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RESPONSE SYSTEMS TO ADULT SEXUAL
ASSUALT CRIMES PANEL

PUBLIC SESSION

Tuesday,
September 24, 2013

United States District Court
for the District of Columbia
333 Constitution Avenue, NW
Ceremonial Courtroom No. 20
Washington, D.C.

1 PANEL MEMBERS PRESENT:
2
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4 HONORABLE ELIZABETH HOLTZMAN
5 BRIGADIER GENERAL MALINDA DUNN, (RET.), USA
6 COLONEL HOLLY COOK (RET.), USA
7 PROFESSOR ELIZABETH HILLMAN
8 VICE ADMIRAL JAMES HOUCK (RET.), USN
9 BRIGADIER GENERAL COLLEEN MCGUIRE (RET.), USA
10 HARVEY BRYANT
11 MAI FERNANDEZ
12 MARIA FRIED, Designated Federal Official to the
13 Response Systems Panel
14 COLONEL PATRICIA HAM, USA, Staff Director
15 LIEUTENANT COLONEL KYLE GREEN, USAF, Staff Counsel
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(9:38 a.m.)

MS. FRIED: Good morning, everyone. I'm Maria Fried, the Designated Federal Official to the Response Systems Panel. I'd like to open up the public meeting and introduce Colonel Patricia Ham, Response Systems Staff Director.

COLONEL HAM: Hi. Good morning, everyone, and welcome to the second public meeting of the Response Systems to Adult Sexual Assault Crimes Panel. This is a two-day meeting.

We want to thank the United States District Court for the District of Columbia for allowing the Panel to hold its second meeting here, especially to Shelly Snook and the Court staff.

Just a couple of administrative matters before turning things over to Judge Jones, the Panel Chair. First, there's some slight time changes for today's proceedings. We've moved everything in the public sessions up 15 minutes to accommodate a senator who wants to come and speak to the Panel this afternoon. So the Panel will

1 break for lunch, for example, at 12:45 and return
2 at 1:15.

3 Second, the staff received one request for
4 public comment and attached materials. All of that
5 has been provided to the Panel members, and public
6 comment will occur tomorrow from 4:45 to 5:00.

7 Third, while photographs are permitted,
8 please don't take them during the presentation
9 sessions as they distract the presenters and the
10 Panel members. Fourth, please turn off or silence
11 all of your electronic devices. And finally,
12 restrooms are located at the end of both hallways.

13 Madam Chair, are you ready to begin?

14 CHAIRWOMAN JONES: Yes, thank you. Good
15 morning and welcome to the second public meeting of
16 the Response Systems to Adult Sexual Assault Crimes
17 Panel. Our Panel was established, as you know, by
18 the Secretary of Defense as directed by Congress in
19 Section 576 of the National Defense Authorization
20 Act for Fiscal Year 2013. And it operates under
21 the provisions of the Federal Advisory Committee
22 Act, otherwise known as FACA.

1 This is a two-day meeting, as the Colonel
2 just mentioned, during which the Panel will
3 continue to examine and assess the role of the
4 commander in our military justice system. We view
5 this as a critical task as the subject is central
6 to the current public debate on how to respond to
7 sexual assaults in the military. And it is central
8 to a number of legislative initiatives currently
9 before Congress to modify or remove the
10 prosecutorial authority of the commander.

11 At our first public meeting on June 27th,
12 we heard a historical overview of the role of the
13 commander in our military justice system and how
14 that role and system have evolved over time. Today
15 we look to the military justice systems of a number
16 of our allies -- Canada, the United Kingdom,
17 Australia, and Israel. Their systems differ from
18 ours. We seek to compare and contrast them with
19 ours to better analyze this critical issue.

20 During the morning panel, we will hear
21 from a distinguished group of academics who are all
22 seated before us now, who have studied and written

1 about the roles of the commander in both the U.S.
2 and some of our allies' military systems, including
3 Professor Guiora, who served in the Israeli Defense
4 Forces. They present divergent views and
5 recommendations for our consideration. We
6 appreciate their help. In the afternoon, we will
7 hear directly from officers from Canada, the United
8 Kingdom, and Australia. They will discuss their
9 systems and the role military commanders play in
10 each of them.

11 I want to express the Panel's appreciation
12 to our Allies for their willingness to appear here
13 today and for the information and help they've
14 already provided to the Panel. And in addition,
15 although a representative from the Military
16 Advocate General of the Israeli Defense Force was
17 unable to be here personally, we thank his office
18 for the information that it sent for our
19 consideration.

20 During tomorrow morning's panel, we'll
21 hear from U.S. commanders and staff judge
22 advocates. They will discuss the relationship

1 between a commander as the general court martial
2 convening authority -- in fact, the only entity
3 that currently has the authority to order a general
4 court martial -- and his or her lawyer, the staff
5 judge advocate. Tomorrow afternoon, the chief
6 lawyers for all of the services as well as the
7 legal advisor to the Chairman of the Joint Chiefs
8 of Staff will appear before the Panel to provide
9 their views and answer our questions.

10 The Panel is also interested in hearing
11 from the public about the matters addressed at
12 these meetings, and to that end, we will receive
13 public comments at the end of today's and
14 tomorrow's session.

15 Let me stress that the Panel's examination
16 and assessment of the role of the commander will
17 continue after today's hearings. In fact, we have
18 scheduled public meetings on November 7th and 8th,
19 and at those meetings, victim advocacy and policy
20 organizations, including the Service Women's Action
21 Network and Protect Our Defenders, will attend to
22 discuss their views on the role of the commander,

1 as well as the systems in place to protect and
2 support victims. The Panel has already been
3 provided with a wealth of materials from these and
4 other victims' organizations and individuals, and
5 this information continues to flow into the Panel.
6 And as it does, it becomes part of our research and
7 review, and all of these documents are available to
8 the public.

9 On a few administrative notes, let me just
10 tell you this. Since our June 27th meeting, I
11 requested the Secretary of Defense to establish a
12 subcommittees for this Panel in three areas in
13 order to help us better organize our work. Victim
14 Services is one, Comparative Systems is another,
15 and the third is the Role of the Commander, of
16 which I am the Chair. Mai Fernandez will chair the
17 Victim Services Committee, and Professor Beth
18 Hillman will chair the Comparative Systems
19 Committee. These appointments have now been made,
20 and the subcommittees will begin their work
21 shortly.

22 In addition, since our June 27th meeting,

1 a number of different members of the Panel
2 conducted what are known as preparatory work
3 sessions. These were conducted on August 1, 5, and
4 6. A preparatory work session is a meeting of two
5 or more advisory committee members -- in this case
6 it was Panel members -- convened solely to gather
7 information, conduct research, or analyze relevant
8 issues and facts in preparation for a meeting of
9 the full Panel, or to draft position papers for
10 deliberation by the Advisory Committee. And
11 actually, that would only occur if it was a
12 subcommittee. These were preparatory sessions.
13 During these sessions, the Panel members of the
14 preparatory sessions are not permitted to and did
15 not engage in any deliberations.

16 For the preparatory session on Victim
17 Programs and Services, members of the Panel
18 requested and received an overview of current
19 programs available to victims from the Department
20 of Defense and the separate services' Sexual
21 Assault Prevention and Response offices. These
22 included special victim prosecution programs and

1 special investigative capabilities. Those members
2 also received information from a civilian victim
3 advocate on the Crime Victims' Rights Act and the
4 role of victims' counsel around the country.

5 The preparatory group interested in
6 comparative systems received information from the
7 Joint Service Committee on Military Justice, which
8 they gathered, comparing the military system to
9 civilian jurisdictions of all sizes in the areas of
10 victims' services, prosecution, and defense
11 training and experience, investigation, and other
12 matters. And as you will all, I'm sure, recall and
13 know, this is a mandate and a task of our Panel to
14 compare the military and civilian criminal justice
15 systems with respect to adult sexual assaults.

16 Those same members also received
17 information on crime statistics from a former
18 Director of the Bureau of Justice Statistics and an
19 academic who has studied sexual assault crime
20 statistics in civilian jurisdictions. Finally,
21 those members received information from an expert
22 in victim perpetrator dynamics and offender

1 characteristics.

2 In a third preparatory session, members
3 focused on the role of the commander and received
4 information on the interaction of lawyers and
5 commanders, different academic views of the role of
6 the commander, and gained some understanding of our
7 allies' military justice systems. All of the
8 information gathered has greatly aided the Panel's
9 preparation for our meeting today and tomorrow, and
10 we appreciate certainly the support of our staff,
11 the services, and all of our many presenters from
12 outside of the Department of Defense who helped in
13 these sessions.

14 We're very happy to announce that the
15 Panel's website is up and running. All the
16 materials that are provided to the Panel in the
17 past and as we go into the future will be uploaded
18 on that website. Minutes of the preparatory
19 sessions as well as any materials provided to the
20 Panel members in advance of or during those
21 preparatory sessions are also available to the
22 public upon request in accordance with FACA, and

1 will also be on the website.

2 All right. I think with that, that's all
3 my business. Colonel Ham, I think we're ready for
4 our first panel. Would you introduce the
5 presenters?

6 COLONEL HAM: Yes, ma'am, and we have a
7 presenter who's going to be with us by phone. It's
8 Professor Eugene Fidell from Yale, and Colonel
9 Green is calling him now. While he's doing that,
10 starting from left and the audience's right, we've
11 got Professor Chris Behan from Southern Illinois
12 University School of Law.

13 PROFESSOR FIDELL: Hello?

14 LIEUTENANT COLONEL GREEN: Professor
15 Fidell, can you hear me?

16 PROFESSOR FIDELL: Yes.

17 LIEUTENANT COLONEL GREEN: Okay, great.
18 You're connected, sir, with the Panel.

19 PROFESSOR FIDELL: Great. Good morning.

20 COLONEL HAM: Good morning, Professor
21 Fidell.

22 CHAIRWOMAN JONES: Good morning.

1 COLONEL HAM: This is Colonel Ham. I'm
2 just introducing all the distinguished academics
3 who are sitting in the room, starting with you
4 again, Professor Fidell, from Yale; Professor
5 Behan, Southern Illinois; Professor Geoff Corn from
6 the South Texas College of Law; Associate Dean Vic
7 Hansen from New England School of Law; Professor
8 Rachel VanLandingham, Visiting Professor, Stetson
9 University College of Law. We've got Lord Martin
10 Thomas of Gresford Queens Council from the UK. We
11 have Professor Michel Drapeau from Canada, the
12 University of Ottawa. And we have Professor Amos
13 Guiora from the University of Utah College of Law.
14 And I welcome and thank you all.

15 Ma'am, we're going to start with a five-
16 minute or less statement from each of the
17 academics.

18 CHAIRWOMAN JONES: All right. Why don't
19 we start with Professor Behan?

20 PROFESSOR BEHAN: Thank you. Judge Jones
21 and members of the Panel, I appreciate the
22 opportunity to be with you here in Washington, D.C.

1 to discuss the role of the commander in the
2 American military justice system. Commanders have
3 played a central role in our military justice
4 system from its inception to the present day. I am
5 a proponent of the command-centered military
6 justice system in which commanders, with the advice
7 of seasoned judge advocates who are part of the
8 commander staff, have ultimate responsibility for
9 the following roles and responsibilities: the sole
10 exercise of prosecutorial discretion; the ability
11 to convene and staff courts martial, including the
12 panel members; funding the administration of
13 military justice within their commands; and the
14 exercise of limited clemency powers that do not
15 include the ability to set the findings or reduce
16 the sentence of a court martial, other than
17 pursuant to plea agreements.

18 In the past, I have written about the
19 central importance of the commander's role in the
20 American military justice system, and I refer to
21 the Board to the materials I submitted earlier in
22 the summer on that topic.

1 The crisis of sexual assault within the
2 military poses a grave threat to good order and
3 discipline. To be sure, the military is a
4 microcosm of a civilian society in which sexual
5 assaults are prevalent, underreported, and
6 frequently unpunished in both State and Federal
7 court systems. But the military is different from
8 civilian society and should be held to higher
9 standards regarding sexual assaults. In
10 particular, every sexual assault in which one
11 service member victimizes another violates the
12 trust and camaraderie that should exist between
13 brothers and sisters in arms, degrades the
14 effectiveness and efficiency of our fighting
15 forces, and leaves eventually a devastated veteran
16 in its wake. This is so regardless of the genders
17 of the perpetrators and the victims.

18 Solving this problem will require an
19 integrated effort that includes a cultural
20 transformation within the armed forces, education
21 and training to recognize and prevent sexual
22 assaults, structural and organizational changes to

1 reduce the opportunities for predators to commit
2 sexual assaults, improved procedures for reporting
3 reporting and investigating alleges sexual
4 assaults, and a justice system that properly
5 balances the interests of victims and the rights of
6 criminal defendants in reaching just and correct
7 outcomes.

