

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL
ASSAULT CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

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PLANNING AND DELIBERATION SESSION

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TUESDAY
FEBRUARY 25, 2014

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The Panel convened in the
Teleconference Room of Suite 150 in 875 North
Randolph Street, Arlington, Virginia at 8:30
a.m, Elizabeth Hillman, Chair, presiding.

PRESENT

Professor Elizabeth Hillman, Chair
Harvey Bryant

BG (Ret.) John Cooke

BG (Ret.) Malinda Dunn

COL (Ret.) Stephen Henley

Rhonnie Jaus

COL (Ret.) Larry Morris

Russ Strand

ALSO PRESENT

LTCOL Candace Hunstiger, Designated
Federal Official

Janice Chayt

Dillon Fishman

Colonel Patricia Ham

LTCOL Kelly McGovern

Terri Saunders

A-G-E-N-D-A

Understanding the Defendant in
Sexual Assault Cases19
 Dr. Robin Wilson
 David Prescott

Military Forensic Psychiatry in
Sexual Assault Cases 141
 LTC David Johnson
 Dr. Jennifer Yeaw (via teleconference)

Briefings from Site Visits 269

Deliberations on Sentencing. 283

Review Issues Remaining. 381

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

8:47 a.m.

LTC HUNSTIGER: Welcome, everyone, to the Comparative Systems Subcommittee meeting. I am the alternate DFO Candace Hunstiger. I'm alternate. So we'll just open up the meeting and we will begin.

CHAIR HILLMAN: Thank you. Thanks to everybody for coming. I'm glad it's still snowing. I missed the last time we were here. I think it was bad weather then too so I'm glad I didn't miss all the fun on the east coast.

So Kelly, how should we start off here? So, do you have a --

LTC MCGOVERN: If I can just explain to you the materials we have for you all today in a red folder which contains the agenda.

We'll have two presentations this morning. One is with two presenters on the panel, Understanding the Defendant in Sexual

1 Assault Cases. We'll take a short break and
2 then have Colonel Johnson in person and
3 Jennifer Yeaw on the phone to talk about
4 forensic psychiatry.

5 Then we'll have our briefings from
6 our site visit, then get into Deliberations on
7 Sentencing.

8 The slides for the presentations
9 this morning are also in your packets which we
10 can just follow along hard copy. We won't
11 have audio/visual.

12 Then you each have a binder. In
13 that binder you will find the shell outline
14 for the topics that you're a team member on as
15 well as the relevant RFIs to that outline.

16 So, for instance, if you are on
17 the prosecution team like General Dunn you'll
18 have a prosecution outline and the RFIs
19 relevant to that. As well as she's on the
20 investigation team so she has everything that
21 Jan has done which is definitely the most
22 extensive work to date and all the RFIs to

1 support that.

2 Dean Hillman, you have all of the
3 RFIs and all of the outlines since everything
4 will come back to you for approval as the
5 chair. And we'll have you serve sort of as
6 the oversight.

7 One of the things we've learned is
8 version control is going to be very important.
9 So we wanted to make sure you had a hard copy
10 and a binder to keep your various versions.
11 And we'll work with you offline via email to
12 coordinate these drafts and update.

13 But if you all could try to read
14 through your RFIs by March 7 and when you
15 receive the first draft you'll at least know
16 the military's responses that are relevant to
17 your topic area.

18 Other than that I don't have
19 anything else. Oh, I actually do.

20 Shannon Green has also prepared a
21 supplement outline that pertains to all the
22 legislation currently out there and she's

1 highlighted which ones are Comparative Systems
2 Subcommittee.

3 So our plan currently is to work
4 these legislative issues into your separate
5 topic areas but we can see how that shakes out
6 for the final report and possibly have a
7 section where we pull out those legislative
8 issues. Because Congress will want to have
9 their attention drawn specifically to that
10 area. But as a starting point you all have
11 the legislative outline as well.

12 That's the only administrative
13 notes I have at this time.

14 CHAIR HILLMAN: So thank you for
15 pulling everything together. I want to thank
16 everybody who's working on this for keeping
17 up.

18 I was reading over the transcript
19 from the meetings that I missed last time and
20 I thought your questions were great and you
21 were all really well prepared to reckon with
22 what was a lot of information and then a lot

1 of no information about some of the critical
2 things that we've been asked to answer. I
3 could see that in there.

4 On the legislative piece, so
5 thanks Shannon for doing this. If there's
6 anything up for negotiation in terms of the
7 committees because our scope is so broad I
8 think we do want to push things to the other
9 committees to the extent we can. Unless we
10 feel really strongly about holding onto those.

11 I'm happy for us to offer the
12 information that we've collected to those, but
13 some of the Victims Services issues, for
14 instance, we can push that just because of the
15 scope of managing our submission to the panel
16 I think is tough. And that includes the
17 legislative analysis piece too.

18 LTC MCGOVERN: Okay.

19 CHAIR HILLMAN: And just one
20 question. We're supposed to weigh in on the
21 wisdom and efficacy of proposals, of the
22 legislative proposals. It's difficult given

1 that they're not implemented yet, perhaps
2 impossible. So I guess maybe if you were
3 thinking of including those then rather than
4 having a separate piece that sort of
5 highlights that part of what we're doing we'll
6 include that in the part of the outline where
7 we address the topic related to the
8 legislative proposal.

9 LTC MCGOVERN: For instance,
10 Lieutenant Colonel Craig Burton last time
11 spoke about the Article 60 revisions. He
12 mentioned there's a few areas that are just
13 unknowable.

14 CHAIR HILLMAN: Right.

15 LTC MCGOVERN: So, my suggestion
16 would be to briefly address that these are
17 some issues which we need to be aware of that
18 the services have spotted as potential
19 concerns. But other than that it is difficult
20 to comment on whether it's a good idea or a
21 bad idea.

22 CHAIR HILLMAN: So that would be

1 with respect to the non-confinement pieces, or
2 discharge pieces of punishment. We don't
3 understand the clemency powers with respect to
4 that because it's not specified in the
5 revisions.

6 LTC MCGOVERN: Or, in the whole
7 Article 60 if you have a certain sentence then
8 you may or may not fall into a category --

9 CHAIR HILLMAN: Of not reviewable
10 or reviewable. Right, yes.

11 MEMBER STRAND: Another area is
12 the Special Victims Council. It's so new and
13 there's so many -- it's like the Wild West out
14 there. There's so many right and left
15 boundaries on some of them. And some of them
16 seem to be doing really well, and some of them
17 really seem to be struggling. So I think it's
18 too early to tell on that as well.

19 LTC MCGOVERN: And that area I do
20 believe we are leaving completely to Victims
21 Services. Other than in passing possibly
22 mentioning the impact that it would have on

1 prosecution or defense or investigating cases.

2 CHAIR HILLMAN: In terms of
3 process do you think they'll have their report
4 ready before ours? Or are we? I guess it's
5 hard to say.

6 I just think it's so much smaller
7 it would be easier in some ways if that were
8 --

9 LTC MCGOVERN: Commander King sent
10 an email to Kyle and me yesterday that we're
11 going to sit down and make sure where we're
12 overlapping.

13 CHAIR HILLMAN: Okay.

14 LTC MCGOVERN: So I can get back
15 to you on that.

16 CHAIR HILLMAN: I'm sure you're
17 tracking it. I just think in some ways -- I
18 know they have a different scope but because
19 we've heard things that are relevant to what
20 they're doing we want to push that. I don't
21 know, and I think we're going to be curious.

22 In other words, once it goes to

1 the panel then there's not an opportunity for
2 everybody who's not on the panel to actually
3 weigh in on that. And if we could have some
4 review of that piece by all the members of the
5 subcommittee I think that would be great,
6 actually. But I don't know. We'll see.

7 Okay, so the March schedule. It's
8 on here to remind us about when -- do you want
9 to run over the schedule stuff that's coming
10 up?

11 LTC MCGOVERN: I still need one
12 more volunteer for the March 5 Quantico trip
13 if anyone's available. That should be a
14 shorter day. But I understand everybody is
15 incredibly busy.

16 And then March 11 and 25 we're
17 still waiting to hear back on whether or not
18 we can break into teams as preparatory
19 sessions. So, once we do that I'll be able to
20 probably send out an email to figure out how
21 we can maximize those sessions.

22 And then my proposal was going to

1 be work in teams to go over your outlines and
2 initial impressions. And then for those big
3 issues that we've identified we can tackle
4 those as the group in the afternoon to
5 deliberate again if we've missed them in the
6 first deliberations.

7 CHAIR HILLMAN: Okay. So, just to
8 put the calendar in our heads again, our next
9 meeting then as a subcommittee is?

10 LTC MCGOVERN: March 11 and March
11 25 we have as two dates on the calendar.

12 MEMBER BRYANT: I'm sorry, I
13 didn't hear what you said.

14 LTC MCGOVERN: Basically every two
15 weeks.

16 MEMBER BRYANT: The 25th is two
17 days?

18 LTC MCGOVERN: No, no, no, no.
19 March 11 and March 25.

20 MEMBER BRYANT: Okay.

21 CHAIR HILLMAN: The 11th and the
22 25th. And you asked us to read the RFIs

1 before March 7?

2 LTC MCGOVERN: Correct, because on
3 March 7 it's a Friday. We'll email you what
4 we have to date so that you can have four days
5 to look over it over the weekend before that
6 meeting.

7 CHAIR HILLMAN: And then what you
8 want from us after we review the RFIs by the
9 seventh is if there's something missing? Or
10 what are you?

11 LTC MCGOVERN: If you're ready for
12 track changes that would be helpful, or if
13 there are just general issues and big topics
14 that need further deliberation, additional
15 information.

16 CHAIR HILLMAN: Okay.

17 LTC MCGOVERN: We're getting this
18 out on the go this time.

19 CHAIR HILLMAN: Okay. So sort of
20 -- that's in some ways a last check for us to
21 say we need more information before we can
22 actually say whatever it is we're going to

1 say. So it would be by March 7.

2 LTC MCGOVERN: Yes.

3 CHAIR HILLMAN: We need additional
4 information. So that's an important -- we
5 should make sure everybody including the folks
6 who aren't here today see that so that we'll
7 -- we aren't going to get everything that we'd
8 like to have as ever but whatever we are going
9 to get we have to flag by then. Okay.

10 COL HAM: Then right now the
11 schedule for the next full panel meeting is
12 April 8, 9 and 10. I'm going to assess
13 availability of the full panel members to see
14 if that can move back a little bit to give the
15 subcommittees all the time possible to
16 complete your report and prepare however you
17 want to cover it with the full panel. But
18 that's going to depend on people's
19 availability.

20 I have spoken to the chair Judge
21 Jones a few times. She does not believe that
22 all three days are necessary so it's probably

1 going to be cut to two days and perhaps moved
2 back a few weeks. But that's going to depend
3 a lot on people's spring break schedule with
4 kids and stuff like that on whether we can do
5 that.

6 CHAIR HILLMAN: Okay. So the 8th,
7 9th and 10th that we've tentatively marked out
8 could be two weeks later. That would give us
9 more time to finish. Because we have to have
10 things to the panel how long before that
11 meeting?

12 COL HAM: It's up to you, ma'am.
13 A few days at least I would think for the full
14 panel.

15 CHAIR HILLMAN: Our report will be
16 --

17 LTC MCGOVERN: Large.

18 CHAIR HILLMAN: Five hundred
19 pages?

20 (Laughter)

21 CHAIR HILLMAN: We're dropping
22 this on --

1 COL HAM: And they'll be getting
2 three reports. So again, how do you want to
3 present that to the full panel?

4 LTC MCGOVERN: Right. We would
5 recommend a PowerPoint presentation listing
6 findings and recommendations. And those who
7 have time can then read the background
8 information.

9 CHAIR HILLMAN: Gotcha. Okay,
10 that sounds great.

11 COL HAM: Then that gives us a few
12 weeks to compile whatever the full panel's
13 findings and recommendations are into one
14 document.

15 CHAIR HILLMAN: Okay.

16 LTC MCGOVERN: For today,
17 Professor Hillman, we are behind schedule a
18 little bit. So it's up to you in your
19 discretion since we do have deliberation time
20 if you want to move the schedule today 15
21 minutes to the right, or if you want to drive
22 us with the time allotted. We'll just leave

1 that up to you.

2 CHAIR HILLMAN: Shall we just go
3 ahead and starts? Let's bring in these guys
4 and we'll see. So, thanks. I think we'll
5 catch up in the afternoon.

6 Good morning. Thank you for
7 coming to join us. It's hugely helpful to us.
8 We're the Comparative Systems Subcommittee of
9 the Response Systems Panel. And as I was
10 mentioning to you in the lobby on the way in
11 we're working on trying to take on all the
12 tasks related to the prosecution and
13 adjudication, prevention of sexual assault,
14 adult sexual assault in the military compared
15 to civilian systems.

16 We know it can be difficult to
17 distill all the information that you've
18 created and gleaned as you've sort of looked
19 at this over a long time. But I want you to
20 know how much it will help us to hear from
21 you.

22 So, we have the PowerPoint

1 presentations. Do we have -- did you guys
2 have PowerPoint or no?

3 DR. WILSON: I won't need it
4 actually.

5 CHAIR HILLMAN: You won't need it.
6 Okay.

7 DR. WILSON: I think both David
8 and I sent that to you in advance so that
9 you'd have some background of where we were
10 going to go. But we don't intend to go
11 through the slides.

12 CHAIR HILLMAN: Okay. So, there
13 are two separate presentations then.

14 DR. WILSON: Right. Which are
15 linked to one another in different ways.

16 CHAIR HILLMAN: Okay. So, I guess
17 we should -- do you have a preference on who
18 should go first?

19 DR. WILSON: I think I'm going to
20 go first.

21 CHAIR HILLMAN: Okay.

22 DR. WILSON: And then David will

1 follow up. So, what we intend to do is to
2 take about 10, maybe 15 minutes each, we'll
3 shoot more for 10 and then leave lots of time
4 for people to ask questions. I think that's
5 probably the most helpful way.

6 We sent you a bunch of stuff in
7 advance which would sort of build the
8 foundation. We intend to draw out some of the
9 more salient points. But we're certainly
10 prepared to answer questions on anything that
11 we sent to you in advance.

12 So, my name is Robin Wilson
13 obviously. I'm sitting behind this. I feel
14 like I'm testifying before the Senate House
15 Committee on something or other.

16 I am from Canada. I'm sorry we
17 won those two gold medals. I was cheering for
18 you when you were playing against the Fins.
19 It didn't help but I was trying.

20 I live in Sarasota, Florida now.
21 I've been there for about seven years. So,
22 I've been working with sexual offenders for

1 about 30 years. So I have lots of experience.
2 I've seen many different types of people who
3 have engaged in this sort of behavior and
4 hopefully have learned a couple of things
5 along the way. And I hope to share a little
6 bit of that with you this morning.

7 I'll let you know in advance I
8 have a very slight speech impediment that most
9 of you wouldn't have noticed but it makes me
10 feel better to have told you so now I'm not
11 trying to hide it. It takes a little bit of
12 the edge off the nervousness.

13 So, what I intend to do is to
14 plant some seeds and then David will kind of
15 water them. And then through the period where
16 you're able to ask us some things we hope to
17 grow it to some better understanding.

18 So, I wanted to start it off by
19 just saying that sometimes when you're talking
20 about offenders one of the ways that you can
21 learn a lot about offenders is to think about
22 who are the people who are ultimately

1 victimized. This gives us a little bit of a
2 sense of where some of the issue comes from.

3 In terms of the people who are the
4 victims of sex crimes there's a perspective in
5 the sort of general public that these are
6 crimes that are done by people who are
7 essentially strangers. And to be truthful
8 this is a myth.

9 Approximately 90 percent of the
10 people who are offended know the person who
11 offended against them. So these are crimes
12 that are not necessarily random. These are
13 the sorts of things that happen within
14 reasonably close contexts, often within
15 families, often within friendly relationships
16 as well.

17 In fact, we know that as many as
18 two-thirds of sex crimes occur in the victim's
19 own home. So this is not the kind of stranger
20 danger thing that we've heard about. Not that
21 there aren't some of those sorts of offenders
22 as well, but in comparison they tend to be

1 quite rare.

2 Overwhelmingly, and this is
3 perhaps one of the great down sides of our
4 field, overwhelmingly victims don't come
5 forward and often it's because they don't have
6 much faith in the system.

7 In terms of the offenders
8 themselves between 90 and 95 percent of them
9 are male. This is essentially a male problem.
10 And we know that even amongst those women who
11 do engage in this sort of behavior they tend
12 to do so for markedly different reasons than
13 men do. They are quite different in their
14 backgrounds and in the way that they offend.

15 One of the markers of risk in
16 terms of people who are engaging in sexually
17 offensive behavior we think about pedophilia,
18 we think about sexual sadism, we think about
19 exhibitionism, all of these sort of diagnostic
20 terms which get used fairly loosely by sort of
21 lay persons without actually knowing that most
22 people who engage in this sort of behavior

1 don't actually meet the criteria to be
2 diagnosed with a so-called sexual disorder.

3 Most of the offenders are not
4 particularly antisocial. Most have jobs.
5 Most have families. Most of the offenders for
6 the most part are not particularly different
7 from me with the exception of the behavior
8 that they engaged in that got them into
9 trouble.

10 Most offenders once identified,
11 once offered some sort of a treatment program,
12 a little bit of risk management, most of those
13 offenders won't go on to re-offend. And I
14 think this is one of the sort of
15 misunderstandings of the general public, the
16 idea that all sex offenders are essentially
17 incorrigible kind of sex fiends who are going
18 to offend and re-offend for the rest of their
19 lives. This turns out to be not true.

20 That's not to say that there
21 aren't some people who meet that. And we need
22 to identify them so we can manage them.

1 David's going to tell you a little bit about
2 that as well. But for the most part once
3 identified, once treated most offenders won't
4 go on to do it again.

5 So, how big a problem is this in
6 the grander scheme of things? The last 30 to
7 35 years or so has been a time of really
8 heightened awareness to sex crimes.

9 Prior to the nineteen seventies we
10 knew that it existed but we didn't really talk
11 about it very much. It certainly wasn't front
12 page news.

13 It seems that our awareness, our
14 sort of tuning into this idea that there's
15 sexual offending everywhere has been on a
16 steady incline as the rates of offending have
17 been on a fairly steady decline.

18 Over the last 30 years or so the
19 per capita rates that crimes of this nature
20 are being reported has been on a very steady
21 decline approximately to the point where we're
22 seeing about 40 percent less reporting of

1 these sorts of offenses today than we did in
2 the mid to late eighties.

3 CHAIR HILLMAN: I'm sorry to
4 interrupt you, Dr. Wilson. Can I just ask
5 you, this chart then, this is a chart of
6 reports.

7 DR. WILSON: Yes.

8 CHAIR HILLMAN: That isn't
9 incidence, right?

10 DR. WILSON: Yes. Yes. And
11 that's one of the great difficulties in our
12 field is that of course because most victims
13 don't report we only know what we can see.
14 So, if folks aren't coming forward we don't
15 know about it.

16 But in terms of the actual reports
17 we've seen a fairly steady decline over the
18 last 25 to 30 years.

19 MEMBER STRAND: Dr. Wilson, is
20 that based on the UCR reports? Eighty-five
21 thousand and it's been going down?

22 DR. WILSON: Yes. These would be

1 federal government data.

2 MEMBER STRAND: Okay. And the
3 problem with that is that only about half of
4 police departments sometimes report into that
5 UCR. Those declines have been going -- the
6 police departments are screening them out
7 before they get them into reports.

8 And so I'm not sure that's -- do
9 you have any information on the prevalence?
10 Because that's a more meaningful tool.
11 Because reports have been going down, but all
12 the research that I've seen shows that
13 actually the prevalence hasn't gone down at
14 all, just the reports are going down. Do you
15 have any information on that?

16 DR. WILSON: Yes, do you want to
17 field that?

18 MEMBER JAUS: Is there a
19 classification issue? Certain sexual assaults
20 aren't being classified as sexual assaults by
21 the police departments. I know that it is a
22 big problem. I agree with Mr. Strand.

1 MR. PRESCOTT: Sure. There's a
2 lot of ways to break down how we think about
3 these things. And all of these points I think
4 are absolutely valid. And yet still there's
5 unexplainable data.

6 And the best minds and the best
7 researchers are saying all we know is that the
8 numbers seem to be going down. And all of
9 these points are well taken. And yet we still
10 can't identify what is the X factor in this.

11 Just as one small case example
12 there was a situation in the State of Vermont
13 a couple of years ago where nobody could
14 figure out why there were no juveniles getting
15 referred to the legal system.

16 And the prosecutor said we're not
17 getting the cases. And the police said we're
18 not getting the calls. We don't understand
19 what's going on either. Is it because people
20 are afraid to report?

21 Is it because our sanctions have
22 gotten more difficult and therefore people are

1 saying I didn't want to be abused, but I also
2 didn't want this guy going away for 25 years.
3 And nobody can really say for sure.

4 But I wouldn't take issue with
5 anything that you've just said. And certainly
6 one problem that we've seen has been with the
7 severity of sanctions, that there is sort of
8 more of a reluctance to report.

9 COL HAM: Is there also -- has
10 there been a corresponding decline in rates of
11 other violent crime as well? And do you draw
12 --

13 DR. WILSON: Yes.

14 COL HAM: -- conclusions or
15 assumptions from that?

16 DR. WILSON: Yes, there has.
17 There are a number of different ways to try to
18 explain that. One of those would be a kind of
19 sociological argument that says that when we
20 are enjoying better social times in terms of
21 having enough to eat, a place to stay, when
22 things are going well for us as a kind of

1 greater society that crime tends to decrease.

2 So we could look at that.

3 One of the other things that I
4 would point to is that although the slide that
5 was shown to me by one of -- pertains to the
6 U.S. We see very similar slides for other
7 nations that are reasonably similar to the
8 United States. The UK, Australia, Canada all
9 seem to have about the same sorts of
10 decreases.

11 To the extent that they might
12 experience some of the same sorts of
13 difficulties that you've highlighted certainly
14 doesn't answer the question entirely, but it
15 does give us a little bit of strength in that
16 it's not just us that's seeing this. You
17 know, there are other countries seeing the
18 same sort of thing.

19 In general in this country our
20 principal means of risk management has been
21 incarceration to the extent that we now
22 incarcerate more of our citizens than any

1 other nation in the world.

2 At the same time we've seen rather
3 dramatic decreases in the rates that people
4 re-offend once they go back to the community
5 as well. The fact that the U.S. incarceration
6 rate has been in this sort of exponential
7 incline and we have this sort of decline in
8 the rates that these crimes are being -- rates
9 that the crimes are being actually reported to
10 us, and the rates that people are actually re-
11 offending have been on the decline some would
12 say that this is because we're essentially
13 locking up all the bad guys.

14 This would be true if we weren't
15 observing the same sort of thing in other
16 nations.

17 So, what I would take from this is
18 that our technologies with respect to
19 identifying those people who are at highest
20 risk are much better than they were 30 years
21 ago.

22 The means by which we are able to

1 monitor and to treat people we've identified
2 as being at risk has also gotten much better
3 to the extent that these decreases I think are
4 probably more principally tied to our being
5 much better able to address the problem once
6 it's identified.

7 To the extent that we actually
8 have a lot of that in hand. We're actually
9 pretty good at that.

10 The issue for us now is much more
11 about prevention. How do we stop it from
12 happening in the first place.

13 Once it's happened what do we do
14 with the offenders? We're pretty good at
15 that.

16 What we're not so good at is how
17 do we stop them from doing it in the first
18 place. How do we identify people at risk.

19 And in terms of sort of punishment
20 as the primary avenue, this is one of the
21 answered questions in our field, actually. We
22 know that more punishment doesn't equal less

1 crime. This has been shown to us over and
2 over and over again in huge, huge, huge meta-
3 analytic studies done here in the U.S., in
4 some of our partner nations as well basically
5 drawing from the same primary research that
6 shows that if you simply punish people they
7 tend not to get better. In fact, in some
8 cases they get worse depending on how that
9 severe that punishment is.

10 So, in terms of how do we get
11 around that, how do we make sure that the
12 people we identify as being at risk, how do we
13 make sure they don't go on to do this again in
14 the future, there are some pretty simple
15 rules.

16 This is known sort of generally as
17 the risk-need responsivity. And basically the
18 idea here is that the people who need the
19 highest-level service are the people who pose
20 the greatest risk. So we need to have good
21 tools to identify who is at the highest risk
22 to re-offend because those are the people who

1 are going to require the most service.

2 But we also have to be smart about
3 what service we're going to give them. We
4 have to actually individualize that service to
5 the person. So, having kind of cookie-cutter
6 programs that sort of intend to deal with the
7 issue on a macro level won't actually deal
8 with the issue the way we need it to be dealt
9 with.

10 We need to identify which risk
11 factors are in each individual person and to
12 build an individualized plan that deals with
13 those specific risk factors. And we need to
14 know that those risk factors are ones that
15 actually contribute to whether or not somebody
16 is going to go on to engage in the behavior
17 again.

18 In terms of the overall risk
19 assessment process I suppose the two things
20 that are most important is that it has to be
21 objective and it has to be absolutely
22 comprehensive.

1 One of the things we've learned in
2 our field is that focusing solely on the
3 sexual behavior hasn't gotten us anywhere,
4 that we need to look at the whole person.

5 It's the whole human mechanism
6 that builds towards risk. It's not just
7 because they had some sort of inappropriate
8 fantasy. That inappropriate fantasy, while it
9 may be important, is going to be influenced by
10 the fact that he's having some problems in
11 other areas, or that has some personality
12 difficulties. It's the whole person that we
13 need to look at. And certainly mental health
14 is a big factor there as well.

15 We know from the research
16 literature when it comes to being kind of
17 objective that unstructured clinical judgment
18 is worse than flipping a coin. If you simply
19 just sort of scratch your chin and say hmm, I
20 think he's high-risk or I think he's low-risk
21 based on your background, your experience,
22 what you read, those sorts of subjective

1 ratings of risk tend to be worse than a coin
2 toss.

3 So we know that we have to refer
4 to the literature. We have to go back to the
5 science. What does the science tell us that
6 we should be focusing on. And this is really
7 the only way to do this properly.

8 So, in terms of looking at risk we
9 need to consider the whole individual and we
10 need to leave no stone unturned.

11 There are two basic classes of
12 factors that we need to consider. Those that
13 are part of the individual's history. So we
14 need to know what has he done. What are the
15 markers in his personal history that are
16 linked in some way to risk.

17 But it's not sufficient just to
18 know what he's done. Although there's a lot
19 of truth to the statement "the best predictor
20 of future behavior is past behavior" it's not
21 an absolute. It's certainly helpful but not
22 an absolute.

1 So knowing what he's done is an
2 important first step, but knowing who he is in
3 the here and now, what sort of factors does he
4 bring to the table today is kind of equally
5 important.

6 Things that may have occurred when
7 he was 18 years old are certainly important to
8 know about, but if he's 38 years old now may
9 be not so linked temporally. So we need to
10 consider who the person is today as well.

11 One of the ways that we get around
12 the unstructured clinical judgment issue is to
13 use what we call actuarial risk assessment
14 instruments.

15 So these are tools that have been
16 basically put together by scientists who've
17 gone back to the literature, done a kind of
18 exhaustive review of that and have teased out
19 the most salient risk factors, the ones that
20 are going to give us the most bang for our
21 buck, and have essentially put them together
22 in a scale that we can rate each individual

1 offender. It gives us a way to basically
2 stratify people by risk.

3 This is particularly helpful to us
4 in terms of being able to triage. If we're
5 going to go back to the RNR model that I spoke
6 to about maybe two or three minutes ago we
7 know that we need to give the most intensive
8 services to the people who pose the greatest
9 risk. So knowing who poses the greatest risk
10 is of really critical importance to us.

11 We don't want to be spending a lot
12 of time and effort on people who are at low
13 risk because for the most part they're not
14 going to give us much grief. Where we want to
15 focus our energies is on those people who are
16 at the much higher levels of risk. These are
17 the people who are going to cause us the most
18 difficulty.

19 The best case scenario though with
20 respect to risk assessment is that we get
21 about moderate predictive accuracy. There's
22 still a lot of room for error. And this is

1 one of the scientific realities.

2 Behavior is kind of notoriously
3 difficult to pin down. No two people do the
4 same thing in the same way. They'll do things
5 in largely similar ways. And we know that
6 there are certain risk factors that are going
7 to be markers for those people who have them.
8 But for each person who has one of those risk
9 factors who ends up going on to re-offend I
10 could probably find you six or seven others
11 who had the exact same risk markers who
12 didn't.

13 So there's certainly some error in
14 this process, and we say that right up front.
15 We're honest about this. We're much better
16 than the stone knives and bear skins of 30
17 years ago but we've got some learning to do.

18 In terms of risk levels overall
19 what we see with respect to sexual offenders
20 is what we call a positively skewed
21 distribution. There are many, many more
22 people at the low end of the risk continuum

1 than there are at the high end. And this is
2 really fortuitous for us of course.

3 About 70 percent of the sex
4 offending population that we know of, and I
5 think it's important to say that we know of,
6 would fit into the low to low/moderate risk
7 category. Only approximately 10 percent of
8 the known sex offender population could be
9 appropriately labeled as high-risk. But these
10 are the guys who are going to cause us the
11 most trouble which is why it's so critically
12 important to identify who they are.

13 In terms of how we deal with this
14 problem as I've said we've gotten much, much
15 better with respect to the technologies of
16 being able to identify who's at risk and how
17 to manage that risk once it's been identified.

18 We know that in the world today or
19 at least here in the U.S. if someone is going
20 to re-offend chances are that he'll likely do
21 so within the first 5 years after being sent
22 back to the community.

1 We know that as that period of non
2 re-offending goes on the rates that people are
3 going to re-offend go down quite dramatically.

4 We know that sex offenders are
5 much more likely to be involved in other types
6 of crimes than they are to be involved in new
7 sex crimes.

8 In terms of what the actual rates
9 of re-offending of course there's always the
10 under-reporting factor. Yes.

11 MEMBER BRYANT: As to your last
12 point you said they're much more likely to be
13 involved in other crimes than another sex
14 crime.

15 DR. WILSON: Yes.

16 MEMBER BRYANT: Is that right?
17 Are there certain types of crimes that
18 correlate to sex offenders?

19 DR. WILSON: Depending on how you
20 want to look at it. Probably the most
21 prevalent post-release crime that most sex
22 offenders find themselves involved in is a

1 violation of the terms of their release.

2 They're about 14 times more likely
3 to be violated because they were someplace
4 they weren't allowed to be, were out past the
5 time they were supposed to be, didn't phone in
6 when they were supposed to. So they're about
7 14 times more likely to be charged for
8 something of that nature than an actual new
9 sexual crime.

10 But there are other types of
11 crimes they find themselves involved in. And
12 I don't know that there's specifically a
13 pattern.

14 MEMBER BRYANT: They're not
15 generally like other crimes against persons,
16 like transferring it off to conventional
17 assaults or anything like that? Don't know
18 enough?

19 DR. WILSON: Don't know enough to
20 be able to answer that with any surety.

21 MEMBER JAUS: Are you talking
22 about failure to register crimes, or like

1 violation of their parole? Because failure to
2 register, you mean like a Megan's Law
3 violation?

4 DR. WILSON: Yes, that would be
5 one of them that would be sort of rolled into
6 that.

7 MEMBER JAUS: Yes, but that's kind
8 of an unfair statistics because sex offenders
9 are so highly scrutinized for those Megan's
10 Law violations. They could be committing lots
11 of sex crimes but they're watched so carefully
12 and monitored in a lot of states. Vermont,
13 one of them is the most -- I think the state
14 that closely monitors -- that monitors sex
15 offenders most closely.

16 DR. WILSON: Yes, I think that's
17 sort of the point that I'm trying to make is
18 that we now monitor them so closely that the
19 chance that they're going to go back to prison
20 is much more likely because of something that
21 is a kind of procedural offense as opposed to
22 an actual crime.

1 MEMBER JAUS: That's what they
2 caught for, not necessarily what they're
3 doing.

4 DR. WILSON: Well, I mean the
5 argument could be put the other way though.
6 If you're being so closely scrutinized the
7 chance that you're going to be involved in new
8 sex crimes is also somewhat decreased, right?

9 MEMBER JAUS: Well, I don't agree
10 with that.

11 DR. WILSON: Okay. Fair enough.

12 MEMBER JAUS: I think it's hard to
13 catch sex crimes because most of them occur in
14 the confines of a house. But it's easier to
15 catch a Megan's Law violation because it's
16 usually a failure to register, to verify your
17 address. And that's easy to catch someone.

18 DR. WILSON: Right.

19 MEMBER BRYANT: And may I ask
20 also, Dr. Wilson. Excuse me, but is this the
21 universe of sex offenders when you have
22 statements like this? Or are we excluding

1 pedophiles? I mean, are you talking mainly
2 adult against adult, or this is the universe
3 of all sex offenders that includes offenses
4 against children?

5 DR. WILSON: We're talking about
6 the universe of all sex offenders.

7 MEMBER BRYANT: Okay.

8 DR. WILSON: And one of the most
9 important points to make, and this takes us
10 back to the RNR model that I spoke of, is that
11 we need to identify who fits where.

12 So there's a larger group of
13 people who are not necessarily diagnosable
14 with an actual paraphilic disorder, and then
15 there's that group of people who are. They
16 tend to be the higher-risk people. They're
17 the ones who are going to drive the bus when
18 it comes to risk.

19 CHAIR HILLMAN: Sorry, RNR is risk
20 in re-offenders?

21 DR. WILSON: Risk, Need and
22 Responsivity. It should be in one of the

1 early slides of my presentation.

2 CHAIR HILLMAN: Thank you.

3 DR. WILSON: Sorry, these are
4 terms that are second nature to us.

5 MEMBER STRAND: So two points
6 here. Crossover is what you're -- how much
7 crossover do you see as far as between child
8 offenders and adult offenders and the like?

9 DR. WILSON: There are kind of
10 generalists who will offend against a broad
11 variety of people and then there are those
12 specialist folks.

13 The offenders against children
14 tend to be much more specialized, especially
15 those who have an actual paraphilic interest
16 in children. And they tend not to be
17 particularly antisocial. They tend to not to
18 be involved in other sorts of crimes. Their
19 focus is on kids.

20 The offenders against adults tend
21 to be much more antisocial. They tend to be
22 much more opportunistic. They'll take the

1 opportunity where it is. And that's where you
2 tend to see a lot more of the crossover. And
3 that's perhaps driven a bit more by the
4 antisociality and the sort of sexual
5 narcissism.

6 MEMBER STRAND: Then going back to
7 the recidivism rate. One of the concerns I
8 have with some of the sex offender recidivism
9 rate research shows that there's lower N's.
10 I've seen that many of them get picked up for
11 other things other than the violations like
12 giving drugs to minors, giving alcohol to
13 minors, you know, buying -- those kinds of
14 things which would cause me cause for concern
15 of why are they doing those things.

16 They get caught for those. They
17 don't actually get caught for "sexual
18 offense," quote unquote. Then it goes into
19 the research that while they didn't get caught
20 for the sexual offense but it's like if I
21 bought a gun and a mask and I was running into
22 a bank I didn't get caught for bank robbery,

1 I got caught, you know, going into a bank with
2 a gun. And I think that's where I've seen
3 some of the research kind of minimize the
4 recidivism on the sex part because they've
5 gotten caught for something else.

6 DR. WILSON: Right. I guess one
7 of the ways you could look at that is that's
8 part of the risk management process. Is that
9 if we can catch them early on before they
10 engage in the actual behavior, if we can catch
11 them doing something that's maybe two or three
12 steps down the road that's much better than
13 not having eyes on them when they're engaging
14 in that sort of offense precursory behavior.

15 I'd actually say that that's part
16 of the success of our learning how to better
17 manage offenders. That if we can identify
18 them before they actually engage in the new
19 sexual offense and stop them from doing that
20 that's, you know, it's not the best prevention
21 agenda but it's certainly better than not
22 knowing.

1 MEMBER STRAND: And the other
2 concern I have in that as well is you
3 mentioned that 90 percent of the offenders
4 offend against someone they know.

5 So, they got caught sexually
6 assaulting somebody they know. They're likely
7 to go back to that same environment where the
8 people have reported it in that circle of
9 friends, in that group, have already seen the
10 consequences.

11 So if there's a re-offense
12 wouldn't that be kind of an incentive for
13 those people not to re-report it? Because
14 they've already seen the consequences.
15 They've already maybe felt their own guilt and
16 things like that. So when they go back into
17 those situations the likelihood of them
18 reporting even if it is occurring again might
19 be significantly reduced.

20 DR. WILSON: Right. So, the way
21 that I would spin that is that one of the
22 reasons that I believe that we're seeing

1 decreases in rates with respect to the
2 reporting is that our citizens are much better
3 informed about this.

4 Over the last 30 years there's
5 been a lot more media attention. It's very
6 difficult not to know that this is one of the
7 greater social problems of our era.

8 Within families if the offender
9 goes back to the same environment that he came
10 from we assume to at least a certain degree
11 that that family is now attuned to the fact
12 that this member of their family poses risk
13 for certain types of behavior.

14 And they're going to perhaps pay a
15 little better attention to the precursory
16 sorts of things that might say Bob's getting
17 back to what he did before. So, we need to do
18 something about that.

19 I don't know if I'm giving you a
20 satisfactory answer or not.

21 MEMBER STRAND: I understand. But
22 our rates of report are still hovering between

1 around 18 to 20 percent overall even though
2 our society is being educated.

3 And quite frankly my biggest
4 concern is when I was doing some undergrad
5 work we worked with a program in a particular
6 state with a university and they had a sex
7 offender recidivism -- a reduction group.

8 And we had an opportunity to
9 interview the offenders -- and they had
10 already been released, interview the
11 offenders, the mothers and the children that
12 had been offended against. And of course the
13 offenders all denied any sexual assault.

14 This was all anonymous and it was
15 all not reportable. The mothers said well, I
16 know exactly what they're doing and I feel
17 more confident because if they lie to me once
18 they're going back. And I'm going to catch
19 them and they're going to go back.

20 Some of the mothers said that
21 well, but I wouldn't report him for it because
22 I don't want him to go back.

1 DR. WILSON: Right.

2 MEMBER STRAND: And then the
3 children which was really troubling, most of
4 them reported sexual assault was going on.
5 And the reason -- they're just waiting their
6 time until they get out of the home and move
7 on because they reported before but they just
8 didn't want to -- they didn't want the burden
9 of that person having to go back to jail.

10 DR. WILSON: Right. And I think
11 David referred to this. As we've seen the
12 punishments for sex crimes become more
13 stringent there is an effect within certain
14 populations that the victim won't report
15 because he or she doesn't want that sanction
16 applied to their family member.

17 So, I want my dad to stop doing
18 it. I don't want him to go to prison for the
19 rest of his life. I still want him to be my
20 dad, I just want him to stop.

21 And where there's the possibility
22 that dad's going to go to prison for X number

1 of years and that dad may not be allowed back
2 to the family even if I want him back in my
3 family, I think probably there is some factor
4 that we're seeing there.

5 MEMBER STRAND: So what confidence
6 then do we have on re-reporting or self-
7 reports and things like that? If they've
8 already experienced the consequences and
9 they're going back in that home, or they're
10 going back in that family or that
11 organization, that community.

12 DR. WILSON: Yes. I mean, that's
13 the \$64,000 question, sir. We for the most
14 part can only report what we see. If people
15 aren't coming forward it's difficult to know
16 what's going on.

17 I guess in some respects the bit
18 that makes us feel a little bit better about
19 that is the things we're observing are
20 essentially global phenomena. They're not
21 unique to the United States.

22 In the sorts of research that

1 we're doing now given that we have this last
2 30 years' worth of burgeoning findings is that
3 we're now looking at the macro level.

4 We're not looking at small
5 individual studies. We're now looking at
6 essential meta-analyses where we've got dozens
7 and dozens of studies with huge N's that give
8 us a little more strength, a little more kind
9 of robustness when it comes to saying that we
10 think something might be happening.

11 But you're absolutely right. This
12 is all tied to the rates of actual reporting.
13 And if people aren't telling us about what's
14 going on then we're always going to have a
15 skewed view of what might actually be
16 happening.

17 MEMBER BRYANT: How does that
18 compare with rates of reporting that don't go
19 criminal so to speak? In the workplace, in
20 the church-place, in social clubs, in the Boy
21 Scouts.

22 It just seems to me that there's

1 an awful lot of attention to at least an
2 increase in education especially in the
3 workplace of sexual assaults. Primarily it's
4 called sexual harassment I think when it's in
5 the workplace.

6 And yet those have gone up,
7 getting the attention of municipalities, state
8 governments. Major corporations are doing
9 surveys and training on an annual basis
10 regarding sexual harassment in the workplace.

11 Do you have any -- have you
12 studied anything about how that is going up,
13 or has that also gone down? I just ask that
14 to see whether or not there's some other
15 alternative that victims outside the home have
16 and are still talking in terms of reporting.

17 DR. WILSON: I think some of this,
18 sir, might be a factor of the empowerment of
19 people within the workplace to actually say
20 something about it now.

21 Some numbers of years ago if you
22 were to say something about this it might be

1 laughed off. It might be something where
2 people didn't take it seriously.

3 We're taking this stuff a lot more
4 seriously now than we ever did before. So I
5 think people who are outside of the home feel
6 more empowered now to speak about when
7 something is happening that they don't want to
8 have happen to them.

9 MEMBER DUNN: We have been
10 presented with data from all the services as
11 well as the Department of Defense that
12 indicates that the vast majority of sexual
13 assaults within the military involve 18- to
14 24-year-olds, alcohol, generally acquaintance
15 but not intrafamilial. I mean, this is adult
16 to adult.

17 Is that type of offense even in
18 your statistics? I mean, are those people
19 ever -- are enough of them prosecuted? Are
20 enough of them -- to even be part of your
21 statistics? And even be part of -- we're
22 clearly here speaking of, talking about

1 children, we've talked about incest, we've
2 talked about maybe more serious sexual
3 assaults.

4 But our issue in the military
5 seems to be --

6 DR. WILSON: Peer age.

7 MEMBER DUNN: -- you, me, alcohol
8 and nobody else is around.

9 DR. WILSON: Yes. The easy answer
10 to that is we can look to some of the
11 university settings. We've certainly had a
12 number of very large high-profile cases here
13 in the U.S. over the last couple of years.
14 It's not just the military. And we're
15 certainly looking at these sorts of crimes,
16 kind of peer-age offenses where the peers are
17 not youth. You know, 18 to 25 is youth, but
18 I'm talking about the younger, you know, less
19 than 18.

20 Where we're talking about young
21 adults who find themselves getting into these
22 sorts of problems.

1 Where you have a person who is of
2 adult age who is sexually offending against
3 another person of more or less the same age
4 this tends to be a crime of relative youth.
5 So we're also talking about the 18- to 25-
6 year-olds. And they're certainly well spoken
7 to in the science beyond simply the military.

8 MR. PRESCOTT: And maybe if I can
9 jump in. I'm going to suggest maybe we should
10 move on because I'll be covering some of this
11 stuff myself.

12 There's one classic study. I
13 think Robin's absolutely right. College
14 campus studies are a good place to look and
15 what you find is that 8 percent of college-
16 aged males, 8 percent report having engaged in
17 some kind of sexual assault behavior that
18 could have gotten them a charge of first
19 degree sexual assault or attempted sexual
20 assault.

21 And what's really interesting is
22 that when you then follow them up a little bit

1 later on there seems to be no evidence that
2 they persist. That about 14 percent of them
3 seem to persist over time.

4 Another study by Michele Ybarra,
5 it just came out, it's maybe a little bit less
6 useful for your purposes but it's in
7 teenagers. And older teenagers are reporting
8 about the same amount of sexual assault, peer
9 assaults here.

10 So I can speak to some of the
11 other numbers that Robin was discussing in
12 just a little bit.

13 CHAIR HILLMAN: I'm sorry, just to
14 clarify your terms. When you say persist, you
15 mean re-offend.

16 MR. PRESCOTT: Re-offend, yes.

17 MEMBER DUNN: So this 8 percent --
18 is 14 percent of the 8 percent.

19 MR. PRESCOTT: Yes. I say persist
20 because for me "offense" is still a legal
21 term. And so I want to be cautious. The
22 environments where I've worked you can get

1 spanked pretty hard if you use the wrong kind
2 of language.

3 CHAIR HILLMAN: I'm grateful for
4 the precision. I'm just trying to make sure
5 that I actually understand what you're saying.

6 MR. PRESCOTT: Sure, sure.

7 CHAIR HILLMAN: I have to ask
8 though then about the epistemology. How do
9 you know that 14 percent? That sounds --
10 we're speaking with such precision with these
11 numbers.

12 MR. PRESCOTT: Yes.

13 CHAIR HILLMAN: Even arrested. We
14 know that reporting is at 18 to 20 percent.
15 I just -- how do you know? How do you get
16 this 14 percent?

17 MR. PRESCOTT: It's a few studies
18 and it's all of our studies. So, yes. I
19 mean, there's a lot of things. I mean, I can
20 easily imagine that I'm dreaming all of this
21 back in the hotel and I'm about to wake up.

22 (Laughter)

1 MR. PRESCOTT: There's always a
2 certain amount of -- I mean, there are many
3 unknowns we know are unknown. And that's the
4 fact of it. But these are the trends within
5 the studies.

6 And for me this sort of 8 percent
7 number becomes quite a bit more interesting
8 when we see that the same thing has happened
9 in a survey of teenagers.

10 CHAIR HILLMAN: So, you said one
11 classic study that has the 8 percent number.

12 MR. PRESCOTT: Yes, I think it's
13 classic. And in my view it was classic
14 because it also said this is basically a
15 replication of an earlier study that found
16 pretty much exactly the same thing.

17 MEMBER STRAND: Dr. Lisak also did
18 some -- have you seen his work? Where he did
19 work -- Dr. David Lisak. Where he found that
20 about 70 percent of them were serial as far as
21 three or more, and that those are the ones
22 that aren't caught.

1 And then Voller and Long followed
2 up in 2010 with looking at the five big
3 personality traits. But they found the same
4 kind of similar things as far as the serial
5 nature and then also the possibility of
6 recidivism.

7 DR. WILSON: Can I field this one
8 and then we'll move on? Which is for me the
9 bright line and the sort of defense against we
10 can get a study to back up anything that we
11 have to say.

12 For me the bright line is --
13 Lisak's numbers are his numbers. But the
14 bright line is has this person been caught.
15 Has he come to the attention of some sort of
16 an authority that said you need to knock this
17 off now.

18 And that -- so once somebody comes
19 to my attention I just take it for granted
20 that there's more in their background that I
21 don't know about. I think I've heard of one
22 person who said no, really, that was the first

1 time I ever did it.

2 But the fact is that after
3 somebody gets caught it really is a whole new
4 ball game which is why the detection piece is
5 so important.

