

1 me to talk about this critically important
2 issue. First by way of introduction, I've
3 spent probably the last two and a half decades
4 doing research on case processing decisions in
5 sexual assault cases. Most, but not all of my
6 work has focused on prosecutorial charging
7 decisions in these cases, but I recently
8 completed a study for the National Institute
9 of Justice on policing and prosecuting
10 decisions in sexual assault cases in Los
11 Angeles County.

12 Before I begin, let me just say
13 that the title of my presentation is a little
14 bit of a misnomer. It indicates that I'm
15 going to be doing a statistical analysis of
16 waterfall slides. In reality, I do not have
17 the data that these slides were based on and
18 so my assessment is more of an assessment of
19 the slides themselves and not a statistical
20 analysis in the typical meaning of that term.

21 So I've been asked to review the
22 material prepared by the various branches of

1 the military service and to compare and
2 contrast outcomes in the military justice
3 system with those in the civilian justice
4 system. I'm going to begin my presentation by
5 talking about some of the challenges that are
6 inherent in making those comparisons and then
7 with these very important caveats in mind,
8 I'll talk about three outcomes, unfounding
9 prosecution and conviction.

10 So one of the challenges and we've
11 already heard some about this today and
12 yesterday, is that the definitions that
13 civilian law enforcement agencies use and
14 those used by the Department of Defense are
15 different. For most of its existence, the
16 Uniform Crime Reporting Program used the
17 definition of forcible rape that was very
18 similar to the pre-2007 definition used by the
19 Department of Defense, that is carnal
20 knowledge of a female forcibly and against her
21 will. This definition which was changed by
22 Attorney General Holder in January of 2012,

1 did not include oral copulation, sodomy,
2 penetration with an object, offenses against
3 men or female on female offenses. And all of
4 that changed then with the change in the
5 definition that was implemented, as I said, in
6 2012.

7 The problem with making
8 comparisons across civilian and military
9 jurisdictions is that the Department of
10 Justice uses a much more all-encompassing term
11 that is sexual assault that as we just heard
12 from the presenter this morning encompasses a
13 range of sexual offenses prohibited by our
14 Article 20 and it includes both penetration
15 and contact offenses. And what this means, of
16 course, is that comparing numbers across these
17 two systems and more importantly comparing
18 changes over time is difficult and the results
19 of those comparisons may be misleading.

20 Another difference and a challenge
21 is that the data that was presented in the
22 waterfall slides includes both the restricted

1 and the unrestricted reports and that causes
2 some challenges in terms of knowing what the
3 denominator of these rates should be and I'll
4 talk about that in a moment.

5 A third challenge is, as you know,
6 that jurisdictional issues limit the cases
7 that can be investigated by the military
8 services and it's limited to service members
9 who are subject to the Uniform Code of
10 Military Justice. The civilian authorities
11 can also prosecute service members if they
12 commit an offense within the jurisdiction of
13 the municipality or county or state and the
14 military cannot take the case away.

15 Again, this complicates the
16 situation in that data for the military
17 services, but not data for civilian
18 authorities must account for cases that fall
19 outside the jurisdiction of the military
20 services. Although there may be some cases
21 that are reported to civilian authorities that
22 involve crimes that are committed outside the

1 jurisdiction of that agency, these cases are
2 rare. When this occurs, typically the law
3 enforcement agency to whom the report was made
4 will unfound the report and refer the case to
5 the appropriate jurisdiction. As I said,
6 however, these kinds of cases are rare. And
7 in contrast in Fiscal Year 2012, cases that
8 fell outside the jurisdiction of the military
9 services accounted for 16 percent of all
10 unrestricted reports of sexual assaults.

11 In addition, the military services
12 data is much more comprehensive than the
13 civilian data. The military services have
14 detailed data on outcomes of allegations for
15 each of the military services and by contrast
16 there is no national data on outcomes of
17 civilian cases that resulted in an arrest.
18 The national data we do have are on offenses
19 known to the police and on cases that were
20 cleared by the police. And that clearance
21 category has its own problems.

22 This is complicated, however, by

1 the fact that the military services use
2 different definitions of outcomes, especially
3 unfounding, and they calculate prosecution and
4 conviction rates differently as we just saw in
5 the presentation just prior to this. So
6 again, this raises issues about trying to make
7 comparisons, not only between the civilian and
8 the military systems, but among the different
9 military services and so I'll have a
10 recommendation at the end of my presentation
11 regarding this.

12 Another challenge that I
13 encountered in trying to make some sense out
14 of all of this data is that the outcomes are
15 not directly comparable. If we look at the
16 Uniform Crime Reporting Program, we know that
17 the FBI does not distinguish between offenses
18 that are cleared by arrests and offenses that
19 are cleared by exceptional means. And so --
20 and I can talk about the difference between
21 those categories if you would like, but what
22 this means basically is that clearance rates

1 are not the same as arrest rates. Although
2 they are sometimes interpreted the same, they
3 do not mean the same thing.