8 A military justice system that provides
9 for the ex post facto vindication of victims and
10 effective prosecution of offenders is an important
11 part of the solution, but it is by no means the
12 entire solution. The true challenge is to
13 significantly reduce the number of sexual assaults
14 that occur in the first instance.

15 Congress has rightly called into question
16 whether military leaders have shown the proper
17 focus, commitment, and ability to end this crisis.
18 As this board works to complete its report and make
19 its recommendations, it is important to keep in
20 mind that no plan to resolve the crisis will
21 succeed without the active involvement of military
22 commanders in all phases of the problem from

1 prevention to punishment. In my view, this
2 necessitates keeping the commander at the center of
3 the military justice system and, in particular,
4 ensuring that the commander retain sole
5 prosecutorial discretion over all categories of
6 offenses in the military justice system, and a
7 continued ability to convene staff and fund courts
8 martial.

9 I refer the Board to the remainder of my
10 prepared statement and welcome any questions that
11 the members that may have.

12 CHAIRWOMAN JONES: All right, thank you.
13 Professor Corn?

14 PROFESSOR CORN: Thank you, Your Honor,
15 and thank you again for the opportunity to present
16 my views on this very important matter. And I'd
17 also like to express my gratitude for being
18 included among a group of such distinguished
19 experts in the field.

20 I reiterate my belief that I consider the
21 fundamental change to military justice proposed in
22 Senator Gillibrand's bill to be extremely unsound.

1 In my opinion, it's empirically unjustified and
2 very likely to produce the exact opposite effect
3 that those who support the proposal seek to
4 achieve. I also believe that it will produce a
5 genuine risk of second order negative effects that
6 will undermine the efficacy of legal support to
7 military operations.

8 I believe the commander must retain a
9 prosecutorial role in our military justice system
10 to ensure that it's a system that produces military
11 justice and not merely justice in the military.
12 And I don't believe those are the same things for
13 many of the reasons my colleague, Professor Behan,
14 noted.

15 I think our system has to produce more
16 than merely justice in the civilian sense. It must
17 link the accomplishment of justice to the interest
18 of good order and discipline and ultimately to a
19 commander's confidence that the military unit that
20 he or she is responsible to lead into combat is
21 ready to meet this challenge, and the subordinate's
22 confidence that the commander is prepared to lead

1 them effectively. This is a much more complex end
2 state for a state designed to respond to
3 allegations of criminal misconduct than the
4 civilian criminal justice system. Accordingly, I
5 believe it is the central and essential role of the
6 commander in this process of dispensing justice
7 that is at the core of true military justice.

8 I do, however, believe that our system can
9 and should be strengthened. After extensive
10 discussions with my friend and colleague, Professor
11 VanLandingham and many other highly-respected
12 colleagues versed in the issues related to military
13 justice, I recommend that you propose transforming
14 the existing informal commander legal advisor joint
15 prosecutorial decision making process into a
16 mandatory concurrence process. Such a
17 transformation will enhance the disposition of
18 military justice, while preserving the role of the
19 commander in the process.

20 There are two primary reasons for this
21 recommendation. First, it leverages the expertise
22 of both the commander and the military lawyer,

1 ensuring the broadest possible perspective of
2 interest is factored into the prosecutorial
3 decision. Second, it mitigates the risk of
4 arbitrary prosecutorial decision making by enabling
5 each of these joint decision makers to offset
6 improper influences that might affect the other. I
7 also believe this is the exact process that de
8 facto occurs today, and has produced prosecutorial
9 outcomes that, when assessed from a totality
10 perspective and not by isolating aberrational
11 cases, produces credible outcomes and, in many
12 cases, is more credible than in the civilian
13 system.

14 I also strongly believe that this joint
15 decision making process, if formalized, must extend
16 to all offenses and not nearly merely one category
17 of offense. Limiting this change to only one
18 category of offense would implicitly indict the
19 credibility of all other military prosecutions.

20 I believe that shifting prosecutorial
21 discretion exclusively to the JAG will undermine
22 the efficacy of legal support to military

1 operations. Never in our history have military
2 lawyers been so comprehensively integrated into the
3 battle command process than today. Indeed, our
4 operational law model is an icon many other armed
5 forces aspire to emulate. With legitimacy a core
6 tenant of joint military operations, it would be
7 strategic folly to jeopardize the progress made
8 over the past several decades in developing a
9 culture where the military lawyer plays a central
10 role in the planning, execution, and oversight of
11 military operations.

12 The role of the operational lawyer today
13 is not primarily the result of doctrine or of a
14 mandate to provide legal support to military
15 operations or of a law degree held by that military
16 lawyer. It is primarily the result of the trust
17 and confidence commanders and their operational
18 staffs vest in the military lawyer. That trust and
19 confidence blossoms from a garrison relationship
20 that is forged through the routine and essential
21 commander-JAG interaction on military justice
22 matters, interaction that will inevitably diluted

1 if it is the JAG is solely responsible for
2 prosecutorial decisions.

3 This is not to say that it would be
4 impossible to provide legal support to military
5 operations or to ensure legally compliant
6 operations if this significant change were
7 implemented. But I believe that the risk of
8 diluting the relationship between the legal advisor
9 and the commander cannot be ignored.

10 Having served as a staff officer both as a
11 JAG officer and as an intelligence officer, I
12 believe from my own experience that the level of
13 trust and confidence that is vested in the advice
14 of a military lawyer is substantially different
15 than that that's vested in the advice of other
16 staff officers, precisely because the commander
17 lacks the same instinct for the function of the JAG
18 that the commander does for the function of, for
19 example, an intelligence or operations officer.
20 And the trust and confidence that those commanders
21 have in that advice is what has ensured that those
22 military lawyers have been fully integrated in the

1 battle command process to a level that is
2 unprecedented in our history, and I believe
3 unprecedented when compared even to the finest
4 armed forces in the world. And I don't think we
5 should jeopardize that lightly.

6 Finally, I also believe that the
7 comparison between the military prosecutor and the
8 civilian DA is an invalid comparison. The function
9 of the military prosecutor is substantially
10 different because the military prosecutor is
11 contributing to the commander and building that
12 relationship of trust and confidence between him or
13 her and the forces that have to be led in combat.
14 No civilian prosecutor shares an analogous
15 responsibility to prepare a unit for combat and
16 ensure that it's combat ready.

17 Furthermore, I believe that a fundamental
18 difference between a civilian prosecutor and a
19 military prosecutor is that the civilian prosecutor
20 is expected to understand fundamentally the needs
21 of the community. In the military, it is the
22 commander that first and foremost understands the

1 needs of the community because that community is
2 the military unit. And it's ultimately the
3 commander's responsibility to have his or her
4 finger on the pulse of that community and not the
5 JAG's responsibility.

6 The JAG facilitates the commander's
7 function of ensuring that unit is prepared by
8 responding to issues that negatively affect that
9 unit, which is, in effect, a community. So to
10 shift the prosecutorial responsibility exclusively
11 to the JAG would, in effect, dilute the
12 effectiveness of an understanding of criminal
13 justice that serves the interests of that very
14 special community in the military.

15 And I refer the rest of my prepared
16 statements for other comments.

17 CHAIRWOMAN JONES: All right. Thank you,
18 Professor Corn. Professor Hansen?

19 PROFESSOR HANSEN: Thank you, Your Honor,
20 and members of the Panel. Thank you for this
21 opportunity to address you on this important issue
22 of the commander's role in military justice. As

1 you know, military justice has been a topic of
2 intense interest among the services, the media, the
3 public, and Congress. The role of the military
4 commander in our system has been a topic of
5 particular interest, and this is an area that
6 myself and others have considered for some time.

7 In my brief prepared remarks, I want to
8 touch on just a few points. First, I believe there
9 are a number of areas where the commander's
10 involvement in the court martial process can be
11 reduced or eliminated without adverse impacts on
12 good order and discipline. I have written on this
13 topic, and I know you have my materials available
14 to you, so I will simply refer you to that material
15 for a more details analysis on those points.

16 I do think, however, that any reforms to
17 this aspect of military justice should not ignore
18 the important role that the commander must exercise
19 in order to maintain good order and discipline
20 within the unit. Military justice is a tool of the
21 commander, and reforms must not ignore this
22 fundamental principle.

1 I do not support legislative reforms that
2 would remove the commander from making the charging
3 referral decisions in courts martial either for a
4 subcategory of offenses or more generally. Such an
5 approach, I believe, would take away from the
6 commander one of the most important tools of
7 command, and the commander would be left with the
8 responsibility, but not the authority, to maintain
9 good order and discipline within the unit. I also
10 disagree with those who would advocate for these
11 changes specifically in sexual assault cases
12 because I do not believe that these changes would
13 have a significant impact on the military's ability
14 to effectively prosecute these cases, hold
15 offenders accountable, while at the same time,
16 protecting victims.

17 One need look no further than the recently
18 completed Article 32 hearing involving allegations
19 of rape and sexual assault at the Naval Academy to
20 see the complexity of these cases. Very little
21 about the factual complexity of these cases would
22 change by having a prosecutor rather than the

1 commander making the charges and referral
2 decisions.

3 I fear that Congress and the public would
4 see reforms to remove the commander from the
5 charging decision as a panacea when I believe that
6 such decisions are likely to have little real
7 impact. Legislative proposals assume too much when
8 they attribute under reporting solely to the fact
9 that we have a command-driven system.
10 Additionally, removing the commander from the
11 system will make it more difficult to hold
12 commanders accountable for their command failings
13 because we now have taken an important tool away
14 from the commander to ensure good order and
15 discipline.

16 In the Naval Academy case, important
17 questions need to be asked at all levels of command
18 about the command environment that existed and
19 about the culture of silence among the cadets.
20 Commanders who fail in their responsibilities to
21 address this environment should be held
22 accountable. I believe removing the commander from

1 the charging decision is a step in the wrong
2 direction.

3 It is also important for this Panel to
4 consider the practical realities of reforms that
5 would remove the commander and establish a
6 centralized prosecution office to make charging
7 decisions. I think the Panel must be careful about
8 comparisons with courts martial systems in other
9 countries with much smaller services, many fewer
10 courts martial, and no similar expeditionary
11 mission. In 2012, for example, there were 725
12 general courts martial, 465 special courts martial,
13 473 summary courts martial tried in the Army. In
14 addition, there were 34,772 impositions of non-
15 judicial punishment in the Army.

16 Given these numbers, I believe it's
17 impractical to think that one or even a few of very
18 senior prosecutors could manage the volume of cases
19 and give each case the individual attention and
20 focus required. The likely result is that these
21 decisions would be delegated down to much more
22 junior JAG officers who have less legal training

1 than senior JAGs and less experience in the
2 military than senior military commanders.

3 Beyond these practical concerns, the
4 commander is accountable for taking all reasonable
5 and necessary means to ensure good order and
6 discipline, and certain obligations are non-
7 delegable. These include disciplining subordinates
8 and understanding both the context of the
9 misconduct and the impact on order and discipline
10 within the unit. These, I believe, represent the
11 core functions of command, and I believe it would
12 be both unwise and inefficient -- ineffective,
13 rather, to remove that responsible from the
14 commander. Thank you.

15 CHAIRWOMAN JONES: Thank you, Professor
16 Hansen. Professor VanLandingham?

17 PROFESSOR VANLANDINGHAM: Thank you,
18 Chairwoman Jones and members of the Panel. Thank
19 you for the opportunity to participate in this
20 matter today. Thank you to Stetson University
21 College of Law for providing a specific grant for
22 my research regarding prosecutorial discretion in

1 the military. And thank you also for this Panel's
2 efforts to improve the fair administration of
3 justice in the military, and specifically to reduce
4 and mitigate the very real problem of sexual
5 assault.

6 I'll expand upon three brief points in
7 these prepared remarks: first, my belief that the
8 commander should remain an integral component of
9 the criminal charging decision within the military;
10 second, that such decisions regarding all offenses
11 under the UCMJ should be jointly made by both the
12 commander and their judge advocate; and third, that
13 such decisions should rest upon a clear and
14 comprehensive set of ethical principles and
15 standards of prosecution which heretofore have been
16 missing within the military justice system.

17 Regarding the last point about ethical
18 standards, the philosophical expression, "Every
19 difference should make a difference," is
20 applicable. Wholly transferring prosecutorial
21 authority from the commander to their lawyer, per
22 Senator Gillibrand, or requiring commanders

1 prosecutorial noble decisions to be elevated, per
2 Senator Levin, could likely leave much of the
3 status quo in place unless and until substantive
4 and robust ethical guidelines regarding just how to
5 make these decisions are provided to whomever the
6 decision maker may be.

7 The Department of Justice provides
8 detailed standards that aim to normatively
9 constrain and guide their attorneys' great
10 prosecutorial power. In contrast, the military,
11 whose commanders and lawyers transfer frequently
12 among assignments, may lack significant
13 prosecutorial experience, has functioned with no
14 equivalent with potentially arbitrary and
15 inconsistent dispositions.