6 So, the how much in their
7 background, how much do they really go on to
8 do it again. We can certainly discuss more or
9 less or whatever. But it does seem that the
10 overall trends across tens of thousands of
11 known sex offenders are rather dramatic.

12 So, we need to catch people, no
13 question about it. We need a serious
14 response. But some of the responses that
15 we've developed as a society aren't bearing
16 fruit nearly as well as they should.

17 CHAIR HILLMAN: I'm going to ask
18 you both to elaborate a little more on this
19 because this is a critical question for me in
20 trying to reconcile the two ends of this.

21 That is, that most assaults are
22 committed -- the statement, true or not. Most

1 assaults are committed by serial predators.
2 And then most offenders do not re-offend.
3 Reconciling those two pieces is difficult for
4 me.

5 You just tried to speak to that
6 with David Lisak's work by saying it makes all
7 the difference in the world once someone is
8 identified as a perpetrator. So can you just
9 explain that a little further?

10 DR. WILSON: You know, terms like
11 "serial predators" are so kind of culturally
12 laden. I mean, these are terms that become
13 larger than life.

14 I'm not sure that I would agree
15 with the statement that most offenders are
16 kind of serial predators. In fact, I believe
17 that the research is a little more clear that
18 the most common offenders are first-time
19 caught guys who are offending within a family
20 context, who may have offended against one,
21 two, or three children within a family, but
22 that in the sort of greater scheme of things

1 risk tends to be much more on the lower end
2 than the higher end.

3 When we use terms like "serial
4 predators" I think we're inflating the high
5 end and the numbers just don't support that.

6 MEMBER STRAND: But when you look
7 at your college studies and they're self-
8 reporting. And they're self-reporting
9 themselves serial meaning three or more. Not,
10 you know, thousands. But they're self-
11 reporting.

12 And then Gene Abel started back in
13 the eighties with incarcerated offenders and
14 huge rates of other offenses.

15 DR. WILSON: That study's been
16 largely discredited, sir.

17 MEMBER STRAND: Okay.

18 MR. PRESCOTT: Yes. In that it's
19 again, maybe I shouldn't talk like this, but
20 it's about sexual assault being distributed in
21 many ways like wealth in America. That there
22 really is this small group of sort of really

1 truly have.

2 And part of the confusion in that
3 study too was that a lot of the -- I don't
4 like to use a phrase like "nuisance offense"
5 because there is no nuisance offending. But
6 some forms of sexual abuse are worse than
7 others.

8 And I think what wound up
9 happening was that stuff like exhibitionism or
10 whatever. Now, my mother was exposed to and
11 she's never entirely gotten over it when she
12 was a little girl but it's still not the same
13 thing as a really, truly nasty vicious --

14 MEMBER STRAND: Correct. But then
15 when you look at those voyeurs, you look at
16 those exhibitionists and they also reported
17 other serious offenses. They got caught for
18 that, but they reported other serious
19 offenses.

20 MR. PRESCOTT: Right, in their
21 backgrounds.

22 MEMBER STRAND: Yes.

1 MR. PRESCOTT: And for me that's
2 the bright line. So yes, without adequate
3 detection, without adequate police work,
4 without a population that's willing to talk
5 about it and to say this is happening and it
6 ain't right then there's a good chance that
7 this stuff will persist. For me the bright
8 line is after they get caught.

9 MEMBER DUNN: When you spoke a few
10 minutes ago in response to my question about
11 the 8 percent in this seminal college study is
12 that -- I guess I'm trying to get my hands
13 around two drunk 19-year-olds in a room. You
14 know, some misunderstandings. Is that guy
15 since we're speaking mostly of men here, what
16 is the likelihood that he will find himself in
17 that same situation taking advantage of
18 another woman a year from now?

19 DR. WILSON: Probably reasonably
20 high unless that first woman actually makes
21 the report. Once the report -- this is
22 essentially David's bright line. People will

1 continue to engage in bad behavior until
2 somebody tells them to stop.

3 The most critical point for us is
4 we need to identify who they are. We need to
5 make it safe for victims to come forward.
6 This is probably the greatest challenge we
7 have. We need to make it safe for victims to
8 come forward and tell us about what's happened
9 to them so that we can identify the offender,
10 do whatever we need to do to make him stop
11 doing what he's doing, but also to make sure
12 that the victims get the services that they so
13 critically need.

14 This is probably the greatest
15 failing in our system as we speak to this
16 issue, that we have yet to find a way to make
17 it safe for victims to tell us of their
18 experience.

19 COL HAM: Dr. Wilson, I have a
20 question if I might. It goes back to kind of
21 the beginning of your presentation where you
22 said victims don't trust the system which is

1 of course what the complaint is as reflected
2 about the military.

3 So what is it that non-military
4 victims which I'm assuming is most of your
5 studies don't trust about the system?

6 DR. WILSON: Sex crimes have
7 probably among the lowest clearance rates of
8 all crimes in that -- and I'm not sure how to
9 answer this in the best way.

10 The experience of being raped is
11 probably one of the most traumatic things that
12 one can experience. Having to go through that
13 again in a courtroom with a largely
14 adversarial system where the intent on one
15 side of the house is to suggest that this
16 wasn't what you say it is. That's a pretty
17 difficult thing I think for any victim of
18 crime, especially for someone where the
19 innermost, most cherished part of our being,
20 kind of our sexual being is something that we
21 don't give away. We certainly don't want
22 someone to take.

1 And to be in that sort of
2 experience where you've been raped. You have
3 to go to the hospital to get the rape kit
4 done. There's an officer who has to observe
5 it. You're being poked and prodded. You
6 know, all of those sorts of things.

7 MEMBER JAUS: The officer doesn't
8 observe the rape kit, he just receives the
9 rape kit. That's not that much.

10 DR. WILSON: Depending on where
11 you are. There are some places where an
12 officer actually observes. The fact you're
13 being probed by anyone is not the sort of
14 experience you'd want to go through after just
15 having been raped, period, so I think my point
16 still stands.

17 But the -- it's an intensely
18 unpleasant experience for someone to report a
19 rape.

20 And then to know that essentially
21 you're not the one who's going to drive that
22 prosecution, that you now become a witness to

1 a crime that involved you and that someone
2 else may make the decision about whether or
3 not that goes forward.

4 I think for some people they sort
5 of think to themselves why would I bother to
6 do this. I might be better off just to deal
7 with it on my own.

8 COL HAM: So you said it's the
9 lowest clearance rate of any offense which
10 would seem to say they're not -- there isn't
11 an arrest, there isn't a trial. So, how does
12 that play into what you were just saying? I
13 guess I'm asking -- I mean the --

14 DR. WILSON: If they know in
15 advance that it may not become anything they
16 may decide that there's no point in doing
17 this.

18 COL HAM: It's not going to go
19 anywhere. No one's going to believe me.

20 DR. WILSON: Right. Yes.

21 COL HAM: I'm trying to see if
22 there's a parallel with what the DoD surveys

1 say about why military victims don't report.

2 MEMBER JAUS: I don't think it's
3 the clearance rate. I think that that's a
4 problem -- the cases get cleared but they
5 don't get prosecuted successfully maybe.

6 I think that one of the problems
7 in the civilian world is that the police
8 officers and in the college campuses, they
9 don't believe the victim. There's the built-
10 in defense of consent. And so they tend to
11 try to not proceed with the case and the
12 victim feels that or senses that at the time
13 that they report.

14 Colleges don't take the cases
15 seriously. Police don't take the cases
16 seriously. They're cleared. They're closed.
17 They're easy to close because the perp is
18 usually -- the perpetrator is usually known.

19 DR. WILSON: Right. Right. And
20 so --

21 MEMBER BRYANT: If that's how you
22 see cleared. Because we talked about the

1 specifics of terms. And if that's your use of
2 the word "cleared." Because she's absolutely
3 right, in the law enforcement world "cleared"
4 means either cleared by arrest or closed.
5 That doesn't have anything to do really with
6 the prosecution.

7 MR. PRESCOTT: There was a woman
8 named Jan Hindman who was a friend to many of
9 us who interviewed 100 survivors of sexual
10 assault.

11 And she said knowing what you know
12 now would you tell again. And all 100 said
13 no. And she never published that data in her
14 lifetime.

15 MEMBER JAUS: All 100?

16 MR. PRESCOTT: All 100 said no.

17 MEMBER JAUS: Wow.

18 COL HAM: Did they say why?

19 MR. PRESCOTT: They did not like
20 the response that they got. So, as we talk
21 about I would be careful about getting hung up
22 on some of the legal aspects. The fact of the

1 matter is that despite all of our best
2 attempts as a society, we still have people
3 who feel isolated, who still feel as though
4 they can't go forward or that this is
5 happening at the hands of somebody that they
6 love or are financially dependent on, et
7 cetera, et cetera, et cetera.

8 And I would suspect in the
9 military that those kinds of things would
10 really play into it a great deal. This is
11 such a threat to the integrity of our family,
12 I just want to see if I can't get through this
13 and somehow maybe it will go away.

14 So for me, it is a lot of the
15 psychological aspects that prevent --

16 MEMBER STRAND: So one of the
17 things I am struggling with, without playing
18 with too many numbers, we can agree that the
19 vast majority of sexual assaults aren't
20 reported.

21 DR. WILSON: Yes.

22 MEMBER STRAND: We can agree that

1 most offenders aren't caught.

2 DR. WILSON: Well, I don't know
3 that we can say that.

4 MEMBER STRAND: Well, if they are
5 not reported, they are not caught.

6 MEMBER JAUS: I mean the ones that
7 are reported are caught.

8 MEMBER STRAND: Right. The ones
9 that are reported are caught but if the vast
10 majority of them aren't reported, we are not
11 going to catch anybody. That is your bright
12 line when it gets reported or when somebody
13 says.

14 That is what I am struggling with
15 because if we continually look at the way that
16 we have been doing it, and we have been only
17 basing our research, and our way ahead on the
18 ones who got caught, which is the minority of
19 the ones who are committing these things, and
20 we continually stick with that and then if we
21 look at re-offense data, the very reason that
22 this hundred victims said that they wouldn't

1 report again, might be very prominent in the
2 recidivisms of the people that we have caught
3 that we now re-release.

4 I am just really struggling with
5 all the research and all the data that shows
6 that we have a lot of sexual assaults that
7 aren't -- most sexual assaults aren't
8 reported. Most offenders never get away with
9 it. We are studying the offenders that were
10 caught. We are now starting to study the
11 offenders that weren't caught, as far as self-
12 reports and behaviors and things like that but
13 they are a small amount, too, that eight
14 percent.

15 But in those college studies up to
16 a quarter of a percent, up to a quarter of the
17 women in those colleges are sexual assaulted
18 by those eight percent. And then we are
19 saying well, we are struggling about whether
20 they are serial or not. But yet they are
21 going to continue to do these things until
22 they get caught.

1 I am just really struggling with
2 all of this.

3 DR. WILSON: So are we.

4 MEMBER STRAND: Okay.

5 DR. WILSON: Yes, this is a field
6 where the map is changing on a year by year
7 basis.

8 MR. PRESCOTT: One thing just to
9 return to your point that I kept thinking but
10 didn't say, which is youth and alcohol don't
11 mix. And when we look at the amount of women
12 that are sexually assaulted in college and the
13 role of alcohol, and not just the role of
14 alcohol but what people think when they start
15 to drink and go out to party is unbelievable.

16 So sorry, I got my kid, he is
17 about to go --

18 MEMBER JAUS: Is it one in five or
19 one in four? Because Russ said it was 25
20 percent. I thought it was one in five.

21 MR. PRESCOTT: The studies that I
22 have heard, if you lump together all sorts of

1 like really obnoxious sexual behavior, the
2 number goes up closer to 30. And that is on
3 college campuses. And remember that college
4 campuses are a little different from the rest
5 of the world. And I have heard but I have
6 never actually seen the data that in blue
7 collar communities that those rates go higher.
8 But this comes from an excellent researcher
9 who has never said and here is the study.

10 MEMBER COOKE: How old is the 100-
11 interview study?

12 MR. PRESCOTT: I'm sorry?

13 MEMBER COOKE: How old is that
14 100-interview study?

15 MR. PRESCOTT: This was the work -
16 - I mention it because it has been cited in
17 DOJ trainings. But I believe it was from
18 around the 1990s into early 2000s.

19 MEMBER COOKE: I'm struggling with
20 all this, too. But we have heard from a
21 number of civilian, as well as military people
22 involved in various stages of the process. A

1 lot has been done in the last five to ten
2 years on the civilian and the military side to
3 try to make it easier for victims to come
4 forward. And I don't know whether any of your
5 study reflects that.

6 The fact that the trend is going
7 down, would suggest that maybe that it is not
8 working and that we are just not hearing from
9 people. But can you comment on that?

10 MR. PRESCOTT: One thing I think
11 is happening is as a society we are talking
12 about it. And I would like to say hey, it is
13 all these prisons that we are building that is
14 doing the trick but all the research is
15 suggesting that that is not the case.

16 I do think that when we have got -
17 - I can't name a single talk show host on
18 those morning talk shows that people watch but
19 this kind of stuff gets talked about on those
20 shows all the time.

21 Sooner or later, I mean throughout
22 time, culture, place, history, people have got

1 together to talk about their pain and anguish
2 and suffering. And that over time we have
3 brought the topic of sexual abuse to so much
4 of the forefront that whether it be the recent
5 Jerry Sandusky case or what have you, it is in
6 the public eye. And people are getting the
7 message this is not cool and you can't do
8 this.

9 MEMBER STRAND: But then what is
10 the media's view of it? What do victims see
11 on a regular basis on the news? What do they
12 see on TV shows?

13 MR. PRESCOTT: Well, that is part
14 of the problem. At least one study has gone
15 and asked politicians on what do you base your
16 knowledge about sexual abuse. And as we look
17 at the media, where you see the most
18 particularly egregious cases so that many of
19 us, I think ourselves included, we become
20 influenced by the really, really dangerous guy
21 that we have seen, forgetting that many other
22 people really do manage to grow up and move

1 on.

2 And there are really a lot of
3 these age demographics that are important, the
4 18 to 24, 25 --

5 MEMBER JAUS: You mean the
6 offenders. Is that what you mean?

7 MR. PRESCOTT: Yes, sorry.

8 MEMBER JAUS: Offenders move on.
9 Is that what you mean?

10 MR. PRESCOTT: Yes.

11 MEMBER JAUS: The offender moves
12 on.

13 MR. PRESCOTT: Yes.

14 CHAIR HILLMAN: So, I want to
15 bring you back to what your expertise is on
16 this, which is really what you know works and
17 what doesn't in terms of the treatments.
18 Right? Because I think that is something we
19 haven't gotten other -- you are helping us
20 understand this front-end problem, too, but it
21 is the offender piece of it that actually we
22 want to understand what is happening in the

1 civilian world because we are looking at
2 changes in the military sentencing and
3 responses that are altering the way the
4 military is treating offenders. And we want
5 to see what your responses are to what is
6 happening there.

7 DR. WILSON: Right. Okay, I have
8 one last thing that I wanted to say before I
9 finish out of my bit. But I am also mindful
10 of the fact that you have been very polite,
11 sir, and you have had your hand quite a bit.

12 MEMBER MORRIS: I think my
13 question is probably about the same, which is
14 just to orient you all to where you could be
15 most helpful.

16 An area that you can help us most
17 is just to figure out, is to look at potential
18 sanctions that are available in the criminal
19 justice system, things like mandatory
20 minimums. In the military, you can get a
21 minute in jail for a rape. There is no
22 mandatory anything right now. So, to

1 determine what that might be, and correct us
2 at this point and the judge, if we are hearing
3 you right, it sounds like your sense is once
4 identified and once caught, the huge majority,
5 and if your 14 percent of eight percent is
6 right, then one percent of offenders need to
7 be squashed.

8 And the question would be then do
9 we smack the other 99 percent because we have
10 kind of a hazy, indistinct sense of who they
11 might be and do we need to have the sanction
12 because the system can't sort well enough.

13 And then secondly, it seems like
14 you assume or integral to your sense of that
15 is a predictable sustained available treatment
16 plan in whatever systems we go into. And
17 first off, the Army has been all over the map.
18 For a few years we were into Nicholas Groth
19 and he was out the door. It is up to whoever
20 is in charge of whatever our justice system
21 is.

22 And technically, we don't own our

1 people anyway. And increasingly in recent
2 times, we export them to the federal system
3 without a tail that follows them in terms of
4 an identified treatment plan and that sort of
5 thing. So, we don't have them captive in the
6 same sense you might in a state system.

7 DR. WILSON: Yes, and as someone
8 who has worked in this field for 30 years, I
9 started doing this in 1984, when I first
10 started doing this, we didn't talk much about
11 sexual abuse as a kind of larger society. We
12 were starting, we were on the tip of talking
13 about it.

14 And you know I think we weren't
15 particularly stringent when it came to
16 managing these cases. Over the last 30 years
17 I have seen us get progressively more and more
18 strict in how we manage this.

19 And I would suggest that the
20 pendulum has swung from this side to this side
21 and that at some point we are going to get
22 back to the middle, where it is more

1 objective, where it makes more sense. But we
2 haven't quite figured that out yet.

3 And one of the greatest things I
4 think that is preventing us from getting
5 there, which is the thing that I wanted to end
6 on, this is the most maddening thing about
7 this entire field, is it is all couched in
8 secrecy. The offender doesn't want you to
9 know. The victim doesn't want you to know.
10 And the vast majority of the rest of us would
11 rather not talk about it. Until we get past
12 those, we are going to have the problems that
13 you have been identifying.

14 With that, I will turn it over to
15 David.

16 MR. PRESCOTT: Okay. We have seen
17 just in this room the various kinds of things
18 that our field, your field has struggled with
19 for a very long time. Hold on a moment.
20 Maybe most of them don't go on to do it again
21 but the guys that have done it, have done some
22 really, really, really scary stuff. And it is

1 very difficult to let go of that aspect. And
2 it is very difficult to convince me that
3 anybody could possibly be low risk, even
4 though the data suggests that it takes
5 considerable evidence to actually identify
6 somebody as being high risk.

7 So, there is a lot of people that
8 are out there doing a great deal of harm. And
9 in my field, I actually used to play a kind of
10 a trick, I guess on audiences until I realized
11 that it was a very bad idea. And I would say
12 how many, what percentage of college-aged
13 males do you think engage in sexual abuse?
14 And the audiences, people in my field would
15 routinely say 80 percent, sometimes 90
16 percent. This is not a very good attitude
17 towards men. Because really, guess what? A
18 lot of us bloody well don't engage in this
19 kind of behavior and so on.

20 And I think that what happens that
21 all of us, I mean we are both husbands and
22 fathers, and I hate sexual abuse in my

1 community as much as anybody else, maybe more.
2 Having seen the harm of it, we get caught up
3 in a moment when we hear about these kinds of
4 crimes. It is like the flashbulb moment at a
5 crime scene. And what we see is this here.
6 And it is difficult for us to imagine that
7 anybody is in fact capable of change. And
8 yet, human beings, human beings generally seem
9 to be more capable of change than we ever
10 thought.

11 In my field, there is something
12 called borderline personality disorder. Maybe
13 some of you have seen it if you have ever seen
14 the movie "Fatal Attraction." It is a
15 wonderful portrayal of it. And the most
16 recent research --

17 CHAIR HILLMAN: Well, I don't know
18 about wonderful.

19 (Laughter.)

20 DR. WILSON: Bone-chilling, would
21 that be better?

22 MR. PRESCOTT: From a

1 phenomenological perspective, it is quite
2 interesting.

3 And the most recent issue of The
4 Diagnostic and Statistical Manual has found
5 that symptoms of this disorder actually
6 decreased by 50 percent over a relatively
7 short period of time. So that the person that
8 we thought was pretty much damaged for life,
9 turns out not to be as damaged as we once
10 thought.

11 The same thing with schizophrenia,
12 although I personally still don't see how that
13 can be, that many people 30 years later don't
14 carry the diagnosis or have to take medication
15 nearly as much as we might have thought.

16 And so I think coming back to your
17 question, one of the sort of hoops that I have
18 had to jump through and many people seem to
19 have to jump through in order to do this work
20 is to say we need to come to the realization
21 that punishing away crime, just punishing away
22 crime actually doesn't work. It just doesn't

1 work. It never did.

2 So, David Prescott, husband,
3 father, neighbor, citizen, man says, "That guy
4 did that? He needs to be off the street for
5 a long time." David Prescott, understanding
6 that people can and do change says, "And he
7 needs to be surrounded by people to whom he
8 can be accountable."

9 The safest sex offender is
10 somebody who is stable, has something to
11 occupy his time with, whether it be school,
12 job, military, whatever; has support people to
13 whom they can be accountable and has some sort
14 of plan for the future. And if we put those
15 four things into place, we can actually keep
16 people safer.

17 The other thing that the
18 researchers really found, and again somebody
19 mentioned Vermont, I think I said that word
20 first but I lived there for a number of years,
21 some studies out of Vermont have really been
22 clear that if punishment doesn't work,

1 treatment can work. And the treatment when it
2 is combined with supervision seems to work the
3 best.

4 And I would like to say that our
5 field has improved in leaps and bounds. In
6 its ability to provide treatment, I'm not sure
7 that that is the case. But one area of human
8 endeavor that really has seen dramatic
9 improvements in recent years has been
10 probation. And I am fond of saying if I ever
11 become king of the world, there will be a lot
12 more probation officers on the street. It is
13 a great way to employ human beings and they
14 are cheaper than prisons. And that a good
15 supervising agent, combined with a good
16 therapist, can produce some pretty good
17 outcomes not perfect.

18 The original, the first studies of
19 treatment, I actually went back and reviewed
20 them. The original studies, a woman named
21 Furby and her colleagues found no effective
22 treatment whatsoever. And a lot of said,

1 rats! We kind of suspected this all along.

2 We then go back and read these
3 studies and say these studies never had a
4 chance. This is just lousy science. But it
5 was the best science that we had at the time.

6 By around 2002, the large-scale
7 meta-analyses were finding about a 40 percent
8 reduction. This was true in Europe and it was
9 true in North America as well. About a 40
10 percent reduction amongst those who were known
11 to -- sorry. Let me go back a step.

12 Even though the vast majority of
13 sex offenders in these studies were not known
14 to go on to do it again for all the reasons
15 and mysteries that we have already discussed,
16 amongst those who went into treatment, when
17 you match them on all other variables, there
18 was about a 40 percent reduction for those who
19 completed treatment.

20 The problem is, that once we have
21 these nice answers, nobody understands well,
22 wait a minute. What is the x factor in

1 treatment? At a time when scientists are
2 looking for the so-called God Particle, we
3 clinicians are trying to think the same way.
4 Well, what is it? Well, is it that they
5 changed the way they thought, the way they
6 behaved? So far what we know is programs that
7 focus on changing how somebody thinks and how
8 they behave seem to have the best shot.

9 I heard a question that might have
10 been from you about well, this guy is going
11 back to the same situation. How do we expect
12 them to behave differently? Well, that is a
13 really good question that sometimes these
14 situational factors really do seem to dictate.
15 So that if you take this person and put him
16 back into the same thing, they are going to --
17 it is more likely that there is going to be
18 some kind of trouble.

19 So what we know is we need to
20 think about punishment over here. Let's talk
21 about punishment but I am not good at that.
22 It is just not my area of focus. So,

1 punishment on its own definitely doesn't work.
2 Treatment seems to work. Treatment combined
3 with supervision seems to work.

4 And treatment where we
5 are able to change the way they think, the way
6 they behave, and the kinds of situations that
7 they are in really seem to work the best. And
8 the most recent studies seem to be bearing
9 this out. There is still lots of room for
10 controversy in our field and I was probably
11 arguing with somebody about this as recently
12 as last week.

13 One thing that we also seem to be
14 finding out, although I would still like a few
15 more studies about it, is that there are some
16 people who are simply more effective at
17 providing this treatment than others. And the
18 acronym WERD, W-E-R-D, which stands for the
19 best treatment providers are warm, empathic,
20 they are rewarding, providing some sort of
21 affirmation, and they are directive.

22 Now, when I say warm, I don't mean

1 warm and fuzzy oh, you poor heartless brute of
2 a killer, I feel so sorry for you, but rather
3 warm in the sense of, when you are with me, we
4 can work together on these kinds of issues.
5 There is plenty of judgment outside of this
6 room, but when we are here, let's simply look
7 at the issues.

8 I have come to think of treatment
9 increasingly a little bit like those, is it
10 FAA, investigations of airplane crashes. You
11 know an airplane goes down in a cornfield.
12 Bad stuff happens. There is going to have to
13 be some sort of response. People are going to
14 have to go into the field and pick up every
15 piece and examine it. And it is going to be
16 ugly. And you know what? You are going to
17 see some stuff you don't want to see but
18 ultimately, you can't let it get to you. And
19 you need to take good care of yourself along
20 the way.

21 But in order to really become a
22 different person, there is really sort of

1 three components to treatment, as I see it.
2 One is to get ready to really look at your
3 life in the wake of sexual abuse. And the
4 other is to really not just disclose what
5 happened but to really examine what were all
6 the factors in your life that contributed this
7 to happening to begin with? Followed by then,
8 how can you understand those factors and
9 really work to manage them in your daily life?

10 MEMBER JAUS: Can I ask you a
11 question?

12 MR. PRESCOTT: Yes.

13 MEMBER JAUS: You said before that
14 incarceration doesn't work and treatment
15 works. What about treatment and incarceration
16 at the same time, treatment in prison?

17 MR. PRESCOTT: That is such an
18 awesome -- I love that question because I
19 don't entirely know. I can point to a large-
20 scale study that found that treatment within
21 prison systems just doesn't seem to work all
22 that well. However, it depends on where it is

1 done and how it is done.

2 In Minnesota, where I lived for a
3 couple of years, Minnesota has an excellent
4 prison treatment program that has managed to
5 reduce risk quite a bit. And you are going to
6 say?

7 DR. WILSON: And there are other
8 places where it doesn't appear to have any
9 effect at all.

10 MR. PRESCOTT: Yes.

11 DR. WILSON: It depends on the
12 nature of the program. There are those
13 programs where it is very kind of directive.
14 You will do this. Then you will do this. And
15 everybody does the same thing. Those sorts of
16 programs aren't particularly helpful.

17 Where they don't match level of
18 risk, where you don't put the high-risk guys
19 in high intensity or the low-risk guys into
20 low intensity, where you just put everybody
21 into the same program, those sorts of programs
22 tend not to work very well.

1 Where you don't address risk
2 factors that are truly linked to offending,
3 where you focus on things that seem to make
4 some sense but that the science doesn't
5 support, those programs tend not to do
6 particularly well either.

7 There are some great, great,
8 prison-based programs, and there are some
9 atrocious prison-based programs.

10 COL HAM: It sounds like -- I'm
11 sorry.

12 CHAIR HILLMAN: We'll come right
13 back to you, Colonel Ham.

14 You know what we are doing in the
15 military, because Congress has told us this is
16 what is going to happen now is not any of
17 these things but making sure they are
18 discharged. I mean, we are throwing them out.
19 So, how is that?

20 DR. WILSON: So you are failing to
21 treat them.

22 CHAIR HILLMAN: There is mandatory

1 discharge now and it is accompanied by
2 ineligibility for benefits, actually, in terms
3 of veteran services.

4 DR. WILSON: So, you are going to
5 make sure they don't get help, once they leave
6 as well.

7 CHAIR HILLMAN: That's right.
8 That is what the trend is right now.

9 DR. WILSON: Yes, that is a bad
10 idea.

11 MEMBER STRAND: Well and then it
12 is resourced-based. And as you have probably
13 seen in the military losing a lot of
14 resources. Now we are going to spend a lot of
15 resources here, or we are going to keep
16 commissaries. And sometimes those are some of
17 the choices.

18 What I am hearing though, see if
19 this -- some very wise person once said, as a
20 professor in San Diego or in California said
21 all behavior is functional. All behavior
22 meets a need. And I think one of the best

1 treatment modalities that I have seen is if
2 you are finding out what those needs are,
3 whether they be psychosocial or psychosexual
4 and in determining whether those needs are
5 social, antisocial or whether they are going
6 to cause problems and work on those needs, is
7 that pretty much where the treatment is going
8 now?

9 DR. WILSON: So, if I can
10 something that will embarrass David, he is
11 probably one of the best people in the country
12 to answer that question.

13 MR. PRESCOTT: Increasingly, that
14 is what we are looking at. There is few
15 components. One is sex offender treatment is
16 not like a sex offender class. It is not
17 where I go and I am the esteemed Mr. Prescott
18 and I tell you that you are messed up and need
19 to live differently. Instead, it is can I get
20 you -- this is a role play -- can I get you to
21 look at your life differently? Can I get you
22 to come up with all the reasons why you need

1 to think about things differently?

2 There something called the Good
3 Lives Model, which is probably worth a Google
4 search if you get a chance. I have written a
5 couple of books on it. I have co-authored a
6 couple of books. I think underneath all of
7 it, the idea all behavior is functional, I
8 happen to believe 100 percent. Our problem is
9 in what ways does this behavior make sense?
10 How did it make sense? And what were the
11 goals that this guy was actually trying to
12 accomplish via a behavior that is so
13 unacceptable we can all barely think about it?

14 And so there is some researchers,
15 they have summer places in my home state of
16 Maine, Ryan and Deci, with something called
17 self-determination theory that is also worth
18 looking up. Basically what they say is
19 underneath everything else, all human beings
20 want to feel connected to other people; all
21 human beings want to experience some kind of
22 independence; and all human beings want to

1 experience some sort of sense of competence.

2 Competence, connection, autonomy.

3 And so a great deal of sexual
4 abuse -- this is not the entire picture and I
5 want to make that very, very clear. A lot of
6 sexual abuse takes place in the name of I need
7 to be independent and I need to feel competent
8 at something.

9 I am just going to warn you, here
10 comes a graphic example. But the guy comes
11 home from a bad day at work on the base,
12 whatever. And for once in his life, he wants
13 to feel competent. He wants to finally feel
14 like the independent free-thinking man that he
15 fancies himself to be and wants to be, and
16 that all human beings want to be, men and
17 women. And he has a fuse that is about this
18 long at the time. And he sexually assaults
19 his wife. It is an ugly experience.

20 The fundamental goals of
21 competence and autonomy, there is nothing
22 wrong with those goals. The good treatment

1 would really be about how can you be competent
2 and autonomous in a way that is different.
3 And that part of this is the airplane crash
4 investigation. Now that you have had a chance
5 to think about it, this is what happens to the
6 victims, the people who have been victimized.

7 I have come not to like the term
8 victim simply because so many people have said
9 I am no longer a victim. I will not be
10 branded by this label. I also don't like the
11 term survivor because some people actually
12 don't survive.

13 So, anyway this, I think goes --
14 other people, a fellow named Robert Emmons has
15 come along and said competence, connection,
16 and autonomy. Aren't you forgetting something
17 really important? What about a sense of
18 mission and purpose, spirituality, which can
19 incorporate religion? Like how could you
20 forget that? Which is a good question. And
21 so all human beings want some sense of mission
22 and purpose in their life.

1 So where sex offending can happen
2 and re-offense can occur is when somebody
3 doesn't have a very broad scope of what they
4 want their life to look like or when their
5 goals come into conflict. I wanted to have
6 sex. I wanted to feel good. I wanted to have
7 happiness and pleasure. And I also wanted to
8 feel competent and in charge of things for
9 once in my life. Those two sets of goals
10 don't mix when you have a sexual assault.

11 So good treatment would be a
12 chance for somebody to go back and look at
13 their life again.

14 I am just going to mention five
15 areas of treatment goals that we tend to focus
16 on and then I am sure there is a question.
17 The number one question that I have is how
18 well can this guy manage himself? The term in
19 my slides is self-regulation. Can this guy
20 solve problems? Can he anticipate problems
21 before they happen?

22 I don't know how many of you have

1 argued with a loved one or your partner or
2 spouse, but at some point you must have
3 recognized that it was probably not working,
4 this conversation wasn't working so well. And
5 a lot of our guys can't do that.

6 Another area of treatment that I
7 actually find pretty easy to work with is sort
8 of these pro-criminal or pro-assault attitudes
9 and beliefs. I have worked with many people
10 who really did believe that women say no when
11 they mean yes and that women are deceitful.
12 And I won't get into the bad language.

13 As a treatment provider, if I
14 could only have one goal that would most
15 likely get to the heart of the matter, it
16 would be can I get this person to feel
17 competent in their interpersonal relationships
18 and just relate to other people empathically?
19 The reason I say it in exactly that way is
20 because we, people in our field have argued
21 for years over how much do we need them to
22 understand and to have empathy for the people

1 that they have hurt. All of our research has
2 found that trying to teach them about having
3 empathy for their victims just doesn't seem to
4 have anything to do with whether or not they
5 do it again but if they can relate to other
6 human beings emphatically.

7 I think an extreme example of this
8 was the guy that once said it is hard to have
9 empathy for your victims when you hate them so
10 much. This was not a guy who was very far
11 along in treatment, I just want to say this,
12 but was able to some degree to begin to build
13 a better life in which he simply didn't want
14 to harm anybody else ever again. So, can he
15 have good relationships and relate to others
16 empathically?

17 And then I don't think it applies
18 as much to the military but in our field,
19 there is also the whole notion of abuse-
20 related sexual interests. Is this a person
21 who is really turned on by sex that harms
22 people and is illegal? And I am really

1 thinking mostly about sex with children which
2 I just expect due to the nature of the people
3 in the service is less of an issue.

4 The number one barrier that I see,
5 and I think one of the -- okay. We did talk
6 about the crossover offending.

7 DR. WILSON: All right. Fair
8 enough.

9 MR. PRESCOTT: Okay. The number
10 one barrier that I see that rarely gets talked
11 about is every therapist has had the
12 experience of going in saying I couldn't have
13 been more clear. I don't see how this guy
14 doesn't get it.

15 There is something amongst people
16 who break the law in general and people who
17 sexually abuse specifically that it is very
18 difficult for them to change the way they
19 think. Half of my efforts, I could provide
20 sex offender treatment in a matter of weeks,
21 if it weren't for the fact that my clients
22 have a difficult time changing the way they

1 think.

2 Every one of you, I have seen it
3 on your faces, you are struggling to come to
4 some better understanding, a deeper
5 understanding. You are listening to all this
6 data and it is influencing you just a little
7 bit here and there. How do I think about
8 this? How can I think about this differently?
9 Our clients can't do that. They are really
10 rigid in the way that they think. There is
11 only way to understand the world and all other
12 ways are wrong. That might be a little bit
13 extreme but that is the way many of our
14 clients think.

15 The last thing that I am going to
16 say, just to point to some areas of
17 controversy within our field, I recently had
18 the experience of a treatment provider and a
19 polygraph examiner. And the polygraph
20 examiner said I think you need to polygraph
21 him on this one part of his sexual history
22 that I don't think he is truthful on. My

1 supervisee said, this guy is so far along in
2 treatment, I don't think it rises to the level
3 of a polygraph examination. I think we can
4 reduce this guy's risk remarkably and I think
5 he really is becoming a different person. We
6 have polygraphed him on everything else I his
7 life. I just don't see the gain.

8 The polygraph examiner said what
9 do you mean reduced risk? And the therapist
10 said the goal of treatment is to make this guy
11 less dangerous. The polygraph examiner, who
12 is a guy I happen to respect a great deal, got
13 back to him in an email and said no, it is
14 not; the goal of treatment is to get to the
15 truth.

16 And I thought, does anybody think
17 we shouldn't be trying to get to the truth?
18 Of course. But on the other hand, it raises
19 the question of what is the ultimate goal.
20 And in my view, I want to make people less
21 dangerous. I want treatment to be of
22 assistance to the victims, wherever possible,

1 of course. But for me, the fundamental goal
2 is still about reducing risk. And I am even
3 willing to forego some of the truth in order
4 to get there. However, we all want to get to
5 the truth. We all want to assist the victims.
6 It is why we are all here.

7 So, we just wear a different kind
8 of costume when we go to work as sex offender
9 treatment providers. But this is about the
10 people who we will never know to say thank you
11 to all of us for our efforts.

12 And so there is an area of
13 controversy of what is it that we are trying
14 to do. If I have my druthers, less dangerous,
15 of assistance to victims, and getting so that
16 people know what the truth actually is. And
17 that is what the victims of crime, very often,
18 want. But it isn't necessarily always the
19 ultimate goal.

20 LTC MC GOVERN: Mr. Prescott?

21 MR. PRESCOTT: Yes?

22 LTC MC GOVERN: You had mentioned

1 earlier that these people will offend until
2 they are caught. And I think that is where
3 there was the discussion whether you call that
4 serial or not. But you made it sound like
5 once they are caught, at least a certain group
6 of them, that will be a turning point,
7 especially if you have treatment.

8 MR. PRESCOTT: Yes.

9 LTC MC GOVERN: What we are
10 looking at in the military, by analogy I think
11 we could do, is we have these if you can
12 consider shoplifters, who are continuing going
13 in until they get caught, versus the armed
14 robbery serious offense. So, it made sense to
15 me when you said you get caught shoplifting.
16 There is a possibility that that will be a
17 lesson in itself versus the armed robbery or
18 serious criminal is going to take a lot more
19 treatment.

20 My question is, are there crimes
21 then on the spectrum that are not treatable,
22 are not -- you can't rehabilitate versus

1 others as we are considering sentencing
2 guidelines and mandatory minimums for like
3 those offense of touchings once they realize
4 that you don't want to hurt victims, you can
5 be empowered other ways or easier to
6 rehabilitate because we are dealing from
7 offensive touching all the way to rape.

8 MR. PRESCOTT: Sure. It sounded
9 like you were --

10 DR. WILSON: No, I am just trying
11 to percolate it in my mind. I don't think it
12 is so much about the crime itself as the
13 person who actually committed the crime.
14 There are some people who do incredibly
15 heinous things who never do it again. From
16 the moment they get, it is like some bright
17 light goes off and they just completely
18 desist. And then there are others who do
19 relatively minor things, who persistently over
20 and over and over again do it.

21 It is a mix of the two and it is a
22 kind of complicated way to get at it. But the

1 bits that the individual brings to the table,
2 who they are as a person drives what sort of
3 behavior they are likely to engage in. And
4 this is part of their upbringing, how they got
5 schooled. It has to do with what kind of
6 nutrition they got when they were children.
7 There are all sorts of studies that have been
8 done about what are the precursors to people
9 having sort of disadvantaged kind of
10 upbringings are more prominent in the offender
11 population.

12 So, I would say it is not so much
13 about what he did as why he did it. And it is
14 sort of incumbent upon us as the people who
15 are going to be doing those assessments to
16 hone in on those risk factors that are likely
17 to lead to the kind of persistence. And I
18 will use David's term, you know, in terms of
19 those people who will go on to do it again.
20 It is not so much about what they did as
21 perhaps why they did it.

22 LTC MC GOVERN: Well, Dr. Wilson,

1 I also have another question. This is
2 completely outside the box. But you have a
3 lot of information on risk assessments for
4 these individuals once they are caught. What
5 Congress has proposed or there have been
6 thoughts about is that we should try to catch
7 these people as we are screening them coming
8 into the military, we do security clearances.
9 Are there any sort -- do you think there is
10 any utility in exploring some sort of
11 screening criteria for the military to prevent
12 people, sex offenders from even coming into
13 the military?

14 CHAIR HILLMAN: What about your
15 list here, for instance? There is a list here
16 of --

17 DR. WILSON: Yes, so those are
18 only risk factors, once you have identified
19 that the person is engaged in the behavior.
20 So, and you know I think I said something on
21 these lines when we first started talking.
22 There are risk factors that we know people who

1 have engaged in a certain type of behavior, if
2 they have these markers in their history or in
3 their personality makeup, these are people who
4 are likely to go on to do it again. But it is
5 not true that every person that has had that
6 experience, period, is necessarily at risk.

7 There are lots of odious people in
8 the world who won't become offenders. But
9 people who are offenders who are odious are
10 likely to go on to do more crime.

11 LTC MC GOVERN: So in your
12 opinion, then, would it not be worthwhile
13 exploring screening criteria for people coming
14 in the military?

15 COL HAM: Opening up an Office of
16 Pre-Crime.

17 MEMBER COOKE: For 18- and 19-year-
18 olds.

19 LTC MC GOVERN: Seriously, there
20 have been suggestions on the Hill that we do
21 that.

22 MEMBER STRAND: Well, there is

1 also significant pressure from our leadership
2 to get what they call left of the bang. We
3 want to identify these people. Once we do
4 have them in our ranks, to have stop them
5 before they commit a sexual assault, which I
6 think is --

7 CHAIR HILLMAN: But we have this
8 special situation in the military where we
9 choose. I mean, we don't take everybody. I
10 mean if you have got asthma, you are out. I
11 mean there are all kinds of things that we
12 screen based on.

13 So, we have this special capacity
14 that it is different than the communities that
15 we are generally looking at, where we are
16 trying to reduce harm and manage risk.

17 COL HENLEY: Do they take a
18 psychological profile test?

19 CHAIR HILLMAN: Right, the NFL
20 does it at the combine, right? I mean what is
21 the extent to which this happens?

22 MEMBER STRAND: The police

1 departments do.

2 COL HENLEY: But the military for
3 basic training, to come in, do they administer
4 some psychological --

5 MEMBER DUNN: Special units do it
6 once you are in.

7 COL HENLEY: For certain skill
8 sets and things like that but not even for law
9 enforcement in the military.

10 LTC MC GOVERN: And if you are
11 going to be a cook, you don't even need a
12 security clearance. So, I mean --

13 MEMBER STRAND: There is no
14 general psychological testing. There is
15 specific -- and in fact, even for some of our
16 skill sets there is no psychological testing.
17 There might be a polygraph for some of our
18 intelligence areas but that is pretty much it.

19 DR. WILSON: Some of these things
20 you can't really predict very well, though.
21 And I am not meaning to diminish the behavior
22 by any means but there are times when people

1 who are for all intents and purposes
2 reasonably okay people who, in certain
3 circumstances, too much to drink, too much
4 stress, too much else going on, end up
5 engaging in behavior that even themselves they
6 never in their wildest dreams ever believed
7 that they could commit, yet they do.

8 How do we somehow kind of crystal
9 ball back five or ten steps and say this guy
10 has some sort of a latent seed somewhere, that
11 when he gets really, really drunk and he is
12 out with this sort of group of people in this
13 circumstance, having had this experience at
14 work, that that is going to lead him to engage
15 in this sort of behavior. We just can't do
16 that.

17 MEMBER STRAND: Well, we have had
18 some history with that with the Sergeant Major
19 of the Army. You know he has been through all
20 of the wickets, all of the promotions, the
21 scrutiny, everything else. How does somebody
22 get through the system and be in charge of all

1 of the enlisted folks in a huge organization?
2 Could it have been predicted?

3 You know when you look at the
4 past, you peel back the onions, were there
5 behaviors ahead of time that look suspicious
6 afterwards? Absolutely.

7 COL HAM: He was acquitted. You
8 have to say he say he was acquitted.

9 MEMBER STRAND: Right. He was
10 acquitted.

11 DR. WILSON: If you are trying to
12 identify people at risk --

13 MEMBER STRAND: But he was accused
14 and there were people who came forward and
15 said he did these things. Could that have
16 been predicted?

17 MEMBER JAUS: But there are some
18 behaviors --

19 DR. WILSON: Yes.

20 MEMBER JAUS: -- that -- I mean
21 certainly not people who --

22 DR. WILSON: Yes, I mean people

1 who got into trouble before they tried to be
2 in the military.

3 MEMBER JAUS: Not just that. Like
4 if you asked a simple question who do you like
5 to spend time with and the answer is seven-
6 year-olds or something like that.

7 CHAIR HILLMAN: Couldn't we ask
8 about these things that are on your list of
9 acute dynamic risk factors, hostility, sexual
10 preoccupation, emotional collapse, substance
11 abuse? I mean really, when you describe the
12 three steps that are key to treatment, it
13 sounds like there could be 12 of those,
14 really. It sounds like a relatively generic
15 assessment of emotional health.

16 So surely, we have some
17 assessments that we could do of general
18 emotional health that would be, it seems
19 reasonably predictive of likelihood of events.
20 Right?

21 LTC MC GOVERN: But in your
22 experience, how honest do you think their

1 answers would be?

2 MEMBER STRAND: Especially if it
3 is a pre-employment screening tool.

4 MEMBER JAUS: But if you are kind
5 of a kooky person anyway, you might answer it
6 in a kooky way.

7 LTC MC GOVERN: Or you are really
8 smart.

9 MR. PRESCOTT: Yes, people have
10 agonized over exactly these kinds of things.
11 I mean Robin is the psychologist and I am not
12 but there are some really interesting tests
13 that can go a very long way to figure out when
14 somebody is faking good or faking kooky.

15 Go ahead.

16 DR. WILSON: It will always be
17 easy to catch the people who stand out. Right?
18 In some of the work I do we use volunteers to
19 work with offenders once they have been
20 released. And part of our screening is simply
21 to get our volunteers together for one
22 afternoon and to sort of let them do what they

1 do. And you can pick out the kooky ones and
2 say that person is not going to be in the
3 program. That person is not going to be in
4 the program. Because they are just wonky and
5 you get that sense right up front.

6 Unfortunately, that is not going
7 to be the majority of people who are going to
8 end up being in trouble. That is going to be
9 a part of it but there are people who are sort
10 of -- and I use the word with some hesitation,
11 who are almost destined to get in trouble.

12 And those are the people who you could
13 probably catch and screen out fairly easily.
14 And that will deal with some of the issue.

15 But then there are other people
16 who look entirely functional, who end up doing
17 something incredibly dysfunctional. And you
18 all end up scratching your heads saying, how
19 did we miss that? And there really wasn't
20 very much of anything that you could have got
21 in advance. Those are the people who are
22 going to cause you trouble. And I don't know

1 how you screen for that.

2 MEMBER STRAND: One of the
3 biggest, I think, bright lights that we had in
4 the past was the Minnesota Multi-Phasic
5 Personality Inventory where they saw that sex
6 offenders, quote-unquote, had a higher risk of
7 narcissism. And so all of a sudden, everybody
8 started looking, oh, if you are narcissistic
9 you are probably going to be a sex offender,
10 which kind of overshadowed that because there
11 is a lot of very good leaders that are
12 extremely narcissistic that probably won't
13 commit a sex offense.

14 DR. WILSON: Yes, and I would make
15 this point. Bob Hare, who is one of the
16 world's foremost authorities on a construct
17 called psychopathy has written two books, one
18 called Without Conscience, which speaks about
19 psychopaths within the prison population.
20 Then he has another book called Snakes in
21 Suits. The same behavioral traits, same
22 psychological makeup in sales people,

1 politicians, CEOs.

2 So, the same personality makeup,
3 entirely different way that they engage in
4 this very damaging behavior.

5 CHAIR HILLMAN: So we are getting
6 short on time but Colonel Henley hasn't had a
7 chance.

8 COL HENLEY: The UK, Canada, and
9 Australia, you mentioned you are familiar with
10 their systems. Do they have something
11 equivalent to adult sex offender registration?