4 And by contrast, the military
5 services report the results of subjects who
6 were investigated for sexual assault, who were
7 service members under the authority of the
8 Department of Justice. And each agency
9 provides the ultimate disposition of each case
10 as they just referred to it as the bin in
11 which each case falls and the action, if any,
12 that was taken against each subject.

13 Let's start with the decision to
14 unfound the case. One of the most important
15 and highlighted criticized decisions made by
16 law enforcement officials is the decision
17 whether to unfound the crime or the charges.
18 In the civilian system, if the official
19 investigating the crime determines -- believes
20 the victim's account of what happened and
21 determines that the incident constitutes a
22 crime, the case becomes one of the offenses

1 known to the police that will be included in
2 the jurisdiction's crime statistics and
3 reported to the Uniform Crime Reporting
4 Program. If on the other hand the officer
5 does not believe the victim's story and
6 therefore concludes that a crime did not
7 occur, the case is unfounded.

8 Now in the civilian system,
9 technically cases can be unfounded only if the
10 police determine following an investigation
11 that a crime did not occur. In reality, we
12 know that the unbounding decision is used in
13 different ways and it's interpreted in
14 different ways by different law enforcement
15 agencies. Research has documented that
16 unbounding can be used to clear or in the
17 words of one researcher, erase cases in which
18 the police are convinced that a crime did
19 occur, but also believe that the likelihood of
20 conviction and prosecution is low.

21 This was apparently the case in
22 Baltimore in 2010. The Baltimore Sun reported

1 that about a third of all rape cases were
2 unfounded by the Baltimore Police Department.
3 They have since changed their unfounding
4 policies and procedures and I believe that
5 their unfounding rate is now down to about
6 nine percent. So the FBI guidelines on
7 clearing cases for Uniform Crime Reporting
8 purposes state that a case can be unfounded
9 only if it is determined through an
10 investigation to be false or baseless.

11 The handbook also stresses that
12 police are not to unfound a case simply
13 because the complainant refuses to prosecute
14 or they are unable to make an arrest.
15 Similarly, the International Association of
16 Chiefs of Police on investigating sexual
17 assault cases states that "the determination
18 that a report of sexual assault is false can
19 be made only if the evidence establishes that
20 no crime was committed or attempted and that
21 this determination can be made only after a
22 thorough investigation." Both the Uniform

1 Crime Report's handbook and the IACP policies
2 and procedures guidelines, in other words,
3 stress that unfounding is possible only after
4 the police have conducted a thorough
5 investigation and they must conclude that a
6 crime did not occur.

7 The baseless category is a little
8 bit -- it's not the same as a false report.
9 An example of a baseless complaint would be a
10 situation in which a victim is perhaps
11 unconscious as a result of drinking too much
12 and wakes up in somebody else's bed and
13 suspects that something happened to her, but
14 isn't sure. She reports the crime to the
15 police and the forensic medical exam reveals
16 that there's no evidence that a sexual assault
17 did, in fact, occur. This case would be
18 baseless, but not false in the sense that it
19 was not deliberately fabricated.

20 The problem, of course, is that
21 these are decisions made by individual law
22 enforcement agencies which may not interpret

1 the FBI guidelines in the same way. For
2 example, in the study that I recently
3 conducted in Los Angeles, we found that the
4 Los Angeles Police Department generally was
5 making unfounding decisions that were
6 consistent with the FBI guidelines. By
7 contrast, the detectives with the Los Angeles
8 County Sheriff's Department unfounded very few
9 cases, about one percent of their cases. If
10 they believe that the allegations were false,
11 many of the detectives in the Sheriff's
12 Department cleared the case by exceptional
13 means which is a misuse of the exceptional
14 clearance.

15 So in contrast, the Department of
16 Defense Annual Report on Sexual Assault in the
17 Military defines unfounding in the following
18 way. "When an MCIO makes a determination that
19 available evidence indicates the individual
20 accused of sexual assault did not commit the
21 offense or the offense was improperly reported
22 or recorded as a sexual assault, the

1 allegations against the subject are considered
2 to be unfounded." Although the report also
3 refers to allegations that are false or
4 baseless, there are subtle differences in the
5 definitions that the two systems use in
6 defining unfounding.

7 Another difference is that the
8 decision to unfound the crime is made by the
9 police in the civilian system and it is made
10 either by prosecutors in the case of the Army
11 or by commanders in the case of the other
12 military services. And so not only are the
13 definitions of unfounding different, but the
14 procedures that are used to unfound cases are
15 different as well.

16 So it appears from the data and
17 the accompanying material that I was provided
18 with that both the definitions of unfounding
19 and the procedures by which cases are
20 unfounded vary among the military services and
21 I think we just saw evidence of that in the
22 presentations that preceded mine. In the

1 Army, the decision to unfound is not made by
2 commanders, but by the prosecutor and only
3 cases that are deemed to be founded are
4 presented to commanders to investigate.