16 DoD is long past due in developing
17 detailed dispositional touchstones as to what is an
18 appropriate case to prosecute and to train its
19 decision makers on the same. In that regard, the
20 11 unexplained factors currently found in the *Rules*
21 *for Courts Martial* 306(b) discussion section need
22 to be significantly elaborated.

1 Replacing the character and good service
2 of accused by the more appropriate service history
3 with respect to criminal activity and an
4 explanation as to why and how the latter may be a
5 consideration would be a good start. Senator
6 Levin's proposal to simply delete the existing
7 factor is insufficient. Separately, my support of
8 a dualistic prosecutorial process, one that
9 requires the agreement of both the military lawyer
10 and the traditional commander serving as convening
11 authority, rests on structural, operational, and
12 practical grounds.

13 While further elaboration is found in
14 other materials I submitted to this Panel jointly
15 with my colleague, Professor Corn, the uniqueness
16 of the U.S. military as an organization bears
17 emphasizing. Unlike any other public or private
18 entity in the United States, and even unlike the
19 world's other militaries, whose operational tempo,
20 never mind defense expenditures, are vastly
21 eclipsed by that of the U.S. military.

22 The U.S. military structural DNA firmly

1 places the archetypal commander at the center of
2 achieving success on and off the battlefield. As
3 Professor Hansen just mentioned, reposing such a
4 responsibility for lives and vast resources in
5 these individuals, which none of the current
6 legislative proposals recommend changing,
7 necessarily and logically means giving them the
8 appropriate tool to manage such responsibilities.

9 In that vein, vesting sole prosecutorial
10 discretion in the 1950s military commander was
11 seemingly appropriate to help ensure good order and
12 discipline. But today's prosecutorial authority
13 wielded to help lead our immensely professional all
14 volunteer force should maximize the legal expertise
15 now resident in all levels of the military and be
16 the product of a required consensus decision by
17 lawyer and commander. Such a sound decision making
18 process should not be limited to sexual assault or
19 other serious common law crimes.

20 All prosecutorial decisions in the
21 military are both serious and essentially legal
22 with serious ramifications for victims and accused,

1 as well as our -- often intangibly also linked to
2 good order and discipline. Therefore, all
3 prosecutorial decisions should benefit from the
4 synergy of a two heads are better than one
5 approach.

6 In closing, as already mentioned, this
7 joint decision making process should be within
8 clear parameters of what is an appropriate case for
9 prosecution. Such parameters should result in the
10 training and application of clearly-articulated
11 ethical standards, similar to those used at channel
12 prosecutorial discretion in U.S. Attorney's Offices
13 across the country, but tailored for the military.

14 Thank you, and I'm happy to further
15 discuss any of these points.

16 CHAIRWOMAN JONES: Thank you, Professor.
17 Lord Thomas, first, thanks for coming all this way.
18 We appreciate it very much. Go ahead.

19 LORD THOMAS: Well, thank you very much
20 for the opportunity of addressing the Panel. It's
21 a great privilege and honor to do so. I'm the
22 chair of the Association of Military Advocates in

1 the United Kingdom, but I have to confess that I
2 don't have a military background, but I have
3 participated in the major courts martial over the
4 past 10 or 15 years.

5 At the very end of his submission in
6 response to a question from Colonel Cook, Colonel
7 Borch, the regimental archivist, said to you that
8 the British were forced to modify their systems by
9 the European Court of Human Rights and by some
10 other appellate courts that have overarching
11 authority. He asserted that the European Court had
12 held that the commander could not be part of the
13 system because it would violate the Convention on
14 Human Rights. The changes in Britain, he asserted,
15 were externally driven.

16 Well, I concede that the decisions of the
17 European Court were the trigger of change, but any
18 impression that either Parliament or the military
19 were reluctant to reform would not be correct. The
20 core case, as you will know, is that of *Findlay*
21 *against the United Kingdom*. Sergeant Findlay's
22 pleas of guilty in 1991 to a number of charges of

1 common assault, threats to kills, and conduct
2 prejudicial to good order and military discipline
3 were accepted by the prosecutor. His complaint was
4 as to sentence. But his claim to the English
5 Appeal Court that the procedures were in breach in
6 natural justice was dismissed in 1992 on the basis
7 that they had a statutory foundation in the Army
8 Act of 1955 and that, therefore, the Court had no
9 power to declare them void. He, therefore,
10 appealed to the European Court of Human Rights,
11 relying upon the Convention.

12 Before the European Commission, which gave
13 a preliminary view of his petition in 1995, the
14 British Conservative government argued that there
15 was sufficient guarantees in place in a court
16 martial, and is then constituted to meet the
17 requirement of Article 6(1) of the Convention; that
18 is the right to a fair and public hearing by an
19 independent and impartial tribunal established by
20 law. The government's argument failed. The whole
21 structure of military justice was clearly out of
22 date and non-compliant with those guarantees.

1 Britain is bound by treaty obligation to
2 abide by the final decision of the European Court.
3 The government, anticipating the decision of the
4 full Court, took steps to enact the 1996 act, which
5 abolished the role of the convening officer and
6 introduced him to the system, an independent
7 prosecuting authority outside the chain of command.
8 It should be noted that neither the commanding
9 officer's summary jurisdiction nor his powers to
10 dismiss more serious charges had been an issue in
11 *Findlay*, and the act of 1996 did nothing to thwart
12 it.

13 When the *Findlay* case came up for a full
14 hearing in 1997 before the European Court, the
15 government did not contest breaches of Article 6(1)
16 guarantees, but drew the Court's attention to the
17 changes Parliament had already made. Following the
18 general election of 1997, the new Labour government
19 of Mr. Blair enthusiastically incorporated the
20 European Convention into British domestic law by
21 the Human Rights Act of 1998.

22 Shortly thereafter, Parliament passed the

1 Armed Forces Act of 2000. That act granted a right
2 to an accused to avoid the CO's summary
3 jurisdiction by choosing trial by court martial at
4 the outset. So he had a choice. He did not have
5 to appear before the CO. He could go for a court
6 martial straightaway. Further, if he decided to
7 take his chance with the CO, he was given the right
8 to appeal the CO's decision through a summary
9 appeal court headed by a judge advocate. And, of
10 course, we use "judge advocate" in the sense of a
11 judge, a trial judge.

12 These provisions obviously diminished the
13 CO's powers, but his power to dismiss more serious
14 charges was not affected. The debates show that
15 the retired field marshals and chiefs of staff in
16 the House of Lords strongly opposed these changes.
17 They said that they eroded the status and authority
18 of the commanding officer.

19 However, the government had rather
20 cleverly sought out the prior backing of the then
21 current chief of the Defense staff, Sir Charles
22 Guthrie, now Lord Guthrie, who had authorized the

1 Minister to tell Parliament in terms, and I quote,
2 "The services at all levels wish to introduce
3 compliant disciplinary procedures as soon as
4 possible; compliant, that is, with the guarantees
5 of the European Convention." The minister added in
6 the debate, "Ideally," he said, "they would like
7 revised procedures introduced during the current
8 legislative session." Sir Charles emphasizes that
9 this is the firm recommendation of the chiefs of
10 staff.

11 So it was not, therefore, the scrutiny of
12 the European Court of Human Rights, but the furore
13 surrounding the Trooper Williams case between 2003
14 and 2005, which cast the spotlight on the CO's
15 powers to dismiss more serious charges, in his
16 case, charges concerning the alleged murder of an
17 Iraqi civilian in Iraq. I've dealt with that and
18 other cases extensively in Sections 9 and 10 of my
19 submission to you, and set out the results in the
20 parliamentary debates concerning the abolition of
21 power in the Armed Forces Act of 2006.

22 To those who ascribe to the view that

1 there is a unique, almost mystical, linkage between
2 the commander and his troops, I commend the speech
3 of Admiral Lord Boyce, who was commander-in-chief
4 of British forces in the second Iraq War. I have
5 set it out in full in Paragraph 9.5 of my
6 submission. I have the highest regard for the
7 noble and gallant lord, not least for his refusal
8 to commit his troops to invade Iraq without a cast
9 iron guarantee from the Attorney General of the
10 time that it was legal to do so. But as he knows,
11 I disagree with him on this particular issue, and
12 not through the "political correctness," which he
13 charges against lawyers who lay "legal siege," as
14 he puts it, to the operations of those which is
15 required -- who are required to fight and win
16 battles.

17 A modern non-conscript professional
18 military with increasing demands for skills and
19 aptitudes, which are very marketable in the wider
20 world, must concern itself both with recruitment
21 and retention. Service discipline is, of course,
22 an essential part of military life, but both for

1 new entrants and for those who are making their
2 careers in the services. It must be and be seen to
3 be fair. Perceived unfairness leads to discontent,
4 poor morale, and indiscipline.

5 The subjective decisions of commanding
6 officers, even with the assistance of legal
7 advisors, cannot hope to achieve the consistency
8 and parity in every unit across all the services.
9 And it seems from these panel hearings that the
10 U.S. Defense Department is now largely persuaded
11 insofar as the Article 60 power is concerned.

12 In my country and in my Parliament,
13 lawyers may not be too popular, but we do have the
14 training to be objective, to assess facts to come
15 to conclusions on set principles of law, and to
16 deal with individuals with parity. This, I
17 believe, is the success of the Director of Service
18 Prosecutions in his department in the United
19 Kingdom. He does not operate in some remote and
20 arcane legal world. He is required to take account
21 both of the effect of a prosecution on operations
22 and of the importance of maintaining military

1 discipline.

2 The commanding officer still has a role to
3 play in that he may draw to the attention of the
4 DSP any factors he considers relevant in relation
5 to the accused and his military experiences before
6 the Director of Service Prosecutions makes his
7 decision on prosecution. The CO also maintains his
8 responsibility for dealing with minor offenses,
9 mainly of the military character, but he has no
10 jurisdiction with regard to sexual offenses.

11 If reforms to the system have been
12 prompted by concern for the fair trial of the
13 accused, there is an increasing recognition in my
14 country that the rights of victims must be at the
15 core of the criminal justice system. The existence
16 of a prosecuting authority independent of the chain
17 of command does mean that complaints across the
18 board will be taken seriously, that the fear of
19 retaliation or of a blighted career has lessened,
20 that anonymity and special measures when desired
21 can be ensured, and that perpetrators --
22 perpetrators -- particularly of a senior rank,

1 cannot expect any favors. Further, the Director of
2 Service Prosecutions has the resources to monitor
3 the proper investigation of such allegations by the
4 service police.

5 If victims have confidence and trust in a
6 system independent of the chain of command, they
7 are more likely, in my view, to report offenses.
8 On the other hand, the present discretion of the
9 U.S. commanding officer to dismiss serious
10 allegations of sexual assault must be a
11 disincentive. The figures for non-reporting spoken
12 to by Professor Lynn Addington on day one of the
13 hearings so suggested.

14 But finally, the military are the servants
15 of the public, and the public has the right to
16 expect for their sons and daughters who enlist the
17 same standards of fairness in the military system
18 of justice as would be their entitlement in
19 civilian life. Thank you very much.

20 CHAIRWOMAN JONES: Thank you. Professor
21 Drapeau, good to see you again, and thanks for
22 coming.

1 PROFESSOR DRAPEAU: Thank you. Madam
2 Chair, distinguished members of the Panel, fellow
3 panelists, I'm truly honored to be asked to
4 participate in this Panel. My comments this
5 morning will be brief as I've already circulated a
6 paper titled "Canada's Military Justice System at a
7 Crossroads," which contends that the Canadian
8 military justice system needs to be modernized to
9 meet inter alia the standards of our charter of
10 freedom. My paper also explains why such
11 structural reforms are slow in the making because
12 innovative and workable structural solutions are
13 resisted until they are imposed in a piecemeal
14 fashion by our appellate civilian courts.

15 It is not as if Canada is not aware of the
16 significant reforms to military law that have taken
17 place over the past two decades around the world.
18 After all, each of our NATO European allies, as
19 well as other countries with which we share a
20 common law legal heritage, have already
21 successfully modernized their structures,
22 standards, and best practices and protocols for

1 their military justice system.

2 In my writing, I have identified two
3 themes that, in my opinion, should form the basis
4 for reform to military justice. I hope that these
5 may have some resonance and applicability to the
6 work undertaken by this Panel.

7 First and foremost, I believe that as long
8 as the military justice system continues to have
9 jurisdiction over both disciplinary and criminal
10 offenses, to be effective it has to have two
11 antipodal focuses. First, for disciplinary
12 offenses, the focus must be on meeting the needs of
13 the military, particularly the chain of command, in
14 order to enforce discretion and rehabilitate
15 offenders before returning them to military duty.
16 And second, for criminal offenses, however, the
17 focus must be on the delivery of victim-centered
18 service by deterring and mitigating crimes, as well
19 as sanctioning those who violated laws with
20 criminal penalties so as to increase the safety of
21 vulnerable members of society.