12 DR. WILSON: Each of those
13 countries has a sex offender registry. To my
14 knowledge at this point, no country, other
15 than the United States, has a publicly
16 accessible sex offender registry. Most
17 countries it is for law enforcement personnel.

18 COL HENLEY: Do they allow for
19 removal at some point or once you are on, you
20 are on?

21 DR. WILSON: That could be crime-
22 specific. It depends on what you did and how

1 many times you did it.

2 I will use Canada as an example.

3 If you are a first time offender, you go onto
4 the registry for ten years, unless you engage
5 in a certain type of crime, which then you
6 would be on for life.

7 If you do more than one sex crime,
8 as in you did it, you got caught, you went out
9 and you did it again, then you are
10 automatically on for life.

11 It is difficult to get off, once
12 on. It is not impossible but much like the
13 U.S., there are tiers.

14 COL HENLEY: And the second is a
15 follow-up on incarceration and treatment
16 combined. In your experience, once an
17 individual is released from confinement, is
18 there a follow-up treatment? And if so, is
19 that discretionary, mandatory?

20 I am trying to address your
21 concern, Dean Hillman, whether we can possibly
22 recommend that even if a discharge is

1 mandatory, you retain eligibility for sex
2 offender treatment once you are removed and
3 sort of force them into some kind of treatment
4 program. Is that -- how do you handle that?

5 MR. PRESCOTT: Yes, it makes no
6 sense to me when treatment only takes place,
7 for example, in prison and there is nothing in
8 the community. That that period of time,
9 leaving prison back into the community is the
10 most vulnerable time in anybody's life, why
11 would we make this an untreated portion?

12 But the real answer is it depends
13 on the jurisdiction. And I have certainly
14 seen it both ways.

15 DR. WILSON: There are some people
16 who will do the institutional program and who
17 will go back to the community and they will be
18 fine. There are others who are going to need
19 more support than that. They are going to
20 need more follow up than that because it is
21 quite a culture shock, going from an
22 institutional setting, where you have very

1 little kind of personal autonomy where
2 everything is quite rigid. You go back to the
3 community and you are basically in charge of
4 yourself, you know, perhaps depending on the
5 length of time you have been in for the first
6 time in maybe 10 or 15 years. That would be
7 difficult for anybody under any circumstances.
8 Worse still, when you have someone who still
9 has some level of risk left in them.

10 CHAIR HILLMAN: Colonel Ham?

11 COL HAM: I have two questions.
12 The first one is, and maybe I am mixing apples
13 and oranges, but it sound like one of the
14 important things is there has to be a risk
15 assessment of each offender. When should that
16 occur, after someone is sentenced to
17 incarceration or as part of the decision of
18 whether to incarcerate and if so, for how
19 long? Or is there no answer?

20 DR. WILSON: Well, there is an
21 answer. Most typically in the civilian world,
22 I will tell you how we would do this. A risk

1 assessment would first be done at the point
2 that the individual is being sentenced. So,
3 we want to be able to inform the court what is
4 the likelihood that this person is going to
5 engage in the same behavior so the court can
6 determine where this individual needs to go at
7 this point. Those people who are at low risk,
8 the court might consider releasing them to the
9 community under supervision. Those people who
10 are at high risk probably will go to an
11 institutional setting.

12 COL HAM: And that is required by
13 the court or up to the defense whether the to
14 --

15 DR. WILSON: The court will --
16 well, kind of depending on the case but it is
17 probably better to give the court that sort of
18 information because you want the trier of fact
19 to have some objective criteria by which to
20 decide what should happen to this guy, now
21 that I have found him guilty.

22 That risk assessment is going to

1 focus much more on the static risk factors.
2 What is the person's history? What has he
3 done before? And these are fairly robust risk
4 factors.

5 MEMBER JAUS: And the nature of
6 the crime.

7 DR. WILSON: Right, yes. Going
8 forward, if someone is going to go into
9 treatment, you need to do some assessment of
10 in-treatment change. This is basically an
11 ongoing dynamic risk assessment. And that
12 process is going to continue to the point
13 where he goes back to the community as well.

14 You may take another look at the
15 static risk factors as he is heading out the
16 door because some of those factors may have
17 changed, like age, perhaps. So there may be
18 some aspect of age-related assistance that you
19 would need to take into account as he is going
20 out the door.

21 But really once the person has
22 been found guilty, once they have been sent

1 into the institutional setting, if you are
2 going back to the community, you are not
3 focusing nearly as much after the fact on
4 those static risk factors as you are looking
5 at how do they manage themselves. How do they
6 interact with others? What do they think
7 about the world? What do they think about
8 their place in that world? How are they
9 managing their general self-regulation? How
10 are they managing themselves with respect to
11 sexuality? How well do they follow direction?

12 And I think I have got most of
13 these risk factors listed in there but those
14 are the sorts of things you are going to want
15 to look at going forward.

16 And if it were my program, this is
17 what I would do. I would do the static risk
18 assessment as he is going into the facility,
19 you know, jail break, whatever the case may
20 be. Then if he is going to go to treatment,
21 at about a six-month interval, six to nine
22 months, I am going to want to look again at

1 how is he making progress on those targets
2 that we are actually addressing in treatment.
3 And then at the point where we are considering
4 whether or not he is going to go back to the
5 community, we are once again going to look at
6 the whole individual and see whether or not
7 this is a good idea, if we have the option to
8 keep him longer. But if we don't and he has
9 to go back to the community, how are we going
10 to make sure that as he goes into the
11 community, he is actually going to continue to
12 do what we have started him on the path of?
13 And this is where aftercare becomes critically
14 important.

15 COL HAM: And is treatment
16 helpful, regardless of admission of guilt?
17 As I understand the military system, unless it
18 has changed, one can't get into a sex offender
19 treatment program unless there is an admission
20 of wrongdoing, whether or not it was a plea of
21 guilty or a plea of not guilty. And there is
22 case law on that that doesn't violate

1 anybody's Fifth Amendment right against self-
2 incrimination but you have got to admit that
3 they did what they are there for.

4 DR. WILSON: The contemporary
5 research would suggest that denial of the
6 offense is not predictive of whether or not
7 they will reoffend in the future.

8 For me, in the programs that I
9 have run, we used to sort of sit there with
10 the paperwork and say okay, you tell me what
11 happened. Hold on a minute, that is not what
12 it says here. Hold on a minute, that is not
13 what it says here. And by the way, you have
14 now said something that doesn't match the
15 official version three times, so you have got
16 to go take your polygraph.

17 And then the actual dynamic
18 between the therapist and the person getting
19 therapy becomes more about truth than it
20 becomes about change.

21 So, if you can get the guy to the
22 point where he can say, you know what, I

1 didn't do what they said I did but I can
2 definitely admit to you that I hate where I
3 am. This is a lousy situation. I never want
4 to be here again.

5 If you at least get them to that
6 point where they can say something went wrong.
7 I am not willing to discuss with you at this
8 point exactly what it was, but something went
9 wrong. I was involved in it and clearly my
10 life needs to change, that is more predictive
11 of whether or not someone will go on to
12 reoffend or whether or not someone will do
13 well in treatment.

14 CHAIR HILLMAN: I want to see if
15 there is any last questions.

16 MEMBER BRYANT: Just a little bit
17 of different dynamic because we started out
18 saying what our goal here is to try to
19 prevent. And I am just wondering if there are
20 any studies or if you can address quickly,
21 because we are out of time, things that have
22 been done in terms of educating potential

1 victims. Are there particular colleges that
2 have gone to great extents to educate the
3 female potential victims about behavior, what
4 not to do, where not to go? You know campuses
5 have put phones every 50 yards so they can
6 call. They have lit up the whole place.
7 Almost all of those efforts are related toward
8 sexual assaults as opposed to assaults of
9 other kinds. And so are there any things that
10 help us in that area?

11 One of the things that makes me
12 ask this is early on we heard a significant
13 percentage and I forget whether it was 30
14 percent or higher of those who reported being
15 victims in the military also reported that
16 they were also victims sometimes multiple
17 times before they ever came into the military.

18 MR. PRESCOTT: I am aware of some
19 organizations. There is one organization
20 called Stop It Now that has something called
21 a help line. Which is if you are afraid that
22 sexual assault might happen, you can call,

1 whether or not you are concerned you might
2 perpetrate the sexual assault for people out
3 in the community. I served on that
4 organization's Board of Directors for a while.

5 There is any number of ways to do
6 it, I suppose. It is likely if you go to your
7 doctor's office and you see the little
8 pamphlets on what to know about diabetes or
9 heart disease or what have you. And I am not
10 sure that that necessarily reaches the person
11 who is in the community who is scared to
12 death.

13 MEMBER BRYANT: What I mean is do
14 you know if maybe, for instance, for example,
15 the University of Michigan pushed this hard.
16 They do it every year with all the incoming
17 freshman women and so on and so on. Have
18 their number of reported assaults or
19 statistical sexual assaults gone down that can
20 be attributed to that program?

21 DR. WILSON: I am not sure that
22 has ever been done, Mr. Bryant. It will be

1 interesting to see what happens at places like
2 Kent State.

3 MEMBER BRYANT: I think some
4 colleges are --

5 MEMBER JAUS: No, it is done all
6 over the country.

7 MEMBER BRYANT: -- doing it but do
8 we know whether the effects are of it?

9 DR. WILSON: No, I don't know what
10 the effectiveness of that might be.

11 MR. PRESCOTT: But I could
12 introduce you to people who would know, if
13 that helps.

14 MEMBER BRYANT: So we don't know
15 whether it is having an effect on the lower
16 reporting or more incidents.

17 MEMBER JAUS: I think one of the
18 problems with victims or survivors is
19 sometimes they don't realize that they have
20 been sexually assaulted.

21 MR. PRESCOTT: Yes.

22 DR. WILSON: Yes.

1 MEMBER JAUS: I have spoken to
2 thousands of victims of sexual assault, I
3 happen to have a case right now, and the
4 victim said she was in college and the reason
5 she didn't tell the college she was raped on
6 her campus is she explained that she was
7 assaulted because she didn't realize that she
8 was sexually assaulted.

9 And so she went back to the
10 college and said you know what, now that I am
11 thinking about it, I didn't know that was
12 rape. And they asked her, did you say no?
13 And she said well, I didn't say no but of
14 course, I am not going to get into it, but
15 there were other things that indicated that
16 she didn't consent.

17 So, I think victims don't realize
18 that they have been sexually assaulted. That
19 is where the education piece comes in. And I
20 think offenders very often don't realize they
21 are sexually assaulting in that whole no means
22 yes and yes means anal. I'm sorry to say that

1 but that is that whole college mentality.

2 DR. WILSON: Right.

3 MEMBER JAUS: I think that they
4 don't even realize that they are sexually
5 assaulting.

6 DR. WILSON: Right, which is what
7 my point to Mr. Bryant was going to be. That
8 it is one thing to try to assist the people
9 who might be victims and to work at that kind
10 of prevention, the prevention agenda with
11 them. We equally need to work with the male
12 students who are potentially at risk. And
13 that if we deal with one side without dealing
14 with the other side, we are not going to solve
15 the problem.

16 MEMBER JAUS: There is an
17 education piece out there.

18 DR. WILSON: Yes, it is definitely
19 an education piece.

20 MEMBER DUNN: That is what I was
21 trying to -- I was going to ask about.
22 Because the military has the unique ability to

1 capture its people in large groups, in small
2 groups, and to kind of force this training on
3 them. And it seems like you think there is
4 some hope that it will be effective to some
5 degree with potential victims and the
6 potential perpetrators.

7 DR. WILSON: Can I ask you folks -
8 -

9 MEMBER DUNN: So the more you talk
10 about it, the more you bring it out in the
11 open, the more you -- yes.

12 DR. WILSON: Can I ask you
13 something? If one of your sergeants came to
14 the officer that was responsible for him and
15 said I have been having some disturbing
16 thoughts and then went on to talk about I have
17 been thinking about forcing someone who is in
18 my unit to have sex with me or I have been
19 thinking about children, how would that
20 individual be handled?

21 CHAIR HILLMAN: I think Russ
22 should answer. I think Russ will answer on

1 behalf of the panel and then he has a last
2 question for you, too, I think.

3 MEMBER STRAND: He would probably
4 be referred for mental health. And if mental
5 health does an intake and he talks about some
6 of these behaviors that he hasn't acted on, I
7 think he would get some treatment. And I
8 think that would be handled well. But if he
9 reports any behaviors that he has acted on,
10 then it will be immediately referred to law
11 enforcement.

12 DR. WILSON: Okay, that is
13 heartening.

14 COL HAM: The commander has the
15 ability to order him for an inpatient mental
16 health.

17 DR. WILSON: Good.

18 MEMBER STRAND: In fact, I was
19 doing a presentation several months ago and a
20 young man came up to me and said you know what
21 you were talking about, I really struggle with
22 and I struggle with those things. We made

1 sure we got him some help, --

2 DR. WILSON: Good.

3 MEMBER STRAND: -- which hopefully
4 prevented him from doing it. He didn't
5 disclose anything that he had done but he was
6 very sincere and he wanted some help and we
7 got him the help. I don't know what the final
8 outcome was but we know we got him some help.

9 DR. WILSON: Will that soldier be
10 able to keep his place within the military or
11 would he be disadvantaged in any way?

12 MEMBER STRAND: Unless he reports
13 any actual behaviors that he has acted on, he
14 would be fine.

15 CHAIR HILLMAN: Maybe he would be
16 fine.

17 MEMBER STRAND: Maybe he would be
18 fine.

19 CHAIR HILLMAN: Just like you say,
20 it depends on the perpetrator, you know the
21 effectiveness of treatment, the commander, and
22 what would happen as a result would depend on

1 that person's attitude towards mental health,
2 notwithstanding our efforts to reduce the
3 stigma attached to treatment.

4 DR. WILSON: Understood.

5 CHAIR HILLMAN: I wouldn't at all
6 say there would be no impact on that person's
7 career prospects.

8 MEMBER STRAND: Two quick
9 questions. You talked about identifying the
10 risk at sentencing. That takes a significant
11 amount of skill sets to do. Basically,
12 probation and parole, they get a lot of extra
13 training. They get a lot of extra insights.
14 We currently don't have that. So, we would
15 either have to outsource that or we would have
16 to build that capability.

17 DR. WILSON: Okay. The easy
18 answer to that is there is a package of tools
19 known as the Dynamic Supervision Protocol. It
20 basically encompasses the Static '99, the
21 Stable 2007, and the Acute 2007. I am one of
22 the certified master trainers. There is a

1 handful of us in the world. I am one of the
2 few trainers here in the United States. I can
3 train some of your officers who are within the
4 mental health division to train others to use
5 those tools. It is not particularly
6 difficult, once you have had that training and
7 as long as you have some background. It is
8 a little time-intensive up-front and I don't
9 expect that you would have that skill set
10 already but it certainly something you could
11 easily obtain.

12 MEMBER STRAND: Okay. And then
13 the second quick question is do all identified
14 sex offenders need treatment?

15 DR. WILSON: No.

16 MEMBER STRAND: No?

17 DR. WILSON: No.

18 MEMBER STRAND: Okay.

19 DR. WILSON: There are some who
20 will be just fine, having been identified.
21 And there are, should I hazard a guess and
22 say, more of those than there are that need

1 treatment.

2 MR. PRESCOTT: Yes, although it
3 also depends on what you want to accomplish at
4 treatment.

5 DR. WILSON: I think it depends on
6 how you define treatment as well.

7 MEMBER STRAND: Yes, and then how
8 do we know which is which.

9 MEMBER JAUS: Doesn't it depend on
10 the type of crime also? I mean there are sex
11 offenders and --

12 DR. WILSON: Yes.

13 MR. PRESCOTT: Yes. I mean this
14 is usually where I go to case example. But
15 yes, I have worked with some people their
16 crime was very, very long ago. They are now
17 at an age that makes them really unlikely to
18 do it again. They were already low risk
19 coming into it and now their circumstances
20 have changed and they are quite
21 psychologically healthy functioning.

22 Part of me says I can do it. I'm

1 not sure I am going to make anything better.

2 I could make it worse.

3 CHAIR HILLMAN: I have one little
4 question for you and then we should wrap up.

5 MR. PRESCOTT: Sure.

6 CHAIR HILLMAN: And we are not
7 really too late. We started a little bit
8 late.

9 MR. PRESCOTT: Sure.

10 CHAIR HILLMAN: The last one of
11 the static risk factors says any male victims.
12 And I mention that specifically because we are
13 in the military which is 85 percent -- anyway.

14 MR. PRESCOTT: Yes.

15 CHAIR HILLMAN: We have a lot of
16 male victims. So, what is that about? Does
17 that mean that --

18 MEMBER STRAND: In fact, we have
19 more male victims, number-wise, than female
20 victims.

21 DR. WILSON: Yes and you see this
22 in your kind of institutional settings as

1 well, where you know people are segregated by
2 gender.

3 This is a global finding, looking
4 at the entire population of offenders, not
5 necessarily taking into consideration what the
6 circumstances may be for small sectors of.
7 And I can certainly theorize with you about
8 why that might be so and then there would be
9 somebody else who is equally educated and
10 brighter than me who will say that I am
11 completely full of crap.

12 When we look at it strictly upon
13 an actuarial basis in terms of are there more
14 people with female victims who go on to
15 reoffend versus people who have even one male
16 victim? Having even one male victim seems to
17 ramp up the risk. And it is just one of those
18 scientific observations that we don't fully
19 understand.

20 CHAIR HILLMAN: Your response
21 triggers another question, which I won't
22 continue on, don't worry, too long here. But

1 the fact that these are global, rather than
2 culturally-specific or demographic consistent,
3 you mentioned the class distinctions where
4 communities and sexual behaviors are distinct
5 within different groups and therefore these
6 are really, these are generic actually.

7 DR. WILSON: That is why we get
8 moderate predictive accuracy.

9 CHAIR HILLMAN: Okay. So, we have
10 a narrow population. We could build then, if
11 we were to look actually at military sexual
12 offenses, we could likely build a model with
13 greater predictability based on the narrower
14 population that we are dealing with.

15 MR. PRESCOTT: The common
16 expression is use local norms and so as much
17 research as you guys can do. It is true,
18 globally men who abuse girls are much greater
19 in number but men who abuse boys seem to do so
20 much more prolifically.

21 MEMBER JAUS: So the male victims
22 are less likely to report.

1 MR. PRESCOTT: Yes. Yes, there is
2 that. I really do think that is --

3 CHAIR HILLMAN: Right. This is a
4 struggle for us because, as General Dunn was
5 pointing out, in general our problem is the 18
6 to 24 demographic. And yet our majority of
7 victims are men, which just doesn't fall so
8 easily into that party-scene-of-
9 misunderstanding crime that works out there.

10 DR. WILSON: Right.

11 CHAIR HILLMAN: Just as it is hard
12 for me to reconcile the repeat offenders as a
13 large number of offenses, perhaps, and yet the
14 one-time offender as the most frequent type of
15 offender.

16 So, there is a --

17 DR. WILSON: One of the sort of
18 analogical situations that you might consider,
19 and it is not a perfect one, is to take a look
20 at the Prison Rape Elimination Act because it
21 really does speak to some of that, that kind
22 of sexual offending within male-only

1 populations where the people who are engaging
2 in the behavior perhaps in certain
3 circumstances, but for those circumstances may
4 not have engaged in that behavior
5 specifically. And that is male on male
6 because that is just what happens to be there,
7 whereas, if there had been more females
8 available, maybe those guys would have
9 sexually assaulted females. We don't know.
10 But within that male sort of dominated
11 environment, you know let's face it -- and I
12 hope I am not giving up too many of our
13 secrets -- but you know when you put men
14 together with themselves, they behave entirely
15 differently than when there are women around
16 and it is not always good.

17 MEMBER STRAND: Amen.

18 (Laughter.)

19 CHAIR HILLMAN: On that note, I
20 want to thank you for --

21 DR. WILSON: It is a state secret.

22 CHAIR HILLMAN: Thank you for

1 joining us. But I also want to thank you both
2 for the work that you are doing on this. This
3 is actually not on the front pages and I don't
4 imagine that the kudos that come to some of
5 the flashier aspects of addressing these
6 problems always roll in your direction. But
7 for myself and for all of us, it makes a
8 tremendous difference to have not only the
9 kind of commitment that you have to solving
10 the problem from this direction but also to
11 really understanding that humanity that
12 everybody shares across the dimensions of this
13 issue. So, I am grateful for that.

14 DR. WILSON: We are all in the
15 public safety business. And I can speak for
16 David. Just because we were here today is not
17 the end of your access to us.

18 MR. PRESCOTT: Yes.

19 DR. WILSON: And in fact, I can
20 speak for myself but there are a handful of
21 different resources that as you have been
22 asking questions I have been saying to myself,

1 I need to send them this. I need to send them
2 this.

3 So, I will be inundating you with
4 stuff, Dillon, and hopefully you can get it to
5 the panel and maybe that will help further, as
6 you deal with this incredibly difficult issue.

7 CHAIR HILLMAN: Thanks, Dr.
8 Wilson. Thanks, Mr. Prescott.

9 MR. PRESCOTT: Thanks for your
10 efforts.

11 DR. WILSON: Thank you.

12 CHAIR HILLMAN: Ten minutes.

13 (Whereupon, the foregoing
14 proceeding went off the record at
15 10:54 a.m. and went back on the
16 record at 11:11 a.m.)

17 CHAIR HILLMAN: So to keep us more
18 or less on track, let's get started.

19 We have a quorum, other folks will
20 be back to join us shortly.

21 Our next topic here for this
22 morning is military forensic psychiatry in

1 sexual assault cases. And we have on the
2 phone Jennifer Yeaw. Am I saying your name
3 correctly?

4 DR. YEAW: Yes.

5 CHAIR HILLMAN: Yes, okay. So,
6 Jennifer Yeaw is on the phone and we'll start
7 with Lieutenant Colonel Johnson who's our
8 first presenter here. So Colonel Johnson, if
9 you could tell us what you know.

10 LTC JOHNSON: Thank you for having
11 me here today. It's a pleasure to be here.

12 I just want to say a few words
13 about myself, Dr. Yeaw and what organization
14 we work for.

15 I'm forensic psychiatrist and Dr.
16 Yeaw is a forensic psychologist. We both work
17 at the Center for Forensic Behavioral
18 Sciences, that's, in our opinion, the DoD's
19 premier center for forensic behavioral
20 research and expert forensic work for DoD.

21 I'm the Training Director for the
22 only forensic psychiatric training program in

1 the military. So I --

2 MEMBER BRYANT: Excuse me,
3 Colonel. Everybody else may know where that
4 it is, I don't know where that is. Where is
5 the Center?

6 LTC JOHNSON: Okay, so we are
7 attached to Walter Reed National Military
8 Medical Center --

9 MEMBER BRYANT: Thank you.

10 LTC JOHNSON: -- although we work
11 about 20 minutes south in a separate building,
12 but, yes.

13 MEMBER BRYANT: All right, thank
14 you.

15 LTC JOHNSON: But yes. So, I
16 work to train forensic psychiatrists for the
17 Army as well as mostly the Navy as well. Dr.
18 Yeaw works with me in that training purpose.

19 Just to tell you a little bit
20 about myself, I attended the military's
21 medical school at USUHS or Uniform Services
22 University in Bethesda, Maryland, graduating

1 in 2000. I attended psychiatry training at
2 Walter Reed Army Medical Center up until 2004
3 and I did forensic subspecialty training in
4 2005.

5 After that, I served five years
6 running behavioral health clinics in Germany.
7 I ran one for two years in Fort Irwin,
8 California at the National Training Center
9 before coming here in this current position
10 about a year and a half ago.

11 I deployed to Iraq and Afghanistan
12 as well as send TDYs to both places,
13 organizing patient care there.

14 You know I -- as far as my
15 forensic work goes, I've consulted or
16 testified I'd say 40 to 50 courts-martial in
17 the military and now in my current job, that's
18 my primary role.

19 So you know, where we work at
20 Center for Forensic Behavioral Sciences, we
21 are kind of -- we consider ourselves the
22 clearinghouse for expert requests throughout

1 the military, that's including even the Coast
2 Guard as well as the Marines.

3 We receive upwards of close to 300
4 referrals per year and when we take cases, we
5 function as an expert consultant to either a
6 prosecution or a defense.

7 We also do what's called sanity
8 boards, that's kind of pre-trial evaluations
9 for competence to stand trial and criminal
10 responsibility. We do similar evaluations as
11 needed for detainees down at Guantanamo Bay or
12 habeas corpus issues that arise down there.

13 We also consult with military law
14 enforcement agencies. So we work with CID or
15 NCIS in any investigation as to potential
16 threats inside the Armed Forces and then
17 there's a few other roles that branch out from
18 that that we cover whenever we can.

19 In addition to forensic
20 psychiatry, we're also a forensic psychology
21 training program, so at any time we have six
22 staff members or experts and then three to

1 four people in training.

2 Let's see, what else here. We've
3 been growing over the past few years with --
4 when we have forensic graduates, we've been
5 assigning some of them to be what's called
6 regional consultants throughout the globe so
7 we've kind of got everything covered as far as
8 keeping track of all the requests and
9 attempting to assign experts.

10 In essence, though, there's not
11 nearly enough of us to cover the demand. I
12 mean when I said there was upwards of 300
13 cases per year, that's just one type of work
14 we do and I'd say there's only say 10 to 11
15 Army forensic psychiatrists on active duty at
16 any given moment. There's a few more in the
17 Navy and Air Force. There's fewer forensic
18 psychologists right now. And obviously, a lot
19 of us have other job responsibilities like
20 most people are not primary forensic work,
21 unlike myself at the Center.

22 We -- as far as, you know, our

1 relevance to this panel, we consider ourselves
2 experts in testifying at sexual assault
3 trials, basically. So as far as the number of
4 consults we get, I'd say over half of our
5 consults are for Article 120 or rape or sexual
6 assault kind of issues. And we'll have more
7 breakdown on the stats a little later today.

8 But we testify either for the
9 defense or the Government. We're impartial.
10 We have to do that so we don't appear to
11 become biased if we were to work exclusively
12 for one side or another.

13 The most common things we talk
14 about would be testifying as to the effects of
15 alcohol on memory, ability to give consent or
16 how to identify levels of intoxication based
17 on behavior or trying to estimate how much was
18 drunk or eaten on a certain night.

19 We talk a lot about
20 counterintuitive rape victim behavior. So a
21 lot of what happens after a rape or even the
22 behaviors before a rape often can cause

1 confusion or questions in the mind for
2 different triers- of-fact.

3 That might be delayed reporting.
4 It might be nonresistance during an assault.
5 The effects of alcohol, of course. And then
6 say continued contact with an assailant after
7 an assault.

8 And you know, one particularly
9 tricky area is, you know, when the victim is
10 already in a relationship with her assailant.
11 You know, we try to explain the psychology and
12 what we know as far as, you know, how this
13 makes sense or how this fits in with
14 everything.

15 So we, you know, we talk to a lot
16 of trial counsel as well as defense on, you
17 know, how often they need us. We get the
18 sense that in sexual assault trials,
19 especially when alcohol is involved, that
20 they're pretty much looking for one of us to
21 at least testify for the government to explain
22 some of the situations. Defense may also want

1 an expert to counter that expert or to explain
2 it to their benefit.

3 We give a lot of training to JAG
4 as well. We -- a lot of JAGs are requesting
5 us to come to their training conferences on
6 this topic and so in recent years, we have
7 done stuff at Fort Sam Houston, at the Navy
8 base in Newport, at the Navy Yard and over in
9 San Diego area we did something recently, too.
10 And we've got more requests coming up this
11 coming year.

12 So, as I said, we consider
13 ourselves somewhat essential to making these
14 courts-martial go. As far as how effective we
15 are or what -- how much importance the triers-
16 of-fact give us, we don't quite know the
17 answer to that one, you know, unless we had a
18 lot of surveys of juries after the fact.

19 But we feel like we're being asked
20 to give a piece of information at all of these
21 trials and hopefully, it's being helpful to
22 whomever's listening.

1 COL HENLEY: Colonel Johnson, is
2 there anybody at the local installation who
3 can testify consistent with what you or is it
4 Dr. Yeaw?

5 LTC JOHNSON: Dr. Yeaw, yes.

6 COL HENLEY: Yeaw. What makes you
7 unique in your testimony in these, either the
8 trial or defense counsel can't obtain at the
9 local installation. Any chance to sort of
10 fast forward and you talk about --

11 LTC JOHNSON: Sure.

12 COL HENLEY: -- you don't have
13 enough people and travel and whatnot. Why are
14 they coming to you?

15 LTC JOHNSON: So I guess, you
16 know, the issue would be that, we're
17 forensically trained. We did a special
18 fellowship training. We're board certified in
19 forensic and forensic is really the interface
20 of mental health and the law. So interpreting
21 statutes and giving testimony in a way that's
22 objective, neutral and to the point.

1 I can say for myself, when I
2 trained as a general psychiatrist, I was not
3 trained in the topics that I just discussed.
4 So counterintuitive rape victim behavior or
5 analyzing alcohol intoxication in such a way
6 as to try to interpolate levels of
7 intoxication or likelihood of blackouts,
8 things of that nature.

9 Most people are not trained in
10 that topic or to testify at all and there's a
11 lot of, I'd say discomfort among non-forensic
12 experts working at local facilities if they're
13 asked to testify at a court-martial. And I
14 say that having been a Chief of small clinics
15 where the local JAG and the local General was
16 asking us to provide an expert and I talked to
17 my staff and there's a great degree of
18 reluctance, I'd say, among non-forensic folk
19 to take on that role.

20 LTC MCGOVERN: Do they sometimes
21 fill that role, though?

22 LTC JOHNSON: Sometimes they have

1 to, yes.

2 Another issue, of course --

3 DR. YEAW: May I jump in?

4 LTC JOHNSON: Sure, go ahead, Jen.

5 DR. YEAW: This is Dr. Yeaw. I
6 would add to that that this type of testimony
7 of putting a victim's behavior in context can
8 be technically complicated from an evidentiary
9 standpoint and I think that is the thing that
10 is the thing that really requires that
11 forensic level of specialization because the
12 expert can't comment directly on credibility,
13 for example.

14 And they have to be prepared to
15 address issues of a disability of scientific
16 testimony. And most times we found that
17 that's beyond the scope of a general risk and
18 certainly beyond their comfort level.

19 And Dr. Johnson, you were probably
20 about to address this but I think that the
21 workload and commitment issue is probably very
22 significant for the local MCS as well.

1 LTC JOHNSON: Right, yes. I was
2 just about to mention the need to deliver
3 patient care, a lot of our installations are
4 under staffed for the demands that we're
5 receiving. So to give up an expert for a
6 significant amount of days both the reading
7 material to prepare for testimony, and to sit
8 in trial waiting for the chance to testify,
9 it's costing a lot of patient hours for the
10 local hospital.

11 CHAIR HILLMAN: How do you
12 prioritize the requests that you get?

13 LTC JOHNSON: You know, we are
14 primarily a training program so we're looking
15 for a mix of good cases to train our fellows
16 in. So as a result, we can't just take as
17 many sexual assault cases as we can. They're
18 one type of case that we want to train our
19 fellows in.

20 You know, we'll prioritize based
21 on -- we do try to support local area commands
22 as much as we can both because there's less

1 time commitment as far as traveling and it'd
2 be easy have to a lot of trainees come to
3 watch testimony if it happens.

4 We do try to takes cases if there
5 is a kind of a, I don't know, a unique aspect
6 or an aspect of it that's unusual or a little
7 out of the realm of normal.

8 CHAIR HILLMAN: So you're like a
9 teaching hospital essentially. Is the model
10 that you're fellows then, I'm just trying to
11 understand how this works. So you have four
12 fellows in training and how long are they with
13 you? And once they get out there and how long
14 do they serve when they get in these roles?

15 LTC JOHNSON: The forensic
16 psychiatrists train for one year and the
17 forensic psychologists train for two years.
18 And I don't have a great answer for why that
19 is.

20 The forensic psychology program is
21 sort of brand new and it was established as a
22 two year program.

1 But all of us have different
2 commitment levels. So for instance, one of my
3 fellows has a seven year commitment, the other
4 fellow has a four year commitment after
5 finishing the fellowship. It has to do with
6 what medical school they went to, who paid for
7 it, stuff like that.

8 The forensic psychologists, it can
9 be variable as well. So, yes.

10 DR. YEAW: I believe they are one
11 for two so they give us a four year commitment
12 of service after the two year fellowship.

13 CHAIR HILLMAN: Right.

14 COL HENLEY: But -- and once they
15 leave your program, they're still available to
16 testify, yes or no or --

17 LTC JOHNSON: Yes or no. It
18 depends on what command they go to and how
19 willing the local hospital command is to allow
20 them to do forensic work.

21 As I said, it takes them away from
22 patient care or it may take them away from

1 being the chief of the clinic and a person who
2 answers questions when the commanded gets
3 dinged on something.

4 So in my own experience, I
5 remember, I remember when I graduated
6 fellowship I started off being allowed to do
7 as much forensic work as I wanted. I did a
8 lot of cases and especially as the war ramped
9 up in Iraq, it became less and less until in
10 the past few years before I came to this job,
11 I'd say I did maybe one or two cases per year.

12 CHAIR HILLMAN: Are there -- I
13 mean cost is a -- you point to in your slides
14 you mentioned specifically how much it costs
15 if you can't support this or there's isn't a
16 local support for it. Is there -- that is it
17 costs a lot to get civilians to do the sort of
18 thing that you can do.

19 Is there an expertise deficit in
20 the civilian testimony here, too? I mean you
21 mentioned some of the military specific
22 factors that you can talk about.

1 LTC JOHNSON: Dr. Yeaw, do you
2 want to try to take that one?

3 DR. YEAW: I haven't heard that
4 there is difficulty finding civilian
5 expertise. I think that one of the things
6 that is value-added about us is we really --
7 our only priority is to offer high quality
8 scientifically valid information to the Court
9 and that's not always true of everyone doing
10 this kind of work.

11 Unfortunately, I think that the
12 cost consideration is often is that it's
13 really a barrier for the convening
14 authorities. But I know no one is tracking
15 that nationally because it comes out of the
16 individual convening authority's budget, if
17 that makes sense.

18 But I think your JAG folks would
19 perhaps know a little bit more about that than
20 we do.

21 MEMBER BRYANT: Well, we saw --
22 there's a figure on the slides about the

1 analysis of data from July through December of
2 2006 and talked about number of cases
3 accepted. Forty-two of the non-accepted cases
4 hired a civilian expert for a total of.

5 So is that an anomaly that the
6 statistics were being kept for 2006 but they
7 haven't been kept since then or this --

8 LTC JOHNSON: This was our own
9 internal research project.

10 DR. YEAW: Yes, sir. That
11 particular data was put together as a business
12 case analysis for us to justify hiring some
13 additional civilian staff and we were
14 successful in doing that. But no, we don't
15 routinely keep that degree of precision in our
16 data collection and our business records.

17 MEMBER BRYANT: All right, thank
18 you.

19 LTC MCGOVERN: What would you need
20 to meet the 300 case load?

21 LTC JOHNSON: I mean --

22 LTC MCGOVERN: Or could you ever -

1 - I mean are you conflicted out if someone is
2 going -- in our office going to testify for
3 the prosecution then will the defense attorney
4 need to request a civilian?

5 LTC JOHNSON: It is true, we'll
6 take one side of a case and not the other side
7 because it would be a conflict if we knew the
8 opposing expert and worked with them
9 regularly.

10 I mean obviously, it would take a
11 lot of experts to meet that demand for 300
12 cases. I don't know how to calculate it
13 actually.

14 LTC MCGOVERN: And of the 300, how
15 many are sexual assault cases versus the other
16 type of cases?

17 LTC JOHNSON: So --

18 DR. YEAW: Would you like me to
19 set out for this -- in our most recent
20 calendar year, if you just bear with me, we
21 received 330 cases totally approximately.

22 Now, we have reason to believe

1 that this -- I mean this is not every expert
2 request through the Department of Defense.
3 These are just the ones that we -- the
4 solicitations that we receive.

5 We know that there are more out
6 there, but we know that we never hear from
7 certain installations that know we're doing
8 sexual assault prosecutions or other types of
9 -- are getting experts so, you know, keep that
10 in mind, that comprehensive enterprise-wide
11 data.

12 We received 330 requests. Of
13 those requests, 209 were cases with a sexual
14 component. That means that they were either
15 charged under Article 120 or they were charged
16 under the general article that had some type
17 of sexual component work. The best example of
18 that would a child pornography type of case.
19 We also included sexual harassment and
20 coercion cases in that figure.

21 That makes up, at least in our --
22 in the most recent calendar year, that was 63

1 percent. And over the six years that I've
2 been tracking the data, that's held pretty
3 constant. We're between 60 and 70 percent or
4 so of the cases -- of the case referrals that
5 we receive involve some type of sexual
6 misconduct.

7 CHAIR HILLMAN: So Dr. Yeaw, it's
8 not going up then?

9 DR. YEAW: No, the percentage is
10 not changing but the number of referrals has
11 steadily trended upward.

12 CHAIR HILLMAN: Right, it's
13 strange. Given the emphasis on prosecution
14 right now and the numbers of reports and the
15 increased intensity here and the, you know
16 Judge Advocates in the field telling us how
17 many of their resources and investigators are
18 being dedicated to this, you're not actually
19 seeing a surge in requests.

20 Do people not request because they
21 know you won't be able to help? I mean is
22 there a suppression effect that happens as a

1 result of your limited resources?

2 DR. YEAW: Well, just to clarify,
3 no. The percentage of cases that involve sex
4 is holding constant but the total number of
5 referrals has increased over time heavily.
6 We've definitely seen a surge in referrals
7 going back.

8 CHAIR HILLMAN: No, no, I
9 understand. That makes sense. I think the --
10 I would have guessed that the percentage would
11 also go up but you're saying it's just the raw
12 numbers that are going up?

13 DR. YEAW: No, and just the raw
14 numbers are going up. What I make of that is,
15 you know, I think as our specialty, you know,
16 our specialty area, you know, we tend to get
17 the, you know, higher profile cases will come
18 our way. And there has seemed to be a wider
19 range of referrals that come to us just by
20 virtue of the fact that we're Walter Reed.

21 LTC JOHNSON: I think, just to
22 answer, you know, part of your question,

1 ma'am. We don't know that everyone comes to
2 us when they need an expert. I mean,
3 obviously, our number of referrals have
4 increased as we've advertised ourselves, but
5 no one is required to contact us or they may
6 have local experts they go to directly who are
7 able to do the cases and they just don't come
8 to us. Yes.

9 DR. YEAW: And ma'am, I believe
10 your point about kind of the ceiling requests
11 on the resources is well taken because our
12 acceptance number of cases has kind of stayed
13 between, you know, 30 to 40 percent, depending
14 on the year.

15 And you know, you can see the
16 pattern where we will hear from one
17 installation two or three times and if we
18 never send them an expert, they stop calling
19 us. So --

20 CHAIR HILLMAN: And you know,
21 really you must --

22 MEMBER BRYANT: Well that's human

1 nature.

2 CHAIR HILLMAN: Yes. Mr. Bryant's

3 --

4 DR. YEAW: Of course.

5 CHAIR HILLMAN: -- saying he

6 understands.

7 I wonder, too, you must be taking
8 a lower -- you can't take all that -- you
9 can't take all the sexual assault cases
10 because you're training people who you need to
11 have a wide variety of skill sets to meet the
12 demand that's out there that's growing, too.
13 So you can't specialize in this arena. I mean
14 nobody really specializes in this.

15 LTC JOHNSON: Yes, I mean we don't
16 do it exclusively.

17 DR. YEAW: NO, ma'am.

18 LTC JOHNSON: But it does, I'd say
19 with the training that JAG is asking us to do,
20 I'd say it is something we focus on or think
21 about a lot. I would say that.

22 LTC MCGOVERN: More than other

1 crimes?

2 LTC JOHNSON: I feel like I do,
3 yes.

4 CHAIR HILLMAN: Yes, what do you
5 not get to that you would get to if you
6 weren't doing all this?

7 LTC JOHNSON: I'm sorry, say that
8 again?

9 CHAIR HILLMAN: Surely, there's a
10 range of -- I'm just wondering about the
11 consequences of the heavy investment in the
12 sexual assault --

13 LTC JOHNSON: Okay.

14 CHAIR HILLMAN: -- specifically?

15 LTC JOHNSON: So what -- I mean
16 other types of cases we could take, I mean we
17 do get a lot risk assessment referrals for
18 future violence, recidivism, sex offender kind
19 of stuff, the sanity boards as I mentioned,
20 other kind of mental defenses at trial.

21 So after a 706 they may still
22 present some sort of mental health defense or

1 a mens rea defense. Effects of substance use
2 or sentencing issues. So you know, PTSD,
3 mTBI, this person needs medical treatment in
4 the future.

5 CHAIR HILLMAN: So you get to do
6 less work on risk management, essentially, and
7 assessment because of the front end investment
8 in the trial process, investigation and trial
9 process?

10 DR. YEAW: I wouldn't concur with
11 that. I --

12 CHAIR HILLMAN: Okay.

13 DR. YEAW: You know, we have --
14 because of our training focus, we, as Dr.
15 Johnson said, we have to prioritize having a
16 range of cases so that our fellows are exposed
17 to a broad expertise. So I wouldn't say that
18 we ignore those cases or deprioritize those
19 cases because of the sexual assault focus more
20 broadly. Would you concur, Dr. Johnson?

21 LTC JOHNSON: Yes, I mean you
22 know, we take as many cases as we can fit into

1 our schedule. You know, I guess, you know,
2 suppose you took away all the sexual assault
3 referrals that we took, I do think we could
4 take more of other types of cases, but we do
5 try to keep it a good mix in general.

6 But if you were to say look at my
7 resume at all the Court trials I've done, I'd
8 say most of them are going to be of a sexual
9 assault arena.

10 MEMBER COOKE: Can I ask a
11 question? I'm struck -- you're making a huge
12 investment in the people you're training. For
13 one or two years they're committing themselves
14 to this specific area and yet you indicate
15 that most of them go out and they're in non-
16 forensic billets. They're out doing, you
17 know, just patient -- I don't want to call it
18 routine but --

19 LTC JOHNSON: Yes.

20 MEMBER COOKE: -- you know, not
21 specialized to do this. It seems like a big
22 investment. I just wonder if there isn't a

1 better way to utilize these people?

2 LTC JOHNSON: Well, this is a
3 complex question that's been gone back and
4 forth for years, I'd say, you know, well
5 before my time even.

6 You know, the Army does look at
7 fellowship training, sometimes -- in some ways
8 as a retention tool. People want this
9 training and it encourages them to stay in and
10 they incur some more debt when they do this.

11 On the other hand, you know,
12 medical command is under intense pressure to
13 deliver patient care and providing support to
14 legal services falls outside of what medical
15 command does. So it's sort of like, we need
16 cooperation between two or more separate
17 commands to coordinate what they want to do
18 with us or how they want to utilize us.

19 You know, there's been talk in the
20 past about JAG, of different services sort of
21 creating their own pool of experts, hire them
22 on contract to be experts just at courts-

1 martial. And I don't know all the specifics
2 on why that hasn't been able to take off in
3 the past but there are complications having to
4 with having doctors working for JAG as opposed
5 to a hospital with its credentialing body.

6 MEMBER STRAND: How much work do
7 you do with the criminal investigators on the
8 front end before it even gets to Court? Do
9 they reach out to you and, you know, send you
10 difficult cases or ask your opinions on
11 things?

12 LTC JOHNSON: On occasion it
13 happens. I wouldn't say it happens very often
14 but sometimes we do get questions in the
15 Article 32 stage. Occasionally I've had a JAG
16 contact me just attempting to make his own
17 decision on whether to recommend preferring or
18 referring charges or not. I'd say that's rare
19 though. Yes, that's about the extent of it.

20 MEMBER STRAND: Okay, I see.

21 DR. YEAW: We very rarely hear
22 from any of the criminal investigative folks

1 regarding sexual assault issues. I would say
2 the exceptions to that are the ones involving
3 child victims.

4 MEMBER STRAND: Okay. Well I
5 suspect in the future you'll hear more from us
6 because I'm going to start putting your
7 information out in our trainings.

8 LTC JOHNSON: Okay, thank you.

9 MEMBER STRAND: You're welcome.

10 CHAIR HILLMAN: Colonel Henley?

11 COL HENLEY: Just curious if you
12 are able, doctors, able to quantify is not the
13 right term, but quantify the value of your
14 expertise to the parties? Do you ever get
15 feedback from either the Court members or the
16 counsel or somebody that actually went through
17 the process whether your testimony or
18 assistance is valuable? And if so, how?

19 DR. YEAW: Well, I can speak to
20 that a bit. I mean I've been told by
21 individuals within both the Navy and the Army
22 TCAP that they recommend to their special

1 victims prosecutors that they get an expert on
2 every 120 case.

3 So what we're hearing and
4 certainly I think the demand backs that up is
5 that the attorneys find our services valuable.
6 The unknown piece is there's no published
7 literature, for example, on how the panel
8 members or the Judges, how they weigh that
9 information when they're making their
10 decision. The attorneys definitely think that
11 has helped.

12 MEMBER COOKE: Can you walk me
13 through, if you're asked to testify for one
14 side or the other, let's say the Government in
15 a sexual assault case. What kind of time do
16 you devote to that? You know, what are you
17 doing from the time you get the case and you
18 -- I guess you need to study up on the
19 particular case. What's your investment?

20 LTC JOHNSON: So initially,
21 there'll be some e-mail go back and forth. If
22 accept the case I'm going to ask them to send

1 me all of the relevant case files that they
2 would like me to read. So that may be the
3 investigative summary of whatever incident
4 happened or maybe sworn statements. There may
5 or many not be Article 32 transcripts or
6 recorded interviews of the accused or
7 something.

8 So this could take anywhere from a
9 few hours to a day or two worth of just going
10 over these documents, maybe even more than two
11 days.

12 Next we're going to set up some
13 sort of conference -- telephone conference
14 where we discuss my interpretation of what's
15 presented. You know, what kind of conclusions
16 I can make from the data, what I can't
17 conclude. And if there's anything that, you
18 know, any data that is contrary to whatever
19 side that I'm working on.

20 The next -- there may not be any
21 more discussion about the case for weeks. You
22 know, we may be waiting for the date of the

1 court-martial and then usually there's some
2 sort of postponement. It gets rescheduled.
3 There's a lot of like scheduling issues with
4 these things so it's hard for us to juggle a
5 lot of cases simultaneous. They're always
6 like conflicting each other it seems like.

7 And so once the court-marital
8 happens, I can be asked to be there anywhere
9 from a day to a whole week it seems like.
10 Sometimes there's exceptional cases. Dr.
11 Yeaw's going to be at one that's going to be
12 three to four weeks long it seems like.

13 So we may be asked to sit through
14 the entire court-martial, observe all the
15 witnesses so that that adds to the data when
16 we give our opinion -- we eventually testify.