5 Moreover, in the Army, founding is a probable
6 cause determination, not a determination that
7 the case is false or baseless. The Air Force

8 and the other agencies, the determinations
9 that cases are to be unfounded are made by

10 commanders, but the definitions of what
11 constitutes unbounding differs somewhat. The

12 Air Force follows the UCR guidelines in
13 referencing cases that are false or baseless.

14 The Coast Guard categorizes cases as unfounded
15 if the investigation revealed that the entire

16 allegation was fabricated which would seem to
17 leave out those baseless complaints. And then

18 both the Navy and the Marine Corps simply, at
19 least in the materials that I was presented,

20 simply use the term unfounded without really
21 defining it.

22 Again, this makes comparing

1 statistics --

2 MEMBER HOLTZMAN: Excuse me,
3 perhaps I misunderstood the testimony, but you
4 say here that in the Army the decision to
5 unfound is made by the prosecutor. It was my
6 understanding from the prior testimony that it
7 was made by the investigative agencies.

8 DR. SPOHN: No.

9 MEMBER HOLTZMAN: Okay.

10 DR. SPOHN: No, their first slide
11 indicated that founding is a probable cause
12 determination made by the prosecutor.

13 MEMBER HOLTZMAN: I thought it was
14 by the CID.

15 MEMBER McGUIRE: The CID -- they
16 work together.

17 MEMBER HOLTZMAN: Okay.

18 DR. SPOHN: So again, this makes
19 comparing data on unbounding across the
20 military services problematic if they're using
21 different definitions and different
22 procedures. But in reality, it's not unlike

1 the civilian system where in reality the
2 different law enforcement agencies also may be
3 using somewhat different interpretations of
4 the Uniform Crime Reporting Guidelines with
5 respect to unfounding.

6 So let's look at some statistics
7 on unfounding in the civilian system. And
8 again, this is problematic in that the Uniform
9 Crime Reports includes data on offenses known
10 to the police. Cases that are unfounded are
11 not included in these statistics. However, in
12 the 1990s, we do have data from the FBI in
13 which they estimated that about eight percent
14 of all rape complaints were unfounded.

15 The study that Katharine Tellis
16 and I conducted in Los Angeles found a fairly
17 similar rate in that 10.9 percent of the cases
18 reported to the LAPD over a 5-year period were
19 unfounded. And this rate varied a bit
20 depending upon whether the case involves
21 strangers or non-strangers. It was somewhat
22 higher in cases involving strangers than those

1 involving non-strangers.

2 What we lack to some extent is
3 solid data on false allegations of rape. Kim
4 Lonsway referred to this yesterday as the
5 elephant in the living room. We know from
6 research that's been conducted that the
7 estimates range from a low of two percent to
8 highs of 30 or 40 percent or higher. Noting
9 that those who work in the field of sexual
10 violence are continually asked to comment on
11 the rate of false reports of rape, Lonsway
12 stated in 2010 that recent research findings
13 from methodologically rigorous research that
14 uses appropriate definitions of false
15 reporting finds that the rates are within
16 about two to eight percent within that general
17 range.

18 Again, the study that I conducted
19 in Los Angeles, we reviewed the cases that
20 were unfounded by the Los Angeles Police
21 Department in 2008. We found that most, but
22 not all of these cases were, in fact, false or

1 baseless and we estimated the proportion of
2 false reports in Los Angeles to be 4.5 percent
3 of all the sexual assaults that were reported
4 to the LAPD in 2008. So this is consistent
5 with that two to eight percent range that is
6 found in other research.

7 So in calculating the rate of
8 unbounding the military, one must first
9 determine what the denominator should be.
10 Should it be the total number of allegations
11 in any particular year, the total number of
12 allegations investigated in a particular year
13 that had a disposition by the end of that
14 year, or the total number of allegations that
15 had a disposition in a particular year and
16 also involved the subject who fell within the
17 Department of Defense legal authority?

18 If we use the latter as the
19 denominator, as the appropriate denominator
20 for calculating the rate of unbounding, there
21 were 594 subjects, excuse me, there were 2,661
22 subjects of investigation with a disposition

1 by the end of Fiscal Year 2012. If we
2 subtract from that the 594, who were subjects
3 outside the Department of Defense's legal
4 authority, this yields 2,067 subjects. Three
5 hundred six-three or 17.6 percent involved
6 allegations that were unfounded by MCIO and
7 therefore no action was taken against the
8 subject. And an additional 81 or 4.8 percent
9 involved allegations that were unfounded by
10 commanders. Thus, the overall unfounding rate
11 for the Department of Defense was 22.4
12 percent.

13 This is substantially higher than
14 the eight percent rate reported by the FBI for
15 forcible rape during the 1990s, but we have to
16 keep in mind that the term sexual assault as
17 used by the military includes offenses other
18 than forcible rape. Thus, the rates are not
19 directly comparable since they do include
20 these touching offenses as well as the
21 penetration offenses.

22 So moving on to the different

1 military services and again, this was
2 challenging trying to come up with a
3 consistent way of thinking about unfounding.
4 In the material that was provided to me, each
5 agency did calculate an unfounding rate, but
6 they also included in their bins cases in
7 which there was insufficient evidence of any
8 offense to prosecute which raises the question
9 of whether these are also cases that should
10 have been, could have been unfounded.