22 At present, however, the focus is on the

1 needs of the military for both disciplinary and
2 criminal offenses. This is particularly evident
3 when the executive, at least in Canada, where such
4 reviewing authorities or reviewing officers and
5 suspending authorities are permitted to toss out a
6 criminal conviction or eliminate a sentence handed
7 down by a competent court and jury following a
8 finding of guilt on the basis of a beyond a
9 reasonable doubt.

10 This brings me to my second theme. As a
11 quintessential institution of a democratic society,
12 the military must remain subservient to the rule of
13 law and be subject to civil control. In my
14 opinion, it is a sine qua non for any well-
15 functioning military justice system that the
16 findings and sentences of an independent military
17 judiciary should only be subject to review by a
18 civilian appellate court. Therefore, having
19 military officers or members of cabinet, as it is
20 the case in Canada, involved in the review or
21 suspension of findings in sentences must be seen as
22 foreign to the notion of due process. This, in my

1 opinion, can only undermine the confidence and
2 respect of the public in general and victims in
3 particular for the administration of justice.

4 The time has come to recognize that the
5 functioning of a military penal system must be
6 completely untrammelled by the executive or the
7 chain of command. Until this is done, many victims
8 of sexual assault serving in the military may lack
9 confidence in the administration of military
10 justice, enough at least to dissuade them from
11 reporting these crimes. Who can blame them?

12 If at the end of the day after having had
13 your dignity, integrity, and safety violated, and
14 then endure the enormity of trial, they see their
15 convicted assaulter set free by the arbitrary
16 decision or person outside the judicial process.
17 This cannot be seen as a fair and just outcome for
18 a victim or their families. Thank you.

19 CHAIRWOMAN JONES: Thank you, Professor.
20 Professor Guiora, am I pronouncing your name
21 correctly?

22 PROFESSOR GUIORA: Almost.

1 CHAIRWOMAN JONES: Okay. You can say no
2 and tell me how to pronounce it.

3 PROFESSOR GUIORA: No, "almost" works
4 better than "no," I think.

5 (Laughter.)

6 CHAIRWOMAN JONES: Okay.

7 PROFESSOR GUIORA: It's Guiora with a hard
8 "G."

9 CHAIRWOMAN JONES: Got it.

10 PROFESSOR GUIORA: Just like it sounds.

11 Madam Chairwoman, members of the Panel, and fellow
12 panelists, it's obviously a great honor to be
13 invited to speak before you this morning on an
14 issue that obviously is of great concern to the
15 public and to the military.

16 By way of background, I served for 19
17 years in the Israel Defense Forces in the Judge
18 Advocate General Corps from 1986 to 2005, and my
19 comments today obviously are reflective of the
20 Israeli system, which obviously is different from
21 the American system. And it's obvious to all of us
22 that the Israeli system is profoundly different

1 from the current American system.

2 The primary difference relates to "the
3 balance of power" between the commander and the
4 judge advocate. In short, while serving as judge
5 advocate to the Navy and Home Front command in the
6 IDF, I was solely entrusted with the decision to
7 order the filing of an indictment against a soldier
8 or officer. Simply put, the commander was granted
9 no authority in the matter whatsoever.

10 While I notified the commander of my
11 charging decision and was open to his input, the
12 decision was exclusively mine in consultation with
13 my own commander, the Judge Advocate General. And
14 on this note, it's important to add that in the
15 chain of command in the Israel Defense Forces, the
16 Judge Advocate General, whether in the Navy, which
17 I was, my commander is the Judge Advocate General
18 and is not the head of the Navy. We have a very
19 distinct and very different chain of command in the
20 IDF, which, again, I repeat and I want to emphasize
21 that the JAG's commander is the TJAG himself. We
22 have one TJAG unified command in the IDF. So my

1 commander was not the commander of the Navy, but is
2 the Judge Advocate General himself.

3 The decision in Israel to create a system
4 whereby indictment decisions are an exclusive
5 bailiwick of the JAG reflects a profound belief in
6 the system and also, I think, in the country that
7 the separation between judge advocates and
8 commanders is necessary in order to prevent undue
9 command influence. Needless to say, in the name of
10 full candor, it's obviously a bone of contention
11 and particularly when commanders are of the opinion
12 that an indictment decision may well impact Israeli
13 national security.

14 This became a matter of public concern
15 when a one-star general was indicated by the JAG,
16 and the then Chief of Staff expressed great concern
17 that the indictment against that one-star would
18 impact Israeli national security. The response of
19 the JAG was very clear that the offenses committed
20 by this particular one-star were so egregious that,
21 with all due respect to Israeli national security,
22 the crime committed and the harm to the victim far

1 outweighed Israeli national security.

2 While commanders understandably express
3 reservations as to their lack of role in the
4 decision making process, the system, from my
5 perspective, properly and effectively minimizes
6 command influence in the criminal process to
7 maintain and to ensure full accountability and
8 impartiality in meting out justice. While my
9 fellow panelists have emphasized the role of the
10 unit, I think that both Lord Thomas and Professor
11 Drapeau -- if I pronounced it correctly -- would
12 also agree with me that with all due respect to the
13 emphasis on the unit, there are far more important
14 issues than the unit, and those issues that are
15 more important perhaps than the unit are indeed
16 public accountability, the rights of the victim,
17 and the need to indeed ensure that there's a full
18 and impartial system.

19 On that note, it's important to add that
20 in the Israeli system in the context of ensuring or
21 seeking to ensure objectivity in court martial
22 decisions, and ensuring that they are based on

1 legal analysis rather than unit or command
2 interest, it is in many ways for that reason that
3 the JAG is the decision maker rather than the
4 commander.

5 In addition to that, it's clear that
6 recent high profile prosecutions in Israel itself
7 -- I add in parenthesis -- you may know, the Panel
8 may know, that the former President of the State of
9 Israel is in jail for seven years for rape, and
10 well he should be in jail for rape. But the fact
11 that there's been indeed public prosecutions with
12 enormous media visibility has significantly
13 enhanced the trust that Israeli Defense Forces
14 soldiers feel in reporting instances of sexual
15 assaults and harassment. I would suggest that that
16 increased sense of confidence is directly related,
17 at least in Israel, to the forceful prosecution
18 policy implemented by the JAGs who are, again, not
19 in the chain of command.

20 A couple of final points. I remind all of
21 us of the wise words of the former chief justice,
22 who we call in Israel president of the Israeli

1 Supreme Court, Aharon Barak, when a different
2 context said the following. It's a rough
3 translation from Hebrew. "The individual must not
4 bear the logistical burdens of the state." And so,
5 the argument that distance and logistical concerns
6 perhaps are a reason to have the commander at all
7 make the command decisions, if you view it from the
8 perspective of then President Barak that what is
9 most important here are the rights of the
10 individual -- we're talking about here the victim
11 -- in the context of minimizing command influence,
12 I would suggest that is point one.

13 Point two, this idea of public confidence
14 and public expectation. So I speak as the father
15 of two children who have served in the IDF.
16 Obviously I also served in the IDF. The fact that
17 our system is predicated on the JAG making the
18 decision in the context of minimizing command
19 influence, I think, enables us as parents, at least
20 in Israel, to sleep more soundly at night.

21 And the third point is public trust, and
22 precisely because of the concern of undue command

1 influence, at least in Israel, the principle of
2 minimizing the command influence and ensuring legal
3 reasoning, legal objectivity by the JAG has, I
4 think, from my perspective reflecting back, has
5 effectively worked in Israel.

6 Needless to say, I would welcome any
7 questions. Thank you.

8 CHAIRWOMAN JONES: Thank you, Professor.
9 Professor Fidell, are you with us?

10 PROFESSOR FIDELL: Yes, I am.

11 CHAIRWOMAN JONES: Great. May we hear
12 from you?

13 PROFESSOR FIDELL: Yes, of course. Thank
14 you for allowing me testify telephonically.

15 I want to address three related questions.
16 First, how widely should the Panel and Congress
17 cast its net? Second, what should be done about
18 Article 32 of the UCMJ? And third, what should be
19 the scope of court martial subject matter
20 jurisdiction?

21 First, sexual assault issues are important
22 in themselves, but more broadly they shine a light

1 on structural defects in the Code that apply to all
2 kinds of offenses. The Panel should, therefore,
3 consider the entire military justice system when
4 recommending any changes. I'm sorry to make work
5 for you, but I think that's the case.

6 Because the parts are interactive,
7 sharpshooting one aspect or another would be
8 unwise. Thus, tinkering with or abrogating the
9 convening authority's post-trial powers under
10 Article 60 would make little sense without
11 addressing the convening authority's pre-trial
12 powers with respect to such critical matters as the
13 decision to charge, jury selection, and pre-trial
14 agreements. In my view, and I'll be happy to
15 develop this in response to questions, the time has
16 come to reassign those powers for offenses other
17 than minor disciplinary offenses.

18 Second, the question of who should have
19 the charging power cannot sensibly be addressed
20 without a very sober evaluation of the Article 32
21 pre-trial investigation. I believe that you've
22 seen the op-ed that I had in last Monday's

1 *Baltimore Sun* concerning the case at the Naval
2 Academy. As you see, I've come to the conclusion
3 that Article 32 hearings are an anachronism, and
4 should be replaced by a simple probable cause
5 hearing.

6 The Naval Academy case, a very nasty one
7 -- but incidentally, nothing I say should be
8 considered to be judging the guilt or innocence of
9 any participant in that case. But the
10 circumstances that have come to public attention
11 are certainly disturbing. That case forced me to
12 take a hard look at Article 32.

13 The provision was introduced in the 1920
14 Articles of War as a protection, perhaps influenced
15 by the notorious Fort Sam Houston race riot cases.
16 The legislative history reports that the idea of a
17 preliminary investigation was based on a British
18 Army model. The provision was strengthened in the
19 1948 Elston Act, and expanded to the other services
20 -- originally it applied just to the Army and then
21 to the Air Force -- when Congress passed the UCMJ
22 in 1950.

1 The Article 32 hearing was often waived in
2 years past, but still has been regarded as both a
3 protection for GIs because it's a valuable
4 discovery tool, and as a benefit to prosecutors to
5 help them see weaknesses in their case. But it has
6 also become bloated as Article 32 investigating
7 officers, fearful that a military judge or
8 appellate judge down that the road will find that
9 the investigation was incomplete, have permitted it
10 to become a second trial before the real one. This
11 means in sexual assault cases particularly, but in
12 other cases as well, that the complainants and
13 other government witnesses will be subjected to
14 withering cross examination in a public proceeding
15 even before there's a trial. Obviously this is
16 going to discourage all but the heartiest souls
17 from pursuing their complaints.

18 Investigating officers lack the whip hand
19 a military judge has in an actual trial. And
20 incidentally, I gather that the investigating
21 officer in the Naval Academy case felt he was on
22 such a short leash, even though he's a military

1 judge, that he has to get approval from the
2 superintendent even to grant adjournments.

3 The personnel who are accused obviously
4 have a right to cross examine witnesses under the
5 Constitution's Confrontation Clause, but the
6 Constitution doesn't confer such a right before
7 trial. Equally obviously, the defense has a right
8 and a duty to prepare for trial, and that includes
9 discovery. But it doesn't mean there's a
10 constitutional right to a trial before the trial.

11 Charging decisions ought to be shifted
12 from the command to a non-chain of command
13 prosecutor. These are legal decisions that ought
14 to be made by lawyers for offenses other than minor
15 disciplinary offenses. Reforming Article 32 is a
16 natural corollary of such a shift since all Article
17 32 officers do is make a recommendation to the
18 convening authority, who can accept it or reject
19 it. Once that shift is made, there's no need for a
20 disposition recommendation.

21 Restructured Article 32 hearings could be
22 limited to determining probable cause, a role that

1 requires little, if any, probing into witness
2 credibility. The model would be Federal Rule of
3 Criminal Procedure 5.1, which calls for probable
4 cause hearings conducted by magistrate judges in
5 non-indictment cases. This seems to me to be
6 faster, cheaper, and wiser all around. Discovery
7 issues can then be resolved by the military judge
8 if they're not worked out informally. And if a
9 complainant has not been made for interview or
10 deposition before trial, I am 100 percent confident
11 that any military judge would give the defense an
12 opportunity to do so.

13 Article 32 made sense in 1920, 1948, and
14 1950 as a check on command sweeping power. But
15 with the expanded right to counsel, the creation of
16 a military bench that can properly control the pre-
17 trial process and producing in the end merely a
18 recommendation. Introduction of the military rules
19 of evidence and the existence of a two-tier
20 appellate court structure to ride on the system, it
21 seems to me that Article 32's costs in time, cost
22 to the taxpayer, and toll on complainants,

1 including deterrent effects, are exorbitant. And
2 the goals sought to be achieved can be achieved by
3 other less convoluted means.