17 So basically I'd say roughly up to
18 a week of time spent traveling somewhere and
19 focusing entirely on the case.

20 MEMBER COOKE: Do you go overseas
21 for trials or --

22 LTC JOHNSON: Sometimes we do,

1 yes.

2 MEMBER BRYANT: In the material
3 that you receive, do you accept submissions --
4 in the hypothetical, you're -- for the
5 Government? Do you accept material from the
6 defense or answer their phone calls?

7 LTC JOHNSON: If I was working for
8 the Government, I would only talk to the
9 defense if the Government was aware of it.
10 Usually, I mean technically, defense I think
11 can ask me questions any time but usually they
12 do not unless I'm about to actually testify.

13 MEMBER BRYANT: Well they know in
14 advance that the Government has requested an
15 expert and that that's been granted, right?

16 LTC JOHNSON: They do, yes. You
17 know, as far as --

18 DR. YEAW: Sir?

19 MEMBER BRYANT: Yes, ma'am?

20 DR. YEAW: If I may, that often
21 will depend on whether or not we're initially
22 retained as a consultant or a witness.

1 In my experience, it's been more
2 common for both sides to retain me as a
3 consultant with the option that I will become
4 a witness should they decide that that's in
5 their case's best interest.

6 So, as long as you're in that
7 consultant stage, there isn't as much
8 communication with the opposing party. Though
9 once you're on the witness list, of course,
10 the opposing attorney can interview you.

11 MEMBER BRYANT: And do you -- and
12 this question is for both of you -- do you
13 routinely prepare a written report in advance
14 that's available to both sides or is there
15 some requirement that there's a written report
16 because various States and various statutes do
17 or do not require written reports from
18 experts.

19 LTC JOHNSON: I generally --

20 DR. YEAW: I --

21 LTC JOHNSON: -- do not.

22 DR. YEAW: Go ahead, David.

1 LTC JOHNSON: Yes, I do not
2 generally do a written report, at least for
3 these arena of cases. It's just going to be
4 mental preparation and rehearsal in my mind.

5 MEMBER BRYANT: So the defense is
6 not --

7 DR. YEAW: I would concur.

8 MEMBER BRYANT: I'm sorry, I keep
9 cutting you off, ma'am. Go ahead.

10 DR. YEAW: I would concur, the
11 Rules of Evidence don't require it. I would
12 say that they are most commonly prepared in
13 cases in which a risk assessment or a direct
14 evaluation of one or -- of a party has been
15 conducted.

16 COL HAM: Or a 706. A 706 is a
17 required --

18 DR. YEAW: Or --

19 COL HAM: -- written report.

20 DR. YEAW: -- or for example, a
21 sex offense or risk assessment in preparation
22 for sentencing, we do quite a bit of those and

1 often times a report will go with that. It's
2 also -- it also just happened that we're asked
3 to evaluate the complaining witness. And so
4 sometimes a report will be generated from that
5 evaluation.

6 COL HAM: If you do a sanity --

7 DR. YEAW: But I --

8 COL HAM: If you do a sanity
9 board, there are two reports, correct? The
10 short form that goes to the prosecution and
11 the long report that goes to the defense only?

12 LTC JOHNSON: That's correct.

13 DR. YEAW: That's correct. Sanity
14 boards require a report, two reports as you
15 said.

16 MEMBER BRYANT: Well I was mainly
17 interested in those issues of counterintuitive
18 conduct by a victim, effects of alcohol, that
19 sort of thing.

20 LTC JOHNSON: Yes, for those two
21 topics, I would not prepare a report and I
22 believe most of us would not either.

1 MEMBER BRYANT: So the defense or
2 the prosecution doesn't really know what your
3 testimony's going to be until you take the
4 stand?

5 LTC JOHNSON: I mean if I'm
6 working for the prosecution --

7 MEMBER BRYANT: They don't know
8 the tenor of it.

9 LTC JOHNSON: -- they'll prepare
10 us beforehand. We'll discuss it so they know
11 what I'm going to say.

12 MEMBER BRYANT: But they'll know
13 but the other side won't?

14 LTC JOHNSON: The other side --

15 DR. YEAW: No, I disagree.

16 LTC JOHNSON: -- is allowed to.

17 DR. YEAW: I disagree, sir. Often
18 times the opposing counsel will interview us
19 prior to us taking the stand. I certainly,
20 you know, as a consultant, I always recommend
21 that they interview the expert. It's unusual
22 for a sworn deposition to be taken. It would

1 be more common for there to be a voir dire in
2 a 39(a) session as a way to get sworn
3 testimony prior to presenting to the trier-of-
4 fact, it's wanted.

5 MEMBER BRYANT: Thank you.

6 CHAIR HILLMAN: Other questions?

7 LTC MCGOVERN: Can you -- I was
8 going to actually shift away from just your
9 forensic expert testimony at this point to
10 other mental health issues you see in these
11 types of cases and any issues such as mental
12 health records. Do you have any experience
13 with those in sexual assault cases?

14 LTC JOHNSON: Yes, you know, one
15 issue that does come up has to do with when a
16 victim has some sort of mental health history
17 with mental health records or something else
18 in his or her history that is somehow possibly
19 relevant to the current complaint.

20 You know, there is what's
21 colloquially called the rape shield law in the
22 UCMJ. When we work for Government, sometimes

1 the question comes up, do we want to interview
2 the victim or not? And our general consensus
3 is that we prefer not to interview the victim
4 because it opens the door to that past history
5 and allows the defense more leeway to try to
6 get access to those other records. Yes,
7 that's --

8 LTC MCGOVERN: Then when you've
9 been in the field working the clinical issues
10 and have that patient confidentiality and
11 those privileges, have you ever been involved
12 in case where one of the parties has been
13 trying to fight for the records?

14 LTC JOHNSON: You know, I have had
15 patients who were victims of some sort of
16 assault and there were attempts to get their
17 records and I don't quite know how that played
18 out because it was outside my arena. I was
19 not the forensic expert there.

20 But I have been a forensic expert
21 on cases where I was on one side or the other
22 and attempts were being made to get access to

1 those records and I have seen it where
2 sometimes they are maybe partially released,
3 like the Judge does an in camera review,
4 redacts irrelevant material in their opinion
5 and other parts of that mental health record
6 are released to the defense.

7 MEMBER STRAND: So how relevant,
8 let me -- an analogy.

9 Say I'm stabbed and I'm stabbed
10 with a rusty knife. I go and I get emergency
11 treatment and they sew me up and then about
12 three days later, I'm overcome by sepsis and
13 I go back in the hospital. My organs start to
14 fail and I almost die.

15 Well, when we get to Court, it's
16 important, I think for most prosecutors to
17 take that information what happened to me in
18 the hospital as a direct result of that
19 stabbing, these are the outcomes of the
20 stabbing as part of the case-in-chief to say,
21 well these, you know, these are direct
22 outcomes. These are -- this is what happened.

1 This helps prove that he was stabbed.

2 In the mental health field, in
3 psychiatric or psychological field, how -- can
4 that same analogy be drawn that if I'm raped
5 and all of a sudden now I have suicidal
6 ideations. I start to cut myself. I start
7 to, you know, have tension reduction behaviors
8 and things like that, that may be a direct
9 result of that.

10 Would that be important or not
11 important to bring to the trier-of-fact?

12 DR. YEAW: I'd like to speak to
13 that if I may.

14 I think that that's a great
15 analogy and I think that it really highlights
16 the difference of what we do.

17 In your example, the sepsis is a
18 direct result of a penetrating injury by a
19 rusty nail. So sepsis could have occurred if
20 that person stepped on that rusty nail, fell
21 onto that rusty nail or was pushed or stabbed
22 with that rusty nail.

1 So the disease sepsis itself
2 really doesn't tell us anything about what --
3 was a crime committed or not that resulted in
4 that injury, if you're following me.

5 MEMBER STRAND: Right.

6 DR. YEAW: The sexual assault is
7 the same -- it's often the same from our
8 perspective. We -- the victim may have a
9 psychiatric disorder. A victim may have post-
10 traumatic stress disorder and we might be able
11 to speak to, okay, yes, this is consistent
12 with what many people report following a
13 sexual assault. But we can't say that those
14 symptoms are a direct result from a criminal
15 behavior by a specific person.

16 MEMBER STRAND: Right. But just
17 like with the rusty nail, then I could come
18 back and say, well, you know, did I step on a
19 rusty nail? Were there other -- any other
20 injuries, things like that. And I know in the
21 psychological field it's probably going to be
22 more difficult to say, you know, cause and

1 effect. But if in your discussion and you
2 research of that particular situation, that
3 victim can say there's no other known
4 explanation or there's no other, not known,
5 but it certainly has an impact potentially.

6 COL HENLEY: An objection to that
7 would be sustained.

8 MEMBER STRAND: Okay. Well, when
9 -- because --

10 COL HENLEY: I mean I'd like an
11 answer to see if according --

12 MEMBER STRAND: Another thing --

13 COL HENLEY: -- to --

14 MEMBER STRAND: Another thing
15 we're talking about though is also what are
16 elements of proof of consent and fear, you
17 know, nonconsent? What are elements of proof
18 for fear? So if I'm great fear, are there
19 some psychological consequences potentially
20 for that fear that could go to that element of
21 proof?

22 LTC JOHNSON: You know, kind of

1 echoing what Dr. Yeaw said, I would say that,
2 you know, the presence of mental health
3 symptoms after an assault could be consistent
4 with the assault caused these symptoms to
5 occur. But to say absolutely that it did
6 happen and it caused them is --

7 MEMBER STRAND: Right. But even
8 the same thing with the medical thing, they
9 wouldn't keep the medical records out because
10 -- and it would -- that would be a thing for
11 the defense to argue, well it could have been
12 caused by other things, couldn't it? Yes.
13 But that doesn't keep it out.

14 COL HAM: It's more the impact of
15 the offense that would be on sentencing would
16 you agree, Colonel? If it was directly
17 resulting from an offense of which an accused
18 was convicted, directly resulting from is our
19 rule --

20 LTC JOHNSON: But on the --

21 DR. YEAW: Well it -- if I could,
22 your point is well taken and you made a

1 comment of if all other foreseeable causes for
2 these psychological symptoms have been ruled
3 out. There's the rub, I think, from really
4 everyone's perspective because in order for us
5 to be able to speak to that, we would have to
6 do a very detailed history of the accusing
7 witness that we get into many areas that are
8 otherwise excluded under rape shield.

9 So the way, at least from the
10 Government's perspective, that we kind of can
11 address this without getting into otherwise
12 privileged areas is to provide education to
13 the panel in general. Yes, it is a
14 foreseeable consequence of an assault that a
15 person might be emotionally withdrawn. Yes,
16 it is a foreseeable consequence that a person
17 would, you know, have problems in her personal
18 relationships or any number of other examples
19 in that way.

20 So I can speak to the science of
21 it and I can speak to the clinical research
22 without, and let the panel apply it to the

1 case at hand.

2 MEMBER STRAND: Right. Like one
3 of the examples in your slides as far as, you
4 know, how do they sexualize behavior
5 afterwards and things like that? You know, it
6 kind of goes against the grain of what most
7 people would think a sexual assault or a rape
8 victim would do, you know, that
9 counterintuitive part.

10 Those behaviors certainly then
11 become important as far as explaining to the
12 panel that, you know, yes, it doesn't fit with
13 what most people might think a rape victim may
14 or may not do but it's not uncommon. Is that
15 kind of the point you make?

16 LTC JOHNSON: Yes, that would be
17 the point.

18 MEMBER STRAND: Okay.

19 CHAIR HILLMAN: Dr. Yeaw, did you
20 want to add something?

21 DR. YEAW: No, I'd just say
22 correct. I would concur.

1 CHAIR HILLMAN: A couple of
2 questions about how effective you feel like
3 you are, and I understand this is -- you don't
4 have the -- some empirical study to work this
5 out. What -- how many times, is it pretty
6 even between defense and Government, you know,
7 requests that you actually testify at? Or is
8 it skewed in one direction or the other?

9 LTC JOHNSON: I do feel I'm a
10 little skewed toward prosecution right now.
11 I think we're getting a lot more requests from
12 prosecution than defense for whatever reason.
13 I feel like I've recently done more
14 prosecution than defense cases.

15 CHAIR HILLMAN: Would it be hard
16 to tell us that for sure if you looked at the
17 records? Is it a difficult thing to figure
18 out?

19 LTC JOHNSON: If I looked at my
20 CV, I could just count up what I've written
21 down on it.

22 CHAIR HILLMAN: What about for the

1 Center, could we get that for the Center?

2 DR. YEAW: I can speak to that a
3 little bit. We haven't tabulated for and --
4 the prosecution and defense specifically, but
5 we do believe that we skew somewhat towards
6 the Government, but that has more to do with
7 the way that adequate Government substitutes
8 are assigned by cases.

9 Often times, we're solicited -- as
10 a typical example, a prosecutor will call me
11 and say defense has requested an expert and
12 they have named an expert that they want and
13 we think we need one too. Can you send us two
14 experts, one for me and an adequate Government
15 substitute for the defense?

16 Is the panel aware of the term
17 adequate Government substitute and what that
18 means?

19 CHAIR HILLMAN: Some of the panel
20 is.

21 DR. YEAW: Okay. An adequate
22 Government substitute is what happens when the

1 defense has requested a civilian expert and
2 the Government will try to find a Government
3 employee with adequate or appropriate training
4 as a civilian expert to make a substitution as
5 a cost-saving measure.

6 CHAIR HILLMAN: So it's easier to
7 find that person to fill the defense need and
8 the Government need? Is that why you wind up
9 on the Government side more often?

10 DR. YEAW: Yes. Like in my
11 hypothetical, the prosecution calls me and
12 says I need two experts, one adequate
13 Government substitute and one for me. Often
14 what will happen is we will, because we can't
15 take both sides of the case, we'll take the
16 Government's side and let defense have the
17 expert that they have --

18 CHAIR HILLMAN: But why?

19 DR. YEAW: -- that often is how
20 it works out.

21 COL HENLEY: Well because they
22 usually get to the Center first, the

1 prosecution before the --

2 COL HAM: Remember the prosecution
3 doesn't have to do anything to get their
4 expert other than say we want one.

5 COL HENLEY: Right.

6 COL HAM: The defense has to go
7 through the hoops. So --

8 COL HENLEY: Professor Hillman,
9 can I follow-up on your trying of empirical
10 data? I'm just curious if you're able to
11 relate for both? And I'm going to go ahead
12 and define success as a conviction or an
13 acquittal. I know that's not what we do here,
14 but just for purposes of argument.

15 In the cases that you --

16 DR. YEAW: I'm sorry?

17 COL HENLEY: I'm going to define -
18 -

19 DR. YEAW: Did I testify how? I'm
20 sorry?

21 COL HENLEY: I'm going to define
22 success, the value of your expertise to the

1 parties, as a conviction or acquittal on the
2 major charge.

3 So the times that you've testified
4 for the prosecution, how often was there a
5 conviction and the times you testified for the
6 defense, how often was there an acquittal on
7 the major charge? The reason you were brought
8 in. Can you testify to that or can you give
9 us some information?

10 DR. YEAW: I can speak to my own
11 anecdotal experience. Colonel Johnson, did
12 you have something?

13 LTC JOHNSON: I was going to give
14 some anecdotal experience as well.

15 DR. YEAW: Then you go first.

16 LTC JOHNSON: Okay. You know,
17 first off, we actually don't seek out to find
18 out the outcome of every court-martial, so if
19 I testify and I leave before the trial is
20 over, I don't actually necessarily try to find
21 out the results and that's part of our ethical
22 stance regarding our legality and such.

1 That being said, you know, in my
2 personal experience, I mean I feel like a
3 sexual assault court-martial is more often won
4 by the defense than the Government. And I'm
5 not sure that I can say if my testifying for
6 the Government makes them win more often. I'm
7 not sure about that.

8 Not really an answer.

9 COL HENLEY: Yes, so you've
10 testified for the Government --

11 DR. YEAW: And I've --

12 LTC JOHNSON: Go ahead, Dr. Yeaw.

13 DR. YEAW: I would add that
14 oftentimes, I think that testifying is not the
15 most value-added thing that I do on these
16 cases. Oftentimes, it's the consultation on
17 the victim or the impacts of trauma that can
18 be used to craft the direct and cross-
19 examinations in such a way that the victim
20 herself can articulate.

21 Say for example, here's why I did
22 not report for several days. Just to take a

1 classic example. If the victim herself can
2 testify to that in an understandable way, then
3 you don't necessarily need me to get up there
4 and explain it.

5 So you know to only look at the
6 testifying, I think would be, you know missing
7 a part of the picture.

8 You know, for me, I think in the
9 times that I've testified and consulted, I
10 think that it is value-added but often I don't
11 think that the results really, you know, turn
12 sharply on what we do.

13 COL HENLEY: Thank you.

14 CHAIR HILLMAN: Colonel Ham?

15 COL HAM: I guess I have a two
16 part question. Have Judges ever forbidden you
17 from testifying to counterintuitive behavior?
18 The second part of that question being that
19 they believe it's easily understood by the
20 members and no longer needs expert testimony?

21 And the reason I'm asking is I've
22 seen records where I believe that that's been

1 the case and I don't know if this happened to
2 you.

3 LTC JOHNSON: For me personally, I
4 have not seen it be disallowed. I have seen
5 defense try to argue what you just said that
6 it's, you know, within the ken of the trier,
7 but I've always seen Judges, nonetheless admit
8 my testimony.

9 DR. YEAW: I would concur. I have
10 certainly seen attempts to prevent or
11 eliminate counterintuitive behavior testimony
12 on the part of the Government. I have not
13 seen it be successful.

14 I think that the, you know, there
15 are very recent studies about preconceived
16 notions of how a person should behave
17 following assault or how most people would
18 have behaved that supports that this is
19 helpful information to a panel.

20 And you know I personally have,
21 you know, gone through a job where there was
22 a challenge on the scientific validity of the

1 research in the area and have been allowed to
2 testify.

3 MEMBER COOKE: Can I ask a
4 question? You say you will testify for either
5 side and it kind of depends on who asks first
6 or whatever. Much of the topics you consult
7 on here is about counterintuitive rape victim
8 behavior which would tend to be in favor of
9 the Government.

10 So I guess my question is, when
11 you're asked by the defense, what sorts of
12 things do you testify or provide them that
13 would be favorable to them?

14 LTC JOHNSON: I think as Dr. Yeaw
15 alluded to earlier, another of our roles is
16 helping to prepare a cross-examination of
17 another expert.

18 So if the Government has a
19 counterintuitive expert, defense calls us.
20 They want us to help them to cross-examine
21 that Government counterintuitive expert.

22 MEMBER COOKE: Okay.

1 MEMBER DUNN: And do you also do -
2 - oh I'm sorry. Do you also do the effects of
3 alcohol --

4 LTC JOHNSON: And the effect of
5 alcohol.

6 MEMBER DUNN: -- of the victim?

7 LTC JOHNSON: Yes.

8 DR. YEAW: And I would concur with
9 that. I think that -- and you're correct, at
10 least counterintuitive behavior, that will --
11 it does tend to favor the Government. You
12 just -- defense the best track is probably not
13 to really do anything about it.

14 But as a defense expert on that
15 particular issue, it's my job to make sure
16 that the other expert isn't getting beyond the
17 science and isn't getting beyond what the law
18 allows you to speak to in that context.

19 CHAIR HILLMAN: Colonel Morris?

20 MEMBER MORRIS: Is the -- how do
21 you prepare them to scrutinize or attack that
22 data? I mean is it on the grounds that it's

1 mainly observational and cultural in its roots
2 this counterintuitive behavior? Or what, how
3 do you help them out?

4 LTC JOHNSON: You know, we'll
5 certainly will look at all the data, same as
6 the other expert. We will generally be
7 allowed to talk to the other expert before
8 that expert testifies so we can find out what
9 their opinion is going to be and what the
10 basis for it is.

11 You know, when you look at the
12 slides on, you know, the explanations for
13 counterintuitive behavior, you can probably
14 run through your mind there could be other
15 conceivable explanations outside of that.

16 And so, you know, there's going to
17 be emphasis on the fact that we can't know for
18 sure that one explanation is the correct
19 explanation for a certain behavior. Yes,
20 that's what we're going to do. We're going to
21 kind of focus on the uncertainties and the
22 fact that there can be a spectrum and just

1 because on side's picking on side of the
2 spectrum, the other side is also a
3 possibility.

4 DR. YEAW: And you make a good
5 point about the methodological issues. I mean
6 it's true that the research phase that looks
7 at this isn't only made up of individuals who
8 engage in counterintuitive behaviors and their
9 assailants were adjudicated to have committed
10 a sexual assault upon them.

11 So, you know, there is an
12 intuitive leap that has to be there in terms
13 of the methodology and that -- my personal
14 perspective is that I think that it is still
15 within what I can testify to scientifically.
16 However, I think that it's important for other
17 experts, including myself, to be prepared to
18 articulate the limits of that science.

19 MEMBER MORRIS: Isn't some of the
20 recent scholarship on this saying that if you
21 look at all the factors people look at to
22 declare success in the war on sexual assault,

1 higher reporting and all that kind of things
2 or they're easy measures.

3 But is that, as you see progress
4 there, that you should see less
5 counterintuitive behavior because the
6 reduction in counterintuitive behavior would
7 reflect societal confidence that those
8 individual victims who are less likely than to
9 act in these ways because they feel more
10 confident in being able to disclose and more
11 trusting that the system will care for them?
12 Shouldn't that a part of --

13 DR. YEAW: I don't think I can --
14 I don't think we know -- we can answer that
15 scientifically. I mean my personal view based
16 on my clinical experience is that, no, I don't
17 expect a profound shift. I think that sexual
18 trauma is unique and very personal and often
19 there is a degree of shame and reluctance to
20 discuss it fully. That goes way beyond do I
21 feel comfortable and trust the system to do
22 the right thing?

1 LTC JOHNSON: I was going to
2 express uncertainly about the scenario you
3 posed whether that would be true or not. I
4 think there's just so many factors that go
5 into some of these counterintuitive things.

6 I mean even if the -- you know, a
7 lot of victims sometimes do not acknowledge
8 that they've been raped. They don't see it as
9 a rape maybe because it was by someone they
10 knew they think it was not a rape or that it
11 was their fault, something to that effect.

12 Even if suppose we theoretically
13 overcame that and everyone was educated to 100
14 percent to be able to identify rape, there's
15 still going to be factors with, you know,
16 knowledge that there's not going to be a 100
17 percent conviction rate at a court-martial, so
18 taking it that far would not necessarily
19 result in absolute success.

20 And then the perception of, you
21 know, local command or peers in their unit, I
22 mean that fear of stigma or embarrassment. I

1 just, you know, it's hard to overcome even
2 with enhanced education and knowledge out
3 there.

4 MEMBER COOKE: Your -- one of your
5 slides speaks of the consulting regarding the
6 sentencing and I think one of you mentioned
7 some involvement with sentencing. How much of
8 your work goes specifically to the sentencing
9 phase and talking about victim impact and that
10 kind of thing?

11 LTC JOHNSON: You know, as far as
12 victim impact in these types of cases, I
13 personally haven't taken many cases of that
14 nature. I haven't seen a lot of consults on
15 that one exactly. I mean --

16 MEMBER COOKE: Is that because
17 you're not asked or is it perhaps a lower
18 priority for you than the --

19 LTC JOHNSON: I haven't seen a lot
20 of requests for it, personally.

21 DR. YEAW: No, it would be unusual
22 for that to be the primary focus of the

1 consultation. It would be more likely for
2 that to become part of the overall
3 consultation with the Government.

4 The problem with that is if I, as
5 the Government expert, am going to testify on
6 victim impact, generally that will require a
7 direct evaluation of the accusing witness and
8 there are some serious downsides to having
9 your Government consults and be able to do
10 that.

11 In my experience, it's been much
12 more common for the victims treating
13 clinicians for some other expert to come in
14 and speak to victim impact.

15 MEMBER COOKE: And if we're
16 talking about risk assessment, what are you --
17 how do you do that?

18 LTC JOHNSON: So that would be an
19 assessment of an accused before the trial. We
20 would do an interview. We'd review all the
21 records. We may use some specialized risk
22 assessment instruments that exist. And often

1 write some sort of report regarding risk of
2 recidivism for whatever the risk factor is
3 exactly.

4 MEMBER COOKE: And how do you do -
5 - are you asked to do that?

6 DR. YEAW: We're getting -- I
7 can't speak to the exact numbers, we're
8 getting an increasing number of those types of
9 cases. That's a major part of our fellowship
10 training focus. And I think as we develop
11 into our expertise, we're getting increased
12 demand. It's become a much more common use in
13 these cases.

14 MEMBER BRYANT: What are, excuse
15 me, what are the pre-trial -- maybe you said
16 this and I just missed it, I was asleep --
17 what are the pre-trial sexual assault profiles
18 used for? You're doing this pre-trial and
19 what is the purpose of that?

20 LTC JOHNSON: Of the risk
21 assessment?

22 MEMBER BRYANT: Yes, the risk

1 assessment.

2 LTC JOHNSON: It would be for, you
3 know, in the --

4 MEMBER BRYANT: What are they
5 doing with it? Does the Judge get it? Does
6 the prosecution get it? Do they --

7 LTC JOHNSON: This would be a
8 defense request so only the defense would get
9 it about their own client that they're
10 representing.

11 MEMBER BRYANT: Okay.

12 LTC. JOHNSON: And, you know, if
13 the risk assessment came out that the risk
14 appears to be somewhat low or lower than
15 expected, that may be something they would
16 like to present to the panel.

17 If our risk assessment comes out
18 high risk, they probably would not want us to
19 testify at all based on that finding. And no
20 one would know the finding except for them.

21 MEMBER BRYANT: And you would have
22 to have the cooperation of your defense in

1 order to do one?

2 LTC JOHNSON: Yes. And generally,
3 the defense is going to specifically ask for
4 it.

5 MEMBER BRYANT: I mean if the
6 prosecution asks for one, and the defense
7 didn't want it, you couldn't do it. Is that
8 right?

9 DR. YEAW: No, that's not correct.
10 I have consulted for the Government and done
11 sex offender evaluations or an assessment when
12 I have not had the opportunity to directly
13 interview the accused.

14 You, of course, have to put in
15 those caveats that that's a major piece that's
16 missing.

17 There are some specialized
18 instruments that we kind of use that look at
19 historical and demographic data to help to
20 get, you know, an idea of in the whole
21 population of sex offenders, is this person
22 more or less likely to be -- to re-offend to

1 recidivate?

2 Those are not as common as defense
3 requests. I think defense is getting those
4 fairly routinely in their cases. And for good
5 reason. I mean most of our -- most of our
6 accused and most of the people who are
7 convicted, it's their first offense and
8 demographically, you know, the chances are
9 pretty good that they're going to come out to
10 be a relatively low risk offender.

11 So, I think as defense is becoming
12 aware of that, they're seeking those
13 evaluations more frequently. And because it's
14 done under attorney-client work privilege,
15 there really is no downside for them to go
16 ahead and get the evaluation.

17 MEMBER BRYANT: Are you aware of
18 instances where those risk assessments by the
19 defense have been voluntarily submitted to the
20 Government counsel as part of pre-trial
21 agreement negotiations? Or is that something
22 you wouldn't track? You wouldn't know?

1 LTC JOHNSON: I would say yes.

2 MEMBER BRYANT: Because you know
3 the suggest that it just makes sense?

4 LTC JOHNSON: I've had a case
5 where I evaluated an accused. I had some
6 opinions on risk. I guess ultimately that
7 wasn't maybe the pertinent reason why they had
8 a plea bargain, but there was a plea bargain
9 and no court-martial resulted.

10 CHAIR HILLMAN: So we're running
11 out of time here. Just one last question,
12 Colonel Johnson, you said you felt like the
13 trial's skewed towards the defense in some
14 ways.

15 LTC JOHNSON: You mean the number
16 of cases I take or the number of consults or
17 --

18 CHAIR HILLMAN: No, didn't you say
19 that the -- maybe I misheard -- that there was
20 an advantage when the question of acquittal --
21 conviction as the measure of success depending
22 on which side you might intervene on. You had

1 the sense that acquittals, that the defense
2 had an advantage in the court-martial process.

3 LTC JOHNSON: I did say that, yes.

4 CHAIR HILLMAN: You did say that.

5 Dr. Yeaw, I wonder if you agree? And I wonder
6 whatever you think on it, I wonder why you
7 think that?

8 DR. YEAW: I agree that most of
9 the cases that I know of, the accused is
10 acquitted or is not convicted of the primary
11 or most serious charge and is convicted of
12 some lesser offense.

13 And why do I think that? I think
14 that it's incredibly hard to prove beyond a
15 reasonable doubt alcohol-facilitated sexual
16 assault among acquaintances.

17 LTC JOHNSON: As far as --

18 CHAIR HILLMAN: Thank you.

19 LTC JOHNSON: As far as why I
20 think that, I mean I talk to trial counsel
21 when I work for them and I think that's kind
22 of the collective anecdotal statement that

1 they have made to me that they generally will
2 not win these kinds of cases or that they feel
3 the evidence may be is not strong enough to
4 win this case.

5 MEMBER COOKE: Is that -- and this
6 is speculation, is that because you're being
7 pulled into cases that are pretty tough cases
8 to begin with?

9 LTC JOHNSON: It's possible. It's
10 possible.

11 CHAIR HILLMAN: Dr. Yeaw, there's
12 a lot of pensive nodding looks around the
13 table that you can't see as a result of what
14 you've brought to us.

15 Are there any last questions here?

16 Thank you, thank you for joining
17 us, Colonel Johnson and Dr. Yeaw. Thanks for
18 your work on this really critical issue for
19 all of us.

20 LTC JOHNSON: Thank you everyone.

21 MEMBER COOKE: Thank you.

22 DR. YEAW: Glad to assist.

1 CHAIR HILLMAN: You bet.

2 UNKNOWN: Thank you very much.

3 CHAIR HILLMAN: Okay, so we're on
4 for lunch and briefing, right? So --

5 LTC MCGOVERN: Correct, Jan has
6 laid out a salad bar with the option of making
7 wraps. So if we could just take ten minutes
8 for everybody to get a plate and bring it back
9 in here, we can brief and eat that the same
10 time.

11 CHAIR HILLMAN: That's great.

12 (Whereupon, the foregoing matter
13 went off the record at 12:14 p.m.)

14 (Whereupon, the proceedings in the
15 foregoing matter went off the record at 12:14
16 p.m. and went back on the record at 12:30
17 p.m.)

18 CHAIR HILLMAN: Okay. So we are
19 back on the record.

20 The next thing we have up here are
21 briefings on our different prep sessions,
22 which I appreciate everybody has made time to

1 attend and to support. I still hope we can
2 find somebody for that Quantico trip, so that
3 we can actually make that. Other
4 subcommittees have had to cancel trips because
5 they haven't had enough support. So far, we
6 are batting a thousand. Is that right?

7 COL HAM: Yes.

8 CHAIR HILLMAN: All right. So
9 we'd like to still make that trip if we can on
10 March 5th.

11 The Washington State visit -- so
12 Colonel Ham and Jan Chayt and Colonel Morris
13 and I went -- that's it, right, it was the
14 four of us? We went to the Seattle area with
15 a visit that Lieutenant Colonel McGovern set
16 up for us with everybody's help here that was
17 really terrific. So first we went to
18 Bremerton Naval Station, then we went to Joint
19 Base Lewis-McChord, and then we went to Dawson
20 Place, which is a civilian facility that
21 manages some adult sexual assault but focuses
22 on child sexual assault specifically.

1 And our objective was to talk to
2 the different -- you know, the people who
3 perform the different functions in the
4 investigation and prosecution and adjudication
5 of sexual assault out in the field. We had
6 great cooperation from all the folks we went
7 to.

8 Going to the Naval Station gave us
9 a sense of what a -- first, the complexity of
10 the different organizations. There are so
11 many different groups that are involved in
12 this now. We heard from defense counsel,
13 prosecutors, the special victims counsel, the
14 investigators. They talked about what their
15 challenges were in terms of resource
16 constraints, the kind of training that they
17 are doing, and their integration into the
18 prosecutor's offices primarily.

19 We separately talked to defense
20 counsel apart from the investigation and
21 prosecution side, and defense counsel echoed
22 a lot of concerns that we had heard more

1 generally in terms of how well they are able
2 to function given the constraints on resources
3 that they have and the general tenor of
4 aggressive training and prosecution of sexual
5 assault right now.

6 I'll run through all of the places
7 that we went, and then I'll ask Colonel Morris
8 and Jan and Colonel Ham to add anything else
9 that you want to on this.

10 We went to Joint Base
11 Lewis-McChord where they have an integrated
12 processing facility. So they call it
13 multidisciplinary. You've heard that. That
14 means all of the different aspects of dealing
15 with the assault are integrated into the same
16 facility, and they actually create a sort of
17 firewall of sorts between the prosecution
18 piece of it and the victim service piece of
19 it, leaving space for social services and
20 support services to be provided to those who
21 aren't going to cross that line into the law
22 enforcement piece of it.

1 It was -- it is a big team that
2 has been assembled there to deal with the --
3 to try to integrate these different elements
4 of it, and there are really well-developed
5 degrees of expertise on all of the different
6 pieces of this, the victims services piece,
7 the special prosecutor's expertise there, the
8 defense counsel, who again we talked to
9 separately there than we did from the
10 prosecution and victims support and
11 investigation side.

12 And I think that my own takeaway
13 from being at Joint Base Lewis-McChord was
14 that it is tough to identify a particular
15 approach that will be most effective because
16 it's really so specific to the setup of the
17 facility, the number of people who are there,
18 the type of base that it is, the type of post
19 that it is, so the -- they had the proximity
20 to a civilian community with resources that
21 they could also draw on.

22 So while they had an effective

1 approach and we were asking them, is this
2 something we should essentially duplicate
3 elsewhere, there is reluctance to sign up to
4 that because they are just not sure that it
5 would work elsewhere.

6 And to be honest, I'm not sure it
7 will work when the individuals who are there
8 rotate out because it does seem dependent on
9 -- they are trying to build structure to
10 support that apart from the individuals who
11 are there, but it is some really dedicated and
12 forceful people who have come together to
13 build that team to work together to handle the
14 problem more effectively.

15 And then we went to Dawson Place,
16 which was a really moving experience, because
17 it focuses on child sexual assault and because
18 it was built -- it's named after a very
19 successful and charismatic prosecutor who --
20 the name of that city is Everett, Washington,
21 which is right next to Seattle there. And
22 they brought together, with a combination of

1 private and public and nonprofit funding,
2 really, to build a facility where they could
3 have victims come to one place and not have to
4 go from one location to another to get a
5 medical exam, to get support services, to get
6 -- to talk to law enforcement, to be engaged
7 with -- to interact with prosecutors.

8 And our team set up an amazing
9 start to that day where we sat in on a
10 processing meeting where the prosecutor came
11 and asked for support from all the different
12 groups that are engaged in this process. And
13 specifically the prosecutor was asking about
14 a case that was going to trial the next week,
15 and she asked for help with engaging a
16 reluctant witness. And she specified the
17 facts of the case to the team who were there,
18 who included the victim advocate who is not
19 part of the prosecution team but did in this
20 instance agree to help aid the prosecution as
21 well as the in-house counselors and support
22 team and the investigators who were there,

1 experienced investigators, and the director of
2 the center who has experience sort of across
3 a range of things.

4 And as this morning we were
5 hearing about the incidence of sexual assault
6 and what it's like from our experts who were
7 here this morning talking about the profiles
8 of offenders, this case was very much in this
9 -- in the realm of what they were talking
10 about. It was an individual who had preyed on
11 multiple -- he was a young man who had
12 allegedly preyed on multiple young women in a
13 small community that was isolated, and their
14 families were implicated in this.

15 Their community was implicated in
16 this, and there was also reluctance to report
17 because of previous experience with a family
18 member who had been convicted of sexual
19 assault, an intrafamily sexual assault. So
20 the discussion was how to do -- how to help
21 who was -- a young woman who they thought was
22 another alleged victim come forward, and the

1 prosecutor got ideas about how to manage this.

2 It drove home the short period of
3 time and the limited resources that they have.
4 They didn't have the resources to do social
5 media analysis, for instance, of everything
6 that happened, even though they knew that that
7 would have potentially helped in this case
8 because the perpetrator had posted some
9 information about this.

10 Anyway, it was a really
11 interesting glimpse into that, and then we
12 toured the facility and talked to the
13 different -- you know, the nurse examiners
14 right through the investigating -- the law
15 enforcement folks who were there.

16 And I'll just add one specific
17 thing, and then let everybody else add their
18 impressions of this. The room where they do
19 the examinations, the place is designed to be
20 friendly to kids who are suffering in this,
21 and their numbers are one in six kids are
22 victims of sexual assault. And so this

1 happens a lot.

2 They talked about how when they go
3 out in communities people always come forward
4 as having been victims of child sexual assault
5 who have not previously identified themselves
6 as such. The number of cases that they are
7 engaged with, as they do more education, has
8 increased. They do also see some adult
9 victims. But there are couches and there are
10 toys, and it's intended to be not a hostile
11 place for kids.

12 In the room where they do the medical
13 exams they ask the kids after they go through
14 this, this give each kid what is a toy
15 essentially, which is one of those sort of
16 gummy things, a long stringy thing with a
17 little hand or something on the end of it that
18 will stick to walls, right? They give the
19 kids one of those to throw on the ceiling, and
20 they leave them all up there, so the room is
21 covered with a lot of colorful ornaments on
22 the ceiling that are a reminder for the kids

1 that they are not alone, that other kids have
2 been through this, other kids have gotten to
3 the other side, and they want to make it
4 possible for those kids to realize that.

5 It was a really powerful visual
6 manifestation of what they are trying to do at
7 this place to support the recovery of not only
8 the victims of the assault but the family
9 members, the non-offender family members who
10 are -- who come along with the victims, the
11 survivors that they get in there.

12 So, anyway, other comments on
13 that? Colonel Morris?

14 MEMBER MORRIS: I agree with all.
15 Only two other thoughts. One is to really
16 agree with you on the question of the whole
17 Fort Lewis operation. We have not discussed
18 this among ourselves but have the same
19 concern. It is massively resourced, of
20 course, as the Army is so expert in doing.
21 And the question would be long term just how
22 to adjust that model, and my sense was it's

1 very much the same, that it reflects the
2 current and particular energy of a couple of
3 extraordinary people. So the sustaining of
4 that is a harder call.

5 And then as far as the rest of the
6 discussions, I think we have all seen some
7 commonalities between counsel when we talk to
8 prosecutors and defense counsel and similarly
9 there. The Navy was really insightful in just
10 the energy and competence of counsel on both
11 sides, and also the reminder that we are as
12 good as the ethics and everything of the
13 people who are in charge.

14 And the defense had said in
15 particular that their -- the defense
16 perception of course is that the system is
17 tilting so much toward the prosecution these
18 days, and their satisfaction out there was
19 that they have a particular trust in the
20 ethics of the guys on the other side, even
21 though they think commanders and others are,
22 you know, feeling the winds somewhat in making

1 disposition decisions and that sort of thing.

2 CHAIR HILLMAN: Colonel Ham?

3 COL HAM: Actually, I am going to
4 -- a couple of points that kind of raised my
5 eyebrows that I'll just throw out to everyone.
6 The terrific experience of the -- what in the
7 Army I think we would call the regional
8 defense counsel level, the O-5 level defense
9 counsel, and the special victim prosecutor,
10 though they don't call him that, and they are
11 in their military justice litigation track,
12 and they have multiple years of experience.

13 I recall the head defense counsel
14 had an LL.M. in trial advocacy and -- and from
15 Temple, which I think is one of the very few,
16 if not the only one in the country still
17 offered, and he had worked -- I don't know if
18 it was part of that, I can't remember, or --
19 or just something else he had done, worked at
20 the U.S. Attorney's Office in Philadelphia and
21 had had the opportunity to try a number of
22 cases.

1 He had just terrific experience
2 that really stuck out. He mentioned -- I
3 would just say one of the defense counsel
4 mentioned non-prosecution letters that they
5 sign, and that he had -- they were aware of
6 some senior-level judge advocates who would
7 not sign those and would have their lower
8 level JAGs sign them. Just throw that fact
9 out without commenting on it.

10 From NCIS, we heard -- we asked I
11 think every group about the collateral
12 misconduct issue. The overwhelming response
13 was do something about alcohol, both with
14 regard to prevention of sexual assault and
15 that that was the common collateral misconduct
16 issue, whether it was underage drinking or
17 something like that.

18 NCIS's approach was they did not
19 read Article 31 right for collateral
20 misconduct, and I think Colonel Morris asked,
21 "Well, isn't that germane?" They said if it
22 comes up, they didn't go into it. And Colonel

1 Morris said, "Isn't that germane to the
2 offense?" And they said they just didn't --
3 didn't go into it.

4 They also said -- again, this is
5 something that -- to throw out to you -- that
6 their job was to support the victim and
7 validate her claim.

8 MEMBER BRYANT: Who said that?
9 NCIS?

10 COL HAM: NCIS. NCIS. At JBLM, I
11 agree with everything everybody said. I took
12 down some numbers, which I just rewrote from
13 my memory. We asked them to kind of, for lack
14 of a better word, do a waterfall of -- without
15 calling it that, how many reports do they
16 have, how many prosecutions, et cetera.

17 And there is some discretion
18 amongst the detectives to not get things to
19 prosecutors, but it sounded like there were
20 some built-in protections, that there was a
21 supervisory review of that. But of 850 things
22 that they counted as reports, 563 of those

1 made it to their special prosecution team. Of
2 those, half were declined for prosecution.
3 About 250 went through a guilty plea process,
4 and about 30 per year were tried, contested,
5 and half of those resulted in acquittals.
6 Those were the numbers off the top of the head
7 of the head prosecutor.

8 Again, I'd just throw out to you,
9 you heard from the National Alliance to End
10 Sexual Violence their concern of the
11 multidisciplinary approach. When we watched
12 the multidisciplinary team meeting, as Dean
13 Hillman described it they had a particular
14 prosecution issue that they asked this whole
15 team to help solve. And the issue was, how do
16 we get a -- they view it as their primary
17 prosecution witness to cooperate when she was
18 not cooperating.

19 And the solution was that the
20 advocate was going to contact her and offer
21 her victim advocate services, which -- because
22 they believe she was another victim as well.

1 And that in the course of doing that they
2 would try to secure her cooperation with the
3 prosecution, which may or may not demonstrate
4 the type of conflict of interest NAESV
5 described.

6 They have the right for either
7 side to request depositions of witnesses in
8 Washington State, just showing they're
9 material and that they were not cooperating.
10 And they were ex parte depositions, for lack
11 of a better word. The defense did not have
12 the right to be there or cross-examine.

13 They have no grand jury system in
14 Washington State, so all of the prosecution
15 decisions are solely the decision of the
16 prosecuting attorney. Those are the things I
17 recall.

18 CHAIR HILLMAN: Something we
19 heard, so this whole discretion is vested in
20 an elected prosecutor.

21 MEMBER JAUS: What is the age
22 cutoff at the Dawson Place? Was it just for

1 little kids or --

2 MEMBER DUNN: 22.

3 MEMBER JAUS: Oh. It's for --

4 COL HAM: Oh. We also asked the
5 experience level of the prosecutors on the
6 special prosecution team at Dawson Place.
7 They would have about seven years' experience
8 when they went in, and they normally stayed
9 about three years, although the elected
10 prosecutor had -- I forget how many years he
11 had been a prosecutor, but he would return.
12 But he said the average stay would be about
13 three years.

14 CHAIR HILLMAN: The training was
15 much less systematic than what we see in the
16 military, as you'd expect. The investigators,
17 likewise, seem to largely be on-the-job
18 training rather than having an opportunity to
19 do other things. They were exposed to it, but
20 they didn't do systematic training more than
21 what -- from what I recall. They just don't
22 have the resources for it.

1 MEMBER BRYANT: Is what's going on
2 at Dawson House, was that impacted at all by
3 either military dependents or military victims
4 or military families?

5 CHAIR HILLMAN: They see some. I
6 mean, they sounded like they see some but not
7 a lot especially, so -- is that your
8 impression, too?

9 COL HAM: Yes.

10 MEMBER BRYANT: Too far outside of
11 --

12 CHAIR HILLMAN: The large, you
13 know, military population, although there are,
14 you know, multiple naval stations essentially
15 right around there, so they did --

16 COL HAM: And we did ask one -- or
17 somebody asked, what would be the sentence if
18 this guy was convicted that they talked about,
19 the multidisciplinary team, and that was when
20 they responded three or four years, which
21 seemed awfully low. And I think there were
22 questions about that, and the response, as I

1 recall, was there just isn't community outrage
2 because the perpetrator was 21 at the time and
3 the victims were 15. Now the victims are 17
4 and 18, and he is 23. I just -- I recall some
5 of that discussion. We'll have the minutes of
6 course that we will distribute. That will be
7 more complete.

8 COL HENLEY: Is there an agreement
9 between Joint Base Lewis-McChord and I guess
10 the Tacoma or Seattle District Attorney's
11 Office on cases? I mean, there is --

12 COL HAM: I think we asked that,
13 because we did -- there was one at Fort Hood
14 that -- I think the subcommittee members
15 received -- I think we did ask that, and my
16 recollection is that they didn't have a
17 written agreement. Do you remember, Dean
18 Hillman?

19 CHAIR HILLMAN: I agree. We'll
20 have to look at our notes. They certainly
21 cooperate. I mean, they are -- but I wasn't
22 -- I don't think I was sure that it was

1 structurally mandated or a result of the
2 individual relationships that they had. So --

3 COL HENLEY: I'm just curious if
4 cases that we take the local prosecutor would
5 decline to prosecute.

6 CHAIR HILLMAN: Honestly, it's
7 hard to tell that. I mean, we have heard
8 repeatedly that the military will take cases
9 that the civilians won't. There is nothing
10 that we heard that would make me doubt that,
11 but we did also see that civilians are taking
12 cases to trial that are hard cases, too, so --

13 COL HENLEY: They are? Okay.

14 CHAIR HILLMAN: -- despite that, I
15 mean, this was a relatively hard case, the one
16 that we actually heard about, I'd say. So
17 despite that tremendous dropoff from the
18 initial report to the actual criminal trial,
19 I don't think it's true that at least the
20 prosecutor to whom we spoke, that that office
21 is refusing to take cases, because they're
22 difficult if they think it's in the interest

1 of justice.

2 They spent a lot of time talking
3 about, you know, our goal is to do the right
4 thing within the community. But if we can't
5 get the conviction, it seems --

6 COL HAM: We ask if since --
7 Dawson Place had been in existence almost
8 three years I believe, and asked if --

9 LTC McGOVERN: I think it started
10 in 2006.

11 COL HAM: I'm confusing it with
12 Philadelphia. I'm sorry, you're right. So it
13 had been in place for a while. We get asked,
14 have they seen any increase in reporting or
15 increase in the number of cases that went to
16 trial? Or an increase in convictions? And my
17 recollection was, no, they hadn't. They
18 hadn't looked for that or noticed it.