11 Nonetheless, starting with the
12 Army, we can see that of the 476 completed
13 rape investigations in Fiscal Year 2010, 25
14 percent were unfounded. Now this rate is
15 high, but we have to keep in mind that this is
16 not a determination that the allegations are
17 false or baseless. This is a determination
18 that there was not probable cause to move
19 forward in the case. And so it's not
20 surprising then that this rate is higher
21 because the definition of unfounding is
22 different. There were an additional 30 cases

1 in which there was insufficient evidence of
2 any offense to prosecute.

3 For the Air Force, there were 177
4 cases that were presented to commanders for
5 action and 11 or 6.2 percent of these were
6 unfounded. And there were an additional 32
7 cases where there was insufficient evidence of
8 any offense.

9 For the Coast Guard, there were 69
10 completed investigations in 2012 in which
11 command action was possible. There were no
12 cases in which the investigation revealed that
13 the allegations were fabricated. But again,
14 there were 22 cases that were not pursued due
15 to insufficient evidence and the Coast Report
16 indicates that this also includes cases that
17 may have been fabricated which suggests that
18 there was not a thorough investigation that
19 determined whether the cases were, in fact,
20 fabricated. But again, that's not at all
21 clear.

22 So for the Marine Corps, again,

1 there were no cases in which the allegations
2 were unfounded. But there were 41 subjects in
3 which action was not taken due to insufficient
4 evidence of any offense and 21 subjects in
5 which action was declined by the commander and
6 no reason was given on the chart for that
7 declination. So it's not clear why action was
8 not taken in those cases.

9 And finally, with the Navy, there
10 were 377 subjects who were presented -- in
11 cases presented to commanders for action. And
12 13 percent were subjects in cases that were
13 unfounded by command. And there was an
14 additional 84 subjects in which action was not
15 taken due to insufficient evidence of any
16 offense.

17 So what can we make of these
18 statistics given that the civilian and the
19 military systems include different offenses,
20 forcible rape versus the broader category of
21 sexual assault, define unfounding in different
22 ways, and have different policies and

1 procedures for making unfounding decisions.

2 If we look at the overall rate for
3 the Department of Defense, it appears to be
4 substantially higher than the rate for the
5 civilian justice system, but again the
6 nationwide data we have are not current.
7 These are data from the 1990s and the
8 definition of sexual assault is broader than
9 the definition of forcible rate used by the
10 FBI and by Dr. Tellis and myself in our study
11 in Los Angeles.

12 I also am not sure what
13 conclusions we can draw based on the fact that
14 the rates for the various military services
15 range from zero to -- for the Coast Guard and
16 the Marine Corps, to 25 percent for the Army.
17 Both the Army and to a lesser extent the Navy,
18 have substantially higher rates than the other
19 military services. I think the high rate for
20 the Army can be explained by the fact that
21 it's -- the definition of unfounding is very
22 different and I'm not quite sure how one would

1 explain the higher rate for the Navy.

2 Finally, it's not clear to me
3 whether cases in which the commander took no
4 action because there was insufficient evidence
5 of any crime whether these cases should or
6 should not be included in the unfounding rates
7 and I think that's an empirical question. Are
8 these cases that were, in fact, false or
9 baseless or are these cases different in some
10 way? Are these more the probable cause types
11 of cases that are included in the Army's rate
12 of 25 percent?

13 So moving on to the rates of
14 prosecution, again, we encounter a problem
15 with respect to the appropriate denominator
16 for calculating these rates. This is true of
17 both systems, but I think it's particularly
18 true of the military where we could calculate
19 prosecution rates based on all unrestricted
20 reports, all reports involving cases that were
21 presented to commanders for action, or only
22 reports in which the evidence supported

1 command action for sexual assault.

2 And just to illustrate, if we take
3 the data that were provided by the Air Force,
4 if we divide preferred cases, that is cases
5 that were submitted or preferred for court
6 martial and we divide those by all
7 unrestricted reports, we would get a
8 prosecution rate of 10.5 percent. And this
9 would be analogous to taking cases that were
10 reported to a law enforcement agency and then
11 dividing that by cases in which prosecutors
12 filed charges. And obviously, that's not the
13 appropriate way to do it because prosecutors
14 can't file charges if an arrest is not made.

15 A second way would be to divide
16 preferred cases by reports that were presented
17 to command for some type of action. In doing
18 this, we come up with a prosecution rate of
19 23.7 percent. And it seems to me that this is
20 probably the most analogous denominator to use
21 with respect to the way that prosecution rates
22 are calculated in the civilian justice system

1 which I'll talk about in a minute.

2 A third way which I think again is
3 probably not the appropriate way to think
4 about prosecution rates is to divide reports
5 with evidence, excuse me, divide preferred
6 cases by reports with evidence that supported
7 command action for sexual assault. And doing
8 that would yield a prosecution of 75 percent.
9 So again, depending upon the denominator, the
10 conclusion that one would reach with respect
11 to the prosecution rate would be very
12 different.