4 Because of its current command-centered
5 wiring, the military justice system has become
6 encrusted with features like this. Command
7 centrality and the system can be made much simpler,
8 but still be fair. Even if Congress were to decide
9 not to shift to an independent prosecution function
10 with charging power, it would still be wise to
11 reform Article 32. The Naval Academy case
12 illustrates why. And I might add, the UK repealed
13 the requirement for a formal preliminary
14 examination when Parliament passed the Armed Forces
15 Act in 2006.

16 Finally, the Panel should consider whether
17 the subject matter jurisdiction of courts martial
18 ought to be confined to offenses that are service
19 connected. A majority of the Supreme Court held in
20 the *Solorio* case in 1987 that the Constitution
21 doesn't require such a limitation. But that case
22 in no way restricts Congress' power under Article

1 1, Section 8, Clause 14, to impose such a limit by
2 statute. Just as Congress has never vested the
3 Federal courts with the entire judicial power that
4 would be permitted by Article 3 of the
5 Constitution, Congress need not exercise the full
6 range of its power.

7 Structural reform of the military justice
8 system would be incomplete, in my opinion, if it
9 left subject matter jurisdiction wide open as it
10 now is. Courts martial should not be trying
11 civilian type offenses, including sex offenses that
12 have no connection to military service other than
13 the accused's status as a member of the armed
14 forces. Thank you.

15 CHAIRWOMAN JONES: Thank you, Professor.
16 All right, I'll now open the Panel up to questions.
17 Professor Hillman?

18 PROFESSOR HILLMAN: Thank you, Judge
19 Jones. I'd like to try to reconcile the two halves
20 that we just heard of perspectives on this issue.
21 If you could try to answer for me in your
22 experience and in your estimation, so experience

1 with respect to military justice systems that have
2 shifted away from the command centric model the
3 United States retained, and then your estimations
4 of what would happen due to the conditions of
5 service and conditions of military justice in the
6 U.S., and specifically, too, if sexual assault is
7 different in the U.S. versus how it is in other
8 jurisdictions.

9 How would a change away from command
10 control alter the legal advising role of judge
11 advocates, because that seems a big secondary
12 effect that we ought to take account of. And it's
13 not clear to me how this would play out. Thank
14 you.

15 PROFESSOR CORN: I'll go. Yeah. Well,
16 thank you, Professor Hillman. First off, I think
17 that to answer that question involves a certain
18 element of speculation. I certainly don't feel
19 qualified to opine on how the system in Israel or
20 Canada or the United Kingdom works because I've
21 never served in the armed forces in any of those
22 nations. I'm not familiar with their culture. I

1 just feel like I lack foundation to understand the
2 consequence of the changes.

3 I will point out a couple of comments that
4 were made by some of the fellow panelists.

5 Professor Guiora noted increased -- the recent
6 increase in reporting of sexual misconduct, and he
7 attributed it to a greater sense of confidence in
8 the fairness of the system. But it's a system
9 that's been structured that way for a long time.
10 So what accounts for the recent increase? It can't
11 be that there's been a sudden change in the system.

12 And I believe that any system, I think we
13 would all agree, has to have first and foremost as
14 its fundamental objective the provision of due
15 process in any criminal allegation.

16 PROFESSOR HILLMAN: Can I just push you
17 back to what I'm looking for, which is how would
18 legal advice to military operations be undercut by
19 the shift?

20 PROFESSOR CORN: Right. So what I believe
21 in our system is, if you take this responsibility
22 away from the commander, you could have a system

1 where the commander would provide input to the JAG
2 prosecutor deciding whether to bring a charge. But
3 once that ownership shifts from the commander to
4 the JAG, I believe that the commander's interaction
5 with the JAG will be diluted. It will become less
6 significant, less of a priority. And I do think
7 that has second and third order consequences. It
8 is the primary mechanism by which the
9 commander/legal advisor relationship is forged, and
10 where commanders learn to have confidence in the
11 judgment of the military lawyers that have to
12 advise them on a wide range of issues in very
13 different contexts.

14 So I think that the commander will view it
15 as somebody else's job, somebody else's
16 responsibility. And, yes, he might, or she might
17 be willing to offer some input if the input is
18 solicited, but it's not going to have the same
19 level of prioritization in that commander's daily
20 sense of mission function that it currently has a
21 fundamental element of the commander's mission
22 essential tasks.

1 PROFESSOR FIDELL: Can I comment on that?

2 I can't see everybody --

3 CHAIRWOMAN JONES: Yes, Professor Fidell.

4 Go ahead.

5 PROFESSOR FIDELL: I'm afraid that I don't
6 agree with my friend, Geoff Corn's, assessment. It
7 seems to me a commander is going to continue to be
8 very concerned and very interested in this part of
9 it. But like a senior executive in a corporation,
10 let's say, and I'm not suggesting they're
11 identical. I know that. We all know that. But
12 nonetheless, if you have a corporation that has
13 major litigation pending, the CEO doesn't just send
14 it off to encapsulate it more and say, take care of
15 this for me. The CEO is going to, you know, be
16 interested in it, and may even express views.

17 So I don't think that the notion that you
18 give this legal responsibility to an independent
19 trial counsel function means that the CO is going
20 to wash his or her hands of it or sort of turn to
21 other matters. What it means is the CO will be --
22 remain an interested party, have the opportunity to

1 express views that, you know, may be fairly deeply
2 held and, you know, will be expressed that way.
3 But they'll be expressed in a way that respects the
4 basic legal nature of the charging decision. Thank
5 you.

6 PROFESSOR HANSEN: If I may just briefly
7 respond to that, I disagree with Professor Fidell's
8 analogy with the head of an organization and
9 comparing that with the commander's role
10 independent of his role with -- his or her role
11 with the lawyer. I mean, there is a law of war
12 principle that you have to keep in mind, that the
13 commander is responsible for the law or violations
14 of the subordinates under his or her command, and
15 can be held personally accountable for those
16 command failings.

17 And one concern that I have that I do not
18 believe was considered in the reforms in either
19 Canada or the United Kingdom or elsewhere is how
20 removing the commander from that authority to
21 impose discipline on his forces, in essence, takes
22 away his authority, but not his responsibility

1 under the doctrine of command responsibility. And
2 I think there is a real concern in my mind that
3 removing the commander from that role takes away an
4 important tool, while at the same time putting --
5 keeping the commander on the hook for the failings
6 of the subordinate forces. And that's a comparison
7 that does not work well in a civilian CEO context.

8 PROFESSOR GUIORA: Can I respond to
9 Professor Corn, Professor Hillman, and Professor
10 Hansen?

11 CHAIRWOMAN JONES: Yes, Professor Guiora.

12 PROFESSOR GUIORA: So, Professor Hillman,
13 to your question, while serving as the judge
14 advocate to the Navy in Home Front Command, I wore
15 two hats. No hair, but two hats. I was both the
16 judge advocate and the legal advisor for
17 operational matters, so, if you will, it's a twin
18 position.

19 Geoff, to your comment about the change,
20 there are two reasons for that. I should've
21 clarified that, and I apologize. One, as I
22 mentioned earlier, the uptick in high profile

1 prosecution of sexual assaults in Israel has
2 clearly impacted the willingness of soldiers, men
3 and women alike, to come forward. And the other
4 was a law passed by the parliament in 1997, which
5 imposed on the commanders an immediate duty to
6 report any cases of sexual assaults. And it
7 imposed on them the duty to report immediately.

8 And then, to Professor Hansen's comment,
9 in Israel in the IDF, commanders still have
10 responsibility for disciplinary matters. There's a
11 distinction between criminal matters which go to
12 the JAG and disciplinary matters which go to the
13 commander.

14 LORD THOMAS: I would make that point as
15 well that nobody is suggesting that the commander
16 should lose disciplinary powers in the military
17 sense. It's when he becomes involved in the
18 criminal process that the objection is made.

19 What has happened in the United Kingdom
20 was expressed by the Director of Service
21 Prosecutions, Bruce Houlder. And in an email to
22 me, he said that COs are rather pleased about the

1 changes that are taking place and that they no
2 longer have to make the difficult decisions about
3 certain cases, weighing up competing interests, nor
4 are they open anymore to having their ears bent on
5 the question of the choice available to them. And
6 they have more important things to do than chasing
7 errant soldiers and wasting time on paperwork.

8 So I was expecting to hear from the
9 Ministry of Defense that there were objections to
10 the changes within the military from commanding
11 officers and from those in the chains of command.
12 And I was surprised to discover that having
13 consulted with Lord Astor of Hever, the
14 Undersecretary of State, that they were simply not
15 aware of any discontent at all within the services
16 over the removal of the CO's powers.

17 So the change in the United Kingdom has
18 been affected without any difficulties that have
19 surfaced. And certainly there has been nothing in
20 Parliament on that issue so far as I'm aware.
21 Well, I can confirm there has been no -- nothing
22 expressed in Parliament on the removal of the CO's

1 powers in this regard.

2 PROFESSOR DRAPEAU: If I can speak on the
3 same issue, because in Canada, in fact, the
4 Director of Military Prosecution handles this task.

5 Back to your question, what impact does
6 this have upon the quality or the immediacy of
7 legal advice to the commander, none, perhaps even
8 better, because there is a separation between legal
9 advice on everything but the prosecution of
10 criminal offenses.

11 We have to keep in mind that a commander
12 has got several issues uppermost in his mind that
13 he has to look after, including the mission, the
14 leadership of his people, the morale of his people,
15 and, more importantly, discipline. Discipline
16 doesn't necessarily lead to a charge either for
17 service offenses or criminal offenses. That's what
18 the commander does. And he has a legal advisor to
19 provide him immediate advice on the day in/day out
20 basis in Canada for the past 15 years. I can't
21 remember a single commander at various levels
22 saying that, in fact, this has somehow diminished

1 his ability to exercise his command and the quality
2 of his command, or the quality of his leadership.
3 I would suggest it would be the reverse.

4 MR. BRYANT: Madam Chairman? Madam
5 Chairman?

6 CHAIRWOMAN JONES: Oh, yes, Mr. Bryant.
7 Sorry. Looking the wrong way.

8 MR. BRYANT: May I ask a question, please,
9 of the members, I guess, from the first four down.
10 Chiefs of police in this country and some sheriffs,
11 too, command forces that are least brigade size in
12 our major cities. Would you recommend -- and they
13 have recruitment and retention problems. They
14 promote. They make assignments. They have
15 discipline powers. People have ranks. They have
16 lieutenants, captains, on down, sergeants, as you
17 know.

18 Would you recommend then that in those
19 police forces the chief of police would decide when
20 an officer commits a crime, whether or not that
21 officer is going to be prosecuted, that that chief
22 of police then selects from his department who will

1 be on the jury, and that if he disagrees with the
2 decision of the jury, he can either change that or
3 reduce any sentence?

4 I'm just -- I think of our police forces
5 as quasi-military organizations at least, and so I
6 wonder if we use that as not the perfect analogy --
7 I guess we could go to sports and any other entity
8 that requires obedience and discipline to a person
9 in charge. Now, apparently some of our coaches
10 don't think it's their obligation to report
11 criminal matters, but when the criminal matter does
12 take place, they are not in charge of what's going
13 to happen with that whatsoever.

14 So aside from that little silly analogy,
15 if you could address the police department analogy.

16 PROFESSOR HANSEN: I think -- sir, I think
17 the analogy breaks down in a fundamental way in
18 that we expect something from our soldiers that we
19 don't expect from police departments. I mean,
20 commanders, for example, in a combat environment
21 give orders to soldiers that they know a soldier
22 may die as a result of those orders, and the

1 soldier is obligated under law to obey those
2 commands. You don't have that similar
3 relationship. You don't have that same level of
4 command and control necessity in a police force. I
5 think there -- because of that, that's a
6 fundamental difference where the analogy doesn't
7 work as well.

8 Now, to your point about having chiefs of
9 police select the panel members that would try an
10 offending person, I absolutely agree that there are
11 reforms to the military justice system, and one of
12 of those, in my opinion being that I don't think a
13 commander needs to be responsible for selecting the
14 members who will try the case. So I would agree
15 that there are certain things that a commander does
16 not need to do to maintain the essence of command
17 in a discipline system.

18 But I do think that your analogy to a
19 police department breaks down at a fundamental
20 level because we expect things of soldiers, and we
21 expect things of our military forces. And they
22 have a mission that is unique and different than

1 any other institution in our country.

2 MR. BRYANT: I agree that --

3 BRIGADIER GENERAL MCGUIRE: And there's an
4 expeditionary aspect of that as well, that you're
5 not going to be in that particular jurisdiction at
6 any point in time when a crime is committed.

7 PROFESSOR CORN: And if I may add, to
8 Professor Hansen's point, certainly police
9 officers, first responders, people work in a fire
10 department, have a job that requires an incredible
11 amount of courage to the direction of danger. We
12 know that. But in the military, the obligation of
13 the service member is fundamentally different in a
14 different sense.

15 The role of the military is to close with
16 and destroy the enemy. That requires an
17 unhesitating willingness to employ deadly combat
18 power on order, not in response to an imminent and
19 immediate threat. That is a fundamental difference
20 between the use of force in war and the use of
21 force in peacetime by law enforcement personnel.