19 CHAIR HILLMAN: Right.

20 LTC McGOVERN: So are they just
21 measuring success by victim satisfaction, not
22 conviction rate?

1 CHAIR HILLMAN: Yes. And they're
2 actually -- they're raising -- their
3 self-assessment is related to fund-raising.
4 So they need to continue to win grants in
5 order to function. They actually have an
6 incredibly creative model of financing, which
7 is clear from all the different offices that
8 are sort of part of the building, and they are
9 viable because they managed to buy this
10 building with resources that they had, so they
11 can actually keep everybody there.

12 Again, it doesn't seem easily
13 replicable elsewhere, but it was -- it does
14 seem to be working, and it's -- they have
15 become a resource for others who are looking
16 for how to manage this, which is why we ended
17 up there, so --

18 LTC McGOVERN: Did they talk at
19 all about rotating the prosecutors through to
20 avoid burnout?

21 CHAIR HILLMAN: They did.

22 LTC McGOVERN: Because I know

1 that's two approaches that we will need to
2 address. Is it better to specialize or
3 rotate?

4 CHAIR HILLMAN: They did talk
5 about that, so -- and they said it depends on
6 the individual, but that they -- but they were
7 certainly aware of that, and they talked about
8 individual circumstances where somebody just
9 hit the wall essentially and had to be
10 removed, not involuntarily by any means, but
11 just somebody who just couldn't -- and that
12 taking care of service providers, including at
13 the center where people were very -- you know,
14 very aware of the emotional depth of sort of
15 what they were doing, a very challenging place
16 but very positive energy there that they
17 clearly work hard to maintain. So --

18 COL HAM: They have a working dog
19 who helps the children with their interviews
20 and had been allowed to accompany children to
21 court and sit -- sit down in front of them,
22 which was really interesting.

1 And I guess just for comparison,
2 because we are going to hear about
3 Philadelphia as well, the parties who were
4 located at Dawson Place were the special
5 victim investigators, the special victim
6 prosecutors -- and I'm using the military
7 term; I can't remember if that's what they
8 were called -- victim advocates who were
9 assigned to the prosecution advocates and
10 didn't use the term "victim advocate,"
11 advocates that were sort of the -- obtained
12 services from -- community services for the
13 victim and arranged appointments and things
14 like that, which were not affiliated with the
15 prosecution, but which also sat in on this
16 meeting, the SANE nurse, and then there were
17 some mental health treatment providers who
18 worked there. I can't -- I don't know if they
19 were solely located there. We went into one
20 of the mental health treatment rooms and they
21 talked to us. Is that everybody? Yes.

22 CHAIR HILLMAN: They were the

1 therapists who do ongoing counseling in
2 support of the individuals who come in.

3 COL HAM: You'll hear what -- when
4 you hear from Mr. Strand about Philadelphia,
5 that it's different parties located there, in
6 a different model.

7 CHAIR HILLMAN: And, Jan, did you
8 want to add anything?

9 MS. CHAYT: Just a couple of
10 things. At Dawson Place, the prosecutor and
11 the police actually rent their space. The
12 building is owned by the hospital group, and
13 it's -- they rent out space, which is part of
14 how they keep income coming. And the one
15 thing that I think is significant, they never
16 allow an offender into the building.

17 If the police or the prosecution
18 is going to meet with an offender, they meet
19 offsite at another location. So I thought
20 that was significant.

21 And the one thing that impressed
22 me at Lewis-McChord, the special victim

1 counsel who was brought in commented that
2 having that resource center there made his
3 transition as a special victim counsel
4 incredibly easy, because everyone that he
5 needs to coordinate with to assist his client
6 is right there.

7 CHAIR HILLMAN: So he was
8 collocated.

9 MS. CHAYT: Yes. And he was
10 actually right there also on the open door
11 side. So that was very good. But the only
12 medical at their resource center was actually
13 what's called the SACC, Sexual Assault Care
14 Coordinator, not anyone who actually provides
15 treatment, but she is there to help set up all
16 of the kinds of appointments and make sure
17 that ongoing care is done and so works with
18 them to ensure that the ball does not get
19 dropped. And so that is her primary function
20 there.

21 Victims are seen at the --
22 complainants are seen at Madigan. They didn't

1 tell us there, but I did check, they actually
2 have a contract where a SANE nurse -- a
3 civilian SANE nurse goes to Madigan.

4 MEMBER STRAND: Jan, or anybody
5 else, was there any discussion about -- at
6 JBLM whether they were considering bringing
7 examination facilities into that center?

8 MS. CHAYT: I think that was
9 mentioned. They don't have the facility for
10 it.

11 MEMBER STRAND: Okay.

12 MS. CHAYT: And also because
13 that's not a 24/7 center.

14 LTC McGOVERN: Would you recommend
15 other large installations attempt something
16 like JBLM? Because right now it seems like we
17 have findings that there are these different
18 models, but not necessarily recommendations as
19 to what will be best for large installations
20 versus small installations.

21 MEMBER JAUS: What about adults
22 versus children? It seems like --

1 LTC McGOVERN: Well --

2 MEMBER JAUS: -- for children, not
3 for adults, because like with a child, the
4 medical exam is usually dispositive, often
5 dispositive. For an adult who sexually active
6 it wouldn't be. So I'm not sure that -- I
7 mean, I would think that an adult really --
8 for an adult that is in the military, it would
9 only make sense. It is very important for a
10 child -- there is Family Court, Child
11 Protective Services, all these different
12 actors. I don't really see how --

13 LTC McGOVERN: Well, again, I
14 think --

15 MEMBER STRAND: Is there a
16 downside?

17 LTC McGOVERN: It makes it easier
18 for the victim if they only have to go one
19 place after just being raped.

20 MEMBER JAUS: Of course, or Family
21 Justice Center. Is it feasible if you're in
22 the military, though?

1 MEMBER DUNN: The JBLM Center is
2 focused on adult sexual assault. It's not
3 intended for child victims.

4 CHAIR HILLMAN: Absolutely.

5 MEMBER DUNN: So what they're
6 doing at Lewis is focused on adult victims.

7 LTC McGOVERN: It is for adult --
8 they do adult and child at Dawson Place. It's
9 just the majority is child, and you get money
10 for children.

11 COL HAM: I'm at page 22. The
12 Navy LM had just started in July, so they were
13 trying to develop some way to measure success
14 and victim satisfaction and anything else.
15 They were trying to: a) determine how to
16 define success, and b) measure -- how they
17 would measure whether they were achieving
18 success, but they haven't -- it just hasn't
19 been in existence long enough.

20 CHAIR HILLMAN: I think -- my
21 guess is -- and I don't know that we're quite
22 ready to do this. We should hear from the

1 other sort of site visit folks. But I did --
2 my guess is that I'd be more inclined to
3 articulate principles that should be
4 considered in the construction of the
5 coordination and structure, rather than a
6 particular model, because, for instance, they
7 spent forever thinking about whether to put a
8 sign outside that said what they were.

9 And these are the kind of things
10 that you actually want people to care about
11 because it does matter. I mean, the signaling
12 to, you know, those who have been harmed is
13 critical in the core issue that it will make
14 it easier to do it here. But I can't imagine
15 that we can just say, "You should put a sign,
16 and it should be this subtle or this bold or,"
17 you know, because it will depend on where the
18 evolution of the community is with respect to
19 the stigma that attaches to the crime.

20 And -- I don't know. Anyway, and
21 I'm not -- I also think there is -- there is
22 a convergence that happens with the different

1 interests that are being represented in the
2 process in these multidisciplinary places, and
3 I think it poses some risk to the justice, the
4 impartiality of the justice process.

5 And I think that if there aren't
6 the right relations and trusts between the
7 different parties that are operating here, I
8 think that that poses real risks to legitimate
9 outcomes. And I wouldn't --

10 LTC McGOVERN: Did you see any of
11 those problems at Dawson Place in the meeting
12 you observed?

13 CHAIR HILLMAN: Sure. The
14 structure of the meeting -- well, first, the
15 -- you know, for the medical examiner to be
16 there advising on how the prosecution can be
17 more successful when the medical examiner is
18 a neutral party in this, you know, collecting
19 forensic evidence, yes, I did.

20 The defense -- we didn't talk to
21 any defense counsel there, and there's a
22 reason, right? So they're not there. So,

1 like offenders don't get in the door, defense
2 counsel don't get in the door there either it
3 seems, so --

4 MEMBER BRYANT: Well, I was going
5 to ask if there was any concern at Dawson
6 Place or at the center on the base that we
7 have heard from other military people, "Well,
8 we can't have these victim advocates or the
9 victim witness case workers in here because
10 they become witnesses." And, you know, we are
11 involved in other -- it doesn't seem to be
12 bothering them at Dawson Place at all.

13 CHAIR HILLMAN: We asked -- we did
14 ask that I think at both places.

15 MEMBER BRYANT: And what did they
16 say?

17 CHAIR HILLMAN: Like JBLM, we
18 asked about the concerns of the different
19 privileges and the concerns of potential
20 conflicts of interest I believe, and the
21 concern of whether it would be overwhelming
22 for a victim to come in and be faced with all

1 this stuff.

2 As to the privileges, they said
3 they don't talk about the discussions they
4 have with the victim. They just talk about
5 what services the victim needs, as I recall.

6 As to conflicts of interest, all I
7 can recall is they didn't believe they had
8 any. And for the victim potentially being
9 overwhelmed with all of the stuff in one
10 location, a victim advocate actually who
11 appeared at one of the public meetings, the
12 November 7th and 8th public meeting, said that
13 it's the job of the unit victim advocate to
14 determine when the victim is ready to go to
15 these things, which raises a question of what
16 training would a unit victim advocate have to
17 make that type of medical psychological
18 assessment, or whatever type of assessment it
19 would have to be.

20 CHAIR HILLMAN: There's a lot of
21 things that we learned that I think will come
22 up as we talk about specific items, too. I

1 mean, we heard -- it was two full days of, you
2 know, hearing from folks on these things. One
3 of the things that they said, for instance, at
4 Lewis-McChord, should everybody get a special
5 victims counsel, we asked, and not -- or
6 should only victims of penetrative offenses
7 get this?

8 You know, can you based on -- and
9 the advocates there, the victim advocates,
10 said strongly, yes, everybody should get it
11 because we can't predict the degree of trauma
12 that a particular type of sexual offense will
13 actually trigger in a particular victim. And
14 making this service available only to a small
15 fraction wouldn't -- would ignore that reality
16 of the consequences are difficult to predict,
17 and they have seen a relatively "minor
18 offense" have tremendous long-term
19 consequences for an individual, and they
20 thought that advocacy would help personally
21 them navigate.

22 MEMBER JAUS: I think it's an

1 artificial distinction between penetration and
2 not, because what about contact? For example,
3 in New York, for most sodomy cases you don't
4 need penetration, just contact. So when you
5 start saying -- I mean, how do we really say
6 that something -- how do we think that
7 distinction? So I'm --

8 CHAIR HILLMAN: Right. So I think
9 we should probably hear from the Philadelphia
10 folks, then.

11 MEMBER STRAND: All right. On the
12 28th of February, Judge Jones, Colonel Ham,
13 Lieutenant Colonel McGovern, and I had the
14 pleasure of going to the Philadelphia Sexual
15 Assault Response Center. I took a train there
16 with Colonel Ham and took the train back, and
17 that's all I care to remember about the trip
18 because I love taking trains. No. But there
19 was a lot in between.

20 So we met with the center
21 director, the commanding officer of the
22 Philadelphia Police Department SVU. There was

1 a person representing Drexel University
2 College of Medicine. He was the SANE
3 coordinator, the SANE chief there. There was
4 a SANE that worked there. There was an
5 assistant district attorney who spends a day
6 a week there, and then there was another
7 wonderful woman from Women Organized Against
8 Rape, called WOAR.

9 So the center was 20 years in the
10 making, basically because of the way that
11 victims were treated in the local hospitals.
12 They said that they could wait up to 15 hours
13 and told not to speak or shower, and so that
14 became a problem. So WOAR went on the warpath
15 and really started making some things happen
16 in the community.

17 Of course, they also had some
18 significant issues about cases which were --
19 you know, they were looked at for the number
20 of cases that were not investigated properly,
21 not categorized properly, so they came under
22 a lot of pressure and a lot of conflict for

1 that.

2 And then, so they developed this
3 center and the goal is to make the process
4 victim-centered. So the whole thing about the
5 center is to make that a victim-centered
6 place. What they have accomplished, they
7 believe they focus on the victim. They made
8 it easier for the victim.

9 They take out the nonsense of
10 having to deal with the hospital
11 administration, the wait, the billing, and all
12 of those other things. I mean, they do the
13 examinations right then and there. They have
14 an examination room. It really doesn't take
15 much. They just have a room and a chair and
16 some other things.

17 But some of the victims can be
18 done -- the examinations can be done in as
19 little as one and a half to two hours through
20 their methods. They are able to focus -- the
21 SANE is able to focus on the victim. The
22 family is in the waiting room; there is no

1 influence on the victim's recollection of
2 events or anything like that. And they are
3 able to call the investigators as they are
4 doing the exam to maybe ask questions or ask
5 the investigators if they have any questions,
6 not that they are working for the
7 investigators, but they just want to make sure
8 they do a complete examination. The
9 investigator might have information the victim
10 doesn't have, and vice versa.

11 MEMBER JAUS: Do all cases go
12 there from that particular area or --

13 MEMBER STRAND: Yes.

14 MEMBER JAUS: Every case.

15 MEMBER STRAND: Every case in
16 Philadelphia that is reported to the
17 detectives as a sexual assault goes to that
18 center. And they also take referrals from
19 outlying areas, other counties.

20 CHAIR HILLMAN: Where is it, Russ?

21 MEMBER STRAND: It's in northern
22 Philadelphia. It's in a suburb kind of. It's

1 not in a main part of the city. It's in a
2 nice --

3 (Laughter.)

4 Well, we didn't get shanked or
5 capped.

6 MEMBER DUNN: Let the record
7 reflect there is a difference of opinion.

8 COL HAM: It wasn't real north
9 Philly for those of you who have been there.

10 MEMBER STRAND: Right. It wasn't
11 real north Philly. The benefits to the Police
12 Department and the SVU, the Special Victims
13 Unit within the Police Department, is the
14 patrolman is not tied up for the entire shift.
15 They don't have to sit there and wait. They
16 drop the victim off there and they know they
17 are going to be taken care of.

18 They get a more refreshed victim.
19 The communication between the investigator and
20 the SANE is very helpful. Current practices
21 -- they just completed a case review and
22 audit, which occurs annually. Eight to 10

1 people sit in a room and they review -- I
2 think they looked at hundreds of cases, and
3 they have lawyers, they have people from the
4 Women's Law Project, they have victim
5 advocates, they have detectives all reviewing
6 these cases and looking for patterns and
7 looking for -- which I thought was a really
8 great thing, looking for patterns.

9 And then they also have a
10 Philadelphia Sexual Assault Advisory Committee
11 that sets policies and meets every other
12 month, includes people from this center, from
13 college campuses, school districts, everything
14 else. They have kind of a community relation
15 impact there.

16 They said that effective January
17 1, 2013, when UCR came out with the broader
18 definition of "rape" they embraced it, but
19 they made a strange comment that only seven
20 to eight states actually are following that.
21 There is a lot of resistance in police
22 departments to include that more encompassing

1 definition, not only in their practice but in
2 their reporting, because obviously that is
3 going to increase reports.

4 Unfounded cases, they follow the
5 UCR standard saying that it's baseless. And
6 if they have a baseless case, the chief of the
7 SVU will review all case files that are
8 unfounded. He said he gets -- about nine
9 percent of their cases are unfounded.

10 Patrolman discretion -- well,
11 sorry, number of reports. They have 6,000
12 reports, and 1,000 or 1,200 of those are rapes
13 each year in Philadelphia.

14 CHAIR HILLMAN: Sorry. You said
15 what percentage are unfounded?

16 MEMBER STRAND: Nine percent.

17 CHAIR HILLMAN: Nine. Okay.

18 LTC McGOVERN: My recollection was
19 if it gets up to nine percent, that's when
20 Captain Darby starts getting concerned.

21 MEMBER STRAND: Right. He doesn't
22 want to go over that -- that point.

1 CHAIR HILLMAN: Based on?

2 MEMBER STRAND: He doesn't want to
3 get into double digits on unfounded cases.

4 CHAIR HILLMAN: Like I said, based
5 on? Is it affection for the number nine? I
6 mean --

7 LTC McGOVERN: They had a history
8 where they were having too many unfounded
9 cases, so now they -- similar to Baltimore,
10 which had the highest unfounded cases in the
11 country, they go through this audit procedure
12 and just do more investigative work before
13 unbounding. So the way to pride themselves on
14 that number is to ensure the number of
15 unfounded cases doesn't get too --

16 COL HAM: They'll keep them open.
17 I think he said they'll keep them open.

18 MEMBER STRAND: Right. They won't
19 close them out. They'll keep them open.

20 Patrolman discretion. Patrolmen
21 still have discretion to dispose of the case.
22 He said that patrolmen call in about 50

1 percent of the cases. And if they talk to a
2 detective, the detective will normally take a
3 case but not always. The detective also has
4 discretion.

5 So this number 6,000 doesn't
6 include all the cases that the patrolmen
7 disposed of on the street or the detective
8 decided not to take.

9 COL HAM: The city size was 1.5
10 million.

11 MEMBER STRAND: Right, 1.5
12 million. There have been patterns
13 over the years where they have seen patrolmen
14 drop cases in high drug areas with
15 prostitutes, but most recently they had a
16 perpetrator preying on prostitutes, so there
17 is a focus on those areas now, too.

18 They go out and talk to the police
19 academies. I think you mentioned he might get
20 an hour for a police academy, so that the SVU
21 can go out and talk about some of the victim
22 dynamics and some of the things to be

1 concerned with, but that's pretty much it.

2 Every adult known offender goes to
3 the DA's office. Every adult known offender
4 -- the assistant DA sits at the PSARC, as I
5 mentioned, one day a week.

6 She talked about Megan's Law, that
7 the defendants were less likely to plead
8 guilty, and they are having a lot more
9 contested cases. And the unintended
10 consequence of the Adam Walsh Act and Megan's
11 Law is more contested trials.

12 The ADA's role is making charges
13 -- charging decisions and reviews of --

14 COL HENLEY: Okay. So there's
15 more contested cases. What's the outcome of
16 those? Are they not winning those cases?

17 COL HAM: They didn't give us that
18 information. However, they did say out of all
19 the cases -- they said about 1,500 of the
20 6,000 reports go to the charging unit, which
21 doesn't mean they will eventually be charged
22 or it doesn't mean they will eventually go to

1 trial.

2 We did not get an answer as to how
3 many plead guilty, although she did say out of
4 a unit of 20 special victim prosecutors they
5 try 10 to 12 cases a year each. So you're
6 getting, from that 6,000, about 200 contested
7 cases. She did not provide us the
8 acquittal/conviction rate.

9 COL HENLEY: Right. But has the
10 conviction rate itself, plea contested cases,
11 declined as a consequence of Megan's --

12 MEMBER STRAND: Yes.

13 COL HENLEY: You're saying, yes,
14 it has?

15 COL HAM: She said that the
16 contested cases went up.

17 COL HENLEY: Right. But if you --
18 it's the conviction rate, so you take the
19 guilty pleas plus the cases that went to
20 trial, in which there was a conviction. You
21 add them together. Is the conviction rate --
22 is that the same as it was before Megan's Law?

1 COL HAM: She didn't provide the
2 number of -- she didn't provide the percentage
3 of cases that resulted in a conviction.

4 MEMBER JAUS: Megan's Law has been
5 around almost 20 years, since 1996.

6 COL HENLEY: Right. And that's my
7 --

8 MEMBER JAUS: It has been a long
9 time.

10 COL HAM: I think she said -- I
11 think she said Pennsylvania just adopted it
12 when --

13 MEMBER JAUS: Adam Walsh, is that
14 it? Because Megan's Law has been around since
15 the 90s.

16 MEMBER STRAND: I think she did
17 indicate when Adam Walsh came along then they
18 started --

19 LTC McGOVERN: She spent a great
20 deal of time talking about the influence of
21 mandatory minimums, that they -- and Megan's
22 Law, Adam Walsh Act, and the impact. She was

1 -- there were market tested cases, and she
2 told me that we are not winning these cases.

3 So I can go back to her, sir, and
4 ask for some specific statistics which may
5 help us contrast it with other civilian
6 jurisdictions.

7 COL HENLEY: I don't think trying
8 more contested cases is necessarily a bad
9 thing. It may be a consequence, but what --
10 okay. What's the next question? How has it
11 affected the outcome? Are you --

12 MEMBER JAUS: Do they offer pleas
13 to avoid -- if they don't have a strong case,
14 so the victim doesn't have to testify? Are
15 they offered pleas?

16 LTC McGOVERN: My impression was
17 if you have a guilty plea, it's a conviction.
18 If there's more contested cases, you're having
19 more acquittals, and that's not success in
20 their minds.

21 COL HAM: And she specifically
22 said they are not taking the cases to trial

1 that she thinks the military will take -- they
2 won't take those cases.

3 MEMBER JAUS: Did you say they had
4 counselors there also?

5 MEMBER STRAND: Yes.

6 MEMBER JAUS: You might have said.
7 I didn't --

8 MEMBER STRAND: Yes. That is down
9 the line here. They said that they do get
10 cases -- the campus police must turn over
11 sexual assault and homicide cases to the
12 police department for investigation. They
13 believe that not all of them are turned over,
14 but they are supposed to.

15 In the Philadelphia DA's office
16 they have 20 full-time prosecutors that deal
17 with the prosecution of sexual assault cases.
18 Four new attorneys handle DV cases,
19 preliminary hearings, misdemeanors, and
20 non-jury trials. There are 18 major-level
21 prosecutors, and these major-level prosecutors
22 have between 2.5 and five years of experience.

1 And those are their major-level prosecutors
2 that handle the majority of these cases.

3 COL HAM: They come in at 2.5, and
4 they leave at five.

5 MEMBER STRAND: Right.

6 COL HAM: They are departing the
7 DA's office at five years.

8 CHAIR HILLMAN: Did you say that
9 new prosecutors handle domestic violence?

10 MEMBER STRAND: Yes.

11 MEMBER JAUS: Most cases are
12 misdemeanors.

13 CHAIR HILLMAN: Okay. But that's
14 -- I mean, they are clearly some homicides and
15 rapes in the domestic violence category. So
16 they handle the low level --

17 MEMBER JAUS: Yes. Most domestic
18 violence, the vast majority are misdemeanors.

19 MEMBER STRAND: Right. They do
20 weekly training. They bring in the doctor.
21 They bring in AEquitas -- AEquitas, because
22 they are right there. They get a lot of good

1 training from that. The DA's office does have
2 unit investigators. Only major-level
3 attorneys handle adult sexual assault
4 preliminary hearings.

5 They do not -- they try to do
6 vertical prosecutions with one ADA handling
7 the case from the beginning to end. So they
8 try to keep the same -- same person involved.

9 Every adult victim testifies at --
10 must testify at preliminary investigation and
11 is cross-examined by defense, unless there is
12 an issue of intimidation and then it goes to
13 the grand jury.

14 The SVU investigators, they have
15 44 -- they have 65 officers in the SVU -- the
16 unit, but 44 are investigators. Fifteen of
17 the 44 are police officers, and the remaining
18 are detectives, so not all of their
19 investigators are detectives. Their training
20 basically is OJT. They may get a conference
21 here and there, but there wasn't really any
22 outside training at all. It's just on the job

1 that they come in.

2 MEMBER DUNN: What is their
3 longevity on the investigator side? We just
4 heard about the prosecution side of it. Did
5 they say?

6 MEMBER STRAND: They didn't say.
7 We didn't ask. They do have to volunteer to
8 be on the unit, and they do have some
9 screening as far as they check with their
10 previous people and, you know, see if they're,
11 you know, having any issues or things like
12 that. But it has to be voluntary.

13 They do have the nurse and medical
14 facility there, which most -- and basically
15 they said victims will disclose things to the
16 victim advocate and nurse because they are not
17 police. They don't want the victim to think
18 the nurse is working for the police. And we
19 asked that very specific question, "Well, how
20 can they know that you're" -- I mean, you're
21 in a police -- the building is owned by the
22 police department. They spend a significant

1 amount of money --

2 LTC McGOVERN: Different --

3 MEMBER STRAND: Yes, it's a

4 different --

5 LTC McGOVERN: Different field.

6 MEMBER STRAND: Right. So they've
7 got actually two sections. They've got a
8 child section which is, you know, in between
9 there is a locked door, so children and the
10 adults don't mix, but they've got two almost
11 identical centers, one for children, one for
12 adults.

13 On the adult side, the
14 examinations -- the medical examination
15 facility is out -- you have to go down a
16 particular hallway, and it's not in the
17 investigative part at all. It's totally
18 separated. And the nurses that come in, most
19 of them are contract. I think they had 17
20 contract nurses, SANE nurses, that -- you
21 know, round robin kind of a thing.

22 And they work for the hospital.

1 They don't work for the police department.
2 They get paid for by the hospital and other
3 grants. So they make that very clear to the
4 patients, that, you know, we're here not on --
5 we are here for your behalf, not the police.

6 The victims can have an exam
7 without consent form, but it's a burden. They
8 do not have to have an equivalent to the
9 military restricted report, but they do allow
10 victims to have an exam and they will preserve
11 evidence for 90 days. So their Jane Doe
12 cases, they only hold on to their evidence for
13 90 days. The SVU detective will contact them
14 after 90 days. If they still don't want to
15 move forward, they will destroy the evidence.

16 They have done 1,300 exams in the
17 last two years. Two were Jane Does, held for
18 90 days, and both of those victims said they
19 didn't want to -- so out of the 1,300 exams,
20 only two of them were -- two didn't want to
21 move forward.

22 MEMBER JAUS: Thirteen hundred

1 over what period of time?

2 MEMBER STRAND: Two years.

3 MEMBER JAUS: Two.

4 DFO HUNSTIGER: If they have
5 6,000, how would they only --

6 MEMBER STRAND: Well, of the 6,000
7 cases, the -- what was it, 1,200 were rape.
8 So that's a good question. You know, so are
9 they don't exams in all the rape cases? No.
10 But --

11 CHAIR HILLMAN: Well, delayed
12 reporting might make the exam not --

13 MEMBER STRAND: Right. Because
14 they'll only do examinations up to a certain
15 point as well.

16 DFO HUNSTIGER: It just sounds
17 low.

18 MEMBER STRAND: Victim support.
19 WOAR --

20 LTC McGOVERN: Just to go back to
21 address your concern, Professor Hillman, they
22 don't have a structured restricted reporting

1 like the military. And so when you walk into
2 the facility it says, you know, you cannot
3 carry firearms. Clearly, you have made the
4 decision to report if you're coming into this
5 facility.

6 Or if you walk in to WOAR
7 downtown, and you've agreed to report, then
8 you will come to this facility. So that's why
9 I think they only had two Jane Doe cases is
10 because the majority of people that are seen
11 there for a SANE exam are also filing a
12 report.

13 MEMBER STRAND: Right. WOAR --
14 the victim support. WOAR provides the victim
15 with a court advocate. They get funding for
16 that from the DA's office. WOAR provides 20
17 individual counseling sessions and 20 group
18 sessions for a total of 40 weeks of counseling
19 for every victim that wants it.

20 MEMBER JAUS: Free of charge.

21 MEMBER STRAND: Pardon? Free of
22 charge. And all of their counselors are

1 masters level, which I thought was amazing.

2 Observations that they have is
3 that men are afraid because they will be
4 perceived as gay, as weak, and things like
5 that. They said they don't treat males
6 differently, but they noted that men react to
7 treatment differently, and that most men will
8 not agree to go into counseling but the men
9 that do will almost always follow through with
10 all 40 counselings. And they were really
11 impressed with that.

12 She said a lot of the women
13 didn't. But once a man agreed to go through,
14 they went through the whole thing, which was
15 an interesting observation.

16 Collateral misconduct. The
17 investigators do not pursue investigation of
18 victim's collateral misconduct. The DA's
19 office won't charge collateral misconduct.
20 And Pennsylvania -- in Pennsylvania you cannot
21 get mental health records for the criminal
22 investigation or for the prosecution.

1 They did make a mention about the
2 number of victim advocates in the process,
3 whether it causes confusion. WOAR said that
4 they are located in a separate location as
5 well, so victims may never have to go to the
6 police. The ones that they give to the
7 police, you know, they are all working
8 together. The SANE tries not to be the victim
9 advocate, so there is no confusion there.

10 The victim coordinator and the
11 police department is basically sending out
12 notifications. They do have a victim advocate
13 coordinator in the police -- the SVU, but they
14 basically just send out notification letters,
15 so they don't do direct patient work.

16 The victim witness liaison in the
17 DA's office just wants to make sure that when
18 it goes to trial that any questions are
19 answered. So the victim advocate is mainly
20 the victim advocate, and everybody else plays
21 an ancillary role.

22 The Assistant DA did think that

1 victim -- the special victims counsel was a
2 bad idea. She said it would complicate the
3 process. Just having another person in the
4 room, the victim would not maybe talk as much.
5 It might cause confusion. She noted the
6 importance of building rapport, a relationship
7 with the victim, with the prosecutor, and then
8 having to go through another attorney might,
9 you know, impede that.

10 And that was pretty much -- oh,
11 victim's health records. The ADA does not
12 want them, does not want investigators to ask
13 for them, and that was basically it, subject
14 to anything else you might remember,
15 highlights of the trip.

16 COL HAM: So the setup was that
17 the participants here are the investigators
18 and the SANES, basically. The prosecutor is
19 there once a week. Because of resources,
20 that's why she's not collocated all the time.
21 So the victim advocate, the WOAR, the
22 community-based victim advocates are not

1 there.

2 They are notified there has been a
3 report, and within 24 hours they call the
4 victim and offer her services. It appeared --
5 and they spoke very plainly. Both the WOAR
6 representative and the lead investigators for
7 the special -- for lack of a better term,
8 special victim investigators, had been there
9 more than 20 years and had started with a --
10 it seemed like a very fractious history that
11 came to a head with this Philadelphia Inquirer
12 expose on the police mishandling sexual
13 assault cases.

14 So over the course of the two
15 decades they have mended their relationship
16 and they work together. It seemed -- I guess
17 my one editorial comment -- a much more mature
18 multidisciplinary approach than -- the only
19 other one that I have seen and am familiar
20 with is Dawson Place. They do see the
21 offender. There is an investigative suite,
22 basically, with a bunch of cubicles and a

1 bunch of holding cells, so the offenders come
2 in.

3 They have two interview rooms, so
4 that a supervisor can watch the interrogation
5 of the offender on one side and the interview
6 of the victim on the other through two-way
7 mirrors.

8 MEMBER STRAND: The cubicle area
9 was interesting. They said they reason they
10 set up -- they have holding cells along one
11 wall on one side, and they have more holding
12 cells on another wall on the other side. It's
13 all glassed in.

14 So the offenders can see the
15 detectives working, and what he said is they
16 sometimes do things to kind of make the
17 offenders think that, you know, they are --
18 kind of like little mind games, you know, that
19 they are doing this.

20 The other concern I had on the
21 interview rooms is the interview rooms and
22 interrogation rooms looked exactly the same.

1 They were very plain, just the desk, the
2 chairs, so there was no adult-friendly places
3 in there. It's very sterile, except for --
4 well, it was very sterile.

5 COL HAM: Yes. Again, this is --
6 this center, although they have been working
7 to get to this center for 20 years, they
8 started in some --

9 LTC McGOVERN: A school.

10 COL HAM: -- a school, then they
11 moved to a stable, they -- so they are finally
12 in their building. So they are fully funded.
13 They don't have the funding issues that Dawson
14 Place has. So they have been in this building
15 since 20 May 2011, but the PSARC has been in
16 existence for a number of years. They, again,
17 don't note any increase in reporting. They
18 don't note any increase in convictions,
19 although the ADA did say it's a little bit
20 more efficient because everybody -- she knows
21 where to call and where people will be.

22 We did ask her quite a bit of

1 questions about the preliminary hearing, which
2 sound a lot closer to the Article 32 than
3 we're used to hearing from the civilian world.
4 Children victims also have to testify at the
5 preliminary hearing, subject to
6 cross-examination, unless there was a showing
7 of intimidation.

8 We asked her if she -- what her
9 thoughts were about this process, whether it
10 was helpful to her as a prosecutor. She said
11 yes, because she finds out the defense case,
12 and because she hears the victim testify and
13 can assess credibility.

14 MEMBER JAUS: The victim must
15 testify live, not even --

16 COL HAM: Must testify. Required.

17 MEMBER JAUS: A little child has
18 to --

19 COL HAM: Must testify. Now, we
20 didn't ask her if there are procedures to go
21 through to show --

22 LTC McGOVERN: Yes. It might be

1 easier if there's not intimidation, because we
2 did focus on adults. She just brought out the
3 fact that as a prosecutor it has actually been
4 helpful for her to see how her victim is going
5 to be on the stand.

6 COL HAM: She said arrest to
7 disposition takes a year "on a good day," and
8 she said that several times. That would be on
9 a really good day -- a year -- so she did talk
10 about losing victims through the time process.
11 And she mentioned a case that had been going
12 on for almost -- it started in 2009, and it
13 was a report from many years before. And she
14 said the victim cooperated in 2009, and by
15 2014 she no longer wants anything to do with
16 it.

17 Let's see.

18 (Pause.)

19 CHAIR HILLMAN: That's great.

20 COL HAM: That was it.

21 CHAIR HILLMAN: I'm sure you'll
22 have more to toss out as we come to the

1 different parts here, so --

2 MEMBER STRAND: I was overall
3 impressed with their enthusiasm, their
4 professionalism, their working together. I
5 mean, they really work together well as a
6 team. They were asked several times,
7 especially the lady from WOAR, you know, about
8 conflict of interest. She said, "We don't
9 have any." And talking to her, they don't
10 have any, because if they don't -- if they
11 don't agree with the police, they stand up for
12 it and they say what they want and say what
13 they need to say. And I didn't see any
14 conflict at all.

15 But they are very professional.
16 They were very proud of what they have, and
17 they have every right to be. I really do look
18 at this particular place as a good model to
19 start looking at, especially with the facility
20 right there.

21 Oh, and I did ask the SANE nurse
22 if there was any -- any problems with JCAHO or

1 credentialing or anything else, and she says
2 no. It's like -- and I asked Ralph as well.
3 She said no. Both of them said no, there is
4 no credentialing problems. It's like a
5 doctor's office. Okay? You're just basically
6 a doctor's office. It's not JCAHO because
7 it's not part of a hospital, even though they
8 work for the hospital.

9 So those are some concerns that I
10 think our medical community might have, but
11 it's just like a doctor's office. They do
12 prophylactics there, they do HIV testing, they
13 do -- they take urine, they take blood, they
14 do everything, the whole -- whole bit.

15 And I just -- I liked it
16 personally because it is not in a hospital
17 setting. They don't have to go from one
18 location to another location to another
19 location. And I think the proof is going to
20 be in the pudding later on when we find out
21 some of the, you know, benefits along the way.
22 But it seems to make sense and they were very

1 proud and they should be proud of what they're
2 doing.

3 COL HAM: A consideration is
4 whether the best practice is to have the
5 victim advocate somewhere else.

6 MEMBER STRAND: Right.

7 COL HAM: That was their approach
8 that they believe worked. Their victim
9 advocates were just highly skilled. They were
10 more like mental health --

11 MEMBER STRAND: Right.

12 COL HAM: -- professional
13 counselors than what we think of as victim
14 advocates. What the prosecutor called a
15 victim advocate who worked with a prosecutor
16 was more of what we think of I think as a
17 victim witness liaison.

18 In fact, the prosecutor at one
19 point said if they want to know what's going
20 on with a case, they talk to the victim
21 advocate. If they want to talk about the
22 case, they talk to me.

1 CHAIR HILLMAN: Thank you, Russ.

2 So, Mr. Bryant.

3 MEMBER BRYANT: I didn't realize I
4 was going to give a report until I saw the
5 agenda, so I looked through my notes last --

6 CHAIR HILLMAN: My fault.

7 MEMBER BRYANT: -- night, and
8 these were primarily in bullet points.
9 General Dunn, Dillon Fisher, and Terri
10 Saunders, and myself went on board Naval
11 Station Norfolk last Thursday. We started off
12 after a brief tour with a briefing from the
13 base commander and Captain Clark.

14 One of the significant things he
15 told us was just the size -- the very size of
16 the base. There are roughly at any given time
17 50,000 active duty people on that naval base
18 alone. He is also responsible for Little
19 Creek and Oceana, and what is now the Joint
20 Expeditionary something -- which is another
21 50,000 people, so that's 100,000 right there
22 that he oversees as base commander.

1 One of the things he told us, that
2 there were -- most assaults -- this is from
3 the base commander -- most assaults, sexual
4 assaults, occur on ships and in town. That's
5 what he said. He didn't have all of the
6 statistics, but he said most of those happen
7 on ships and in town. So that's --

8 MEMBER DUNN: But one point that
9 is relevant to that is that they live on the
10 ships.

11 MEMBER BRYANT: Oh, yes. Yes.
12 No, no, yes, I'm not --

13 MEMBER DUNN: So that seems like
14 --

15 MEMBER BRYANT: Yes. That's part
16 of the 50,000, so he was just pointing that
17 out I guess in terms of the need to -- and I
18 will just throw this in now, because it was
19 going to be later, for -- since last -- well,
20 maybe it has been as much as a year, but at
21 least since last September/October, they have
22 had an officer and a CPO, chief petty officer,

1 who roam around at night going into -- they
2 can go into the living quarters. They go up
3 to people that they see. They are checking
4 for people who are drunk, and they are also
5 checking for just safety of the community,
6 loud music, maybe parties, the very places
7 where we have learned at that age group these
8 sexual assaults occur.

9 It has been very, very successful,
10 they feel. And I can just throw in this from
11 personal experience. It got great publicity
12 in the area when they started it. The TV
13 channels went out and interviewed and followed
14 them around one night, and the people on board
15 the base seem to be accepting it fairly well
16 also. So they felt like that was one of the
17 actions that they were taking to deter --

18 MEMBER COOKE: Excuse me. Is this
19 a single team, or are there -- I wasn't clear.
20 How many --

21 MEMBER BRYANT: It's just two of
22 them.

1 MEMBER COOKE: Two teams.

2 MEMBER BRYANT: Two people.

3 MR. FISHMAN: At a time.

4 MEMBER COOKE: And how many are --

5 MR. FISHMAN: They do it every

6 night.

7 (Simultaneous speaking.)

8 MEMBER COOKE: Yes. But what I'm
9 trying to get at, there is one team out at a
10 time? Is that --

11 MEMBER DUNN: Two teams.

12 MEMBER COOKE: Two teams out --

13 MEMBER DUNN: They divide the base
14 in half. That's what they said.

15 MEMBER COOKE: Okay.

16 MEMBER DUNN: So four people, two

17 --

18 MEMBER COOKE: Two teams. Every
19 night.

20 MEMBER BRYANT: That's a lot of
21 territory, so they're driving in a car, they
22 can see if something, you know -- it's just --

1 it's one of the deterrent efforts that they're
2 making in this area.

3 One of the things that he said
4 that I found significant was many, many -- and
5 then he said lots of these cases go in town.
6 That is, they are prosecuted in the city of
7 Norfolk, city of Virginia Beach, and that
8 those cases are tracked by him and others
9 within his office when the case goes into
10 town.

11 The next -- and if I cut short,
12 then, Dillon, who I understand has already
13 done the minutes, which I wasn't permitted to
14 see -- I didn't even know that was one of the
15 rules until I did this -- until I get this
16 over with -- and certainly General Dunn and
17 Terri can -- is Terri here? Can throw in
18 later.

19 But other bullets to try to catch
20 us up, we next met with defense counsel,
21 including their captain, who is in charge of
22 that particular regional defense command, and

1 three of his attorneys. What they told us is
2 that they are seeing more general
3 court-martials in the last few years than ever
4 before.

5 Acquittals have gone way up in
6 sexual assault cases in their experience and
7 in their view. The convening authorities are
8 proving more and weaker cases overall. This
9 is a defense counsel's viewpoint now. That
10 investigations by NCIS are often poor, and
11 they gave us some specific examples. That the
12 defense -- we've heard this before -- the
13 defense has no investigators and almost no
14 access to NCIS for help, and, in fact, NCIS
15 rarely even returns their phone calls.

16 When I get to the NCIS part, you
17 will find that NCIS said, "We didn't even ask,
18 do they call you? We just said, what about
19 cooperation with the defense?" "Oh, sure, if
20 they call, but they never call." So we got
21 two completely different points of view there.

22 NCIS did say that sometimes the

1 prosecutor will call and say, "We've agreed
2 that the defense can -- you will do so and so
3 for the defense, so do it or let them have
4 that information," or whatever it might be.

5 COL HENLEY: Harvey, can I ask a
6 quick question?

7 MEMBER BRYANT: Sure.

8 COL HENLEY: You said that the
9 defense counsel had noted an increase in
10 acquittals.

11 MEMBER BRYANT: Yes.

12 COL HENLEY: So what are they --
13 what would they use this defense investigative
14 service for? I assume they want an -- what
15 would they -- what benefit would it be if
16 they're getting acquittals?

17 MEMBER BRYANT: Well, I'm -- I
18 have to put in my subjective thing based on
19 everything they had to say. They also,
20 remember, said that they saw that NCIS
21 investigations were pretty poor. And I think
22 they feel like if they have their

1 investigators they could shore up some of the
2 missing parts of an investigation, which they
3 feel like would help their clients, that NCIS
4 had not done.

5 At the same time, I felt it was
6 clear that they were saying one of the reasons
7 that they are winning more cases was because
8 of the poor investigations being done, because
9 they are able to point out, "Well, you didn't
10 do this, you didn't do that, you didn't do the
11 other."

12 MEMBER DUNN: I mean, they cited
13 one specific case where there were five
14 witnesses, and NCIS interviewed the witness
15 and the perpetrator, and none of the other
16 four witnesses.

17 MEMBER BRYANT: Yes, that was it.
18 And of course, as they pointed out, as defense
19 counsel, they are often not even seeing these
20 reports until something like a year to a year
21 and a half after the offense. So by that
22 time, "Hey, could you go back and do so and

1 so? Joe is out of the service. He is, you
2 know, now living in Alaska hunting bear."
3 Something like that.

4 Let's see. They do have a good
5 complement of trained paralegals. They all
6 have associate degrees and specific paralegal
7 training. This is the defense again. They
8 have approximately a paralegal for every two
9 and a half attorneys, which I think is a good
10 ratio, but I probably shouldn't be commenting
11 at this point.

12 Their case loads were only about
13 16 cases apiece, and they do about 12
14 court-martials per year per attorney. One --

15 COL HENLEY: Twelve?

16 MEMBER BRYANT: Twelve.

17 COL HENLEY: Including guilty
18 pleas or 12 --

19 MEMBER BRYANT: No. Well, 16
20 court-martials. That's going to trial. But
21 their rotating case load averages about 16,
22 which -- anyway. Okay. A third of the cases

1 -- and I remember this coming up in some of
2 the folks that we had here in our earlier
3 meeting. A third of the cases involve
4 civilian-retained counsel. And they saw --
5 they were not aware of any difference between
6 the officer defendants and the enlisted
7 defendants who were getting private defense
8 counsel.

9 (Name redacted) attributed this to
10 the fact that enlisted pay has gone up to the
11 point now that even enlisted people can afford
12 civilian counsel. So that's what he said.
13 I'm just reporting what we heard.

14 CHAIR HILLMAN: But we follow a
15 non-attribution policy with respect to the
16 folks who we saw on these site visits.

17 MEMBER BRYANT: Yes, we did. I'm
18 sorry. I'm sorry. I withdraw that. I'm sure
19 I meant Captain Kangaroo.

20 (Laughter.)

21 One of the lieutenant commander
22 defense attorneys, very strongly in favor of

1 giving convening authority to the JAG Corps.
2 He also highly recommended and thought it
3 would -- and this was without any prompting
4 from us. This just came out of the blue that
5 he said that.

6 PARTICIPANT: This is Captain
7 Kangaroo still?

8 MEMBER BRYANT: No, no. I didn't
9 give a name. They were all lieutenant
10 commanders except for --

11 PARTICIPANT: Mr. Bryant did perk
12 right up at that.

13 MEMBER BRYANT: But his idea that
14 things would be better if convening authority
15 was in the hands of JAGs, that opinion was
16 very strong. And also, without any prompting
17 from us whatsoever, he thought one of the ways
18 to deal with this in a military -- at least in
19 a Navy -- in this person's perspective was to
20 have a pilot program at one of these bases and
21 just see how some of these proposals were
22 going to work.

1 They said -- this is still the
2 defense -- almost one-half of the cases of
3 sexual assault result in acquittal. About 40
4 percent of the cases that they are seeing on
5 the defense side are non-penetration cases.
6 It is taking a two-year average time to go to
7 trial on their felonies, and that was not just
8 sexual assault, that was in all felonies.

9 COL HENLEY: Two years from date
10 of offense or date of --

11 MEMBER BRYANT: Two years from
12 date of offense.

13 MEMBER JAUS: Date of offense or
14 date of arrest?

15 MEMBER BRYANT: Well, date of
16 offense, arrest. I'm not sure. I'm not sure
17 that my notes differentiated. But what I
18 wrote down was it's taking two years average
19 trial time in felonies.

20 MEMBER DUNN: Let's say date of
21 discovery by the government, shall we say.

22 MEMBER BRYANT: Yes. Yes, I think

1 that's fair.

2 This is a "wild disparity in
3 sentencing" in the cases that they are
4 handling, and they gave us several examples in
5 which there were, you know, just wild
6 disparity in sentencing in the cases that they
7 are handling, both the sexual assault cases as
8 well as the other felonies they prosecute.

9 MEMBER COOKE: Did they attribute
10 any of that to judge versus member sentencing?
11 Or was it just a general --

12 MEMBER BRYANT: Well, the
13 prosecutor said they certainly prefer judge
14 sentencing and would prefer guideline
15 sentencing. That's what they told us.

16 The convening authority there is
17 the convening authority -- and I think we can
18 -- this was Admiral Dixon Smith who actually
19 appeared before us in September. He is the
20 convening authority there as the -- maybe
21 Mid-Atlantic something or other. Runs from
22 North Carolina up to Maine, I believe, and he

1 is doing it for all of them. He is the
2 convening authority for all of that.

3 And I think there is something
4 maybe that we can discuss later on, what that
5 means or doesn't mean. And his SJA was at the
6 -- sitting in there with the prosecutors,
7 which frankly I felt may have been a little --
8 I think we would have maybe had a better time
9 with the -- not a better time in terms of
10 enjoyment. We may have had a little more
11 candor from the prosecutors -- this was my
12 impression, General Dunn -- had the SJA for
13 Admiral Smith not been there. But I could be
14 totally wrong about that. That may just be
15 subjective on my part.