13 So there are similar problems with
14 calculating prosecution rates for the civilian
15 justice system. Do we determine the odds of
16 prosecution based on all cases reported? I
17 think most prosecutors would say no. On all
18 cases that were closed or cleared? Again, I
19 think most prosecutors would say no because
20 this would include cases that were cleared by
21 exceptional means which may or may not have
22 been presented to the prosecutor for a

1 charging decision. All cases that resulted in
2 an arrest? This is the denominator that is
3 typically used by researchers? Or all cases
4 screened by the prosecutor before or after an
5 arrest or all cases screened by the prosecutor
6 only after an arrest was made.

7 And again, depending upon how we
8 calculate the prosecution rate, you can see
9 that the odds of prosecution would vary pretty
10 dramatically. I'm using the data from the Los
11 Angeles Police Department from 2005 to 2009
12 and these are all rapes and attempted rapes.
13 There were 5,031 during that 5-year time
14 period. If we calculate prosecution based on
15 reports, we come up with a prosecution rate of
16 9.7 percent. If we calculate it based on all
17 closed cases, the rate of prosecution would be
18 just over 20 percent. But if we use the more
19 appropriate charges filed by all cases
20 screened after arrest, we come up with a
21 prosecution rate of 82.2 percent. This figure
22 is a little bit misleading for Los Angeles

1 because as we discovered in doing our study
2 there, detectives from both the Police
3 Department and the Sheriff's Department
4 present cases to the prosecutor before an
5 arrest is made and the prosecutors make
6 charging decisions in those cases. And so the
7 data that we had from 2005 to 2009 did not
8 allow us to determine the cases that were
9 screened by the prosecutor before an arrest
10 was made. But I'll come back to that data in
11 a minute.

12 So if we assume that the
13 appropriate denominator for calculating the
14 prosecution rate is the total number of
15 subjects who can be considered for possible
16 Department of Defense action during a
17 particular fiscal year, for 2012, that number
18 was 1,714. However, even making this
19 assumption does not eliminate the challenge of
20 determining the prosecution rate as there are
21 different ways of calculating the rate,
22 depending upon how the numerator is defined.

1 If we consider only cases in which
2 court martial charges for sexual assault were
3 initiated, and this again is data for the
4 Department of Defense in 2012, we find that
5 there were 594 cases which yields a
6 prosecution rate of 34.7 percent. If on the
7 other hand our numerator is court martial
8 charges for any offense initiated, the
9 prosecution rate increases somewhat to 36.8
10 percent. If we consider only sexual assault
11 charges that were substantiated, but court
12 martial charges were not necessarily initiated
13 in those cases, the prosecution rate increases
14 to about one out of every two. And if we
15 consider that the evidence supported some type
16 of commander action, the prosecution rate
17 increases to about two thirds.

18 So the question is which of these
19 is the appropriate way to calculate the
20 prosecution rate? So in the civilian courts,
21 most prior research defines the prosecution
22 rate as the proportion of cases presented to

1 the prosecutor for a charging decision that
2 result in the filing of charges. We do not
3 have data on the prosecution rate for cases
4 for the United States as a whole, but we do
5 have data for individual jurisdictions and
6 this data seems to hover around a mean of
7 about 50 percent. For example, in Detroit,
8 charges were filed against 66 percent of all
9 criminal sexual conduct suspects. In Kansas
10 City and Miami, charges were filed in 57.5
11 percent of the cases in Kansas City and 56.8
12 percent of the cases in Miami.

13 A six-city study of rape law
14 reform that a colleague and I did back in the
15 early 1990s found that prosecution rates
16 ranged from 37 percent in Washington, D.C. to
17 62 percent in Houston with the other
18 jurisdictions particularly Philadelphia,
19 Detroit, and Atlanta with rates about 50
20 percent. In the study that I conducted in Los
21 Angeles most recently, charges were filed
22 against 50.2 percent of all the suspects who

1 were arrested by the LAPD and the Sheriff's
2 Department in 2008.

3 So considering all of this data
4 from individual jurisdictions, it appears that
5 prosecution rates defined in this way hover
6 around a mean of about 50 percent. So there
7 are some outliers, obviously. Detroit with 66
8 percent and Washington, D.C. and Chicago with
9 rates only in the 30s, but again 50 percent
10 seems to be a reasonable mean prosecution
11 rates.

12 So in an attempt to sort of
13 summarize what all of this means, there are
14 problems with determining both the denominator
15 and the numerator and this makes calculating
16 rates particularly for the military services
17 difficult and it makes making comparison
18 across systems somewhat problematic. With
19 these important caveats in mind, the rates
20 appear to be somewhat lower for the military
21 system. The overall military rate is 36.8
22 percent if we think of prosecution as court

1 martial charges divided by subjects in cases
2 in which DoD action is possible. The civilian
3 rate again is about 50 percent.

