 MR. FISHMAN: The 11th and the  
6 25th.

7 BG DUNN: And then March?

8 MR. FISHMAN: The 11th is here. I  
9 believe the 25th was going to be  
10 teleconference.

11 BG DUNN: March 11th I have as  
12 well.

13 MR. FISHMAN: And March 11th, I  
14 believe had just been set as a telephone date,  
15 tentatively. The 25th and 11th of March. The  
16 11th of February when we are supposed to be,  
17 it is a meeting here.

18 BG DUNN: And 25 February, we have  
19 a meeting here.

20 MR. FISHMAN: That was the thing.  
21 I don't know that it had ever been decided.

22 BG DUNN: It's all in that thingy.

1 It is all in that attachment to the email.

2 PROF. HILLMAN: I think that is  
3 too late for us to wait until February 11th to  
4 talk about the topics so that you actually a  
5 chance to write and we have a chance to screen  
6 and review.

7 So, it is just too late, right?

8 COL HAM: Well step two of the  
9 process would be once the list of issues are  
10 decided upon, the staff will pull everything  
11 we have on those issues.

12 Professor Hillman, you have seen  
13 that done for the role of the Commander  
14 Subcommittee that we don't couch it. We don't  
15 comment on it. It is basically putting a  
16 Reader's Digest version of the information we  
17 have on those issues, which you can see by our  
18 initial list, it is going to be a substantial  
19 undertaking.

20 PROF. HILLMAN: So we can't wait  
21 until February. Do we need to do it sooner?  
22 I agree I don't think we can do it via

1 conference call. I think it is too difficult.  
2 And actually, I don't think we should hear  
3 more information before we do it with what we  
4 have heard already because there is already  
5 such an avalanche that the sentencing piece is  
6 just too much more.

7 MR. BRYANT: Thank you. I thought  
8 it was just my brain.

9 PROF. HILLMAN: Your brain is  
10 growing.

11 So then we should probably try to  
12 do this, although I already said I couldn't,  
13 I know but maybe I have rethink that, around  
14 the 30th, the date that we are -- is that  
15 right for the --

16 COL HAM: Yes, that is a one-day  
17 public meeting on the 30th.

18 MR. STRAND: That is going to be  
19 here?

20 COL HAM: That is for the RSP, the  
21 full panel, that is going to be at the George  
22 Washington University Law School.

1 PROF. HILLMAN: So the 31st?

2 COL HAM: The 30th of January.

3 PROF. HILLMAN: Right but --

4 COL HAM: Oh, I'm sorry.

5 BG DUNN: I'm not here the 31st.

6 I have to fly to Chicago at noon.

7 MR. FISHMAN: And the 29th?

8 PROF. HILLMAN: The 29th? What  
9 about the 29th?

10 MR. FISHMAN: General Dunn, the  
11 29th?

12 BG DUNN: The 29th I believe I  
13 said yes on that. Hold on a second. Right,  
14 since I won't be in Seattle. But this  
15 committee was supposed to be in Seattle are we  
16 not doing that?

17 PROF. HILLMAN: Right. We are  
18 not. No because we have to be here on the  
19 30th because Judge Jones set the public  
20 meeting on the 30th.

21 BG DUNN: Okay. Yes, the 29th I  
22 am fine. The 29th, fine. The 30th, fine.

1           The 31st, on a plane at noon.

2                   MR. STRAND:   Could we meet in  
3           California?   Because I am going to be in  
4           California on the 29th.

5                   PROF. HILLMAN:   We would all be on  
6           the red eye together.

7                   BG DUNN:   Well, I mean is there  
8           any way to VTC these two from California?   Of  
9           course you have got to travel to be here on  
10          the 30th.

11                   PROF. HILLMAN:   You have got to  
12          travel on the 29th.

13                   BG DUNN:   Yes, you have got to  
14          travel on the 29th to be here on the 30th,  
15          sorry.   Are you going to be in California on  
16          the 28th, Russ?

17                   MR. STRAND:   I am going to be in  
18          California from the 26th to the 30th.   I could  
19          do it on the 31st.

20                   BG DUNN:   Well, I am just saying,  
21          could you VTC then in from the West Coast  
22          anyhow?

1 COL HAM: We have had issues with  
2 VTCing even from the Pentagon from non-  
3 military numbers. We have tried to do that in  
4 the past with some great degree of difficulty.

5 MR. FISHMAN: Why don't I throw  
6 out there this suggestion? I realize that it  
7 is a less desirable option but just the  
8 initial deliberation of these topics maybe  
9 email next week, coordinate, do some of the  
10 initial one-hour conversation about the  
11 issues, one to two hour.

12 PROF. HILLMAN: You know, Dillon,  
13 I wonder if I should set up like individual  
14 calls with members and talk about that.  
15 Because we could have, the conference call  
16 piece of it is what will be challenging here  
17 because we just won't hear from everybody.  
18 But if I can talk individually to folks about  
19 the different parts of this, that might --

20 MR. FISHMAN: You just have to  
21 loop it, right?

22 PROF. HILLMAN: With Maria. That

1 sounds more feasible to me and then we are  
2 just finding it hard -- as expected, we are  
3 having a hard time finding a date.

4 BG DUNN: Yes, except a group  
5 discussion does promote some consensus to drop  
6 certain things down or to say --

7 MR. STRAND: So you can't make it  
8 the 31st or you can?

9 BG DUNN: I'm on an airplane at  
10 noon at noon on the 31st, out of Dulles, so  
11 that is very difficult.

12 MR. STRAND: So is the 30th going  
13 to be all day? Could we meet in the morning  
14 on the 31st or no? You have to be on a plane  
15 at noon.

16 I can make the 31st.

17 PROF. HILLMAN: I could do the  
18 31st but --

19 BG DUNN: But I have access, I  
20 think, now to the civilian facility if that  
21 would be useful. I don't know. I mean the  
22 people next to me said we have got a big

1 conference room and we have two separate video  
2 teleconferencing if you ever need one.

3 PROF. HILLMAN: Can we close this  
4 and then talk administratively?

5 MS. FRIED: We could probably  
6 close this if it is just planning the next  
7 meetings.

8 This meeting is closed, for the  
9 record.

10 (Whereupon, at 5:54 p.m., the  
11 meeting in the foregoing matter was  
12 concluded.)

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This is to certify that the foregoing transcript

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

Before: US DOD

Date: 01-07-14

Place: Arlington, VA

was duly recorded and accurately transcribed under  
my direction; further, that said transcript is a  
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