16 She said that Admiral Smith, while
17 he is the convening authority -- this includes
18 the ships, everything. He is it. That one
19 person for these several hundred thousand
20 active duty people, he spends about 15 minutes
21 a week on convening issues. And he always
22 follows his SJA's advice.

1 NCIS -- they have eight agents
2 designated to investigate sexual assault.
3 They have all been through various stages of
4 rigorous training, so that they understand
5 what is involved there. From their viewpoint,
6 48 percent of the cases that they are seeing
7 are kind of threshold cases. The case load of
8 their agents is about 16 cases per agent in
9 the sexual assault area, although they do have
10 a goal -- we had heard this once before from
11 somebody who was here -- of limiting it to 10
12 cases per agent for sexual assault. But they
13 are averaging in -- for this NCIS office 16
14 cases apiece.

15 The majority of cases that NCIS is
16 seeing and hearing, which is going to be all
17 of them we would assume, they are -- the
18 reports are coming outside 72 hours in the
19 majority of the cases that they are seeing,
20 the reports from the victim.

21 Here is my note. They rarely get
22 calls from the defense counsel for

1 investigative assistance. Defense counsel
2 said that was not true at all. But they do
3 respond when the prosecutors call them saying,
4 "We have agreed to this," or "do this for the
5 defense."

6 We did have one of the attorney
7 victim advocates for the Navy who was there.
8 They are really just getting into this in the
9 Navy, so she was -- she was very excited, very
10 -- you could tell a very active participant in
11 this, and was looking forward to -- they just
12 have a real sense of optimism that this is
13 going to be a good thing.

14 The prosecutors did not express
15 any negative thoughts in terms of dealing with
16 the victim advocates. They thought the whole
17 thing was and is -- is working now and will
18 continue to work as they go along.

19 We heard from -- base security sat
20 in with the NCIS folks who were there, and
21 they really don't have an investigative role
22 in sexual assault at all. They are often the

1 "first responders" if there is a phone call.
2 They show up, but they don't take any
3 pictures, they don't do interviews, they don't
4 collect evidence. They just sort of hold the
5 scene until NCIS gets there and then they move
6 on.

7 And let's see. The victim witness
8 advocates and the SARC folks, we heard from
9 them. They have a very, I thought, robust
10 program that seemed to be working very well
11 and you just sensed a lot of cooperation
12 between them and NCIS, and as well as the
13 prosecutors. The defense attorneys kind of
14 just -- didn't really have strong views or
15 opinions on how that whole thing is going
16 right now. That was my sense of it.

17 And then I will finish with this,
18 or maybe I should just let General Dunn tell
19 about the trip to Iwo Jima. That was fun.
20 But go ahead first on what we heard, and then
21 I will let you tell -- the Navy, as no one can
22 else do, showed us their toys.

1 MEMBER DUNN: Yes.

2 MEMBER BRYANT: Or has toys a lot
3 of people don't have. That's what I really
4 wanted to say.

5 MEMBER DUNN: The comments that I
6 would add to Harvey's comments are, one, the
7 special victim counsel is -- was an O-5,
8 right? She was an O-5. She seems to be
9 relatively well resourced in terms of the
10 number of special victim counsel she has in
11 the region.

12 She was extremely positive about
13 the relationship with the prosecutors, her
14 ability to speak in court when necessary, that
15 she had actually had a couple of experiences
16 where the judge had permitted her to speak on
17 the record on an issue, as well as to provide
18 written submissions. And so she thought that
19 was very positive. She did note that, you
20 know, the Air Force program is more well
21 developed and that they sort of look to that
22 a little bit. The Navy program is newer as I

1 think is the Army's, but --

2 COL HENLEY: What issue is the
3 judge allowing the victim's advocate to speak
4 on? Do you have to file -- what's her
5 experience on what she is allowed to -- what
6 she is requesting and what she is allowed to
7 do, and what the judge has approved and --

8 MEMBER BRYANT: She said that
9 that's part of what she's feeling her way
10 through. She's not sure when she should file
11 something, what issues she can stand up and
12 address, but she is starting to do that and
13 she is not being -- she hasn't been, you know,
14 slapped down each time she has tried to appear
15 and speak in court, so --

16 COL HENLEY: But did she have a
17 separate table in the courtroom? What is --

18 MEMBER DUNN: She said she -- she
19 sits behind the bar.

20 LTC McGOVERN: Which is the same
21 as the civilian counsel.

22 MEMBER DUNN: Right. She sits

1 behind the bar, but --

2 MEMBER JAUS: She sits in the
3 audience? Is that what you mean?

4 MEMBER DUNN: That's what she
5 said, right?

6 MEMBER BRYANT: Yes. She is
7 sitting back there, and she stays in
8 throughout the entire trial, even if the
9 victim has been excluded.

10 LTC McGOVERN: That is the same as
11 civilian victim's counsel in criminal -- I
12 mean, Kelli Luther, who you all heard from,
13 she had raised her hand literally, and the
14 judge would call on -- when a victim issue,
15 victim's rights issue popped up, they had been
16 permitted to address the court.

17 COL HENLEY: From behind the rail.

18 LTC McGOVERN: I think he allows
19 them to approach.

20 MEMBER DUNN: Them to approach the
21 bench, right. And she also said that in her
22 limited experience thus far that, you know,

1 for the really contentious legal issues
2 pertaining to the victim that she and the
3 prosecutor are of the same perspective, and
4 that, therefore, she has felt up to this point
5 that the prosecutor has well represented the
6 victim on those particular issues.

7 But she foresaw in the future
8 maybe medical records issues perhaps, you
9 know, where the prosecution wanted the medical
10 records for a limited purpose and --

11 MEMBER JAUS: Psychiatric.

12 MEMBER DUNN: Psychiatric,
13 exactly. That she could foresee some issues
14 that she hadn't yet faced. But it was good to
15 get her perspective because she has actually
16 had several go-rounds with it, you know, in a
17 contested case setting in the courtroom.

18 We had the opportunity to talk to
19 several non-commissioned officers kind of --
20 maybe I should say we took the opportunity to
21 speak to a couple of non-commissioned officers
22 outside the, you know, formal presenters. One

1 was the woman who was actually driving us
2 around, giving us a tour of the post who
3 happened to be a female E-6 with 10 or 12
4 years of service, and quite the personality.

5 So as we are driving we started to
6 have this discussion with her about, well,
7 talk to us about sexual assault in the Navy.

8 MEMBER BRYANT: She actually
9 pulled over, stopped, and talked --

10 MEMBER DUNN: She actually pulled
11 over and stopped, and then it was really
12 interesting because what she did was she --
13 she gave a rundown of the training, the
14 training she had, how she had gotten it, her
15 role in training younger sailors, how that
16 went on, what she thought was most effective.
17 I mean, it was really -- you know, what I took
18 from that is that she took it seriously.

19 You know, so whatever you could
20 extrapolate from that. She had the training,
21 she took it seriously, she saw it as something
22 that was ongoing, and she was -- felt that

1 there was some effect at least, you know, from
2 her perspective. That's kind of fair summary,
3 I think.

4 And I had another opportunity to
5 talk to a more senior NCO on board the USS Iwo
6 Jima, a senior male NCO, who also talked kind
7 of through all of the different things. And
8 then I would tie that in with, in terms of the
9 training when the SARC women were speaking.
10 Two things that I thought were very important
11 there. One is they are pretty well resourced
12 with senior civilian positions.

13 So they have civilian women who
14 are -- one was a clinical psychologist, yes,
15 the -- and then another -- but they are -- you
16 know, they are trained, they are bachelor --
17 bachelor degree required. What?

18 MEMBER STRAND: I'm sorry. I
19 think she was actually a licensed clinical
20 social worker.

21 MEMBER DUNN: Okay. The one, yes.
22 Anyway, but they are professionals, and they

1 are invested in the program there and
2 regionally, since Norfolk is kind of the
3 center of that huge region. And they are --
4 you know, there is continuity, there is all of
5 that.

6 And their access to very high
7 levels of command that impact across the
8 region was excellent. So, you know, that, in
9 addition to the training, seems to be
10 trickling down, and that access seems to be
11 there. So I was, you know, kind of impressed
12 by their -- by their access to --

13 MEMBER STRAND: You're talking
14 about the base level?

15 MEMBER DUNN: Yes. They are in
16 Norfolk, but they also -- well, from their
17 perspective, you know, they have established
18 the premier program in the United States Navy.
19 And they may well have. I mean, they were
20 certainly excited about it, and so they may
21 well have done that. And that's -- they have
22 then pushed it out to other installations in

1 their region because they go from Groton, you
2 know, kind of all the way down to Charleston
3 I think.

4 MEMBER BRYANT: A corollary to
5 that, excuse me, General, is that the NCIS
6 also feels like they have the model program
7 going there for the entire Navy. And I meant
8 to print off the PowerPoint that they provided
9 me last fall on that, and I didn't and I
10 apologize.

11 MEMBER DUNN: Yes. And then, let
12 me see, the NCIS, very similar to what you
13 described in -- on the west coast, also victim
14 collateral misconduct -- yes, we didn't even
15 discuss that. Not reading them their rights,
16 it's not even an issue. And the same sort of
17 statement that you all heard on the west coast
18 in terms of, you know, well, we're here to
19 support the victims, and we wouldn't want to
20 disturb them by reading them their rights for
21 any, you know, collateral misconduct that may
22 have sorted through.

1 So that's very -- very interesting
2 in light of, you know, Article 31(b), and a
3 few other things. But they were quite adamant
4 about it, so it was the same thing.

5 And one last thing I would note is
6 the -- because as we -- maybe as we look
7 across the services and the way services
8 manage their processes, the Navy court-martial
9 panel convening process and the way they
10 manage their interaction with the convening
11 authority is significantly different from the
12 other services. They convene an individual
13 panel for every single case, and they have no
14 what I would characterize as tasking
15 authority.

16 So an officer or senior
17 non-commissioned officer may serve on one
18 panel and, you know, that's it for -- you
19 know, until they get tagged again eight years
20 later. So you have no -- you know, sort of no
21 building of experience with different types of
22 cases, and, you know, therefore, they -- both

1 the prosecution and the defense did talk about
2 their sentencing being kind of all over the
3 place. So that's very different from the
4 other services.

5 And the fact that they don't have
6 access -- I mean, those who run the Navy, from
7 the bottom up, apparently don't sit on
8 courts-martial panel. So -- and that's very
9 different from the other services. So --

10 DFO HUNSTIGER: Ma'am?

11 MEMBER DUNN: Yes.

12 DFO HUNSTIGER: I'm sorry. I
13 don't know who you spoke to with the Air
14 Force, but ours are individually convened.

15 MEMBER DUNN: Yes.

16 DFO HUNSTIGER: There is typically
17 a standing pool, though.

18 MEMBER DUNN: Oh. I mean, every
19 court-martial is individually convened. Every
20 member sits one panel and never sits again
21 for, you know, extended periods of time.

22 DFO HUNSTIGER: So we don't like

1 have like a list of 50, and then the commander
2 will pick 10 of those for a court-martial.

3 MEMBER DUNN: Right. But they sit
4 on that -- they sit in that standing pool for
5 a while.

6 DFO HUNSTIGER: Until court comes,
7 yes.

8 MEMBER DUNN: And there may be --
9 and it also may be a matter of volume, you
10 know, in terms of how you're able to get it.
11 But I know that was sort of --

12 MS. SAUNDERS: And, ma'am, I think
13 one point, too, if somebody fails to --

14 MEMBER DUNN: Oh, yes.

15 MS. SAUNDERS: -- give -- if
16 somebody fails to -- if one of the court
17 members fails to show up for the court they
18 have been tasked to be at, it is -- there is
19 no way to -- it seems like there is really no
20 way to go back and hold them accountable.

21 MEMBER DUNN: I mean, the
22 commander is kind of --

1 MS. SAUNDERS: Just sort of, oh
2 well, we'll excuse them, and, you know --

3 MEMBER DUNN: Right.

4 MS. SAUNDERS: -- hope that the
5 others show up.

6 MEMBER DUNN: Yes. The convening
7 authority is kind of removed from that process
8 and --

9 COL HENLEY: Can they order the
10 court member to appear?

11 MEMBER BRYANT: No. That was an
12 odd thing for all of us. They actually gave
13 -- well, I think it was a hypothetical. If a
14 member doesn't show up and they call him and
15 he says, "Oh, I forgot. I'm on leave."
16 Click.

17 (Laughter.)

18 (Simultaneous speaking.)

19 COL HENLEY: Yes. Well, you take
20 a recess and we'd find the court member, and
21 the member would appear. We'd have a
22 discussion.

1 (Laughter.)

2 I guess the Navy or the -- I'm not
3 saying it wrong. They move on and have
4 somebody excuse the member, but that rewards
5 poor behavior.

6 MEMBER DUNN: But it was just a
7 very interesting difference. You know, it may
8 be just in this particular command. I'm not
9 sure, but that was pretty interesting.

10 LTC McGOVERN: We do have two RFI
11 responses on panel selection, which I can send
12 to the group, just so you can see what the
13 services' responses are to clarify the
14 differences in the services.

15 MEMBER DUNN: Yes. That was
16 interesting.

17 All right. So then on to the
18 ship. We -- you know, of course on the one
19 hand it was kind of a grand tour of an
20 amphibious carrier, which was very
21 interesting. On the other hand, I think it
22 was instructive to see the living quarters,

1 which are very distinctly separate male and
2 female with kind of limited access really to
3 the female quarters. You had to go down two
4 separate ladders. After you went down the
5 first, there were some individual NCO rooms.
6 And a lot of other individuals, but there were
7 non-commissioned officer female, petty officer
8 rooms. And then down another ladder or two,
9 you know, where the female sleeping and
10 latrine areas were, and then the -- you know,
11 the male ones are on -- you know, very well
12 physically separated on the ship.

13 It was also interesting to see --
14 you know, you could see the narrow passageways
15 and kind of the several -- both the
16 installation commander, who we spoke to, and
17 a couple of people on board the ship talked
18 about the vast majority of their complaints
19 were contact complaints based on people
20 passing in those hallways or women who are
21 climbing the ladders, and some guy is climbing
22 behind them and, you know, they are

1 uncomfortable that he is looking up while
2 they're climbing.

3 But you have to look up while you
4 are climbing, and, you know, it's sort of --
5 I mean, it was just an interesting perspective
6 from some of the leadership on some of the
7 close quarters issues that come from being on
8 board those ships and when they are at sea for
9 months at a time and --

10 COL HENLEY: Were you able to --
11 or did you ask whether the number of sexual
12 assaults on shore -- the rate is different on
13 shore than at sea? I mean, is there -- you
14 were talking I think about, you know, living
15 on the ship and all. Is the incidence of
16 reported sexual assaults higher when the ship
17 is at sea?

18 MEMBER BRYANT: I talked to the
19 Executive Officer about that while we were
20 having our tour, and he wasn't aware of any
21 particular differentiation, at sea or on base.
22 He seemed to --

1 LTC McGOVERN: Are they allowed to

2 --

3 MEMBER DUNN: When it's deployed,

4 no.

5 MEMBER BRYANT: There is --

6 MEMBER DUNN: No alcohol when

7 deployed.

8 MEMBER BRYANT: Supposed to be not

9 legal.

10 MEMBER DUNN: The answer I got

11 when I talked to the senior NCO was the sexual

12 -- when they're deployed, of the sexual

13 assaults that they may address while they are

14 deployed, the vast majority of those occur off

15 the ship when the ship is in port, right?

16 Which would make sense, because that's where

17 the alcohol is and everybody leaves and you

18 have issues, and then they come back on board

19 the ship.

20 MEMBER BRYANT: One difference

21 with maybe the task force that the Iwo Jima is

22 assigned to -- I don't know if this is

1 Navy-wide or whatever -- when there is a
2 report, it is the offender they get off the
3 ship. And we ask, "Well, is the victim
4 request" -- oh, sure, there is a process. But
5 it's almost like if -- if there is -- I don't
6 even know if they use a probable cause
7 standard. But if you're the accused, you
8 know, they arrange for you to go somewhere
9 else fairly quickly.

10 MEMBER DUNN: Right.

11 COL HAM: And is counsel afloat
12 that --

13 MEMBER BRYANT: No.

14 COL HAM: That's kind of a
15 traditional issue that they --

16 MEMBER BRYANT: Well, I say no.
17 There was a JAG officer who was assigned to
18 this particular task force that the Iwo Jima
19 is in, who accompanied us on the tour. So,
20 and of course, as we all know, every battle
21 group has at least one NCIS agent on the
22 carrier.

1 MEMBER DUNN: And there is an NCIS
2 agent on this particular --

3 MEMBER BRYANT: On this particular
4 ship, because it's also the Admiral's
5 operational ship during combat, during battle.

6 COL HAM: So they don't -- there
7 is no defense counsel out there?

8 MEMBER BRYANT: I got the
9 impression there was --

10 MEMBER DUNN: I think on the
11 carrier, yes. On the -- any lesser ship
12 within the strike force or when it's deployed
13 -- we need somebody in the Navy -- not.

14 MEMBER JAUS: What is the -- a
15 Navy officer can't turn down an Article 15 --

16 MEMBER DUNN: Right. Exactly.
17 The Marines --

18 COL HAM: The proof is
19 preponderance, not beyond a reasonable doubt?

20 MEMBER JAUS: What is the standard
21 that they remove the accused?

22 MEMBER DUNN: An accusation.

1 Sounds like mere accusation, and I would -- I
2 inferred from the discussion, some preliminary
3 discussion at least, and then the person
4 accused is removed, unless the victim asks to
5 be removed.

6 MEMBER COOKE: Where do they
7 remove them to if they are deployed? Do they
8 bring them all the way back to the States, or
9 do they --

10 MR. FISHMAN: They'll take a
11 helicopter.

12 MEMBER BRYANT: That's what he
13 said, they go all the way back. They are
14 headed back. I mean, that can't happen at --

15 MEMBER COOKE: Not to another ship
16 in the same --

17 MEMBER BRYANT: No. They can't go
18 to another ship -- get to the carrier to get
19 a flight that's going back.

20 MEMBER COOKE: But they are
21 bringing them clear back here. Okay.

22 COL HAM: Is there a brig on the

1 Iwo Jima? Like the aircraft carriers have
2 brigs. Did you -- did they --

3 MEMBER DUNN: You know, I didn't
4 ask that question. They didn't show us the
5 brig.

6 MEMBER BRYANT: No.

7 MEMBER DUNN: I didn't ask that
8 question.

9 MEMBER BRYANT: And we got --
10 because we had General Dunn with us, the Navy
11 showed that it fully understands military
12 etiquette. She was piped aboard, you know, a
13 little gauntlet and met by the captain and the
14 XO. And then the XO himself gave us I thought
15 a very, very thorough tour of the Iwo Jima.

16 So, let's see, there was one other
17 thing about what we saw on the Iwo Jima. Yes.
18 That brig question, hmm, I don't know.

19 MEMBER STRAND: The special victim
20 counsel thought that she had worked well with
21 the prosecutor. Did the prosecutor talk about
22 the special victim counsel?

1 MEMBER DUNN: Yes. I mean, they
2 -- they go in there at the same time.

3 MEMBER BRYANT: No, no, no, they
4 weren't.

5 MEMBER DUNN: She came with --

6 MEMBER BRYANT: She came in with
7 the SARC people.

8 MEMBER DUNN: Yes. The prosecutor
9 had no issue with the special victim counsel
10 as he had encountered.

11 CHAIR HILLMAN: It's the defense
12 counsel who have issues with the special
13 victims counsel.

14 MEMBER STRAND: How about the
15 NCIS? Did they mention the special defense
16 counsel at all?

17 MEMBER BRYANT: I don't recall us
18 talking to NCIS about their relationship with
19 special victims counsel or that there was any
20 issues. It's like so many things in life. It
21 may have -- it may depend on or it may be a
22 factor of the personality and the approach of

1 the victim witness counsel.

2 She was someone you could see you
3 could work with. I mean, it's not that she
4 was laying back. She was going to be
5 aggressive. She was out there for the victim.
6 But she knew, you know, what -- you could just
7 sense this is an officer who knows what rubs
8 people the wrong way and what doesn't.

9 MEMBER COOKE: Just to go back to
10 that removal thing a little bit, there are
11 some people in any organization who are pretty
12 critical to the day-to-day operations of the
13 organization. Does it -- is it -- no matter
14 who it is, do you take them off the ship or --

15 MEMBER BRYANT: Well, that's the
16 answer that we got while we were on a walking
17 tour, General, so I'm

18 COL HENLEY: I don't like you,
19 General Cooke, so I'm going to go to the
20 captain and say you assaulted me, and tomorrow
21 you'll be off the ship.

22 MEMBER JAUS: You need nothing

1 more than an accusation? That's amazing.

2 MEMBER DUNN: That was their
3 implication.

4 LTC McGOVERN: DoD does have the
5 expedited transfer policy, and I'm sure you
6 guys are all aware of that, so the victim can
7 move. But, I mean, even in a deployed
8 environment, if something happens, you know,
9 they usually have been going out on missions,
10 may not go out on missions anymore until you
11 can clear up what just happened. So they are
12 just in a unique scenario because you are
13 stuck on a big ship.

14 MEMBER MORRIS: And if you have
15 kind of a thief among you, you could just pull
16 him out, because you don't need him around.
17 So the sailor doesn't have any necessary right
18 to him. The commander would have that
19 discretion if it hadn't been codified anyway.

20 MEMBER DUNN: Right. The
21 commander can remove anybody from the ship at
22 any time, I imagine. You have no right to be

1 anywhere in any unit in the military, so --

2 MEMBER BRYANT: I have to tell
3 this about the O-6 that General Dunn mentioned
4 who was -- not the O-6 -- the E-6 who was --
5 we asked her a couple of questions and she
6 says, "I don't think I know that. And
7 anything I don't know the answer to, I'm going
8 to say it's classified."

9 (Laughter.)

10 MEMBER DUNN: And it had something
11 to do with submarines.

12 MEMBER BRYANT: And just -- at the
13 naval base, they have all of these -- the
14 steam pipes run about -- oh, they've got to be
15 a good 12 to 15 feet in the air, and so if
16 someone asks, "Well, what is that? Why is
17 that?" and she said --

18 MEMBER DUNN: Without missing a
19 beat.

20 MEMBER BRYANT: -- "Well, they're
21 that high because we have Army and Marines on
22 base and we don't want them tripping over

1 them."

2 CHAIR HILLMAN: All right. Thanks
3 for all the reports. Maybe we'll take a break
4 before we deliberate. Let's take a break and
5 come back in 10 minutes and we'll talk.

6 (Whereupon, the proceedings in the foregoing
7 matter went off the record at 2:03 p.m. and
8 went back on the record at 2:17 p.m.)

9 CHAIR HILLMAN: We are going to
10 follow Colonel McGovern's lead, as we sort of
11 walk through this, and we're going to lose a
12 couple of people around four, I think a little
13 after four.

14 So we'll try to tackle those
15 first. So that the team assignment. Was
16 anybody -- the topics that we have set up here
17 to deliberate are sentencing guidelines,
18 mandatory minimums and clemency.

19 The sentencing guideline, all
20 three of those are under the team that Mr.
21 Bryant, General Cooke and Dillon is the staff
22 person assigned to those. Since those are the

1 -- those are what you heard about actually in
2 the last meeting that we had, it seems
3 appropriate to talk about those right now. So
4 that's what we'll focus on here.

5 And then the last thing you wanted
6 to do, review remaining issues and report due
7 outs, do you want to do that before we dig
8 into this, so in case we lose these folks or
9 --

10 LTC McGOVERN: Again, just to sort
11 of explain, our goal is to have something very
12 rough written for you all on the 7th of March
13 for each of your teams, and as I said, Terri
14 is checking with Elaine to find out how we can
15 possibly meet in person to discuss that.

16 But the important thing will be,
17 as you stated earlier, if there's information
18 that we still need, or if there are big issues
19 that you anticipate, there will be a finding
20 or recommendation that we need further
21 deliberations, please email me, and we can put
22 those on the topics of discussion for the

1 afternoon.

2 Because the mornings is working
3 groups and the afternoon is group
4 deliberation, because for instance, the
5 investigation, we deliberated many of those
6 topics initially, but there may be some new
7 thoughts on that, now that we're further down
8 the road and have received more information.

9 CHAIR HILLMAN: So you gave us a
10 homework assignment specifically, right? You
11 asked everybody to come with a list of what
12 else we need?

13 LTC McGOVERN: General theme last
14 week, we received a lot of information and the
15 impression was members were not sure of this
16 -- whether there was a problem in the military
17 or the scope of the problem, as far as there
18 being sentencing disparity.

19 So there were thoughts of
20 different data that we might want. So my
21 request was if you all on the record today can
22 brainstorm for five to ten minutes. If you

1 were to able to do an assessment, what
2 information would you need to know whether we
3 should have sentencing guidelines and
4 mandatory minimums?

5 CHAIR HILLMAN: Okay. So let's
6 start with that.

7 MEMBER STRAND: Research. Well,
8 I'll go on the record. We need research.
9 It's a very complicated issue.

10 MEMBER BRYANT: That may end up
11 being one of our recommendations, that there
12 needs to be more statistical gathering,
13 because --

14 LTC McGOVERN: But that -- that's
15 what I was -- if we could get some thoughts
16 that, for instance, we need the number of
17 sentences or the length of sentences in
18 various trials for judge alone and for panel,
19 those types of ideas.

20 What information would you want,
21 to be able to say whether or not there's a
22 problem with sentencing in the military?

1 MEMBER JAUS: To show the wide
2 disparity. Some people are getting three days
3 and some people are getting 30 years or
4 whatever.

5 LTC McGOVERN: Right. If you were
6 to submit a request for information, how would
7 you formulate that? What data do you want to
8 see from --

9 CHAIR HILLMAN: So one of the
10 problems is the unitary sentencing that's
11 happening, right. So we actually -- one of
12 the reasons that, as you heard this testimony
13 the last time, the witnesses said we can't --
14 there were multiple charges, we got one
15 sentence. We can't parse that out.

16 So really what we want to know, in
17 cases that involved a sexual assault, what's
18 the range of sentences that resulted,
19 recognizing that we actually have to look more
20 closely and will need some research to code
21 actually what the other offenses are that are
22 embedded in each one of those cases, because

1 each one is different.

2 But the fact that there's some
3 coding that's involved isn't an excuse for not
4 having access to the data. I mean there is
5 data on what the sentence was. I think we
6 want to know what the sentence, the different
7 points at which it could be changed.

8 So we want to know for the last
9 year, you know, all the sentences that were
10 adjudicated by -- at a trial by the -- with a
11 sentence from a panel and with a sentence from
12 a judge alone, for every case that involved a
13 sexual offense, and then we want to know,
14 after the clemency process and the review of
15 the commanding officer, the review of the
16 convening authority, what happened, what was
17 the sentence there.

18 After the review and appellate
19 process, what was the sentence there, and then
20 eventually we want to know what was served,
21 you know, what the actual sentence was, which
22 is really what the Sentencing Commissions have

1 sort of set out there.

2 You know, in other words,
3 following a civilian model for how we can
4 actually collect information and what the
5 sentences are, right? I mean is it --

6 MEMBER BRYANT: Is there though?
7 I thought the problem was right now there is
8 no repository for that statistical data.
9 Nobody is sending forward, that I --

10 MEMBER DUNN: Well, the data
11 exists, because every court-martial --

12 MEMBER BRYANT: It exists, but
13 it's in a --

14 MEMBER DUNN: Every court-martial
15 has a record of trial at the beginning.

16 MEMBER BRYANT: Yes ma'am.

17 MEMBER DUNN: There is a charge
18 sheet that shows what the charged offenses
19 are. As you go through that record, it shows
20 what happened to each charge, you know.
21 Dismissed by the judge, you know, dismissed
22 pursuant to a plea agreement, acquitted,

1 convicted.

2 So you can see what they were
3 convicted of, right, and then there was a
4 sentence, okay.

5 MEMBER BRYANT: And where does all
6 that go outside the installation?

7 MEMBER DUNN: Okay. Then it goes
8 to the convening authority, who takes action
9 on the case.

10 MEMBER BRYANT: All right.

11 MEMBER DUNN: Which may involve
12 clemency. Generally, let me speak for the
13 Army, the clemency involves, you know, a
14 waiver or forfeitures for a period of time.
15 So the family of the person who's going to
16 jail still has the money to put food on the
17 table and stuff, you know. That's the vast
18 majority of clemency maybe, you know, a couple
19 of months here and there.

20 It depends. Certainly, you know,
21 there are some astounding cases out there but
22 not many. Then though -- then, assuming the

1 record has a punitive discharge, assuming the
2 case has a punitive discharge, or --

3 FEMALE PARTICIPANT: A year or
4 more.

5 MEMBER DUNN: --a year of
6 confinement, then it goes automatically into
7 the appellate system. So each Service, the
8 Navy and Marine Corps has one, the Army has
9 one, the Air Force has one. Each Service has
10 an appellate court, and it goes there, where
11 it can --

12 MEMBER STRAND: Well, that will
13 cover the courts-martial, but that -- but many
14 of them don't ever make it to that level with
15 the Article 15s, the letter of reprimands.

16 MEMBER DUNN: There is no --

17 (Simultaneous speaking.)

18 MEMBER STRAND: There's even the
19 summary court-martial.

20 MEMBER DUNN: But this is a
21 sentencing guideline, so it doesn't matter.

22 MEMBER STRAND: How about summary

1 courts-martial? Do they also have the same --

2 COL HENLEY: Well, you're not
3 going to have -- it would be a rare
4 circumstance you'd have a summary court, and
5 even these days, I think a special court for
6 sexual assault. I think if you limited your
7 request for information to GCMS and
8 confinement, because that's really the only
9 issue. I think --

10 MEMBER COOKE: Well, but you want
11 to capture the cases where there wasn't
12 confinement adjudged. That's one of the
13 problems, is the cases that end up at one of
14 the courts of criminal appeals, confinement.

15 COL HENLEY: Not the amount of
16 confinement. If they --

17 MEMBER COOKE: Well, but if a guy
18 was facing ten years and got three months,
19 you'd like to know that. That's one of the
20 problems.

21 (Simultaneous speaking.)

22 COL HENLEY: --pointed out the

1 unitary nature of this.

2 MEMBER COOKE: Well I know.

3 COL HENLEY: You're facing 120
4 years. It looks, if you've got five months,
5 that something was wrong.

6 MEMBER COOKE: Well but you --
7 that's got to be -- if you're going to do --
8 get the whole range, you've got to cover the
9 low end of the range as well as the high.

10 I think part of our problem is we
11 really don't know what data the Services have,
12 that will cover these -- I mean the courts of
13 criminal appeals will have the cases that got
14 to them.

15 LTC McGOVERN: But what we can do
16 is recommend data be collected over the next
17 few years for the judicial proceedings panels.

18 COL HAM: What is DSAID doing?
19 Isn't that what DSAID is doing? What is the
20 database the Department of Defense had, the
21 Defense Sexual Assault Incident Database.

22 Isn't there -- isn't the purpose

1 of that to collect all this data from
2 allegation to disposition? What is the
3 database that's collecting that, because it's
4 in the DoD SAPRO report, I believe?

5 FEMALE PARTICIPANT: Yeah. But I
6 think doesn't it just --

7 MEMBER STRAND: The SAPRO report
8 does have disposition in it, doesn't it?

9 DFO HUNSTIGER: I could be -- I'm
10 not part of SAPRO. I do not believe they're
11 collecting charges, the charges and the
12 disposition of court-martial procedure.

13 I know like in the Air Force,
14 through our criminal -- through our JAG
15 office, we have a program that we input our
16 data into, and we have different codes for
17 each charged offense.

18 And you can pull up summary,
19 special, general court-martial and the general
20 nature of the charge, what article it was, and
21 you can find the sentence. To know what
22 severity of that 120 charge is, you would have

1 to go into the charge sheet, to actually find
2 what the nature of that 120 charge was.

3 So they can pull up -- I know at
4 least the Air Force, the Air Force would
5 probably shoot me, they can pull up that data.
6 I know the Air Force can.

7 CHAIR HILLMAN: Everybody can see
8 that.

9 (Simultaneous speaking.)

10 DFO HUNSTIGER: So it would just
11 be a matter of them going in, to then have
12 someone that can physically look at a charge
13 sheet, which is going to, you know, take time
14 and resource, to see what the nature of that
15 120 was, and that way they could break it
16 down.

17 You could get raw 120 charges, and
18 this was the sentence. But you won't know the
19 severity of that.

20 COL HENLEY: What do you mean the
21 severity?

22 DFO HUNSTIGER: Well I mean, you

1 know, I mean there's different --

2 (Simultaneous speaking.)

3 MEMBER DUNN: It just says 120.

4 It doesn't say --

5 COL HENLEY: The Army used to
6 distinguish anyway with those codes, at least
7 the trial judiciary did in submitting the
8 reports. So I --

9 DFO HUNSTIGER: It might be
10 Welter.

11 MEMBER COOKE: That's why I would
12 have to ask the question to each of the
13 Services. What kind of data can we pull out
14 of this, and is it in a single database or is
15 it going to be the courts have some of it and
16 somebody else has some of it?

17 CHAIR HILLMAN: My only concern
18 there is that I don't actually -- I want to
19 set out what we need to have, and then see if
20 it's --

21 MEMBER COOKE: Well, I agree. I
22 think we should say this is what we need to

1 have. Can you, you know, can you give it to
2 us or what can you give us?

3 CHAIR HILLMAN: Right. I know,
4 I'm sure we can get this data. I mean but I
5 don't think we can get it in five minutes, and
6 I don't think we can get it actually in the
7 period of time we have to complete this
8 report. But so I guess --

9 MEMBER COOKE: Well, I'm not sure
10 -- I think we can get the basic data. But I
11 think in terms of the kind of judgments you're
12 going to have to make to make sentencing
13 guidelines, I'm not sure you're going to be
14 able to get the nuanced information that you
15 need, and I think we need to look --

16 But we need to look at a sample of
17 what they would give us, to even have an idea
18 as to how you would -- what the next step
19 would be in trying to do that process.

20 CHAIR HILLMAN: Colonel Morris.

21 MEMBER MORRIS: My sense is let's
22 say all of the things that we want, and then

1 pick out what they have, you know. I mean we
2 have -- it seems to me you want to know things
3 related to the charge itself. Like what was
4 the main offense charged and what you finally
5 plead to, because you couldn't -- you don't
6 want just what was the final disposition to
7 determine whether somebody was bargained down
8 or the jury came down, and then look at all
9 three, four options, right?

10 And then sort for -- my sense is
11 that we sort for offender, junior, enlisted,
12 NCO, officers and chart all those things
13 against each other, and then you have a sense
14 of what the system expected as you came in the
15 door, assuming good faith, ethical prepared
16 charging by the prosecution, what ultimately
17 you ended up with, and how they chose forums
18 and what those forums yield.

19 Then you get a sense of is there
20 -- where on that chart you find numbers that
21 are out of whack, that would suggest to you
22 some distortion or something. Then you do

1 your informed speculation on that on what
2 that's saying to you.

3 My sense is to then figure out
4 what those factors would be that we want to
5 have measured and see how they carry it. I
6 mean all of it's findable, I think. There may
7 be more of it in there than we --

8 MEMBER BRYANT: But it's not our
9 task and everything you've said is correct.
10 But we don't have to formulate guidelines, nor
11 do we actually have to have the statistics
12 there that would help determine what they're
13 going to be.

14 Those have to be gathered for any
15 entity that is then going to set any
16 guidelines. What we need to determine, it
17 seems to me, is do we believe and what
18 evidence do we have that there is some,
19 whether it's wide or not so wide, disparities
20 in sentencing, so that sentencing guidelines
21 is a good idea in and of itself.

22 FEMALE PARTICIPANT: But don't you

1 need the data?

2 MEMBER JAUS: But we need that
3 data to make that successful.

4 MEMBER BRYANT: But we don't need
5 the full universe of it is what I'm saying.

6 (Simultaneous speaking.)

7 MEMBER MORRIS: But to at least
8 say there -- one answer could be there is a
9 disparity and we don't care, because the point
10 is to have individualized sentencing and we
11 trust juries to figure this stuff out,
12 whatever is in the atmosphere there or
13 whatever.

14 You know, you might -- obviously,
15 you'll have heavy predictability in judge-
16 alone sentencing in general, within a more
17 predictable band, less so to the others, and
18 then --

19 FEMALE PARTICIPANT: And it
20 depends on what Service too.

21 MEMBER MORRIS: Right. Looking at
22 all those things including the assumption of

1 -- I guess I would maybe consider sorting,
2 maybe you have civilian counsel as well.

3 MEMBER STRAND: So we first of all
4 have to determine or determine if there is a
5 problem. If we think there's a problem, what
6 the problem is. Another concern that I have
7 on sentencing guidelines, and this is probably
8 in the confusion between the civilian and the
9 military, but if you have minimum sentencing
10 guidelines, from what we heard from some of
11 the witnesses, was that they can't plead
12 certain offenses below.

13 They can't do certain things. But
14 we do that routinely in the military with an
15 Article 15, with a letter of reprimand. So if
16 you had a sentencing guideline for rape, for
17 example, and a minimum sentence, can that --
18 you can you get an Article 15? Can you get a
19 letter of reprimand?

20 And if you can or if you can't do
21 that, then we have to include that in the
22 research, because that would be part of the

1 problem, because people are currently getting
2 an Article 15 or a letter of reprimand for
3 rape.

4 MEMBER MORRIS: Not really. I
5 mean you still have a major/minor offense
6 thing. So that just should not be. Article
7 15 is still defined to be a minor offense.

8 FEMALE PARTICIPANT: I mean I
9 think that --

10 MEMBER STRAND: Article 15 is, but
11 the charge itself or the offense itself, if it
12 carries a mandatory minimum, can you give an
13 Article 15 for that?

14 LTC McGOVERN: I think that the
15 Services have put out the information, that
16 there have been no Article 15s for penetrative
17 offenses in the last several years. So again,
18 making sure we stay scoped on this issue, not
19 to consider the initial charging decision at
20 this point. But is there a disparity in
21 sentencing?

22 MEMBER STRAND: But that conflicts

1 with what the AP found over in Japan, that
2 there were Article 15s and letter of
3 reprimands for -- again, that's just --

4 MEMBER DUNN: Russ, you got the
5 news story on that.

6 MEMBER STRAND: Okay. But I also
7 have my own history on that, that I have seen
8 that and --

9 CHAIR HILLMAN: And to be honest,
10 Congress has the news story on this too and so
11 does the public --

12 MEMBER STRAND: But I currently
13 see that in my practice. I currently see rape
14 cases with a letter of reprimand, and I
15 currently see rape cases with Article 15s.

16 MEMBER DUNN: But the Services
17 have said in the last several years, there
18 have been no Article 15s for rape, or for
19 penetrative offenses, okay.

20 LTC McGOVERN: At least the Army
21 has.

22 MEMBER BRYANT: To address your

1 concern, just because there are sentencing
2 guidelines doesn't mean there has to be -- if
3 we make them discretionary yes, then plea
4 bargains can still be addressed. You know, if
5 they're discretionary guidelines, will they
6 ever get before the Court or not?

7 Just because there's a guidelines
8 and civilian prosecutors can make the deal,
9 forget the guidelines. They go into court and
10 say judge, this is what we agreed to do.

11 MEMBER JAUS: Well, it depends on
12 the state.

13 MEMBER BRYANT: And the judge can
14 -- it depends on the state.

15 MEMBER JAUS: Yeah.

16 MEMBER BRYANT: The judge can then
17 still say well, I'm going to take this or I'm
18 not going to take it. What are the
19 guidelines?

20 But if they're discretionary with
21 the court and the court can go below whatever
22 minimum is set, it doesn't necessarily tie the

1 panel or the court's hands, or if we have to
2 decide whether or not whether we're
3 recommending that the panel be advised of
4 guidelines or not, because as we heard, no
5 states --

6 Of the 20 states that have
7 sentencing guidelines, no state tells their
8 jury what the guidelines are.

9 CHAIR HILLMAN: So our task on
10 this is an assessment of advisory sentencing
11 guidelines used in civilian courts in adult
12 sexual assault cases, and whether it would be
13 advisable to promulgate sentencing guidelines
14 for use in courts martial.

15 So the assessment of the
16 guidelines in civilian courts is from the --
17 will be drawn from what you heard last time,
18 right, which is two states, right? So
19 Virginia, Pennsylvania and then the federal
20 guidelines essentially. So that will be our
21 universe of how those --

22 COL HAM: Plus they provided a

1 terrific -- I can't, I don't know what the
2 right word is -- study of state sentencing
3 guidelines around the country, with all the
4 flavors and variations.

5 MEMBER STRAND: And we also had
6 the victim advocates weigh in.

7 CHAIR HILLMAN: Okay. So I
8 actually don't think that we have much to say
9 about that, the assessment of advisory
10 sentencing guidelines. I think we should --
11 we'll just use what those who have looked at
12 this so carefully have said on this, right?
13 I mean I don't know that we have some
14 additional gloss to put on that.

15 So we're focused on whether or not
16 to promulgate sentencing guidelines for use in
17 courts martial, and in order to answer that,
18 we have to understand how sentencing and
19 courts martial is different than sentencing in
20 civilian jurisdictions.

21 So the process we've already set
22 out, I think that will be in the background

1 information that we collected, about how the
2 sentencing process is distinct here. But we
3 do need to have a sense of outcomes, and
4 that's really what we're getting at here.

5 So I don't think we know actually
6 what the outcomes are, including the whole
7 range of outcomes. We're an independent
8 panel. The military has told us that there
9 aren't Article 15s being used for this, and
10 haven't been for some time.

11 We need to ask that again, because
12 of what the reports that have come out, and
13 because of the importance of clarifying what
14 the data is on this. So I think we need to
15 ask that again, based on this recent report.

16 CHAIR HILLMAN: And I think
17 another way to get at it, I know from the
18 Army's standpoint is CID can just -- CID can
19 run their database. We get a report of
20 commander's action on every single case.

21 COL HAM: But the issue with those
22 is that what somebody's titled for, 72 hours

1 in, doesn't mean a whole lot.

2 CHAIR HILLMAN: No. That's the
3 final case, right, and it goes through another
4 process.

5 COL HAM: I understand.

6 CHAIR HILLMAN: So but when we
7 close out a case founded, that goes to the
8 commander, and we get a record of every --
9 well, not every single one. We'd like to, but
10 we get most of them, and I think that would
11 also be very telling.

12 COL HAM: But it shows what
13 somebody's titled for and then what the
14 commander's action is, and what somebody's
15 titled for doesn't mean that that's what
16 there's evidence for.

17 MEMBER DUNN: That there is
18 evidence there to support prosecution of that.

19 LTC McGOVERN: We can certainly
20 ask for it and then compare it to what the
21 clerk of the court has.

22 COL HENLEY: Deliberate sentencing

1 guidelines implies that there's been a court-
2 martial, not what disposition of the alleged
3 offense short of court-martial. I think
4 you're trying to get information that's not
5 germane to that particular issue, is you're
6 only worried about sentencing guidelines if in
7 fact there's a court-martial and if in fact
8 there's a conviction in a court-martial for a
9 sexual offense.

10 I'm not sure what the panel would
11 gain by getting information about whether a
12 penetrative offense was resolved in an Article
13 15 or a non-judicial punishment or a summary
14 court. You're not going to have -- if you
15 want to have a rule that says you can't impose
16 an Article 15 for a penetrative offense,
17 that's fine.

18 That's not as I'd look at
19 sentencing guidelines, what should we
20 recommend for military sentencing guidelines.
21 In my mind it implies for a conviction and a
22 court-martial. That's what I think we need to

1 -- I agree. I'm not sure we have enough
2 information.

3 I think it's going to be difficult
4 to get information in the past, I think. If
5 you go to the Services now and say this is
6 what we need you to collect going forward for
7 --

8 MEMBER DUNN: Yeah, but the thing
9 is that the data is there, because the records
10 of trial are there, and as long as we don't
11 ask to go too far back. I mean once you get
12 back a certain period of time --

13 LTC McGOVERN: Yeah. I don't
14 think we should go back further than 2009.

15 MEMBER DUNN: --then you're in
16 sort of into the box of, you know, Raiders of
17 the Lost Ark. But for 2013, which just closed
18 out, for 2012 and for 2011. Now you're going
19 to have cases in various states of appeal
20 still over that time period. There's plenty
21 of the cases for 2011 that are still in the
22 appellate system.

1 But you know, we could probably
2 ask for every single general court-martial,
3 where there was a -- and we'll list by type of
4 offense, what was charged, what was convicted,
5 what was the sentence, was there a plea
6 agreement, was there clemency. Where is it in
7 the appellate process, what has happened, and
8 a synopsis. We could probably get a short
9 synopsis of facts too.

10 CHAIR HILLMAN: We should ask. Do
11 you have enough information to ask, based on
12 what we've sort of said?

13 LTC McGOVERN: I think we do, and
14 again, it will be do we want to go back to the
15 time where Article 120 began to change, or do
16 -- you know, around 2007, or do you go to
17 2009, when you know at least the Army adopted
18 a special victim prosecutor program and
19 started really emphasizing sexual assault?

20 CHAIR HILLMAN: Right.

21 LTC McGOVERN: The panel's mandate
22 is 2007 to 2011, which is strange. It stops,

1 right. So 2007 to 2011, and then the update
2 is, you know, presumably it's continuing to
3 evolve here --

4 MEMBER COOKE: Well, I was going
5 to say we've got a month, right. It seems to
6 me if we ask for one year and took a look at
7 that, it would give us a pretty good idea of
8 what somebody else would be up against if they
9 tried to develop guidelines.

10 That would give us an idea in one
11 year what the range of sentences was for these
12 offenses, how big a disparity there is, and
13 what kinds of issues there are in the data
14 that would be potential challenges for
15 somebody trying to actually put together
16 guidelines, using a much wider, larger base.
17 But we're not going to be able to do that.

18 MEMBER JAUS: We can just say it's
19 preliminary matter, and that we're going to
20 make our suggestions.

21 CHAIR HILLMAN: But we're going to
22 make a decision about recommendations based on

1 the preliminary data, that is, should we
2 pursue guidelines, because there's disparity.

3 COL HENLEY: Why not pick an
4 offense? There's just -- if we don't know
5 that there's a problem, let's just pick an
6 offense. Pick rape, all the Services, what
7 rape, not other, lesser sexual assaults, but
8 rape going back any number of years, and what
9 was the disposition?

10 Based on that data, if you think
11 you need to go further to see if there's any
12 other sentencing disparities.

13 MEMBER STRAND: Just the cases
14 referred to court-martial?

15 COL HENLEY: Yes.

16 FEMALE PARTICIPANT: Yes.

17 COL HENLEY: Yes. Just focus. As
18 General Cooke said, based on that data, it may
19 lead to additional data. But why not just --
20 there's so many different types of sexual
21 assaults. I think that's where I think the
22 Services would run into difficulty, trying to

1 distinguish between types of sexual assault.
2 Let's just give them one option or two
3 options.