4 MEMBER DUNN: May I ask a
5 question?

6 DR. SPOHN: Yes, please.

7 MEMBER DUNN: Dr. Spohn, I'm
8 sorry, I might have missed this at the very
9 beginning, but when you're doing the DoD
10 numbers, you're doing all offenses, all sexual
11 assault offenses reported.

12 DR. SPOHN: Correct.

13 MEMBER DUNN: Which could be a pat
14 on the butt to all-out rape.

15 DR. SPOHN: And I did emphasize
16 that that was a problem with those data.

17 MEMBER DUNN: Okay, so you didn't
18 control the military data for just the rape
19 and --

20 DR. SPOHN: I didn't have the
21 military data.

22 MEMBER DUNN: Okay.

1 DR. SPOHN: I only had the --

2 MEMBER DUNN: But the civilian
3 data is rapes.

4 DR. SPOHN: Yes.

5 MEMBER DUNN: Okay, so there's a -
6 -

7 DR. SPOHN: It's apples and
8 oranges.

9 MEMBER DUNN: Okay.

10 DR. SPOHN: It is.

11 MEMBER DUNN: Okay, because you
12 have in that 36.8 percent number, you've got
13 then --

14 DR. SPOHN: The touching offenses
15 as well as penetration --

16 MEMBER DUNN: -- that would never
17 go to a trial in a civilian community and most
18 of them don't go to a trial in the military
19 community, although other action is taken
20 based on other evidence that's been given to
21 the panel.

22 DR. SPOHN: Exactly. And if one

1 had the data, one could reach those kinds of
2 conclusions based on the rape and sexual
3 assault cases only, taking out the aggravated
4 sexual contact and sexual contact offenses.

5 MEMBER DUNN: Okay, thank you.

6 DR. SPOHN: Again, if we calculate
7 prosecution rates for the various services as
8 the number of cases preferred for court
9 martial divided by cases presented to
10 commanders for action for the Air Force, the
11 rate would be 24 percent; for the Army, these
12 are rape cases only, so perhaps this is a more
13 accurate reflection, the rate was 56 percent.
14 But the problem with this number is that cases
15 that were unfounded due to a lack of probable
16 cause are not included in the denominator for
17 the Army, whereas they are included for the
18 other services.

19 For the Navy, again, using this
20 consistent definition, one would arrive at a
21 prosecution rate of 26 percent. The Navy
22 presentation indicated that their rate was 56

1 percent, but this was based on cases in which
2 commander action was taken, not on cases that
3 were presented to the commander for action.

4 For the Marine Corps, the rate was
5 15 percent and for the Coast Guard, it was 34
6 percent. Again, these rates appear to be
7 lower than the rates for the civilian system,
8 but I would hesitate to put too much stock in
9 them in that they really are -- we really are
10 comparing apples and oranges with rapes versus
11 all sexual assaults.

12 So moving on to conviction rates.
13 I think there are fewer problems inherent in
14 calculating conviction rates, especially for
15 the civilian system. Again, I'll use the data
16 for the Los Angeles Police Department to
17 begin. Charges were filed in 486 of the rapes
18 and attempted rape cases from 2005 to 2009.
19 And of these 486 cases, just over 80 percent
20 of the defendants were convicted. Very few,
21 one percent were acquitted. Charges were
22 dismissed in just about 10 percent of the

1 cases and in another 9 percent, the cases were
2 still pending.

3 If we calculate the conviction
4 rate based on cases that had dispositions,
5 that is, if we subtract those cases that were
6 pending, we would come up with a conviction
7 rate of 88.2 percent. And if we only look at
8 cases that proceeded to trial, the conviction
9 rate would be a whopping 98.7 percent.

10 These data, I don't think are
11 necessarily representative of outcomes in the
12 civil justice system overall. And in part, I
13 think that reflects the fact that the Los
14 Angeles County District Attorney files charges
15 only if there is evidence that meets the
16 standard of proof beyond a reasonable doubt
17 and if there is corroboration of the victim's
18 allegations. In other words, they file
19 charges only if they believe that they can
20 take the case to trial and win. And the
21 conviction rate in Los Angeles confirms that
22 that is, in fact, what is happening there.

1 But we do have data from other
2 jurisdictions that also calculates convictions
3 rates and the SCPS data is probably the most
4 comprehensive source of data on conviction
5 rates in the United States. These are data
6 that come from 75 large, urban counties. The
7 data are collected every two years and it's a
8 sample of cases that were filed in May of the
9 year in which the data are collected. So the
10 SCPS data, the problem with that data is that
11 it begins with charges being filed and so we
12 cannot calculate prosecution rates using these
13 data. But we do know that the conviction rate
14 for these large, urban jurisdictions was 62
15 percent with about half of the defendants
16 being convicted of felonies and an additional
17 12 percent being convicted of misdemeanors.
18 All of these defendants were charged with
19 felony rape. Two percent were acquitted which
20 is similar to the one percent rate in Los
21 Angeles. Thirty-two percent were dismissed.
22 So the conviction rate for these 75 large,

1 urban counties is lower. The dismissal rate
2 is higher than what was found in Los Angeles
3 County.