22 A law enforcement officer is trained to

1 respond to an imminent threat of death or grievous
2 bodily harm to her or the person that she's
3 protecting. But law enforcement officers are not
4 expected to have another superior point to a person
5 who's in a barracks, who may be sleeping, or who
6 may be running away, and say engage that target.
7 The need to ensure, number one, that that
8 subordinate will respond to that order and, number
9 two, that that subordinate has confidence in the
10 judgment and the leadership of the person giving
11 that order, that it's the right order, is a very
12 unique aspect of military service.

13 And by the way, I would also say that the
14 proposal that Professor VanLandingham and I have
15 put before you, a joint prosecution decision making
16 modality, is really what chiefs of major police
17 departments in the United States do when one of
18 their officers engages in misconduct. They work
19 with the DA, and together they decide what the
20 appropriate disposition should be.

21 MR. BRYANT: Sort of, kind of. I'm one of
22 those DA's, and we have a police department of over

1 900 members. So that's not entirely correct, but
2 it's not beyond that. About this model, who would
3 break the tie when the military JAG says I don't
4 think we should go forward with this, sir, and the
5 commander says, oh, yes, we are? Who breaks that
6 tie?

7 PROFESSOR VANLANDINGHAM: Sir, then it
8 would go up to the next higher level commander JAG
9 team. They would not be able to order, because of
10 Article 37, unlawful command influence, order the
11 subordinate commander to take action. Instead they
12 would look at it afresh, and they would come --
13 they would go through the collaborative decision
14 making process themselves at that next higher
15 level. And I think through the forcing function,
16 they would receive consensus at -- in short order.

17 MR. BRYANT: Excuse me. Are you
18 responding to that question?

19 LORD THOMAS: Yes.

20 MR. BRYANT: Yes. All right, thank you.

21 LORD THOMAS: Where I have difficulty is
22 this, that the criminal law deals with what's

1 happened. It's in the past. And concern with
2 investigation, the punishment of what's happened in
3 the past.

4 And I can't see the connection between
5 that and the unhesitating willingness of a soldier
6 to respond to an order. I don't see that what has
7 happened in the past, and the investigation of
8 that, and how that is done, and whether it is fair,
9 and whether it results in confidence in the justice
10 has anything at all to do with the discipline that
11 sends someone over the top to do something that is
12 quite extraordinary and maybe very brave. I don't
13 see that it is necessary for the commander to
14 exercise that investigation and punishment function
15 in order to ensure proper discipline in action.

16 PROFESSOR DRAPEAU: And if I may, I
17 simply, I just -- I have commanded myself in the
18 past. I cannot see what the interest of a
19 commander would be. Even in combat, if one of his
20 soldiers is accused of sexual assault, murder,
21 torture, a major crime, why would he want to
22 continue to be involved in any aspect of

1 prosecution of as opposed to putting it into the
2 hands of the proper authorities that would
3 prosecute this and see this to come to trial? If
4 for no other reason, he also owes a duty to both
5 his unit and other people under his command,
6 particularly if the victim is residing from within.
7 So why would he want to take a role and lose any
8 objectivity that he may have, impartiality, and is
9 focus on delivering the mission? I just can't make
10 it.

11 CHAIRWOMAN JONES: Ms. Holtzman?

12 CONGRESSWOMAN HOLTZMAN: Thank you, Madam
13 Chair. I was going to get to the same point that
14 Lord Martin Thomas and Professor Drapeau raised,
15 which is when you say, which is what is the
16 connection, the logical connection, between the
17 claim that the commander sends people to their
18 death, and the role of the commander in sending
19 cases for prosecution? I mean, if we analyze this
20 a little bit more in depth, you can say what is the
21 willingness of people to follow a commander who is
22 perceived to be unfair? What is the consequence of

1 that? And if the --

2 So I guess I don't have an answer to that.
3 So what is the argument you're making that if the
4 commander doesn't have the power to seem to be
5 arbitrary to do whatever he wants or she wants to
6 do, then troops won't follow that person? I mean,
7 it seems to me that the implication of unfairness
8 could be extremely corrosive of discipline and of
9 morale. And so, why put the commander in that
10 position?

11 If the commander -- and I want to go back
12 to the police argument that was -- example that was
13 used because I was a prosecutor. And by the way,
14 we never made decisions, or at least not in my
15 office that I'm aware of, with the police when we
16 were deciding prosecutorial decisions. That was a
17 decision for us to make.

18 But the same argument holds. Why would
19 people -- and not quite to the same degree, but why
20 would people obey the police because basically
21 their decisions on arrests are going to be decided
22 by prosecutors as to how to implement it? We have

1 a constant division in our society between the
2 enforcement, the arrest function, and the
3 prosecution. The prosecution is not normally in
4 our society handed to heads of corporations or
5 others. So I don't see that changing this would be
6 -- would affect -- would so undermine our sense of
7 how a proper society or a fair society works that
8 we would have no discipline in the military, that
9 commanders wouldn't be followed.

10 I'm not following the logic of your
11 argument. I just don't see -- I think this is an
12 inductive leap without evidence. I'm not saying
13 that it couldn't be true. I'm just saying how do
14 you get to the point that because a commander sends
15 somebody to his or her death, that they then have
16 to have the power to send someone to be prosecuted
17 or not prosecuted. Where is the logical
18 connection?

19 PROFESSOR CORN: Well, first off, I'm not
20 saying that you have to have that. Obviously we
21 have members of the Panel who come from armed
22 forces where commanders give the same orders, and

1 unfortunately sometimes the service members
2 responding to those orders either have to take life
3 or lose life.

4 It's the exact opposite, I think, though.
5 That is the point I'm trying to make. You start
6 with the supposition that the commander is going to
7 exercise his authority arbitrarily and will,
8 therefore, corrode the relationship of command and
9 subordinate. I wouldn't disagree with that. But
10 if the commander is exercising the authority
11 properly, if the members of the unit recognize that
12 when there is an act of misconduct in the unit,
13 it's handled efficiently and fairly according to
14 fair process, that builds the sense of confidence
15 in the leadership of the organization and enhances
16 that command relationship.

17 I think that is the entire foundation of
18 the military justice system and has been emphasized
19 in prior reform efforts that by ensuring fair
20 process in the process of achieving discipline, you
21 enhance good order and discipline in the unit
22 because it builds that bond of confidence.

1 And one other comment. All of the members
2 of the Panel, either whether on, as one of the
3 Panel members indicated, this side or that side,
4 agree that a commander must retain a function in
5 the discipline process. How you distinguish
6 discipline from crime I find somewhat perplexing.
7 Is cutting off the ear of a dead enemy combatant in
8 combat a discipline matter or a criminal matter?

9 PROFESSOR FIDELL: It's a war crime.

10 PROFESSOR CORN: It's a violation of the
11 Geneva Convention. It's the abuse of a body. It
12 can have potential massive consequences if it's not
13 addressed adequately and rapidly. Do you hand that
14 to the prosecutor, or does the commander deal with
15 that?

16 Is the sexual assault of a member of your
17 own unit a disciplinary problem or a criminal
18 problem? To me, they're intertwined, and that's
19 why the commander has to have a role in responding
20 to them.

21 CONGRESSWOMAN HOLTZMAN: Well, but -- may
22 I just follow up?

1 CHAIRWOMAN JONES: Yes, of course. Go
2 ahead.

3 CONGRESSWOMAN HOLTZMAN: Well, with regard
4 to sexual assault, I don't understand how that
5 could never -- how that in any case couldn't be a
6 criminal problem, prosecuted to make a decision
7 about whether there's sufficient evidence to bring
8 a case. Is it also handled in some other
9 disciplinary manner until -- wait until the
10 prosecutor makes a decision? That's another story.
11 I don't know whether there's an arrest first or
12 what. But how is that ever not a decision to go to
13 a prosecutor?

14 PROFESSOR CORN: I think it does to have
15 to go to a prosecutor.

16 CONGRESSWOMAN HOLTZMAN: Okay. So then --

17 PROFESSOR CORN: Our point is that if you
18 provide it exclusively to the prosecutor, you are
19 nullifying the role of the commander in ensuring
20 that the response to that misconduct contributes to
21 the disciplinary of the unit and the confidence of
22 the other members of the unit in that commander's

1 leadership --

2 CONGRESSWOMAN HOLTZMAN: Okay, but
3 that's --

4 PROFESSOR CORN: -- that they're the ones
5 who have to follow that commander's orders in
6 combat.

7 CONGRESSWOMAN HOLTZMAN: Well, I guess
8 that's the question I started out with. You're
9 assuming that in order for the commander to have
10 that kind of support from the troops, the commander
11 has to be able to make the decision on prosecution.
12 And to me, I don't see any connection between those
13 things.

14 PROFESSOR VANLANDINGHAM: Ma'am, I think
15 there's another component to it, and that is even
16 if it's not essential, our members of today's U.S.
17 forces are consummate professionals. And I doubt
18 that they're following their commander's order
19 because they're think they're going to wind up
20 being court martialed tomorrow if they don't. They
21 don't anticipate violating an order. They follow
22 out of a sense of duty and professionalism.

1 But because of the same reasons -- for the
2 same reasons we place commanders in such roles of
3 great responsibility and we do trust them to order
4 our sons and our daughters and our brothers and our
5 sisters into combat and at times to their death,
6 why not maximize that good judgment, that decision
7 making acumen and attach it and combine it with
8 that of a military lawyer, who does have the
9 training, the objectivity, et cetera?

10 I mean, I think if you had someone that we
11 trusted and vetted as much as commanders in the
12 civilian community in a corporation, we would want
13 to maximize and have that synergistic effect
14 because prosecutors don't always get it right
15 either. I mean, you have the Duke lacrosse cases,
16 and then you have the acquittal avoidance syndrome
17 that you've received information about. So I think
18 it's not necessarily completely hinging on that
19 suddenly we will have a breakdown and degradation
20 of discipline within the military if you take the
21 commander away.

22 But I think it's for a very fundamental

1 other reason, which is why we have this resource.
2 Why not continue to use it, but add to it and
3 formalize the process, which primarily already
4 occurs, which is a collaborative dialogue with the
5 commander. And that leads to my third point, which
6 is even the prosecutorial decision is given to
7 judge advocates, to military lawyers. The status
8 quo may continue to exist.

9 I'm not sure I've seen or heard any
10 empirical data that supports that suddenly the
11 greater reporting of sexual assaults will increase
12 if it's judge advocates making the decisions
13 because, as Professor Fidell aptly pointed out,
14 they still don't know if and when it's prosecuted
15 they have to undergo the system. So I think I'd go
16 back to my last point, which is let's not minimize
17 the commander as a wise individual whose been
18 chosen to sit in that seat and utilize that in an
19 effective and smart sense in decision making.

20 PROFESSOR GUIORA: Can I respond to the
21 question for a second?

22 CHAIRWOMAN JONES: One second.

1 PROFESSOR GUIORA: One second.

2 CHAIRWOMAN JONES: And then Admiral Houck.

3 PROFESSOR GUIORA: One really quick
4 response to your question, Ms. Holtzman. It seems
5 to me that there's a fundamental question that is
6 being faced here, and I think your question hones
7 in on that, is who are we seeking to protect here?

8 CONGRESSWOMAN HOLTZMAN: Exactly.

9 PROFESSOR GUIORA: The unit --

10 CONGRESSWOMAN HOLTZMAN: What is the
11 objective?

12 PROFESSOR GUIORA: Thank you, the unit or
13 the victim. And the decision that was made in the
14 IDF way back when was, with all due respect to the
15 unit, right, as some sacrosanct body, there's
16 something more important than unit, and that is the
17 person who is the victim of a crime. And I
18 understand the unit. I served in the military. I
19 get this. But I think that with all due respect to
20 this idea of the unit, if somebody has been, again,
21 a victim of a crime, that person, he or she, is
22 more important than the sacrosanctcy --

1 CONGRESSWOMAN HOLTZMAN: Sanctity.

2 PROFESSOR GUIORA: Thank you, of the unit.
3 And I think that goes to your question, ma'am.

4 LORD THOMAS: The arguments --

5 CHAIRWOMAN JONES: Admiral Houck?

6 LORD THOMAS: -- I'm hearing to my right
7 seem to suggest that the purpose of maintaining the
8 CO's position is to enhance his status as a wise
9 leader, and to improve his status to be seen to be
10 a fair decision maker. But, of course, it may
11 diminish his status if he's seen to be an unfair
12 decision maker when it comes to prosecution.

13 And you can have a situation where in one
14 regiment, the CO is thought to be very strict, and
15 in the other regiment he's seen to be very weak.
16 How does that help? Why don't we have an
17 independent -- well, we do have an independent in
18 Britain -- who achieves parity across the whole
19 system?

20 PROFESSOR HANSEN: I think that assumes
21 too much, that somehow a prosecutor is always going
22 to be better at this than commanders.