4 MEMBER DUNN: If it's a
5 penetrative rape of an adult.

6 FEMALE PARTICIPANT: Yes.

7 COL HENLEY: What we all think is
8 rape, rape itself.

9 MEMBER JAUS: Do we have the
10 numbers? Do we have the recommendations from
11 Pennsylvania and what's the other state,
12 Virginia?

13 LTC McGOVERN: They have --. I'm
14 sure we could get it.

15 MEMBER JAUS: Do they have
16 mandatory sentencing?

17 MEMBER BRYANT: We have some. In
18 Virginia, there's some mandatory minimums, and
19 I think there was in Pennsylvania also, but I
20 can't swear to that. But Virginia does not
21 have a mandatory minimum in rape.

22 MEMBER JAUS: See, I come from a

1 state that did, and I worked for many years
2 without, and I think that having mandatory
3 minimums is really helpful, and it provides
4 equitable results.

5 LTC McGOVERN: Well, and there, I
6 think we can steer the conversation. So we
7 have a sense of we need to identify whether
8 there's a disparity to make an initial
9 assessment of whether or not there's a problem
10 with sentencing disparity.

11 But then you can take it one step
12 further and make an assumption and say
13 assuming based on your conversation with the
14 Navy last week, that there is. Would you then
15 recommend sentencing guidelines, would you
16 then -- so that we can open the debate and go
17 ahead and deliberate that today.
18 Assume there is a problem.

19 MEMBER BRYANT: I like that.

20 LTC McGOVERN: All right. I'll
21 get the data so we can assess whether there's
22 a problem. But even if there were a problem,

1 would you -- would sentencing guidelines or
2 mandatory minimums be --

3 CHAIR HILLMAN: I actually think -
4 - I don't think we have to define this as if
5 there's a problem actually, but I'm really
6 uncomfortable in going forward saying there is
7 a disparity, when we don't even know if there
8 is one. But sentencing guidelines could be
9 helpful for other reasons.

10 That is, this landscape is
11 changing very fast. There's a lot of
12 aggressive prosecution that's happening.
13 Guidelines would help to establish some
14 standardization and targets that would ensure
15 more fairness potentially going forward, as
16 would mandatory minimums potentially, right?

17 So it seems to me that one of the
18 things, if we are going to -- like we can walk
19 in the middle of this in some ways. But if we
20 are going to, if anybody's going to undertake
21 sentencing guidelines, they need to undertake
22 a project comparable to what the Sentencing

1 Commission did, to study what has happened.

2 Because all of the information
3 that you got in that last set of witness
4 presentations was this has to be organic. You
5 have to look locally. Which means we actually
6 have to look at each of the Services and see
7 what they're doing, and then try to put
8 together what is a uniform standard, because
9 we're not going to have different guidelines
10 in the Navy versus the Army.

11 But they've been doing different
12 things. I don't actually think they'll
13 necessarily be the same, because there's so
14 many, so much variability within those
15 systems.

16 So to me that seems like if
17 there's going to be guidelines, regardless of
18 what we say, if anybody's going to do
19 guidelines, President, Congress, whatever,
20 they have to do this huge study of all the
21 cases, for I don't know however many years.

22 DFO HUNSTIGER: Ma'am, that sounds

1 like the recommendation on the issue.

2 CHAIR HILLMAN: Right.

3 MEMBER BRYANT: Again, you
4 generally don't, because Virginia and I
5 believe Pennsylvania, they did those based on
6 historical data from what do judges across
7 Virginia say the going rate is for grand
8 larceny.

9 The feds didn't do that. They put
10 together this Commission, and they built the
11 guidelines. They had judges on there. I
12 don't recall who else was on the thing, and
13 then they say it took something like five
14 years.

15 (Simultaneous speaking.)

16 COL HAM: But he said they based
17 them on what they had in data.

18 MEMBER COOKE: They had the
19 databases of all the sentences that had been
20 adjudged for a number of years, and that was
21 -- that helped them inform.

22 MEMBER BRYANT: To some extent,

1 but they didn't -- you know, they weren't
2 trying to find necessarily a median level for
3 what judges were doing. To wit, for those
4 drug guidelines, for cocaine and crack
5 cocaine, were like off the chart. No judge in
6 the country was doing that.

7 MEMBER COOKE: Part of that was
8 Congress.

9 MEMBER BRYANT: Maybe. But I'm
10 just saying you can do guidelines -- you can
11 do guidelines without -- you can create them,
12 and your idea is absolutely I think one of the
13 things we should discuss here and consider.

14 You can justify having guidelines
15 without saying we're doing this because
16 military judges and panels are all over the
17 board.

18 LTC McGOVERN: But it's a drastic
19 change.

20 MALE PARTICIPANT: Why is that a
21 bad thing.

22 MEMBER DUNN: Yeah. If you change

1 it in each -- in the federal sentencing
2 article that we read and in the testimony that
3 came before us, in each instance there was a
4 --

5 First, there was a substantial
6 amount of time devoted to determining whether
7 or not there was a problem, years, years,
8 devoted to it, guided by the Supreme Court in
9 the state of Virginia, guided by the Federal
10 Sentencing Commission.

11 I mean there was a huge amount of
12 data collected and analysis done to determine
13 if there was a problem, and then they said --
14 I think Virginia actually kind of said well,
15 maybe not so bad.

16 But you know, other -- you know,
17 and then each entity, as Professor Hillman,
18 you know, each state and the feds then
19 proceeded along a path of -- another multi-
20 year path of devising what would work in their
21 system.

22 I mean I don't think we just sit

1 here and say oh, sentencing guidelines are a
2 good idea; let's come up with a few of them.
3 I think we've got to establish that there's a
4 problem.

5 MEMBER STRAND: But I also still,
6 just listening to the witnesses the last go-
7 round, I walked away with me understanding
8 that the prosecutors in general didn't like
9 them. The defense attorneys didn't like them
10 and the victims didn't -- victim advocate
11 folks didn't like them, that they were a real
12 problem. So I don't want to just go --

13 CHAIR HILLMAN: Judges largely
14 like them. I mean the percentages are so --
15 are more than half, right. I mean not
16 everybody likes them, but some at least, in
17 some systems. It really --

18 MEMBER STRAND: But they brought
19 up some significant problems with them.

20 COL HAM: And you have less than
21 half the states in the country that have them.

22 MEMBER STRAND: Right, and the

1 problems that they brought up is one of the
2 witnesses I remember saying, you know,
3 actually it's worse off than it was before,
4 because now if you get a minimum, mandatory
5 minimum, you have to do that time.

6 So if you got three years before
7 and you got eight years before, they both
8 basically did about the same time.

9 Now, they're going to do
10 drastically different time for the same crime,
11 and those are -- I mean there's some real
12 pitfalls that I heard.

13 MEMBER JAUS: I think those get
14 ironed out over time. I mean you can
15 straighten that out.

16 FEMALE PARTICIPANT: That's in the
17 implementation.

18 FEMALE PARTICIPANT: In the
19 implementation, you could straight all that.

20 (Simultaneous speaking.)

21 LTC McGOVERN: Well, and it seemed
22 like Russ just said that they did try to

1 straighten it out and have a correction in
2 their system, and now it's going back to being
3 a disparity again, because it's discretionary
4 after Booker.

5 So you know, judges are -- and the
6 infrastructure that's required for people to
7 make these calculations. We heard that will
8 take a significant amount of personnel and
9 training for an entire system, which in the
10 end may still just have a resulting disparity.

11 COL HENLEY: The states that have
12 sentencing guidelines, do any of them only
13 have guidelines for sexual assaults?

14 MEMBER STRAND: No.

15 (Simultaneous speaking.)

16 COL HENLEY: So we could not have
17 a system or we would not --

18 FEMALE PARTICIPANT: It would have
19 to be broad.

20 COL HENLEY: It would have been
21 broad. That's a --

22 LTC McGOVERN: And that's the

1 other thing. You can't just do it for sexual
2 assault.

3 MR. FISHMAN: Well, you received
4 information from Mr. Burress that you could in
5 fact do that.

6 FEMALE PARTICIPANT: Yeah, but
7 that was --

8 CHAIR HILLMAN: We do have
9 mandatory minimums though, right.

10 MALE PARTICIPANT: Very few.

11 MALE PARTICIPANT: Rare, yes.

12 CHAIR HILLMAN: Right. But we
13 could add this to that list, that short list
14 of offenses. I mean we would just be deciding
15 to set this into that category of --

16 LTC McGOVERN: I think that's
17 easier to manage than sentencing guidelines.

18 MEMBER STRAND: The purpose that I
19 heard for sentencing guidelines and for
20 mandatory minimums, by the testimony that I
21 heard, wasn't achieved, and there were major
22 problems with both mandatory minimums and

1 sentencing guidelines, and they were still
2 creating some problems and there were still
3 disparities, you know, disparity between them.

4 So I think before we even
5 recommend, you know, based on what we heard,
6 you know, recommend this is a good idea for
7 DoD to do.

8 CHAIR HILLMAN: Well, fair point.
9 My concern about that is that the -- we want
10 the data, to look and see if there's a
11 problem.

12 My concern about deciding we
13 shouldn't do it because it hasn't worked very
14 well, and that's under dispute about how well
15 it works in civilian jurisdictions, is that
16 there are a lot of things that are different
17 about the way sentencing works out and the
18 UCMJ was created in part specifically to
19 address disparities of sentencing during World
20 War II.

21 We don't have -- we likely don't
22 have that degree of disparity. I mean that

1 was dramatic what was happening then. But
2 because of that, and because of the convening
3 authority's multiple sites of power, you know,
4 it's not -- we don't have the centralized
5 prosecution and sort of adjudication system
6 that we have with standing courts, but the
7 court-martial is an ad hoc court.

8 We do have more potential for
9 disparities. So just reckoning with this as
10 a different system seems to lean towards we
11 ought to think about whether this would help
12 mitigate concerns about fairness including,
13 you know, for the accused who feel the
14 elevator effect of the intensity of pressure
15 on the issue now.

16 MEMBER MORRIS: And are we
17 assuming then constrained power of the
18 convening authority to adjust sentences then
19 on these cases, that there has to be some
20 change in Article 60 now.

21 CHAIR HILLMAN: We at least have
22 to comment on the changes in Article 60,

1 right, which as they pointed out to you in
2 that testimony last time aren't -- it's not
3 clear what the extent of that is going to be.
4 Do we want to make recommendations --

5 MEMBER MORRIS: Because if you do
6 guidelines, the firmer your guidelines are,
7 then you have cut out again another piece of
8 --

9 COL HENLEY: Well, that certainly
10 changes the adversarial nature of our
11 sentencing proceedings. You really constrain
12 the parties, then what benefit do you have to
13 actually, on both sides.

14 MEMBER MORRIS: You know, in other
15 cases --

16 (Simultaneous speaking.)

17 MEMBER MORRIS: But at least you
18 can think of the kind of the things you want
19 to footnote to think about are truth in
20 sentencing as well, you know. Should we --
21 should there be instructions on parole gates,
22 on confinement policies, you know.

1 There's always been an argument
2 against that, that it will cloud the jury's
3 minds, that those things, those policies can
4 change while somebody's sitting in jail.

5 But it's certainly information
6 that civilians would have these systems also
7 take into account, in what is heavily a
8 parole-free environment in the civilian world
9 compared to ours too. They're serving every
10 day they get. Our guys will still be --.

11 MEMBER JAUS: In New York, they
12 serve 6/7ths, 6/7ths of the sentence on
13 violent crimes. 6/7ths. It's very good.
14 They kept raising, raising the sentencing.

15 When they first started out, you
16 could get 2 to 6 for rape. Now it's 5 to 25.
17 Not 5 to 25. As low as 5 and up to 25.
18 That's a definite sentence. You have to do
19 6/7ths of the sentence.

20 CHAIR HILLMAN: Do you think that
21 makes for a more effective system?

22 MEMBER JAUS: Yes. Personally, I

1 do.

2 CHAIR HILLMAN: And why?

3 MEMBER JAUS: Because it's fair.

4 You have a range. So somebody who doesn't get
5 that -- who the crime was not so severe can
6 get five. But somebody who does something very
7 seriously has to get 25.

8 MEMBER STRAND: Rhonnie, one of
9 the things that the victim advocates were
10 concerned about with minimum sentencing is if
11 you have -- you know going in that you know if
12 I report this person for committing this
13 crime, they're going to get a minimum of five
14 or a minimum of 25 years or whatever. They're
15 concerned that they may not report it.

16 Now there might be a difference in
17 the military and civilian in that aspect too.

18 MEMBER JAUS: That's interesting.
19 I don't think that -- that's an interesting
20 thing, because I was wondering what they could
21 be against, because I've never heard of a
22 victim who ever knew anything about

1 sentencing.

2 MEMBER STRAND: But in the
3 military they will, because we train the heck
4 out of everybody, and if we get mandatory
5 minimums, I guarantee that will be in every
6 PowerPoint slide in every sexual assault
7 presentation.

8 MEMBER JAUS: But if you had a
9 broad range like we have in New York, for 5 to
10 25, that's a very broad range. Not to mention
11 the fact that you could always plead down from
12 that. You don't have to. You can go to an
13 Attempted Rape 1. You can go to a Rape 2.
14 You can go to a Rape 3. So you don't have to
15 always have to give it.

16 But I think that in New York, I
17 believe that the reason they set it up this
18 way is to show the public that we take this
19 crime very, very seriously. So the least
20 amount of time you can get is five years.

21 If it's very, very serious, you
22 can get 25. Not to mention the fact that if

1 you get consecutive time, you can actually get
2 lots and lots of time.

3 MEMBER STRAND: But with victims,
4 we went down that same road with mandatory
5 arrest and minimum sentencing on domestic
6 violence, and we saw that our report rates
7 went, you know, tanked in some of those areas
8 in some of the studies.

9 So there what we -- what I heard
10 the last time is that we've really got to be
11 concerned about the unintended consequences.
12 You know, on one hand they sound good; but
13 then when you look at what we've already
14 experienced in some of the other areas like
15 mandatory arrest and how that really impacted
16 reports.

17 CHAIR HILLMAN: This is in the
18 mandate that Mr. Taylor sent to us, the update
19 of what we had to do.

20 "The panel should assess the
21 potential -- the possible collateral
22 consequences of such mandatory minimum

1 sentences, including likely effects on sexual
2 assault reporting, the ratio of guilty pleas
3 to confessing cases, and conviction rates."

4 So that's --

5 MEMBER BRYANT: Mandatory arrests
6 haven't affected anything, at least in
7 Virginia so far as I know, and certainly not
8 in Virginia Beach, because before the police
9 decided and the state legislature decided
10 there would be mandatory arrests when they
11 respond, Virginia Beach was running about
12 2,500 domestic violence cases a year, and
13 we're still running 2,500. The raw number
14 sometimes goes up by 100 or so, but that's the
15 average. So maybe in some jurisdictions it
16 has, maybe some jurisdiction it hasn't.

17 In New York now, is that five, is
18 that the mandatory minimum?

19 MEMBER JAUS: Uh-huh.

20 MEMBER BRYANT: So we'll see the
21 difference in Virginia and I assume --

22 MEMBER JAUS: --which is

1 enforceable to a child under 13.

2 MEMBER BRYANT: Statutorily, it's
3 five to life. But if it's a judge doing the
4 sentencing, the judge can give the five,
5 suspend two, suspend four, suspend the whole
6 five, because that's not -- that five years is
7 not mandatory.

8 MEMBER JAUS: Oh, okay.

9 MEMBER BRYANT: Not a mandatory
10 minimum. So I don't think in that kind of
11 jurisdiction we have the same issue with a lot
12 of our victims.

13 MEMBER JAUS: We have mandatory
14 minimums.

15 COL HAM: You also have the issue
16 of a mandatory minimum for a contested case,
17 where there's not a mandatory unanimous
18 verdict. I mean there's no unanimous verdict.

19 So are you raising the issue of --
20 it happens very rarely. I'm not aware of it
21 happening in the Army. I'm aware of it
22 happening in the Marines, a mistrial on

1 sentence because a jury refuses to -- a panel
2 refuses to impose a mandatory minimum. I
3 don't know.

4 CHAIR HILLMAN: General Dunn or
5 General Cooke.

6 MEMBER DUNN: Well, Rhonnie raised
7 the thing with the range that I think goes
8 into the data analysis, that is one of the
9 issues that I think we have in the military is
10 we just have a maximum sentence, and you know,
11 so everybody looks at that and thinks than ten
12 years less than that or 15 years less than
13 that is not a good thing.

14 But even in a state that has
15 strong mandatory minimums, you've got a 20
16 year range, 5 to 25 is the range. So as we
17 look at just the preliminary data, if we're
18 going to look at it, I mean I think --

19 I mean we'll have every sentence.
20 So we can kind of plot it on -- but we need to
21 look at different states and see what their
22 left and right limits are, if they have

1 mandatory minimums.

2 MEMBER JAUS: Is there a
3 distinction in the military? Like in New
4 York, we have first degree rape is with force
5 or with a child. But you could also have a no
6 means no, which is just saying no, and that is
7 no minimum. You can get up to four years in
8 jail or you could actually get probation.

9 So there's the distinction. You
10 could have forcible rape or rape of a child,
11 or the no means no rape.

12 MEMBER STRAND: Article 120 rape
13 has a pretty broad spectrum.

14 (Simultaneous speaking.)

15 MEMBER JAUS: Right. So that's
16 why in a case where's just a no means no, it's
17 not as serious, but not as serious as a
18 terrible, forcible knife, gun, that kind of
19 thing.

20 CHAIR HILLMAN: General Cooke.

21 MEMBER COOKE: Well, I was going
22 to say a couple of things. One, I think we

1 need to keep mandatory minimums separate from
2 guidelines. At least in the federal system,
3 the mandatory minimums are a rigid, you know,
4 you can't go there without very exceptional
5 circumstances.

6 Whereas guidelines now are
7 guidelines, and judges are able to go above or
8 below the guidelines if they find certain
9 factors that justify that, and so we should
10 keep those separate. As to guidelines, I
11 don't think we're going to reach a final
12 recommendation that there be guidelines or
13 that there not be guidelines.

14 It seems to me we need to tee up
15 the issue for whoever comes after. There are
16 some advantages in guidelines. There are some
17 disadvantages, particularly given the
18 structure of the military sentencing system
19 and the changes that would be required in
20 order to make some form of guidelines work.

21 I think we would do a service if
22 we just kind of lay out those pros and cons,

1 without coming out with a recommendation,
2 because until you've studied this, more than
3 we have time to do frankly, I don't think we
4 can reach a conclusion.

5 CHAIR HILLMAN: Can you pause
6 there, sir? Does anybody think otherwise?
7 Okay. There you go.

8 LTC McGOVERN: Well, so can we go
9 with that and possibly, you know, elaborate on
10 what you see would be the advantages in the
11 military versus the disadvantages, and as
12 Colonel Ham pointed out, we need a two-third
13 majority for a conviction.

14 What are these differences in our
15 systems going to have, which may require
16 changes?

17 MEMBER DUNN: I don't think we
18 even spend the time to go down this path, if
19 we don't have the --

20 LTC McGOVERN: But I think it will
21 help. I mean just if we're supposed to assess
22 whether or not it goes forward, and assess

1 whether the collateral impacts --

2 COL HENLEY: Well, the big one
3 would be to have what I think would be a
4 lengthy delay between findings and sentencing,
5 in order to prepare a report sufficient to
6 address these issues. You couldn't proceed
7 immediately or it would be difficult for me
8 decide whether to proceed immediately to
9 sentencing. But what would do with the
10 accused or not?

11 MEMBER COOKE: Well, we heard --
12 we heard about that from Rusty Burress in the
13 federal system.

14 But we also -- the observation was
15 made among ourselves that a lot of the
16 information that the probation officer has to
17 go out and gather in the civilian case is
18 already right at our fingertips in the
19 military, because we've already got a file on
20 the person.

21 So there might not be as extensive
22 an inquiry necessary, and it also depends on

1 how you structure the guidelines. If you're
2 going to build a system that counts up and
3 down and across a chart and all, then you need
4 a lot more granular information.

5 If you have a much, I'll call it
6 looser system of guidelines that says
7 basically, the range for this offense is two
8 years to ten years. It's a wide range and --

9 COL HENLEY: When do they prepare
10 that, sir? They prepare it after -- in the
11 federal system after there's a conviction.

12 MEMBER COOKE: After there's a
13 conviction. But as I say in the military,
14 you've already got most of that information
15 before you even start, and if -- it depends
16 how much other information you want to get as
17 to how much of it. I mean I think that's
18 part of the issue that somebody has to
19 address.

20 CHAIR HILLMAN: I'm torn about
21 that. I saw that, that response. But you
22 know, based on what we heard this morning

1 about you do an effective risk assessment, an
2 ad hoc assessment is worse than flipping a
3 coin. And I'm not sure that if we go based on
4 a military record without a rigorous
5 assessment by trained personnel --

6 MEMBER COOKE: Well, but the
7 federal system isn't doing a risk assessment.

8 CHAIR HILLMAN: No, but why would
9 we --

10 MEMBER COOKE: And that raises --
11 a risk assessment raises a number of other,
12 you know, this actuarial stuff raises a whole
13 other layer of due process issues and so forth
14 that -- that's another reason why we need to
15 kick this can down the road.

16 MEMBER JAUS: In New York, we
17 don't do such a big report like that. It's
18 called a probation report, a sentencing report
19 and they interview the defendant, the
20 defendant's family, the victim, et cetera.

21 It's not this gigantic risk
22 assessment, et cetera. It's just like a

1 background. It's not -- it's a few pages,
2 talking about whether the defendant was
3 sexually abused as a child, you know, this
4 type of thing.

5 MEMBER DUNN: All of which could
6 be done in the court sentencing process.

7 COL HENLEY: Is it an adversarial
8 process? I mean that's --

9 MEMBER JAUS: It's a report you
10 could -- the defendant obviously wants to be
11 interviewed and all his family members, et
12 cetera, and the victim can or doesn't have to
13 be interviewed if he or she doesn't want to.

14 MEMBER COOKE: Here again, we
15 don't have to decide this. I just think these
16 are the -- these are exactly the issues.

17 (Simultaneous speaking.)

18 COL HENLEY: But that's what I
19 thought Kelly was trying to articulate, some
20 advantages and disadvantages that this group,
21 whoever's --

22 LTC McGOVERN: Effectively, we'll

1 have to create and find a type of report and
2 --

3 MEMBER DUNN: Or a process. I
4 mean in the current sentencing process, the
5 accused generally gets up there and tells you
6 about his horrible childhood, and his mother
7 may come and cry and his wife is there, you
8 know, carrying on about the children. The
9 victim may speak and the prosecution may, you
10 know, call members of the command to talk
11 about the individual's contributions or
12 perhaps lack of thereof, you know. I mean the
13 defense counsel can call --

14 COL HENLEY: It's certainly a
15 contested phase.

16 MEMBER DUNN: You have their prior
17 criminal record admitted.

18 MEMBER BRYANT: We brought out
19 from the two men that were here from the
20 public defender's office. You don't have to
21 have a pre-sentence report to do the
22 guideline. The defense attorney and the

1 prosecutor can calculate them themselves
2 before you ever get to court.

3 That's why the plea agreement says
4 we recommend low end of the guidelines, the
5 mid-range of the guidelines or the upper range
6 of the guidelines they're going to plead
7 guilty, and I know what the guidelines are
8 going to be. The defense attorney knows what
9 they're going to be.

10 So this whole thing about having
11 to do a pre-sentence report with the
12 guidelines --

13 COL HENLEY: But it's not the plea
14 that I would be concerned with. It's the
15 contested case. The defense counsel is not
16 going to sit down with the prosecutor before
17 trial and work out sentencing guidelines in a
18 contested case.

19 MEMBER BRYANT: In the state
20 system, the defense attorneys go to classes on
21 how to calculate the guidelines. You get a
22 book and print it out. You know, it doesn't

1 take a rocket scientist to put it together and
2 know what the guidelines are.

3 MEMBER JAUS: If that's your job,
4 you do it all day long. You're negotiating
5 pleas. Okay. I think it's worth five, I
6 think it's worth three. Let's go one down,
7 let's go to probation.

8 CHAIR HILLMAN: But see one our
9 challenges is they don't do it all the time,
10 because the court-martial rate is low and
11 because there aren't very many of these cases,
12 and because they're spread out over a such a
13 scattered diaspora of --

14 MEMBER STRAND: And it could be
15 done in Iraq or Afghanistan or some other
16 place that we find ourselves in the world.
17 It's not just --

18 MEMBER BRYANT: Pull out the book
19 and you figure out what the guidelines are,
20 and I think significantly, the fact that you
21 don't have to have these pre-sentence reports
22 is that -- I can't even pronounce his last

1 name -- Jonathan from the Office of Policy and
2 Legislation, DOJ, told us that before
3 sentencing guidelines, 15 percent of all
4 federal cases were tried.

5 After sentencing guidelines,
6 they're down to two to three percent are
7 trials.

8 (Simultaneous speaking.)

9 MEMBER BRYANT: That's because --
10 that's because the defendants are no longer --
11 and their attorneys rolling dice on what the
12 sentence is going to be. They can say this is
13 the minimum, this is the maximum --

14 MEMBER STRAND: But the nature of
15 those cases aren't really good to contest.
16 They're immigration cases, they're fraud
17 cases. Those are open and shut to begin with.
18 The nature of sexual assaults is different.

19 MEMBER BRYANT: What do you mean
20 they're open and shut to begin with?

21 FEMALE PARTICIPANT: Meaning
22 they're paper cases.

1 MEMBER STRAND: They're paper
2 cases, right. They're not ones that they
3 would normally want to go to in front of a
4 jury. They're not going to want to roll the
5 dice.

6 But in a lot of our sexual assault
7 cases, like we've seen once we start
8 attaching, you know, sex offender
9 registration, we have a lot more contested
10 cases. When we have minimum sentences, we're
11 going to have more contested cases because
12 it's going to be worth the risk to go, because
13 they can go before that jury and possibly win
14 it, and not have to do anything.

15 CHAIR HILLMAN: Colonel.

16 MEMBER MORRIS: I'm trying to
17 think of what I'm reacting to. I think there
18 are a lot of assumptions knocking around this,
19 and maybe our job is just to lay out how big
20 a change it would be, and then evaluate
21 whether that change on balance is worth it.

22 The idea that we'd be down to one

1 percent contested cases, I'm not sure that's
2 given that that's good. The fact that you
3 have prosecutors sitting there thumbing
4 through the manuals together, you know,
5 picking something on the grid and then having
6 everything fit that.

7 Maybe in the real big picture is
8 good, if all these other things we think would
9 flow from it. It's a -- if it's an
10 unmistakable deterrence that over time is
11 calculated into a potential accused's head
12 decides, where this is not worth risking this
13 sort of crime.

14 But it is -- and just to say it's
15 a cultural change doesn't mean it's not a
16 change you should make, because maybe some
17 cultural changes need to be jolted by a
18 significant structure change.

19 But it's a huge change from the
20 idea that a soldier has a right to bring out
21 damn near anything he wants, to stick in front
22 of a bunch of fellow soldiers, to make the

1 case to decide that all this stuff that might
2 be peripheral.

3 It might be all this stuff you're
4 talking about, you know, the crying mom and
5 the thing that says he handed out water on the
6 rough march or whatever, has something to do
7 with something that somebody takes into
8 account in deciding how to dispose of him.

9 So there are so many variables out
10 there. In our short time, it would really be
11 malpractice, I think, to pick a side. But it
12 might be really useful to frame as many of
13 these things as we can, and look at it.

14 As you open one door, you move to
15 one measure the things you're -- of the doors
16 that you have to shut in the system, either in
17 terms of clemency, how robust the advocacy is
18 in trial, where you would find and enlist your
19 support, constraints it places on the
20 government as well.

21 COL HAM: Can I make a suggestion?
22 I mean you have a lot of that in the

1 transcript from the last meeting. If the
2 staff can go through and pull out all the pros
3 and cons as described by the witnesses, and
4 your discussion with them, that might
5 encapsulate most of what you're saying, or at
6 least spur your thoughts on what is left.
7 Would that be helpful?

8 LTC McGOVERN: I don't know,
9 because I left the last meeting thinking my
10 impression from the question and answer period
11 was that most of the members were against
12 sentencing guidelines.

13 But yet today, we have a different
14 sense amongst everyone. But we can certainly
15 do that, and we have other information too
16 that again, could be pulled out.

17 Like Rusty said, there's only 166
18 cases in the federal system last year, because
19 those are the ones that occurred on the Native
20 American Territories, that these sexual
21 assaults are mostly contested.

22 So again, you're not looking at

1 sentencing guidelines as much for those cases
2 in the federal system. So we can take a
3 closer look at what states have done, and oh
4 by the way, we can forward you a report from
5 the Sentencing Commission, in which they just
6 are now considering a new variation or a
7 deviant from the sentencing guidelines for
8 veterans suffering PTSD.

9 So again, this major factor that
10 plays into our court-martial are a reason to
11 not follow guidelines. So --

12 CHAIR HILLMAN: By all means, put
13 that in. That's great. I mean that's one of
14 those distinctions too.

15 MEMBER JAUS: Very much so.
16 There's a big difference than the civilian
17 system.

18 CHAIR HILLMAN: I don't think
19 we're actually saying that we think there
20 should be sentencing guidelines adopted.
21 We're saying the converse. We're not prepared
22 to recommend sentencing guidelines at this

1 point without more information, and we're
2 setting out the additional information that we
3 need.

4 And we recognize, along the lines
5 of what Colonel Morris just said, this would
6 be a major change in the system, because of
7 the way in which sentencing proceeds in the
8 military, as compared to civilian
9 jurisdictions. Then we set out the way that
10 sentencing works out.

11 I also think we should punt some
12 of this to the role of the Commander
13 Subcommittee, because the role of the
14 convening authority in sentencing is critical
15 to the changes that we're talking about
16 making.

17 That's the role of the Commander
18 Subcommittee, which is tasked with only one of
19 the 32,000 things we're supposed to do here,
20 as opposed to our 30,000.

21 They should look at should the
22 convening authority have a reduced role in

1 sentencing, apart from the changes already
2 made in the clemency proceedings under Article
3 60, right?

4 LTC McGOVERN: What -- I don't
5 know what they play in sentencing besides
6 clemency. Could it be a plea agreement?

7 FEMALE PARTICIPANT: Accepts the
8 plea agreement.

9 CHAIR HILLMAN: The plea
10 agreement, right, and the --

11 LTC McGOVERN: But don't you have
12 to make an agreement with somebody between the
13 parties?

14 CHAIR HILLMAN: Well, this is
15 their lack of a standing court. I mean it's
16 the -- the structure is just distinct, and I
17 think that the role of -- because this really
18 does belong to the convening authority's role
19 as the, you know, the watchmaker throughout
20 the process that's happening, they have
21 control from the start and then they have some
22 control at the end, and the plea agreement

1 isn't actually binding, because the convening
2 authority's --

3 Anyway, so it's just -- it's a
4 different process, and I think that we should
5 ask the role of the Commander Subcommittee, to
6 take that piece on for us.

7 MEMBER BRYANT: And I just want
8 to, you know, my point is not whether you
9 should say we're for them or against them, but
10 just so that we are fairly considering what it
11 does and does not mean.

12 When he said that trials were now
13 two to three percent, I don't think that he
14 necessarily meant, at least in my experience
15 with the U.S. Attorney's Office and having
16 been there, that doesn't mean there's plea
17 agreements in everything but in 97 or 98
18 percent of the cases.

19 It is they're pleading straight
20 up, because they know at the most, if the
21 judge follows the guidelines, and of course he
22 doesn't have to in the federal system, that's

1 what he's getting.

2 On the other hand, we heard from
3 the Virginia folks on the guidelines that a
4 little over one percent of all criminal cases,
5 and the state prosecutors are not doing major
6 fraud cases or certainly not doing immigration
7 cases and all this sort of thing.

8 This is pretty much hard line
9 criminal stuff. A little over one percent are
10 now jury trials. Why? Because the jury
11 before sentencing is now told the defendant's
12 criminal record. Now I understand that the
13 military people are not going to have prior
14 criminal records, for the most part.

15 But it had nothing -- it has
16 nothing to do with the fact they have
17 guidelines. It's they're not taking juries
18 because they don't want the jury to sentence
19 them after knowing all this bad stuff they've
20 done. So you can't say that guidelines have,
21 you know, taken away people in Virginia at
22 least, and I don't think it's fair to say --

1 I would be surprised if the recent
2 guidelines in the federal system after jury
3 trial or trials. He didn't even say jury
4 trials. Trials are now down to two to three
5 percent, which means most are pleading guilty.

6 So just so we, you know,
7 understanding what it does and doesn't mean.

8 LTC McGOVERN: What are your views
9 if -- to have panel sentencing versus judge
10 sentencing, in light of sentencing guidelines?
11 If you recommend sentencing guidelines, would
12 it be better than to have judge sentencing in
13 your opinion, or do you work it like Virginia,
14 where you could maintain --

15 MEMBER BRYANT: Well, if it's 1-2-
16 3 and Harvey Bryant gets to make all the
17 decisions?

18 LTC McGOVERN: Right.

19 MEMBER BRYANT: I would take
20 sentencing away from the panel and let that be
21 with the judge. Just guilt and innocence,
22 like it is in what do we say 45 states and the

1 federal system. The jury decides guilt or
2 innocence. The judge does the sentencing.

3 MEMBER JAUS: So does New York.
4 The jury does guilt or innocence; the judge
5 does the sentencing.

6 MEMBER BRYANT: Yeah, and then my
7 next choice would be okay, let's have
8 guidelines, and then I don't know, what is
9 number three. I forgot already.

10 MEMBER COOKE: I think certainly
11 if you decide you want to have a guideline
12 system, that raises a question about who
13 should do the sentencing in courts martial.
14 So that's another issue that we have to
15 consider.

16 CHAIR HILLMAN: Don't you think
17 it's triggered anyway? Don't you have some
18 question about whether or not we should have
19 panels?

20 MEMBER COOKE: Well perhaps, but
21 you know, since we're talking about guidelines
22 now.

1 LTC McGOVERN: And it goes back to
2 the disparity.

3 MEMBER COOKE: But to some extent,
4 it also depends on what kind of guideline
5 system you come up with. If you came up with
6 something like the federal system, it would
7 make virtually no sense to have military
8 juries do this. It would just be too
9 complicated for them.

10 If you had a very broad -- the
11 guideline for this offense is two years to ten
12 years, and there's several factors that you're
13 going to consider, well then members could
14 still do it. So it depends a lot on what kind
15 of a system you come up with.

16 Again, I don't think we're going
17 to answer that here. But I think those are
18 the kinds of questions we need to raise. If
19 you have a guideline system, what do you do
20 with the members?

21 LTC McGOVERN: If you had a
22 guideline system, would you then require to

1 break down the offense and the ranges for
2 those separate offenses? I think Colonel
3 Henley brought that up at the last session,
4 that that's an issue, right sir?

5 MEMBER COOKE: You'd have to have
6 some mechanism for, you know --

7 (Simultaneous speaking.)

8 MEMBER COOKE: --that were all two
9 to ten years, let's just to make it easy.
10 Then would your range be 10 to 50 years that
11 you'd tell them, or would there be some
12 concurrency in it? You know, we don't worry
13 about those things now, but that would be an
14 issue that would have to be addressed.

15 MEMBER BRYANT: Some crimes that
16 are going to be in the guidelines will be
17 zero, zero to six months.

18 MEMBER COOKE: Right.

19 MEMBER BRYANT: So the Judge can
20 give them probation, by following the
21 guidelines.

22 CHAIR HILLMAN: I want to throw

1 out that if we do -- given the breadth of
2 Article 120, as currently drafted, and the
3 serious -- the maximum punishment that's
4 available under it, guidelines would help, for
5 different offenses would help distinguish all
6 of the 120 offenses that right now some of the
7 military defense counsel and prosecutors who
8 came before us, who are critical of that
9 statute, it would actually help solve one of
10 the problems.

11 In addition, judge-only sentencing
12 would actually help solve one of the other
13 problems that we're seeing out there, that is
14 this idea that one drink equals an inability
15 to consent, and therefore we're kind of having
16 a hard time seating panels, because voir dire
17 eliminates so many who have had training on
18 sexual assault from being a part of the venue.

19 COL HAM: But that's for findings
20 portions. So you still have panels for
21 findings, right? I mean you still have that
22 same issue.

1 CHAIR HILLMAN: You would still
2 have that same issue, but the sentencing piece
3 of it just magnifies, I think, the consequence
4 of that. I mean you're right. It doesn't
5 solve the problem there. But that having a
6 judge make the decision on -- not on the
7 merits necessarily, but on the sentencing at
8 least reduces that -- the potential
9 consequence.

10 So I think we should lay those
11 things out. I don't think we should make a
12 strong recommendation on it. I don't think we
13 have time actually to fully investigate it.
14 But there really are arguments that are on
15 both sides here.

16 MEMBER STRAND: I like Colonel
17 Ham's idea, that if you can, you know, pull
18 out from the testimony and from our
19 discussion, you know, the pros and cons and
20 just kind of leave it at that. That way, it
21 just lays it out for somebody else to --

22 LTC McGOVERN: Those are Dillon's

1 yellow tabs.

2 MEMBER STRAND: Okay, good.

3 COL HAM: For mandatory minimums,
4 Chair Hillman, Mr. Taylor requested the panel
5 examine that before the NDAA. So there are
6 some mandatory minimums, and I throw to you --
7 it gives you an assessment mechanism with the
8 new ones as a potential area to discuss and
9 make recommendations in.

10 Whether you want to watch the
11 assessment of the current mandatory minimums,
12 whether you want to take a stand one way or
13 the other.

14 CHAIR HILLMAN: We can recommend
15 that. I'd be glad to.

16 MEMBER DUNN: I agree.

17 CHAIR HILLMAN: Because again, we
18 don't have enough time. We've been here for
19 an hour talking about something that we don't
20 even know if it's an issue.

21 MEMBER JAUS: If there is a
22 disparity. I agree. So --

1 CHAIR HILLMAN: Right. We don't
2 know.

3 LTC McGOVERN: Well again, if I
4 can just entertain you for a ten minute
5 discussion on mandatory minimum, what do you
6 see are the advantages or disadvantages? Do
7 you see increase in guilty pleas if there are
8 mandatory minimums, so that people can get
9 around those minimums?

10 That's certainly what we heard in
11 Philadelphia. What are the pros and cons that
12 you all see in mandatory minimums?

13 FEMALE PARTICIPANT: Mandatory
14 minimums don't apply in Pennsylvania if you
15 plead guilty.

16 LTC McGOVERN: Philadelphia, they
17 had the mandatory minimum. So if you're
18 negotiating a guilty plea, say you know if you
19 go to trial you're getting five years, but we
20 can negotiate around that and give you three.

21 MEMBER DUNN: They're permitted to
22 go below for a guilty plea?

1 COL HENLEY: So the mandatory
2 minimum is five --

3 LTC McGOVERN: The mandatory is
4 what she called it.

5 COL HENLEY: Mandatory minimum
6 would be five, but if you plead guilty, you
7 get three?

8 LTC McGOVERN: You can agree to
9 three.

10 FEMALE PARTICIPANT: So you could
11 drop down?

12 COL HENLEY: That's other
13 jurisdictions, from what I understood.

14 MEMBER DUNN: So you have a
15 penalty for exercising your right to a jury?

16 COL HENLEY: Yes.

17 FEMALE PARTICIPANT: You have an
18 incentive --

19 (Simultaneous speaking.)

20 MEMBER STRAND: We heard that at
21 our last committee meeting. We heard that,
22 you know. There's a tax.

1 COL HAM: No, it's a bonus for
2 pleading guilty.

3 MEMBER STRAND: A bonus for
4 pleading guilty.

5 COL HAM: A penalty for pleading
6 not guilty.

7 MEMBER STRAND: Right. There's a
8 bonus for pleading guilty. Plus you can also
9 plead to another offense to avoid that
10 mandatory minimum in some jurisdictions.

11 MEMBER JAUS: Right. You can go
12 down. Like in New York, if you're charged
13 with a Rape 1, you don't have to plead to the
14 Rape 1. You can go down.

15 MEMBER STRAND: It could just be
16 in the system.

17 MEMBER COOKE: Well, let's
18 distinguish. You can negotiate with a
19 prosecutor to basically plead to a lesser
20 offense, and then the mandatory minimum
21 doesn't apply then.

22 You're getting something else. Or

1 this sounds like though you can plead to the
2 offense as charged with the mandatory minimum,
3 and there's a --

4 LTC McGOVERN: That was my
5 understanding.

6 MEMBER COOKE: The military does
7 that. You can do that. It happens frequently
8 with premeditated murder. You can plead and
9 then the convening authority agrees to approve
10 70 years or 90 years, not the life sentence
11 that is actually adjudged. So it's not --

12 MALE PARTICIPANT: Under the new
13 clemency, under the new Article 60, whether
14 that would still work is --

15 MEMBER COOKE: Can't do yeah,
16 right.

17 COL HAM: Which the Services
18 predicted was going to -- again, this is a
19 prediction. You can assess it over time, but
20 why have a guilty plea in a murder case
21 anymore?

22 MEMBER COOKE: Right.

1 COL HAM: Mr. Strand, did you
2 remember? I thought in Philadelphia they also
3 talked about some real high mandatory minimums
4 for either a second offense started at 25 or
5 whatever. I thought she said that.

6 (Simultaneous speaking.)

7 MEMBER JAUS: We have that too,
8 yes.

9 COL HAM: That caused less guilty
10 pleas, that there were many more contested
11 trials with those higher ones.

12 MEMBER JAUS: Right, because it's
13 15 to life, yes. That's -- we had the same
14 thing in New York, second trial for an
15 offender.

16 MEMBER STRAND: Penalties were
17 very high for repeat offenders; second
18 offenses 25 year mandatory minimum; third
19 strike is mandatory life.

20 COL HAM: Yeah, and that those --

21 MEMBER STRAND: And that, yeah.

22 COL HAM: She thought those were a

1 bad idea because it caused more contested
2 trials, which caused ultimately more
3 acquittals, and of course the victim would
4 have to testify, whereas with a plea they
5 wouldn't.

6 MEMBER STRAND: Right.

7 MEMBER JAUS: I'd also like to say
8 that in New York, you're sentenced according
9 to your record. So even though the minimum
10 for Rape 1 is five years maximum of 25, if
11 you're a second felony offender or a second
12 violent felony offender, the minimum is ten
13 years.

14 So it goes up according to your
15 record, and of course, if you have two violent
16 felonies in your background, then you're going
17 for life.

18 CHAIR HILLMAN: Mr. Bryant.

19 MEMBER DUNN: But a lot of that
20 isn't relevant in the military because --

21 MEMBER JAUS: Right. That's not
22 one of your issues.

1 MEMBER DUNN: Right.

2 MEMBER STRAND: No, because we
3 have to kick them out now.

4 MEMBER BRYANT: It's the same law
5 somewhere that's saying we don't have all the
6 information we need for sentencing guidelines,
7 and saying -- suddenly saying yes, but we need
8 mandatory minimums because we really don't
9 know whether we do or not.

10 LTC McGOVERN: Well and again,
11 this is to lay out for the DoD general counsel
12 and Congress what are some of the issues that
13 will need further study, and I think we heard
14 a unique perspective from FAMM, that the
15 victim wouldn't want the personal
16 responsibility associated with the mandatory
17 minimum, knowing she was sending someone away
18 for five years.

19 Whereas other times, mandatory
20 minimums may benefit the victim if there's a
21 guilty plea and she doesn't have to testify at
22 all.

1 MEMBER JAUS: Or it takes the
2 thought out of her hands. So you say look,
3 we're going with first degree. The minimum
4 is five, the maximum is 25. It's up to the
5 judge or whatever it is. Then the victim,
6 it's not their responsibility anymore. That's
7 what the law says, and we can't go lower than
8 five. So sometimes it's very freeing for the
9 victim.

10 MEMBER COOKE: What the law says
11 and what the victim perceives, though,
12 sometimes is very different.

13 MEMBER BRYANT: I don't know about
14 your experience. But my experience is most
15 rape victims think five years is ridiculously
16 low.

17 MEMBER JAUS: I agree. I didn't
18 want to say it like that in front of
19 everybody, but I completely agree.

20 (Simultaneous speaking.)

21 LTC McGOVERN: It's a unique
22 military perspective, in that it was a

1 neighbor. She's friends with the wife and
2 knows the kids. It's a common military
3 community. The husband sexually assaulted her
4 and she doesn't want to hurt the family,
5 knowing that he would -- the whole family
6 would be put through that.

7 MEMBER BRYANT: It all depends on
8 where you put that mandatory minimum, because
9 they're the same -- the Virginia prosecutors
10 have the same problem. When they jacked it up
11 for your third offense child molesting, it's
12 life. It's mandatory life.

13 Well that means this six year-old
14 girl, if she's victim number three, is going
15 to have to testify, because who's going to
16 plead guilty to life? The only way they gave
17 prosecutors a way out of that, and you have to
18 allege that third offense in your indictment
19 to get the mandatory life.

20 So most prosecutors in Virginia
21 are not charging that mandatory life, because
22 that's an automatic trial. Who's going to

1 plead guilty? I mean who's going to, you
2 know, plead guilty? You know, you might as
3 well take your chance with a six year-old on
4 the stand.

5 So in that sense, if we're going
6 to recommend them, it's going to have -- I
7 don't know that we should be setting what
8 should be a mandatory minimum in this offense,
9 you know, the sexual assault or the rape
10 cases, and nowhere else in the UCMJ.

11 CHAIR HILLMAN: So the issue, I
12 mean we're flagging issues, right. We're not
13 going to recommend this. We're flagging this.

14 So and I think we should flag that
15 the military's strong sense of community and
16 connectedness among Service members has the
17 potential to make mandatory minimums a
18 deterrent to reporting, I think because
19 members of the same unit, even if they're not
20 members of the same family, feel the
21 consequence or the same community, neighbors
22 as you pointed out, feel -- are likely to feel

1 a stronger connection to their acquaintances,
2 who are part of the same institution than
3 individuals in a civilian community who don't
4 share that relationship.

5 MEMBER STRAND: And if they're
6 even in the same unit and they're, you know,
7 co-soldiers or co-airmen or something like
8 that, what they're doing to their -- to not
9 just that person but to their section, their
10 squad.

11 CHAIR HILLMAN: That's right, and
12 as we -- as the military undertakes this
13 campaign of education, to help raise awareness
14 of what constitutes a sexual assault,
15 including many incidents that previously
16 victims would themselves not have brought was
17 a sexual assault and weren't necessarily the
18 offender.

19 Then for victims to continue to
20 come forward, mandatory minimums raises a
21 higher barrier for that person to decide that
22 this really is wrongful enough that it's worth

1 prosecuting, with the harm being that serious
2 to the other offender.