4 In the six-city study that Julie
5 Horney and I conducted in the early 1990s, we
6 found conviction rates that were about 50
7 percent in Philadelphia and Houston; 66
8 percent in Chicago; 67 percent in Detroit; and
9 in the 70 percents in Atlanta and Washington,
10 D.C. So the rates are a little bit all over
11 the map, but I would say that they're
12 generally in the area of about two thirds,
13 half to thirds of all cases result in
14 convictions.

15 So in the Department of Defense
16 there were 594 subjects against whom sexual
17 assault courts martial charges were initiated
18 according to the 2012 report. And of those,
19 40 percent were convicted of the charges; 10
20 percent were acquitted. The acquittal rate is
21 higher than the rate that one would see in the
22 civilian jurisdictions which was one percent

1 to two percent. Charges were dismissed in
2 14.8 percent of the cases. Now I think the
3 lower conviction rate for the Department of
4 Defense reflects the fact that there are
5 options other than conviction, acquittal, and
6 dismissal in the military system. And these
7 are reflected in the discharge/resignation
8 category which includes about 12 percent of
9 all of these cases.

10 So if we calculate the conviction
11 rate for the 594 subjects with dispositions,
12 that is, we subtract out those 134 cases that
13 were still pending, the conviction rate is
14 very similar to the rate for the civilian
15 jurisdictions, at about 51.7 percent. The
16 conviction rate for cases that proceeded to
17 trial is obviously higher for the Department
18 of Defense as a whole at 79 percent. In the
19 interest of time, I did not calculate
20 conviction rates for each of the military
21 services, but one certainly could do that.

22 So I have a couple of

1 recommendations and then some thoughts about
2 where future research might go. One
3 recommendation is I think that the military
4 services should use a consistent definition of
5 unfounding and consistent procedures for
6 determining whether a case should be unfounded
7 or not. The fact that the definitions and the
8 procedures are different means that the
9 overall data for the Department of Defense is
10 in many ways meaningless because it includes
11 cases that for the Army were unfounded because
12 of a lack of probable cause and cases for the
13 other services that were fabricated, false, or
14 baseless. So I think that's sort of a first
15 step is that the military services should use
16 a consistent definition and consistent
17 procedures.

18 I also think the data I was
19 provided was to say to put it mildly confusing
20 because of the agencies presented their data
21 in a slightly different way so that the case
22 attrition or the case flow slides are not

1 consistent and so I think there should be a
2 consistent methodology for characterizing case
3 flow or case attrition and for calculating
4 prosecution and conviction rates. I tried to
5 go back and use a consistent methodology for
6 calculating prosecution rates, but if you look
7 through the slides that were presented, the
8 data that were presented by the various
9 military services, you'll see that they have
10 different ways of calculating those rates.
11 And so again, it makes comparing the data
12 across services difficult, if not impossible.

13 So some conclusions -- I think
14 I'll skip this. I think I've already talked
15 about this. Let me just talk about what I see
16 as the research agenda for the future. I
17 think that one thing that should be done is
18 there should be some kind of analysis to
19 determine why the unfounding rate is higher
20 for the Department of Defense than for
21 civilian jurisdictions. And this would
22 involve a case file review that would be

1 designed to determine if cases that are
2 unfounded are, in fact, false or baseless or
3 if unfounding is being used to dispose of what
4 might be referred to as problematic cases.
5 And this is what Dr. Tellis and I did in Los
6 Angeles and we have a paper coming out in Law
7 and Society Review, I think in January or
8 February, that uses this approach and really
9 tries to tease out what these unfounding
10 decisions involve and whether in fact, in this
11 case Los Angeles Police Department was making
12 unfounding decisions consistent with the
13 Uniform Crime Reporting Handbook guidelines.

14 I think a second research priority
15 should be to identify the correlates of cases
16 that are not prosecuted and that result in
17 dismissal or acquittal and questions that
18 might be asked, what role does victim
19 cooperation or lack of victim cooperation
20 play? Research in the civilian justice system
21 reveals that this is a key factor in cases
22 handled by the civilian court system. But I

1 would argue that a related research question
2 would be why do victims decide not to
3 cooperate with the prosecution of the case?
4 So there ought to be some attention paid to
5 that as well.

6 And then I think that based on the
7 results of these studies this panel or another
8 panel might be able to make recommendations
9 for changes in policies and procedures that
10 might produce lower rates of unfounding and
11 higher rates of prosecution and conviction.
12 But I think that there is some research that
13 needs to be done before these kinds of
14 conclusions about policies and practices can
15 be reached and I also want to emphasize again
16 that there needs to be some consistency in
17 definitions and in policies and procedures
18 across the military services. Thank you and
19 I'd be happy to take any questions that you
20 might have.