1 CHAIRWOMAN JONES: Admiral Houck?

2 VICE ADMIRAL (RET.) HOUCK: I want to
3 thank all of you for being here and for your
4 opinions. I would want to follow up on the issue
5 of empirical data, though. Professor Corn made a
6 comment early on that Senator Gillibrand's proposal
7 is unsupported by empirical information. Professor
8 VanLandingham just made I think what was only the
9 second reference in almost two hours to empirical
10 data.

11 So I think as a Panel it would be helpful
12 to know if there is any empirical data that goes
13 beyond our intuition. And I, too, have served, so
14 I'm not sure our intuition, having served in the
15 military, you know, allows us to get it or not any
16 more than anybody else does.

17 Any of you want to comment on empirical
18 data and how empirical data in your own armed
19 services demonstrates a connection between the
20 differences of your system and the U.S. system to a
21 reduction in sexual assault in your own militaries?

22 PROFESSOR FIDELL: I'd like to comment on

1 that, Admiral. And good morning. Nice to talk to
2 you again.

3 VICE ADMIRAL (RET.) HOUCK: Good morning.

4 PROFESSOR FIDELL: I think that empirical
5 data are, number one, unlikely to provide any
6 assistance to either side -- any of the multiple
7 sides in this discourse. And speaking only for
8 myself, I'm not looking to empirical data, and I
9 will -- to lay a card on the table that I've
10 expressed before, I thought frankly the DoD numbers
11 -- I'm not a number guy -- numbers guy, but I
12 thought they intuitively struck me as a little high
13 in terms of the, you know, sheer number of cases
14 and some definitional issues.

15 But my own view is what's -- what we're
16 talking about here is public confidence in the
17 administration of justice. And in my opinion,
18 public confidence is the touchstone that we should
19 be concerned about, not whether a particular reform
20 will drive up, drive down, or leave the same the
21 number of cases that are -- the number of
22 complaints that are received, the number of cases

1 that are brought to trial, and the number of
2 convictions. I think it's much more important that
3 all the affected interests, and that includes
4 accused, persons who are complaining, and
5 onlookers, family members, have the feeling that
6 the system is a 21st century system that abides by
7 the high standards that Americans have come to
8 expect from the administration of justice.

9 So it's not a numbers question for me, and
10 frankly I think that's a hole down which the Panel
11 should not descend because I think it's the wrong
12 question.

13 VICE ADMIRAL (RET.) HOUCK: Well, I think
14 it's an important question because if, in fact,
15 there is no empirical data one way or the other --
16 and I ask it in an open-minded way; I ask it
17 objectively -- then I think we should acknowledge
18 that we are then dealing with questions of
19 intuition, and simply acknowledge that right up
20 front because there have been statements made this
21 morning in a variety of ways and from a variety of
22 perspectives about what must be the case and what

1 -- how people may, you know, are bound to react in
2 certain circumstances. And I think we just need to
3 be clear about what we're basing that on.

4 If I may ask one more?

5 CHAIRWOMAN JONES: Yes.

6 VICE ADMIRAL (RET.) HOUCK: It goes to the
7 question of, there is Professor Guiora, who is a
8 very distinguished professor and I admire your work
9 very much.

10 PROFESSOR GUIORA: Flattery will get you
11 everywhere.

12 VICE ADMIRAL (RET.) HOUCK: Pardon me?

13 PROFESSOR GUIORA: Flattery will get you
14 everywhere.

15 (Laughter.)

16 VICE ADMIRAL (RET.) HOUCK: Well, you made
17 the comment earlier on that the rights of an
18 individual -- and I'm paraphrasing, and I didn't
19 get it exactly -- should not be subject to
20 logistical issues. And I do wonder, and I think
21 it's worthy of exploration, how the proposals to
22 put lawyers in charge of these decisions, how will

1 that work?

2 There is no doubt that the fighting forces
3 of the United Kingdom and Canada and the Israel
4 Defense Force are courageous, and bold, and fierce
5 fighters. But I don't think anybody would dispute
6 the fact that the breadth and scope of their
7 deployments and the logistical challenges of the
8 operations of any of the forces, which total
9 combined are less than the size of the United
10 States Army alone, are comparable to those facing
11 U.S. forces. So I wonder if you could comment on
12 the logistical aspects of this, because I think
13 it's a reality.

14 PROFESSOR DRAPEAU: If I may, as you just
15 said, you characterize it as putting the lawyers in
16 charge. I see it at the other end of the
17 telescope, is to remove the commands -- the
18 commander for being in charge so that when you have
19 these systems whose purpose in life and training
20 and resources is the application of law in a fair
21 and universal way, that you can have an increased
22 sense of confidence that those who become victims

1 of crimes, many of them our sons and daughters
2 serving in uniform, can have a sense of confidence
3 into the justice system. Not the command system,
4 the justice system, that if and when reported, and
5 we know there is a wide disparity between the
6 number reported and the number of presumed
7 assaults, then these can be brought to prosecution.
8 And that's the issue, and on which there is no
9 empirical evidence, at least not from our country.
10 We cannot tell you how much there is and how much
11 difference this has made. I presume it has, but
12 that's it. We cannot -- I cannot provide this kind
13 of evidence.

14 PROFESSOR GUIORA: If I can respond, sir,
15 to your question. So not only do you paraphrase it
16 correctly, but you said it exactly correctly.
17 Chief Justice Barak made that statement in response
18 to the detention of tens of -- I think between 10
19 to 15,000 Palestinians in response to Operation Ebb
20 and Flow, which comes after the Passover massacre
21 in 2001. So we detained around 10,000
22 Palestinians, which was fine or not fine, it

1 depends on your perspective. The only problem was
2 there was no place to put them, and the IDF decided
3 unilaterally to extend the period of detention of
4 remand from, I think, two days to four days or four
5 days to seven days. And it came to the Israeli
6 Supreme Court. And Barak held to the idea if it
7 violated individual rights and there wrote that
8 logistical burdens must not be borne by the
9 individual.

10 So to your question, sir, you're
11 absolutely right. The size of the IDF is obviously
12 different from the size of the U.S. military. But
13 in the context of the discussion that this Panel is
14 having, it would seem to me that while the
15 logistical question is absolutely essential, the
16 broader question, which ties into the logistical
17 question, is what I said to Ms. Holtzman, is what's
18 the primary burden here in terms of what rights are
19 we protecting? Are we protecting the rights of the
20 unit or are we protecting the rights of the
21 individual? I think that's the larger
22 philosophical existential question.

1 If we determine that the primary purpose
2 of this entire conversation -- not this
3 conversation, but the larger conversation -- is to
4 protect individual rights, then it would seem to me
5 that systems at the end of the day, you know,
6 reflect what individuals have decided, that systems
7 can be put in place that would enable the JAG,
8 again, based on my experience in the IDF. The JAG
9 can be put here, it can be put here, and, you know,
10 there can be courts here, and there can be courts
11 there.

12 I mean, I don't think that a logistical
13 question, again, paraphrasing Barak, is more
14 important than the rights issue, because I think at
15 the end of the day what needs to, at least --
16 again, from my experience in the IDF, that the
17 primary concern here is the rights of the
18 individual in this case or the victim. And I think
19 seems, at least in the IDF experience, is superior
20 to the rights of the unit. And if you determine
21 that it is the individual's rights that are more
22 important than the unit's rights, then logistical

1 decision making just falls lockstep into that.

2 VICE ADMIRAL (RET.) HOUCK: And a final
3 comment. I don't -- I think that there should be
4 no mistake that there's no issue that the rights of
5 the individual are paramount and critical. But I
6 think we -- I think the issue is, are they mutually
7 exclusive of the effectiveness of the system that's
8 put in place and the combat effectiveness of
9 fighting forces. And it strikes me that the
10 objective here is to do both and to find a way that
11 protects absolutely the rights of individuals and
12 victims of sexual assault without doing harm to a
13 combat force that has proven itself to be pretty
14 successful.

15 PROFESSOR FIDELL: It's Gene Fidell. Can
16 I add a footnote here, if you don't mind?

17 CHAIRWOMAN JONES: Yeah, go ahead, and
18 then we're going to take a break, Professor.

19 PROFESSOR FIDELL: Right, I'll make it
20 short. I personally don't see that there is a
21 tension between logistics and affording people's --
22 people their rights. I mean, the U.S., we have a

1 wonderful military. It never has enough resources,
2 but it's got tremendous resources. And indeed
3 we've been able to administer justice in country,
4 in Iraq, Afghanistan, Vietnam. We were conducting
5 trials basically in the jungle in Vietnam. Anybody
6 here remember that? So, you know, we are capable
7 of doing it.

8 There are issues as to where cases should
9 be tried, and some of those were developed,
10 frankly, by the Defense Legal Policy Board, and I
11 hope everybody on the Panel has a copy of the
12 report of that board. But there has never in my
13 knowledge been a sense that it would be an
14 insuperable or even a serious or any change, in
15 fact, in those questions, the feasibility of trial,
16 if you had a trial counsel function outside the
17 chain of command. I just -- there's no connection
18 between those two.

19 CHAIRWOMAN JONES: All right. We'll take
20 it up after the break. We're going to take a 10-
21 minute break.

22 (Whereupon, a recess was taken.)

1 CHAIRWOMAN JONES: All right. During the
2 recess, Colonel Ham brought to the Panel's
3 attention that we were in receipt of empirical
4 information with respect to the Israel Defense
5 Forces. Colonel Ham?

6 COLONEL HAM: Yes, thank you, ma'am. The
7 members received a large amount of information,
8 part of which was some materials from the Deputy
9 Military Advocate General of the Israeli Defense
10 Forces, who pointed out that every year, 50 percent
11 of complainants, sexual and harassment, choose not
12 to report their complaint to the military police,
13 and, therefore, a criminal investigation of these
14 complaints is not conducted. So while as Professor
15 Guiora pointed out there is an increase in the
16 number of complaints from approximately 318 per
17 year to 583 per year from 2007 to 2011,
18 approximately 50 percent every year of those
19 complaints are never investigated.

20 The Israeli Defense Forces also provided
21 us the number of indictments per year from 2007 to
22 2011. For 2007, out of 318 complaints received,

1 there were 23 indictments. For 2008, out of 363
2 complaints received, there were 28 indictments.
3 For 2009, out of 445 complaints received, there
4 were 26 indictments. For 2010, out of 483
5 complaints received, there were 20 indictments.
6 And for 2011, out of 583 complaints received, there
7 were 14 indictments.

8 As to empirical information for the UK --
9 I'm sorry. And the Deputy Military Advocate
10 General said, "We can't attribute the incline in
11 complaints between 2007 and 2011 or the decline in
12 complaints in 2012 to a specific reason. The rise
13 in the complaints could be the result of a rise in
14 the commitment of sexual offenses. Just as much,
15 it could be the result of authorities' campaigns to
16 raise awareness to the issue."

17 LORD THOMAS: May I say something about
18 the United Kingdom?

19 CHAIRWOMAN JONES: Yes. Just a moment,
20 Lord Thomas. Is that it?

21 COLONEL HAM: And as to the United
22 Kingdom, the Library of Congress issued a report

1 this past July on our Allied services for the
2 United Kingdom. A survey in 2006 found that almost
3 all service women who responded had been in a
4 situation that involved sexualized behavior, with
5 almost 70 percent responding that they had
6 encountered sexual behavior directed at them that
7 was unwelcome. The length of service was found to
8 play a role. The longer surveyed respondents had
9 served, the more likely they were to perceive there
10 was a problem with sexual harassment in the
11 military.

12 Thirteen percent reported they had been
13 sexually assaulted, but only five percent of these
14 made a formal written complaint. Reasons given for
15 not filing a formal complaint included wanting to
16 handle the situation by themselves, concern over
17 being labeled a troublemaker, concern that the
18 complaint would have a negative impact on their
19 career, and concern that nothing would be done
20 about it.

21 For those who did make a formal complaint,
22 almost half stated it took too long to resolve the

1 issue, claimed they were not properly informed
2 about the procedure, and were not satisfied with
3 how the outcome was explained. Over half stated
4 there had been negative consequences as a result of
5 filing a complaint, with 64 percent considering
6 leaving the service.

7 CHAIRWOMAN JONES: All right. Let me just
8 say that to some extent, our interest in empirical
9 evidence such as this flows from the rationale that
10 is out there behind making the change to the role
11 of the commander in our military. And the
12 rationale, or at least the primary one, is that it
13 will increase the confidence of victims and will
14 increase reporting. And so, to some extent it's
15 obviously important for us to see whether there is,
16 in fact, that empirical connection.

17 I don't know if -- I know, Lord Thomas,
18 you wanted to say something. And then I'm going to
19 go to Colonel Hook. I think I just called you
20 Colonel Hook. Where are you, Colonel?

21 COLONEL (RET.) COOK: Over here.

22 CHAIRWOMAN JONES: Colonel Cook. Why

1 don't we do that?