3 Because so many of the cases that
4 we see in the military now are not the, you
5 know, super-violent sorts of cases that would
6 clearly want those sorts of very serious
7 penalties that you talk about so many victims
8 do want actually, but are instead something
9 less.

10 Therefore mandatory minimums, we
11 should just point out, given where the
12 military is in its big educational campaign
13 and with its demographics, pose real risks of
14 undermining the effort to encourage reporting,
15 which is the most important thing that we have
16 to get ahead of the problem.

17 CHAIR HILLMAN: Which we're
18 currently being very successful in. We're
19 seeing some great successes.

20 LTC McGOVERN: So I think that's a
21 good solution.

22 MEMBER COOKE: Another problem

1 with mandatory minimums is if you set them a
2 little bit too high, there's always going to
3 be the case where you say boy, that's just --
4 this person just doesn't deserve this. But if
5 you set them low enough to try to cover all
6 but the, you know, the really exceptional
7 cases, then you almost send a signal that's
8 too lenient, that you know, well this is only
9 -- if this is the mandatory minimum, then
10 yeah.

11 LTC McGOVERN: It's okay.

12 MEMBER COOKE: So that's my --

13 LTC McGOVERN: The political
14 pressure of sexual assault might not --

15 MEMBER COOKE: Well yeah. Well,
16 one of the problems with many of the mandatory
17 minimums in the federal system is that they
18 were knee-jerk reactions when Congress
19 perceived a problem, and they just sort of
20 threw it in there.

21 MALE PARTICIPANT: For drugs.

22 MEMBER COOKE: And one of the --

1 and as Rusty pointed out, they often ended up

2 --

3 (Simultaneous speaking.)

4 MEMBER COOKE: --out of kilter

5 with the guidelines, and the guidelines had to
6 be readjusted. You know, if this was worth
7 this, then well, we've got to adjust all these
8 things. So it kind of had a ripple effect
9 throughout the guidelines of ratcheting things
10 up.

11 You know, presumably or
12 theoretically at least, minimums could be
13 prescribed on a more rational basis. But you
14 still have that problem of where do you set
15 it, that leaves you the latitude to not really
16 screw somebody who just doesn't deserve it,
17 and yet doesn't set sort of the bar so low
18 that people look at that and say well geez.
19 If that's all a rape case is worth, they're
20 not very serious about it.

21 Whereas again, guidelines at least
22 have a little more flexibility, to send a

1 signal as to where the typical case belongs,
2 and give the court a little more latitude to
3 go higher or lower when they need to.

4 CHAIR HILLMAN: Do you have an
5 opinion on Congress versus the President?
6 That's something that Mr. Taylor said
7 specifically. I think it makes a difference
8 whether Congress or the President acts in this
9 way. Colonel Ham.

10 COL HAM: Well, that would mean --
11 I wouldn't express an opinion. But that would
12 mean by executive order or by statute. Of
13 course, executive orders, I think the typical
14 view, General Cooke and General Dunn would be
15 able to comment more, the typical perception
16 is that those are more easily amended, which
17 is good or bad, depending on how you look at
18 it, than statutes.

19 MEMBER COOKE: DoD has much more
20 influence over what the President's going to
21 do, than it does over what Congress is going
22 to do.

1 MEMBER DUNN: And it's good in the
2 sense that it's -- not that I in any way
3 approve of this path, but if issues arise,
4 like General Cooke just discussed, and which
5 the gentleman from the Federal Sentencing
6 Commission noted that there's legislation now
7 back in front of Congress to undo many of
8 those mandatory minimums because of the issues
9 that have arisen, that weren't thought through
10 in the beginning.

11 (Simultaneous speaking.)

12 MEMBER DUNN: It certainly gives
13 you a lot more flexibility.

14 COL HAM: The President
15 traditionally sets maximum punishments in the
16 military justice system.

17 MEMBER DUNN: Right, right, to
18 have him set --

19 MEMBER COOKE: Now, I don't know
20 if anybody's looked at -- I don't know that
21 the President has. I think there would be --
22 legislation would be necessary to give the

1 President the authority to set either minimums
2 or guidelines. There might be some latitude
3 for him to set out very loose guidelines in
4 the manual.

5 But I don't think he could
6 prescribe particular penalties. I think it
7 would add stability, but it would also -- or
8 add flexibility, but it would also take away
9 stability, and one of the things that we
10 probably need to consider in the long term,
11 you know, is do we want something certain for
12 a period of years, or do we want something
13 that's going to change perhaps with every
14 Presidency.

15 MEMBER DUNN: But executive
16 orders, they're not tossed around.

17 LTC McGOVERN: The JSC usually
18 thinks it through and gets a lot of input and
19 proposes that, versus --

20 MEMBER COOKE: Presidents have
21 been a lot less inclined to meddle than
22 Congress has, nevertheless.

1 LTC McGOVERN: Right. Congress
2 will be a bunch of staffers fighting over what
3 they think is politically correct.

4 CHAIR HILLMAN: And yet because if
5 there is an issue with respect to how
6 sentencing currently works out, the President
7 is the one who sets what we have right now,
8 which are just maximum punishments, and it
9 hasn't -- if we decide to recommend something
10 else, I'm not sure that the President is the
11 right -- that executive orders are the best
12 way to do it, in part because of the risk of
13 apparent capture by the Department of Defense
14 rather than an independent review.

15 That's really one of the tensions
16 that we have here. So Congress is
17 independent, perhaps rogue in this realm. Is
18 there something sort of in between? An
19 independent commission that could recommend
20 review?

21 I'd be really reluctant to set
22 something in stone for an extended period of

1 time, just because of our lack of
2 understanding of the problem, and the fact
3 that I don't -- I view our legal and social
4 responses to it as more dynamic, because we
5 don't yet understand the full range of the
6 problem.

7 Right now, the problem is 18 to 24
8 year-olds and alcohol, and that's sort of
9 what. But as that -- I don't know that that
10 will be the same at some point down the road,
11 as different education campaigns take hold and
12 attitudes shift.

13 MEMBER STRAND: And we start to
14 reduce some of those.

15 CHAIR HILLMAN: So anyway, I would
16 be reluctant to put things, and I would
17 consider whether -- the flexibility and the
18 ease of revision is definitely a plus for the
19 executive order route, and it's also
20 historically what has happened.

21 But that very same fact that if
22 we're actually going to say the system is not

1 working so well that we have right now, maybe
2 a different authority then to make the
3 decisions would be a good one.

4 I don't think Congress is the
5 right place to do that, because of the
6 difficulty of amending statutes. But maybe
7 something in between would be right.

8 FEMALE PARTICIPANT: Another
9 Commission.

10 MEMBER STRAND: Like an
11 independent commission?

12 CHAIR HILLMAN: Yeah, like a
13 sentencing commission.

14 (Simultaneous speaking.)

15 MEMBER STRAND: Could the current
16 clemency board within the military take on
17 that role?

18 MEMBER DUNN: No. They do, you
19 know, something that is so outside this
20 concept, I think.

21 MEMBER COOKE: But I mean I think
22 the whole question gets back again to if

1 you're talking guidelines, what structure are
2 you going to set up to try to develop these
3 guidelines?

4 I think we have to talk about how
5 the Sentencing Commission works and how
6 complicated that is, and whether anything like
7 that would be workable in the military, or
8 what alternative there might be.

9 That then gets to Colonel Ham's
10 question, like well who's -- under whose
11 authority is this done? Is it the President
12 or is it Congress and could the President --
13 can Congress and power of the President
14 establish some kind of a commission that would
15 consist of uniformed and perhaps non-uniformed
16 people, to meet periodically and review this
17 thing and create it? You know, there's all
18 kinds of things.

19 LTC McGOVERN: Do you have a
20 branch of the U.S. Sentencing Commission?

21 COL HAM: Would it be a federal
22 advisory committee as civilians?

1 (Laughter.)

2 MEMBER STRAND: If you had a
3 branch -- I think you'd need some military in
4 there, for the culture piece and for all the
5 complications that they may not consider, and
6 for the implications that they may not
7 consider if it's all the civilian.

8 COL HAM: Or we can have a
9 standing subcommittee of the JSC, but you'd
10 have to staff it.

11 MEMBER STRAND: You'd have to
12 create some mechanism --

13 (Simultaneous speaking.)

14 COL HAM: And you'd have to create
15 the data feed.

16 MEMBER DUNN: I mean if you read
17 that -- the justice who wrote that?

18 LTC McGOVERN: Human Rights Watch?

19 MEMBER DUNN: No, the justice.

20 MEMBER STRAND: Breyer.

21 MEMBER DUNN: Breyer, Breyer. If
22 you read Justice Breyer's, you know, article

1 on this, and you listen to what -- and read
2 what we submitted, the submissions we had in
3 the state of Virginia, I mean they created
4 data requests or data. They created the
5 apparatus to collect the data to feed their
6 constant decision-making. I mean that's a
7 huge structure.

8 LTC McGOVERN: I think we have
9 agreement on that.

10 CHAIR HILLMAN: I think we should
11 probably talk about clemency.

12 LTC McGOVERN: Clemency.

13 CHAIR HILLMAN: I have one
14 question for you, though, that I don't know
15 the answer to and I'm curious, and General
16 Dunn's comment reminded me of this. Can we
17 ask a sociologist/anthropologist about --
18 psychologist about the impact on sentencing of
19 the maximum punishment?

20 Is there -- I mean in other words
21 what we have -- we don't have an absence of
22 any guidance at all.

1 LTC McGOVERN: We have a guideline
2 zero to 25.

3 CHAIR HILLMAN: That's right. So
4 actually what's the effect of that? Like just
5 cognitively and on their decision-making
6 process. Somebody ought to know something
7 about that, what impact that has.

8 The other thing that I just want
9 to flag too is the lack of unanimity required
10 of our panels in the process. That seems --
11 it's worth noting, and I'd like to know what
12 the experts say about that on the -- in terms
13 of the outcomes, because it seems you're just
14 much more likely to get two-thirds than you
15 are to get unanimous, and that's something
16 that defense counsel we talked to were
17 certainly concerned about, and the prosecutors
18 were thrilled by, just to be clear.

19 MEMBER DUNN: Well, it keeps the
20 military justice system, you know, and it
21 allows the system to finish and move forward.

22 LTC McGOVERN: The two-thirds --

1 MEMBER DUNN: You have to have
2 three-quarters if you're having sentence
3 recommendations, and you have to have
4 unanimity.

5 LTC McGOVERN: That benefits the
6 prosecution, but the defense can plead guilty
7 and beat the deal. So there are things within
8 the system that work both ways.

9 MEMBER STRAND: There are
10 advantages to the defense as well, I mean to
11 the defendant, additional rights and
12 everything else.

13 COL HAM: Well, but I mean the
14 issue of if there's a disparity, you've heard
15 several witnesses, I think, say remember
16 you've got people who voted not guilty who now
17 have to sentence, and you have people who
18 voted guilty who now have to sentence if the
19 accused is found not guilty of a major
20 offense.

21 So there's all that at play in the
22 jury room, that we're not privy to that may

1 account. If there's a disparity, that
2 explains some of it.

3 MEMBER COOKE: Right. You know,
4 there's all kinds of studies on anchoring, you
5 know, and even a litigation with -- especially
6 in civil litigation with, you know, ranges of
7 possible verdicts and the amount and so forth,
8 and if you suggest a certain amount, then
9 people go higher than if they were suggested
10 this -- the case is worth this much.

11 That's bound -- I mean and it
12 appropriately should have an effect if you're
13 -- if as a judge, you're looking at an offense
14 that carries a five-year maximum, you're going
15 to sentence that guy differently than you
16 would with a case that has a 25 year maximum.
17 So there's, you know, there's an appropriate
18 role there to play.

19 CHAIR HILLMAN: There is. I just
20 -- when you say, you know, 20 -- when there
21 are high maximum punishments and there's just
22 that open range, you know, and everything --

1 there's an open universe of choices, I tend to
2 think it probably increases the arbitrariness
3 of the result, because there's a lack of
4 guidance and not meaningful markers that are
5 set out in between those extremes for serious
6 offenses.

7 This is a question that we can't
8 answer, unless we have info on sentencing
9 disparity. But I think that that's part of
10 answering the question about it. What's the
11 impact of the maximum punishment approach to
12 guiding decision-makers, whether it's the
13 military judge or the panel members making the
14 decision on sentencing?

15 All right, clemency. So what do
16 you want us to tell you about clemency.

17 LTC McGOVERN: You heard there's
18 really two to three types of clemency. One is
19 the convening authority has clemency powers,
20 as well as the Secretary through his boards
21 has clemency, and that relationship between
22 those two may change in light of the Article

1 60 changes. We might now see more from the
2 clemency and referral boards. That is an
3 unknown.

4 But what specifically, I think,
5 most relevantly, do you -- are the concerns of
6 the changes in the legislation with Article 60
7 that you heard from the Services, that stood
8 out to you as an issue, for convening
9 authority clemency?

10 MEMBER BRYANT: As a comparative
11 system, my first comment, Professor Hillman,
12 is as the Comparative Systems Subcommittee, I
13 don't recall that we've heard about anything
14 about how this happens in other systems. We
15 only heard the military.

16 LTC McGOVERN: But really isn't it
17 just that the governor grants a pardon?

18 MEMBER BRYANT: I think it's
19 generally the governor, but I don't know that
20 that's the way it is in all 50 states. I
21 think it's generally the governor and that's
22 it. At least that's the way it is in

1 Virginia.

2 LTC McGOVERN: That was part of
3 Congress' question.

4 MEMBER BRYANT: I mean there's two
5 processes. There's a restoration of rights,
6 which doesn't clear your record, but you get
7 your right to get a passport and to vote and
8 things like that. Then there's the whole
9 clemency thing.

10 LTC McGOVERN: So you want more
11 information on --

12 MEMBER BRYANT: No, no. I don't
13 want to hold things up, because I think we've
14 got -- we've got a ton of information on a lot
15 of things. But and I don't mean to hold
16 things up, because that will hold things up in
17 general. We can just assume maybe that it's
18 always the governor? I don't know how --
19 maybe that would be --

20 LTC McGOVERN: Well, and I think
21 that the --

22 MEMBER BRYANT: --available online

1 somewhere.

2 LTC McGOVERN: The tasking was
3 specifically whether the opportunities for
4 clemency in the military and should clemency
5 be saved until the end, after the appellate
6 process. Those were sort of the big things
7 that stood out in the tasking. So it wasn't
8 even necessarily comparing. It was just
9 assessing --

10 CHAIR HILLMAN: I think, though,
11 it's worth the starting point for analysis
12 being comparative systems. I still think
13 that's probably where we start, which is just
14 to say civilian courts, there isn't this
15 opportunity, because of the different
16 structure.

17 It allows us to hammer home the
18 fact that you're changing a system that really
19 is very distinct, and this is the distinction.
20 There's really executive clemency. It's
21 available --

22 MEMBER BRYANT: In the federal

1 system, exactly, and I'm going to assume that
2 in different states there will be a time
3 frame. You can't even apply for clemency
4 until you've done X number of percentage of
5 your sentence, or until you've done, you've
6 shown why you should now get clemency, as
7 opposed to I should have been convicted, which
8 is a whole 'nother story.

9 CHAIR HILLMAN: So your question
10 runs to should this be saved until after? So
11 let's address that piece of it, right, the
12 clemency part. Should it be -- should it
13 happen after the appellate process rather than
14 --

15 LTC McGOVERN: Should it go back
16 to the convening authority right?

17 MEMBER MORRIS: Should the
18 question then be are we making no other
19 changes, right? Obviously if you go -- or
20 maybe not obviously, but if you go to
21 sentencing guidelines, it would seem to me
22 then you can't have the same clemency

1 structure or you undermine those guidelines,
2 right? So we'd at least have to put that in
3 as an assumption --

4 (Simultaneous speaking.)

5 LTC McGOVERN: I do think this
6 legislation was made in a vacuum.

7 MEMBER DUNN: So the vast majority
8 of military cases, if you save clemency until
9 the end of the appellate process, it is
10 completely ineffective, because by then the
11 discharge is executed. Not the people who get
12 25 years, but the people who get five, four,
13 okay, which is most of them. The sentence has
14 been served, the discharge has been executed.

15 COL HENLEY: Well, would the
16 discharge have been executed prior to
17 completing appellate review?

18 MEMBER MORRIS: Discharge is not
19 the right term.

20 COL HENLEY: Yeah, but I certainly
21 --

22 MEMBER DUNN: Well, okay. Maybe I

1 shouldn't have said "discharge." The person
2 is -- they are out, living out in the civilian
3 community for the last six years or three
4 years.

5 (Simultaneous speaking.)

6 COL HENLEY: They no longer have
7 any ties to the military.

8 MEMBER DUNN: Right. There's no
9 ties to the military. I mean it's --

10 LTC McGOVERN: They don't have a
11 free defense counsel.

12 (Simultaneous speaking.)

13 COL HENLEY: Well, that's true.

14 MEMBER MORRIS: But now to answer
15 the core question of why is it in there to
16 begin with, is it mainly in there as -- in
17 other words, in the civilian world, clemency
18 has a different purpose, and therefore it is
19 obviously much later. A small number of cases
20 to correct for a person who is stuck in jail
21 and is truly innocent, otherwise to soften the
22 long-term impact of being a felon or whatever.

1 I mean our system, the immediacy
2 of it is one operational kind of a faded, but
3 I mean there's a theory that you could still
4 say I need you to go back to work, go back, or
5 to correct for a vague reason the system that
6 we kind of bear the risk of and assume a lot
7 of -- we indulge in a certain amount of
8 vagaries, right, the wide sentences, because
9 of all the stuff that we think is more
10 important.

11 Therefore, can the convening
12 authority do a short-term corrective when
13 things are way the hell out of whack, when the
14 guy who testified against him gets 25 years;
15 the other guys have seven years. Let's fix
16 that now. Or just some real big screw-up.

17 Instead of saying let's wait for
18 it to slog its way through the appellate
19 courts, fix that now, reduce that, you know,
20 from this charge to that charge, because the
21 evidence only supports that and that kind of
22 thing.

1 MEMBER DUNN: Or there's been, you
2 know, all the administrative post-trial
3 processing delays, for example, which the
4 convening authority can grant a small amount
5 of clemency to address those trial delays.

6 COL HAM: Well, I'm not sure he
7 can anymore. This task was priority before
8 the NDAA. But one thing to consider, ma'am,
9 is I think maybe where you were going. I mean
10 most of the clemency is in the forfeitures and
11 the trial area --

12 MEMBER DUNN: Right. It's in the
13 forfeitures to help the family.

14 COL HAM: --and that's not going
15 to do anything --

16 MEMBER DUNN: Right. It's the
17 forfeitures that helps the families; it's the
18 -- exactly. Forfeitures can be used to pay a
19 fine perhaps, and in the post-trial
20 processing, where on a 12-year sentence and
21 the post-trial processing has taken way too
22 long, the convening authority may grant 60

1 days of clemency, specifically because of the
2 trial processing delays which then --

3 COL HAM: I don't think you can do
4 that anymore.

5 MEMBER DUNN: Right, but could,
6 and then prevents that from being an appellate
7 issue, where the case could be dismissed.

8 MEMBER MORRIS: But of course he
9 can grant clemency for no -- it doesn't have
10 to --

11 MEMBER DUNN: Sure, yes, yes.

12 CHAIR HILLMAN: Not anymore.

13 MEMBER DUNN: Not anymore, right.

14 COL HAM: And so it's an open
15 question. I think you heard from the DoD
16 folks what happens with forfeitures, etcetera,
17 under the new Article 60. Does the convening
18 authority still have the right to grant that
19 kind of clemency, which -- it's not, doesn't
20 appear to be addressed by the language of the
21 statute.

22 But if assuming it is still

1 available, I mean it sounds like you've
2 reached -- it makes no sense to wait until the
3 end of --

4 MEMBER DUNN: Right, it does, yes.

5 MEMBER COOKE: I guess I'm
6 confused about what we're being asked now, in
7 light of the recent change. Are we being
8 asked to comment on that change, or are we
9 being asked what other changes might be made?

10 LTC McGOVERN: It was very
11 confusing in the tasking, because the
12 additional duty for us to look at clemency was
13 in the same legislation where they had just
14 changed Article 60.

15 So if you read the two together,
16 it's like why are you asking us if we should
17 save it to the end, when you just took this
18 power away from the convening authority?

19 So that's why we brought
20 the secretarial boards too, to say okay, we've
21 looked at every clemency opportunity, or you
22 all have looked at every clemency opportunity.

1 What is good about the system or what isn't,
2 and what is unknown at this time?

3 I think it's the only thing we can
4 say, because the legislation is --

5 MEMBER DUNN: Because you know
6 again, and I know I'm like a broken record on
7 this lack of data, but the legislation came
8 from a single action by a single individual.
9 I mean that's what spurred that legislation.
10 So again, has anybody looked across the board
11 at clemency granted by a general court-martial
12 convening authorities over the last five
13 years, and what types of cases and how much?

14 I'm sure that if you did, the
15 answer would be yes, we have this one case
16 over here and we have all these other little
17 cases over here, where you know, the convening
18 authority addressed sentence disparity from
19 three co-accuseds, who were engaged in the
20 exact same course of conduct.

21 Two of them got eight years and
22 one of them got 15 years, and so the convening

1 authority brought that one down to ten, you
2 know, forfeitures for families, you know, all
3 of that, that they normally address in that
4 process.

5 LTC McGOVERN: I guess all we can
6 do now is state in light of this current
7 legislation, the forfeitures at the time, when
8 Article 60 is currently available, your
9 recommendation would be that still be
10 available for families as a clemency measure?

11 MEMBER STRAND: Well, I don't want
12 to sound unpatriotic or unmilitary, but I'm
13 asking myself a broad question.

14 If I'm in Virginia and I get -- if
15 I get convicted of something, and they make me
16 make restitution. I don't get my job, so
17 therefore I don't have any money coming in.
18 My family suffers and everything else.

19 Do I have anything available to
20 help me, short of the appeals system and
21 executive clemency?

22 MEMBER BRYANT: No.

1 MEMBER STRAND: So if I'm in the
2 military, why am I different?

3 MEMBER DUNN: Because you're a
4 thousand miles away from home with two small
5 children and no job. You're not living
6 permanently in a location where you have some
7 sort of community support group.

8 MEMBER STRAND: Isn't the family
9 going to be moved back home?

10 MEMBER DUNN: No. I mean it's
11 gone. It's gone.

12 MEMBER STRAND: That's an
13 interesting anomaly though, because in the --
14 and I don't know about New York, but every
15 time I hear that, I start thinking this
16 doesn't happen in state courts. Nobody says
17 well because you have family and children and
18 medical benefits, we're not going to be really
19 bad to you.

20 It's just tough. You should have
21 thought of that as one of the consequences of
22 your actions.

1 (Simultaneous speaking.)

2 MEMBER DUNN: But it sort of --
3 but it's the worldwide movement. There's
4 military family that feeds into that.

5 MEMBER STRAND: Well I mean and
6 they're prosecuting all these people that the
7 base commander confirmed what I already knew
8 in town. Those families are often way away,
9 and when they go to the state penitentiary,
10 nobody says who's going to feed this family.

11 MEMBER JAUS: Well, they can get
12 public assistance, et cetera, Medicaid.

13 MEMBER STRAND: Well again, that's
14 why I don't -- I know we have this real zeal
15 to protect our families, to protect our
16 soldiers, to protect our way of life. I think
17 that comes from that. I have that same
18 feeling.

19 You know, we get it drilled into
20 us in the military.

21 MEMBER DUNN: It's not -- it's a
22 few months of, you know, essentially

1 transitional compensation without it being the
2 actual transitional compensation that goes
3 within families.

4 MEMBER STRAND: But that can be
5 part of the court-martial process and part of
6 the prosecution of the defense, saying well,
7 let's hold this back and let's do this.

8 MEMBER DUNN: Otherwise, your pay
9 stops the day you go to jail. So here you
10 are, you know, you're from, you know,
11 California. You're in Virginia, and your
12 husband is being court-martialed, and you
13 don't, you know, you don't know what's going
14 to happen. If he is convicted, he goes to
15 jail and pay stops. That's it.

16 MEMBER STRAND: But in the
17 civilian world, the pay stops when you get
18 thrown in jail.

19 MEMBER DUNN: But you're in your
20 community. But you're in your community,
21 though. That's completely different.

22 (Simultaneous speaking.)

1 CHAIR HILLMAN: I think given the
2 changes that Congress made, this change is
3 what happens for a 120 offense, as compared to
4 everything else, right, because there isn't --
5 the convening authority can't take any
6 clemency action if there's a 120 conviction.
7 Am I understanding that correctly? I think
8 that's what it is.

9 So I think what we have to reckon
10 with in part then, because this something --
11 do we want this additional punishment? I mean
12 this is -- this creates a separate system
13 which then affects -- we need to at least
14 point out that this affects the families of
15 Service members, which has been the reason for
16 this distinction. So we're deciding should we
17 not say consider rolling this back, because --

18 MEMBER COOKE: I don't know that
19 it's been the reason for the variation. I
20 mean I think this is -- I don't want to use
21 the -- I'll use the term. It's probably not
22 accurate.

1 It's almost an artifact of the
2 convening authority's original powers, where
3 the court-martial was a true creature of the
4 commander, and the commander had the power to
5 do whatever the commander wanted with the
6 results.

7 That power -- in the old days, the
8 commander could even send it back and say give
9 me more; you haven't punished this guy enough.
10 A lot of it was a reaction after World War II
11 to what was widely perceived as the draconian
12 sentences, and the fact that the system was
13 tilted heavily against the defendant.

14 So Congress built in a number of
15 protections and basically ratcheted a number
16 of them, so that they could only work to the
17 defendant's benefit. It couldn't work against
18 him, and the convening authority retained that
19 power to reduce a sentence.

20 That has continued even after
21 other changes in the UCMJ, as another
22 protection against a defendant being

1 steamrolled by the system or being treated
2 unfairly.

3 MEMBER STRAND: That's why I
4 wanted to be an angel's advocate. The devil
5 already has enough advocates. But we have to
6 articulate the reasons why this is different
7 and we need it different for our military, as
8 opposed to civilians. That's why I asked the
9 question, not to be, you know, mean or
10 anything.

11 Because I agree with you 100
12 percent on those things. But we have to be
13 able to articulate that in a meaningful way,
14 for civilians who are going to look at this,
15 like in Virginia or New York, and say well why
16 are we treating the military different than
17 John Q. Citizen or Jane Q. Citizen? So we've
18 got to be able to articulate why we want that.

19 CHAIR HILLMAN: Colonel Morris.

20 MEMBER MORRIS: The reason this
21 protect the family thing was done less than 20
22 years ago against the -- opposed by the

1 military.

2 It's from those Dayton Daily News
3 articles in the mid-90's, where people were
4 saying what the hell is this guy doing sitting
5 in jail, sucking down pay for years, which was
6 the policy at that time until you went to
7 appellate review.

8 So this was a compromise, to say
9 we at least need to be able to not just have
10 this abrupt impact on families, and then all
11 that super-structure of how to calculate it
12 out and all came as part of one of those NDAA-
13 driven changes.

14 MEMBER DUNN: Well then
15 immediately go to public assistance in the
16 state where they're located.

17 COL HENLEY: Does the NDAA address
18 whether -- or I guess does it prohibit an
19 accused from -- after sentence, going directly
20 to the Army Clemency and Parole Board or the
21 Service equivalents, and get immediate relief?
22 I know that the speaker did say it's their

1 practice not to address cases until appellate
2 review is stopped.

3 But would one of the consequences
4 of removing the convening authority from this
5 process be well then the various clemency and
6 parole boards should expect requests for
7 relief immediately upon, I guess --

8 MEMBER MORRIS: You can't go to
9 them until you have a final conviction now,
10 right?

11 LTC McGOVERN: Once you have a
12 conviction --

13 MEMBER DUNN: But they as a
14 practice.

15 LTC McGOVERN: But I mean for at
16 least that ABCMR, you can apply, saying that
17 there's been an error or injustice in my
18 records at any time, whether you're active
19 duty or out.

20 COL HENLEY: But would that
21 consider a draconian sentence?

22 MEMBER DUNN: Well, they said they

1 don't consider anything until after the
2 appellate.

3 (Simultaneous speaking.)

4 COL HAM: But in very high profile
5 -- Lieutenant Behenna, a very high profile
6 case, they did take action before the appeal
7 was over.

8 COL HENLEY: So there is an avenue
9 for an accused to seek relief. The convening
10 authority is removed from the process or the
11 case has not been on final review.

12 COL HAM: Well, appeals at that --
13 I'm sorry, it appears that that's something
14 you're supposed to consider, which is why we
15 thought you should hear from the Army Clemency
16 -- from the clemency and parole boards, that
17 that appeared to be encapsulated in your task.

18 MEMBER MORRIS: And is that
19 realistic and accessible in the same way the
20 current one is? So you have to just say you
21 have a theoretical opportunity there, but the
22 intent would be to --

1 (Simultaneous speaking.)

2 COL HENLEY: Well, who would do
3 it? Would it be your detail defense counsel?
4 I mean they wouldn't --

5 MEMBER MORRIS: That's my next
6 question, right.

7 COL HENLEY: You know, that he or
8 she has moved on to the next client.

9 MEMBER MORRIS: That would become
10 part of what the appellate counsel would do,
11 right. Whatever, you have to one way or the
12 other, and --

13 (Simultaneous speaking.)

14 LTC McGOVERN: But I do think it
15 would -- I mean it's a note that we could
16 place in the report, that Services may want to
17 look at the policies of the -- of reviewing
18 cases while they're on appeal, if they no
19 longer have this clemency opportunity through
20 the convening authority, if you would like
21 that in there.

22 MEMBER STRAND: Well what's the

1 likelihood of us changing Congress' mind on
2 doing away with Article 60 powers?

3 COL HAM: I see problems in the
4 legislation, you should point it out if you --

5 MEMBER BRYANT: I don't think I'm
6 concerned with that, whether they're changed
7 or not. It's just our recommendations.

8 MEMBER STRAND: Right.

9 CHAIR HILLMAN: Yes.

10 MEMBER BRYANT: Russ, I don't
11 think we should be concerned. I'm personally
12 not concerned whether we can change their
13 mind. If we can change their mind about
14 anything, we should be walking up there right
15 now.

16 But it's what our recommendations
17 are, whether they follow them or not after all
18 we've seen and heard. That matters to me. If
19 they say that's baloney, good-bye, thanks a
20 lot, then that's what happens.

21 MEMBER COOKE: You know, I think
22 it's fair to say that taking it away removes

1 an avenue to correct an error, a potential
2 error affecting a defendant. You know, it may
3 be an avenue that in the civilian life
4 defendants don't have or they don't have the
5 same thing.

6 Well, one problem you have in the
7 military is that after the trial, the judge
8 doesn't have the power to correct a lot of
9 errors.

10 So the case kind of goes to the
11 convening authority, and a convening
12 authority, you know, you could have, imagine
13 a case where the result is such that in that
14 -- at that installation, everybody's up in
15 arms, that boy, you know, Jones just got a raw
16 deal here and the convening authority's got to
17 deal with that and say, you know, I need to do
18 something.

19 You know, you lose that. Now is
20 that subject to potential abuse? Sure, and
21 that's where Congress has gone the other way
22 on it. But I think it's fair to say that

1 given the responsibilities that commanders
2 have, that's something that ought to be
3 considered.

4 COL HENLEY: Well, you could
5 certainly -- well, I don't know if -- you can
6 certainly do it. But if the convening
7 authority exercises clemency, can you write in
8 an amendment to 60 that a higher level
9 commander could override --

10 (Simultaneous speaking.)

11 MEMBER DUNN: The Secretary could
12 undo the clemency or --

13 COL HENLEY: Right. I mean I
14 think there's always a mechanism that you
15 could build in that addresses the immediate
16 clemency opportunity for an accused at the
17 ground level, and if it's General Franklin
18 part two, then a superior commander could step
19 in and say under these circumstances --

20 MEMBER STRAND: I'm pulling that.

21 COL HENLEY: Right. Clemency is
22 revoked or approved.

1 LTC McGOVERN: Do you think
2 defense counsel would have issue with that,
3 sir? I mean if they say Wilkerson is not
4 guilty anymore, but the higher commander says
5 no, I still think he is, you know, don't grant
6 him that clemency. I think due process rights
7 and defendant rights would be up in arms.

8 MEMBER DUNN: We could limit it to
9 sentencing, not to findings.

10 COL HENLEY: Yes, right.

11 MEMBER DUNN: You could limit it
12 to a sentence.

13 COL HENLEY: And you wait for the
14 appellate review to address --

15 (Simultaneous speaking.)

16 MEMBER DUNN: And all the
17 collateral -- of that finding.

18 COL HENLEY: Right, and you have
19 the normal appellate process to address the
20 actual conviction.

21 MEMBER DUNN: Right.

22 LTC McGOVERN: That recommendation

1 would be consistent with the approach to
2 retaining the convening authority, but
3 elevating the level of the convening authority
4 to control prosecution with these sorts of
5 cases. It would be the same thing.

6 Elevate the level at which
7 clemency could happen, and the problem is it's
8 an incompletely transformed system, where the
9 convening authority has control, to one that
10 has a standing court with a judge who has
11 continuous power from the start to the finish
12 here.

13 So we're taking the convening
14 authority out. We're moving it up out of
15 different parts of it, but we're not replacing
16 that authority with anything else. So I think
17 we should consider recommending that there be
18 an alternative.

19 I mean this is -- this is a
20 patchwork solution that the clemency and
21 parole board could do it, a military judge
22 could do it. I mean we just -- we're

1 tinkering with a system that's not the same as
2 the civilian parallel.

3 (Simultaneous speaking.)

4 COL HENLEY: What I said all
5 along. You have a judge who has a standing
6 court.

7 COL HAM: The judge does have the
8 authority to set aside offenses for legal
9 error. What he doesn't have the authority to
10 do is to grant clemency.

11 COL HENLEY: Correct. Would we
12 need a judge with standing -- a standing
13 court?

14 MEMBER DUNN: What we just said
15 here about maybe bifurcating the conviction
16 from the sentencing.

17 (Simultaneous speaking.)

18 MALE PARTICIPANT: Colonel Morris
19 would say no.

20 COL HENLEY: Colonel Henley would
21 say yes.

22 MEMBER DUNN: Where a convening

1 authority could grant clemency on the
2 sentence.

3 (Simultaneous speaking.)

4 MEMBER DUNN: But conviction,
5 that's for the appellate courts to decide.

6 LTC McGOVERN: That was
7 McCaskill's proposal, I believe, was --

8 MEMBER DUNN: Conviction, yes;
9 sentencing, no.

10 LTC McGOVERN: Correct.

11 MEMBER DUNN: I mean --

12 LTC McGOVERN: It was that cleaner
13 Article 60 amendment.

14 MEMBER DUNN: Right, right. You
15 may not overturn the conviction, because there
16 is an appellate process for that. You may
17 grant clemency. I'd vote for that.

18 CHAIR HILLMAN: Last words on
19 clemency?

20 LTC McGOVERN: So is your
21 recommendation that we should wait and see
22 what Article 60 holds, that if we do see that

1 there are potential issues or opportunities
2 when clemency may be appropriate? What's the
3 takeaway?

4 MEMBER DUNN: Well, I'd go one
5 step further and say the convening authority
6 should be able to grant clemency as it
7 pertains to the sentence, but not findings of
8 the court. There's an appellate -- there's an
9 appellate court process to address the
10 findings of the court.

11 You know, if you want to put left
12 and right limits on that, with clemency you
13 can do that.

14 COL HENLEY: And explain -- and
15 explain if clemency is granted, why? Right
16 now, there's really no -- you can do it. And
17 that's, I think, the transparency problem. If
18 they're forced to explain why, then I think
19 the public would maybe --

20 CHAIR HILLMAN: So let's -- shall
21 we endorse the change in Article 60 that
22 encourages transparency? That seems pretty

1 nominal really, right? That's in it. We can
2 say that will enhance confidence, potentially
3 increase reporting and legitimacy, one of the
4 issues here, and fairness itself.

5 So the transparency requirement is
6 an appropriate one. The restriction on the
7 clemency power, in these types of cases, based
8 on the sentence adjudged, poses some potential
9 difficulty, given the structure of the system,
10 and that I think we should raise.

11 Maybe the Clemency and Parole
12 Board ought to do this. The military judge
13 still has a role to play in some pieces of
14 this, but flag what those issues are, raising
15 the forfeiture issue, and articulating the
16 family piece of this, related to military-
17 specific jurisdiction as opposed to civilian
18 jurisdictions. That feels about -- does that
19 feel like what we can say?

20 MEMBER DUNN: Although I would go
21 one step further and just say, and make some
22 comment, pointing out that on the issue of the

1 conviction, there is an appellate process. On
2 the issue of clemency --

3 COL HAM: There may be an
4 appellate process.

5 MEMBER DUNN: Well, there may be
6 an appellate process.

7 COL HENLEY: Right. But the Army
8 court can always, they have the authority to
9 conduct a sentence appropriate --

10 (Simultaneous speaking.)

11 COL HAM: If it's within the
12 appellate court's jurisdiction. There may or
13 may not be that type of -- you also have heard
14 from Colonel Mulligan the issue. He was, I
15 think it's fair to say, advocating the issue
16 of retaining the authority of the convening
17 authority sometimes to overturn convictions
18 for the minor offenses.

19 Which is retained a little bit in
20 the amended version of Article 60. But his
21 example of the larceny, which would be more
22 than a very minor offense and the convening

1 authority overturned the conviction, when the
2 soldier said I'll do anything, you know, to
3 save my time in the Army and he redeployed,
4 and it was a success story.

5 So you've eliminated that, and
6 maybe that's a good thing. It sounded like in
7 Colonel Mulligan's view, that was not a good
8 thing.

9 CHAIR HILLMAN: I don't think
10 we're prepared collectively to take a stance
11 on that, you know, on the advocacy piece of
12 that, about what may be the consequences of
13 making that change. But --

14 LTC McGOVERN: There seems to be a
15 general unease with the current version of
16 Article 60.

17 MEMBER DUNN: Right, with the
18 change, I think because -- although we don't
19 have the data sitting here -- that everybody's
20 experience in the military is that generally
21 that is exercised with great care, and that
22 the legislation is a reaction to, you know,

1 one incident that created a huge and perfectly
2 understandable public outcry.

3 That in going where Congress has
4 gone with this now, the commander's authority
5 to correct many minor injustices --

6 CHAIR HILLMAN: But we don't have
7 a system that really should create many minor
8 injustices. I mean we have a robust, you
9 know, process with lots of protections
10 throughout, and we really shouldn't.

11 We shouldn't be in a position
12 anymore, where we've got weird things
13 happening that the convening authority has to
14 swoop in and fix at the end of the day.

15 MEMBER STRAND: Do you think the
16 public outcry would have been different if in
17 that particular case, the commander kept the
18 conviction but says I'm going to take away all
19 punishment and you stay in and serve your
20 career, and nothing's going to happen?

21 CHAIR HILLMAN: No.

22 MEMBER DUNN: It still would have

1 been a big uproar. I mean but --

2 MEMBER STRAND: Right. But see
3 that's -- what I'm asking then we're
4 differentiating between the giver of the
5 conviction or the sentence, does it really
6 matter?

7 MEMBER DUNN: No, but there is --
8 but the thing is, when we're talking about the
9 system and the process, that Professor Hillman
10 was addressing a few minutes ago, there is a
11 steady process forward for appeals, either
12 through the appellate system or I believe the
13 Judge Advocate General.

14 COL HENLEY: But that officer, and
15 I don't know his name, a lieutenant colonel,
16 said even if you set aside the sentence and
17 the conviction stands, I'm sure the Air Force
18 would have a show cause board or he would have
19 eventually been eliminated at some point.

20 MEMBER COOKE: You know, this gets
21 back to the other thing, the fixes we're
22 talking about making or possibly making in the

1 system. But you get a case, you get three co-
2 defendants or three defendants all charged
3 with, you know, participating in the same
4 event, an assault or something like that.

5 Each goes to a different military
6 panel, and you can get widely disparate
7 sentences for those three guys. The convening
8 authority looks at this and says you know,
9 I've got to even this up somehow. You know,
10 this guy shouldn't be way out here.

11 MEMBER JAUS: Is that common? I
12 mean how common is that?

13 MEMBER COOKE: Well, it's not --
14 it doesn't happen frequently, but it happens,
15 and because there would have to be three
16 different panels. You'd have to -- you know,
17 you couldn't -- it would be tried three
18 different ways.

19 (Simultaneous speaking.)

20 COL HENLEY: Remember, we had a
21 couple of cases at court where you had three
22 co-defendants. It was like 7, 9 and 15 years,

1 all different panels. I mean it was -- and
2 the convening authority exercised clemency and
3 I think came somewhere in the middle.

4 LTC McGOVERN: General Cooke,
5 you're saying that since there are no
6 sentencing guidelines, clemency was a
7 corrective measure or tool?

8 MEMBER COOKE: Well yes. Under
9 the current system it can be used --

10 LTC McGOVERN: To ensure there's
11 not sentencing disparity.

12 MEMBER COOKE: Right.

13 MALE PARTICIPANT: It is a tool.

14 CHAIR HILLMAN: But we need to
15 know that that gets exercised in a way that
16 corrects disparities, rather than --

17 (Simultaneous speaking.)

18 FEMALE PARTICIPANT: And I think
19 in light of the Wilkerson --

20 MEMBER DUNN: What have commanders
21 done in the Services, in terms of --

22 COL HAM: I actually think we

1 asked for that.

2 (Simultaneous speaking.)

3 COL HAM: The type of clemency of
4 overturning a conviction through Article 60.

5 LTC McGOVERN: Right.

6 COL HAM: I think we do have the
7 answer.

8 LTC McGOVERN: We do. In light of
9 the Wilkerson case, all of the Services had to
10 spend that particular --

11 MEMBER DUNN: Okay, and how many
12 other convictions had been overturned?

13 LTC McGOVERN: There were very,
14 very few.

15 CHAIR HILLMAN: Well no, but
16 sentences get changed all the time. I mean
17 that's not unusual. So there is -- and that's
18 actually what we're talking about with respect
19 to the disparity.

20 MEMBER DUNN: Yes, but not -- yes,
21 yes. But also not in the major -- but I mean
22 it really is, you know. This guy got eight

1 years, this guy got nine years, this guy got
2 15 and so the convening authority will look at
3 the 15.

4 COL HAM: And that's fairly rare.

5 MEMBER DUNN: No, it is fairly
6 rare, because --

7 COL HAM: In the last five years,
8 as a judge and defense counsel, so thousands
9 of records --

10 MEMBER DUNN: Right.

11 COL HAM: I understand it's still
12 anecdotal; it's not empirical and exact. But
13 clemency is exercised in several instances.
14 Forfeitures.

15 MEMBER DUNN: Right.

16 COL HAM: Post-trial delay and
17 major changes in the law that meant there was
18 legal error in the record that didn't exist
19 when there was a trial, and the case I'm
20 talking about is Fosler, which changed the
21 nature of how to charge Article 134 offenses.

22 MEMBER DUNN: Right.

1 COL HAM: Those are the three
2 major times. I know there's a person, Dean
3 Schenck had forwarded research. Someone doing
4 an LL.M. actually looked at all the records of
5 the court-martial convening boards, lists the
6 conviction and for what and when clemency was
7 granted, and it was in an incredibly low
8 number of cases.

9 Then once you removed the legal
10 error as a result of changes in the law, it
11 was -- I have the information somewhere. I
12 can find it and send it to you. But someone
13 has done a study, at least in the Army.
14 That's not going to answer the question for
15 everybody.

16 LTC McGOVERN: Once we build the
17 factual basis, we can bring that back to the
18 group at one of the March sessions, and
19 perhaps see if you can narrow down a finding
20 and a recommendation, if there's any
21 recommendation at all, as to Article 60. But
22 this does seem to be a gray area for the

1 subcommittee right now.

2 CHAIR HILLMAN: To be honest, it's
3 fine if it's a gray area. The Role of the
4 Commander Committee will also have some input
5 on this issue, and if we forward a
6 recommendation to the panel that raises the
7 issues that ought to be considered, I think
8 that's more than enough to do on this piece of
9 it.

10 MEMBER STRAND: Is there a list
11 being drawn up as far as findings and
12 recommendations, kind of an index or --

13 LTC McGOVERN: What you have for
14 the outlines for each. I believe Jan has
15 tried to pull out some of the findings and
16 recommendations for investigations. We'll
17 develop those. Once we have each
18 subcommittee's report or section of the
19 greater report, we do intend to have a table,
20 because most people won't read the report.

21 They want to go to a table that
22 will see findings and recommendations. At

1 least that's how they envision the greater
2 response systems panel.

3 COL HAM: It will be right in the
4 front. The executive summary, ex facto
5 findings and recommendations, full report and
6 then findings and recommendations.

7 MEMBER STRAND: The question I
8 asked, if they're being pulled out now for us.
9 So as we start our deliberations or continue
10 our deliberations next month, that we can
11 start, kind of see where these findings and
12 recommendations are, to see whether we should
13 add or take away or --

14 LTC McGOVERN: And that's such a
15 large task, because we have so many. That's
16 why we broke into the teams, is to help fine
17 tune those findings and recommendations, and
18 present them to the group for the group vote.

19 MEMBER STRAND: Okay.

20 CHAIR HILLMAN: I do think that it
21 means that we'll have to walk through -- I
22 think I will have to walk through some of our

1 deliberations, to try to make sure that we
2 actually -- that we get some of this, and
3 everybody's going to do this too. That is,
4 the staff who's actually writing this stuff,
5 drafting. It's going to do it too.

6 But I do think that we'll have to
7 look back at the pieces that are in our
8 section, to make sure that we're -- we are
9 accurately reporting what the outlines and the
10 consensus are in this. I think that's right.

11 Because the court reporters are
12 turning things around fast, this is actually
13 possible.

14 MEMBER STRAND: Did we give you
15 everything you needed Kelly?

16 LTC McGOVERN: Dillon? It's
17 actually Dillon.

18 MR. FISHMAN: I think we're all
19 right. We're on the right track.

20 CHAIR HILLMAN: All right. That's
21 not very resounding.

22 (Laughter.)

1 CHAIR HILLMAN: Okay. So I've
2 done -- I think we're -- are we wrapped up?

3 MEMBER JAUS: March Madness is
4 next week?

5 LTC McGOVERN: If I haven't
6 touched base with anyone, I haven't talked to
7 you, just to confirm your availabilities for
8 March 11th and 25th, I'd appreciate it.

9 CHAIR HILLMAN: Okay. Thanks
10 everybody for your work on this, hard work on
11 this.

12 (Whereupon, at 4:09 p.m., the
13 meeting was adjourned.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

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

Before: US DOD

Date: 02-25-14

Place: Arlington, VA

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
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Neal R Gross

Court Reporter

NEAL R. GROSS

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