21 CHAIR JONES: Any questions?

22 MEMBER HILLMAN: Hi. I don't

1 really have a question, but just a comment
2 that I'm relieved that we weren't unreasonably
3 confused by the data and I appreciate your
4 guidance for how we might be able to push in
5 the right direction.

6 I guess I do have a question then
7 if I might. Is there more consensus in
8 civilian communities about these definitions?
9 In other words, can we just graft consensus
10 that already exists out there and perhaps take
11 advantage of that?

12 DR. SPOHN: There would be
13 consensus if I were convinced that the
14 agencies were interpreting the guidelines they
15 have in a similar way. The Uniform Crime
16 Reports Handbook is very clear on what
17 constitutes unproven, that the case must be
18 false or baseless and those terms are defined.
19 Now whether individual agencies are
20 interpreted those in the same way, I think is
21 questionable. With respect to prosecution and
22 conviction, I think there's more consistency

1 across the civilian jurisdictions that
2 prosecution rates should be calculated based
3 on the cases that are presented to the
4 prosecutor for a filing decision. But the
5 question is what is the analogous stage in the
6 process for the military? And conviction
7 rates, I think that's fairly clear, cases that
8 either result in a guilty plea or a conviction
9 at trial, but again, it's complicated in the
10 Department of Defense by the fact that there
11 are these other outcomes that are possible.
12 But I think some consistent guidelines from
13 the Department of Defense would make making
14 these kinds of comparisons substantially
15 easier.

16 MEMBER HOLTZMAN: Thank you very
17 much for your very clear testimony. I just
18 have a couple of questions. One is I notice
19 that you identified earlier on a point that I
20 had raised in prior presentation which was the
21 category of insufficient evidence and how that
22 relates back and what does it consist of? And

1 so I was just wondering whether that ought to
2 be part of your research agenda for the future
3 which is a clearer analysis of what that is.
4 I mean I asked the question and was told well
5 that could conclude, for example, issues of
6 fourth amendment searches which would exclude
7 the evidence and so forth. Who knows what
8 that means and so I think that's a big
9 category out there that in my view should be
10 looked at.

11 DR. SPOHN: Yes.

12 MEMBER HOLTZMAN: I see you agree.
13 The second question has to do with analyzing
14 why victims cooperate and here there's a
15 problem and I would really appreciate your
16 guidance. How does that get done when you
17 have -- well, I guess it wouldn't be included
18 at all, a victim restricted report. We're not
19 including restricted reports in this.

20 DR. SPOHN: No.

21 MEMBER HOLTZMAN: So how would you
22 go about doing an analysis of the victim's

1 refusal to cooperate? Have you done that in
2 other jurisdictions?

3 DR. SPOHN: Yes. In other
4 jurisdictions, if the victim refuses to
5 cooperate there would typically be some
6 indication in the case notes from the
7 prosecutor or from the police agency
8 indicating why the victim refused to
9 cooperate. Now sometimes it is something
10 ambiguous. A victim could not be found, for
11 example. Or victim refused -- victim did not
12 return telephone calls. But other times there
13 would be something more detailed written
14 either by the detective investigating or by
15 the prosecutor to whom the case was assigned
16 so that one could go back, if that is
17 documented in case files, one would be able to
18 then do some analysis on what types of victims
19 are less likely to cooperate and what are the
20 reasons that they give for their failure or
21 for their unwillingness to cooperate, but that
22 would have to be documented in the case files

1 because obviously you wouldn't have access to
2 victims to ask them those questions.

3 MEMBER HOLTZMAN: But I think
4 that's a really important area for research,
5 not only in terms of being able to assess the
6 conviction or prosecution rate, but to figure
7 out how better job could be done if at all
8 possible in securing victim cooperation.

9 DR. SPOHN: One of the
10 allegations, not allegations, but one of the
11 findings of research on victim cooperation or
12 lack thereof is that -- and this is from
13 studies in which victims were interviewed
14 after the fact. Victims get subtle and
15 sometimes not so subtle hints from law
16 enforcement or from prosecutors that this is
17 going to be very difficult and it's unlikely
18 that this case is going to move forward and
19 you would be better off if you would simply
20 let this case disappear, go away. Victims who
21 -- we did some focus group interviews with
22 victims and we found that they were actually

1 told by law enforcement in some cases that
2 they should just simply drop the charges or
3 decline to prosecute or refuse to cooperate,
4 whatever the terminology is.

5 MEMBER HOLTZMAN: So that's just a
6 way of law enforcement putting the blame for
7 non-prosecution?

8 DR. SPOHN: Exactly.

9 MEMBER HOLTZMAN: Thank you very
10 much.

11 CHAIR JONES: Thank you very much.
12 All right, we'll have our next panel and this
13 is a continuation of our comparisons of the
14 military and civilian fields and this relates
15 to defense counsel.

16 CHAIR JONES: Ok. I want to
17 welcome our next panel. We will start with
18 Commander Donald King, U.S. Navy Director of
19 Navy Defense Counsel Assistance Program.
20 Commander.

21 CMDR KING: Thank you, Madame
22 Chair. Thanks for having me here today. I am