2 COLONEL (RET.) COOK: I'm fine with that.

3 (Laughter.)

4 CHAIRWOMAN JONES: Go ahead, Lord Thomas.

5 LORD THOMAS: May I apologize, first of
6 all, that the quotation which has been just read to
7 you from that 2013 document refers to a research
8 that was done in 2006, which is before the current
9 system was introduced under the 2006 Armed Services
10 Act with the appointment of the Director of Service
11 Prosecutions and so on. So that was the situation,
12 it would seem, from a report made at that time.

13 Last week we were sent by yourselves, by
14 the Panel, an analysis of British statistics for
15 the last few years by Dean Schenck. No doubt you
16 have seen that or will see it in due course. On
17 immediate examination, it appeared to be
18 desperately flawed, and since it was only Thursday
19 that we received it. The responses from the
20 Director of Service Prosecutions when he had calmed
21 down were sent to Dean Schenck, who very graciously
22 revised her conclusions not once, but to date,

1 yesterday, three times. I don't think it is
2 possible to go into her analysis, but simply to ask
3 you not to accept it as being correct because she
4 has herself agreed that it is flawed.

5 CHAIRWOMAN JONES: Well, Lord Thomas,
6 you're also going to provide us with your comments
7 on her analysis, correct, or how is that going to
8 work?

9 LORD THOMAS: Well, what is going to
10 happen is that you will hear from Brigadier Anthony
11 Paphiti this afternoon, who has done quite a bit of
12 work over the weekend on that. I think that you
13 will ultimately hear -- I hope you will hear from
14 Bruce Houlder, the Director of Service
15 Prosecutions, at a later date, either appearing in
16 front of you orally or certainly he will make
17 submissions about those figures. And by the end of
18 that process, I'm sure the position will be
19 clarified.

20 But certainly, first of all, the 2006
21 survey is no longer valid because, of course,
22 things have changed, and, secondly, the analysis of

1 recent things that you have received is flaws. The
2 purpose of the changes, of course, in the United
3 Kingdom were not limited to sexual assaults.
4 They're across the board. If somebody hits you
5 over the head or steals your car or burgles your
6 house, you immediately complain to the police.

7 Sexual assault is a very different thing.
8 People don't complain about sexual assaults for the
9 various reasons that were pointed out in that 2006
10 survey and for reasons that we all know and I won't
11 go into. What is necessary is to have a system,
12 which is seen to be fair and independent to create
13 a climate in which complainants will come forward
14 more willingly to make their complaints, and by
15 their so doing and by the knowledge that they will
16 so do, diminishing those who are likely to be
17 perpetrators of sexual assaults at some future. So
18 it's all a question of building up a climate of
19 confidence in the system, which will result
20 ultimately in the diminishing of sexual assault.

21 We believe, and I think one of our
22 representatives will say that, that in the Royal

1 Navy, the problem has been tackled. Complaints by
2 young men, of course, are possibly more difficult
3 than by young women. We position that it has been
4 tackled, and the -- it is believed that the
5 incidence of sexual assault in the Royal Navy has
6 been very severely diminished by steps that have
7 been taken.

8 CHAIRWOMAN JONES: Thank you.

9 PROFESSOR FIDELL: Ma'am, it's Gene
10 Fidell. I'm afraid I have to ring off now because
11 I have to go to class.

12 CHAIRWOMAN JONES: Well, we're sorry to
13 lose you, Professor Fidell. I hope you can join us
14 in person one of these days.

15 PROFESSOR FIDELL: Nothing would give me
16 greater satisfaction.

17 CHAIRWOMAN JONES: Okay, thank you.

18 PROFESSOR FIDELL: Thank you. Bye now.

19 CHAIRWOMAN JONES: Colonel Cook?

20 COLONEL (RET.) COOK: Thank you, Judge.

21 Thank you all for being here today. The
22 information you've provided us is very helpful and

1 the dialogue is helpful to our thought process.
2 And I'm going to start where Lord Thomas just ended
3 by -- when he said that the confidence in the
4 system is that's what's going to diminish some of
5 the challenges associated with sexual assault, and
6 I would agree with that because it goes back and it
7 answers for me, to some extent.

8 One of the questions I keep hearing is who
9 are we trying to protect, the unit or the victim.
10 Are we trying to enhance commander status as a fair
11 decision maker by keeping them there? Having been
12 in the system, there's a part of me that says we're
13 trying to protect the system. It's supposedly a
14 military justice system, and that's for all that
15 are involved. And there are the victims that are
16 in the units. There are commanders. There are the
17 people who are accused, and unlike the civilian
18 sector, often these people are not removed from
19 that situation. They may be in that same command.
20 And while there may be an opportunity that, one,
21 either the victim or the accused may be separated
22 or removed, in some cases that's logistically

1 impossible at least for some time frame. So
2 maintaining that command discipline and unit
3 integrity is important, at the same time making
4 sure that the fairness of the process remains.

5 So having said that, I know that right now
6 one of the things we're focused on is some of the
7 victims have a perception that it's not fair, and
8 that alone is a big concern. So when I look at the
9 proposal -- I'm going to have -- my question goes
10 for both sides. When I say "both sides," I'm
11 looking to some of the comments about how do we
12 change our system and how do we look at some of the
13 international systems.

14 On our system, the proposal that was given
15 to us as far as a recommendation, a joint proposal.
16 I think both Professor Corn and Professor
17 VanLandingham have both conceded it's essentially
18 what we're doing now. You've got an advisor, the
19 legal advisor, to the commander. We formalized the
20 system when we put it in writing and say this is
21 the requirement. We add some ethics. How does
22 that change anything of what we've been doing,

1 because I have to believe that the lawyers are
2 still giving ethical advice to the commanders. The
3 commanders may not have the same level of training,
4 but either they're taking that advice or they're
5 making their own decisions based on the command
6 responsibility. And that would be one part, so I'd
7 like that addressed first.

8 But then the second part will be more to
9 my -- the international side of the house. We've
10 talked about what if you take the commander out of
11 it, does that in any way change the commander's
12 role? I would suggest, at least in the U.S.
13 military, probably not because they still have that
14 disciplinary piece. They still care about every
15 member of their unit.

16 I guess my question for you that I haven't
17 heard discussed or addressed is, how does that
18 change the legal advisor's role, because before
19 they've got -- in most cases, at least, in our
20 units, the legal advisors work for the commanders.
21 They're in their -- they're being rated by the
22 commander. They're responsive to them. Now

1 they're going to be focused maybe a little bit less
2 on what the command's interests are because they're
3 looking solely at the system or the process and the
4 prosecutorial aspects of it. Does that diminish or
5 in any way harm that relationship? Have you seen
6 any impact long term?

7 But I'd like to start with first of what
8 changes if all we do is formalize a system that
9 we've already done.

10 PROFESSOR CORN: Well, I think that one of
11 the responses goes to the point that was made
12 before the break, which is one of the objectives
13 here is to enhance the credibility of the system,
14 actual and perceived. So it responds to the, what
15 I think is, overbroad assertion that commanders are
16 exercising plenary authority in an arbitrary
17 manner. What we know, those of us who've been in
18 the system, is that, in fact, commanders very
19 rarely deviate from the advice of their legal
20 advisor. But by formalizing it in the Code, it
21 enhances the perceived credibility of the system
22 because that then is recognized as a mandatory

1 requirement as opposed to the kind of de facto
2 customary process that occurs. That's number one.

3 And number two, I think that from the
4 first time we appeared, Professor VanLandingham
5 made a critical point. You can create process, but
6 if you don't train people, if you don't educate
7 them on the process, and if you don't give them
8 decisional touchstones, then the efficacy of the
9 process you create is diminished.

10 So part of it would be the incorporation
11 of the touchstones for exercising prosecutorial
12 discretion that would guide this cooperative or
13 joint decision making process. Ultimately, I think
14 that credibility of the system relies on process.
15 I've heard a couple of times, what are we
16 protecting here, the unit or the individual, or the
17 unit or the victim. It seems to me that justice is
18 a process that considers all of these interests,
19 the interest of the effectiveness of the unit, the
20 interest of the mission, the interest of the
21 victim, the interest of the accused. The exercise
22 of prosecutorial discretion has to factor all of

1 these interests in.

2 If the system were designed only to
3 protect the victim, we wouldn't have a right to
4 confrontation. The confrontation clause is a
5 constitutional provision that's designed to protect
6 the rights of the accused, oftentimes at the
7 perceived expense of the victim. But it's because
8 that is the process of achieving justice.

9 So I think what it would contribute is a
10 sense that what is informal is now formal, which
11 enhances the process itself because it will be the
12 venue for requiring more training and understanding
13 of the system, and it will create a greater
14 perception that what is actually happening now is,
15 in fact, happening.

16 COLONEL (RET.) COOK: So your view then,
17 you don't think that training that the commanders
18 are getting now in terms of what the rules are that
19 they're applying and the standards that they're
20 imposing in this process with their legal advisor
21 sitting next to them are adequate the way it is
22 right now. Do you think there's going to be

1 something substantively added that's going to
2 change that?

3 PROFESSOR CORN: I think that the services
4 need to consider substantively modifying the
5 training. As I said in the first Panel, the notion
6 that you train people to exercise the immense
7 responsibility of making these judgments just by a
8 lecture is inconsistent with the way we train
9 commanders to exercise significant judgments in all
10 other aspects of their function. They have to
11 practice it.

12 Now, I don't know if that -- I can't say
13 that never happens now. I think there's an ad hoc
14 nature to it. In that the way commanders are
15 developed in one command might differ than
16 another command. But I do think that it would be
17 worth re-looking at the way we develop commanders
18 or future commanders for the function of their
19 military justice responsible.

20 CHAIRWOMAN JONES: Professor Corn, would
21 the staff judge advocate be reviewed, though, by
22 the commander in terms of his performance in this

1 system?

2 PROFESSOR CORN: I think so, and I think
3 that if we don't have confidence in a senior
4 military lawyer to understand the ethical
5 obligation of who the client is and have the moral
6 and ethical courage to be able to say to a
7 commander, sir, you're wrong here, and we shouldn't
8 send this case to trial because there's
9 insufficient evidence, or you cannot allow your
10 concern that an officer might suffer a sanction to
11 influence your decision to send this case to trial
12 because of a perceived self-interest of what the
13 rating is going to look like, how are we going to
14 trust that legal advisor to give the commander
15 advice in battle on what is or is not a lawful
16 target, or what is or is not a necessary precaution
17 in the attack?

18 We trust lawyers to exercise judgments
19 ethically, and I don't think the fact that the
20 staff judge advocate is rated by the convening
21 authority undermines that. If anything, I think
22 most senior military lawyers assume that the

1 commander is going to value that level of candor,
2 which is why that advisor is different than any
3 other advisor on that battle staff.

4 PROFESSOR BEHAN: If I could just be heard
5 on that. I don't agree with Professor Corn and
6 Professor VanLandingham's proposal.

7 CHAIRWOMAN JONES: Did you say or you
8 don't?

9 PROFESSOR BEHAN: I do not agree with it,
10 and for a couple of reasons. First, I don't
11 believe that making formal something that Geoff
12 characterizes as informal would necessarily make a
13 difference. I actually think it is a formalized
14 relationship right now with the requirement for
15 general courts martial, at least of an Article 34
16 advice by a staff judge advocate. And there is a
17 formal requirement.

18 Now, the shared exercise of prosecutorial
19 discretion, I think, creates some problems in this.
20 And maybe I'm a little bit reactionary when it
21 comes to the role of military commanders, but I --
22 there are no other staff officers who would have

1 the ability to veto an action of a commanding
2 officer, to have equal vote, for instance. An
3 operations officer could propose a plan. The
4 commander could take a look at it and say, I think
5 that's a fantastic plan. It's the most likely to
6 succeed. I'm going to go with the most dangerous
7 option right here because I think that it's worth
8 it to take a chance.

9 And I don't think that we need to elevate,
10 especially in a military setting, lawyers to the
11 same level as commanders. There is nobody, I
12 believe, in the military justice system more
13 equipped, given better information, to be able to
14 determine the effect of a particular offense,
15 pattern of offenses, pattern of behavior in a
16 command on the command, on its efficiency, on its
17 good order and discipline, than a military
18 commander. Military lawyers have a sense of this
19 obviously. Those of us who have served, we get a
20 sense of what's important about good order and
21 discipline, but we don't get to make the ultimate
22 call because we don't have that ultimate

1 responsibility and authority.

2 To address a concern earlier from the
3 Admiral on empirical evidence, I think that the
4 system that we have right now from the empirical
5 evidence that I've seen from some other submissions
6 to this Panel and others indicates that when it
7 comes to the difficult sexual assault cases -- the
8 he said/she said cases, the cases that civilian
9 prosecutors won't touch -- the military takes those
10 cases. And as I understand it in a recent
11 submission, the Air Force, not a single case where
12 a civilian prosecutor took a case that the military
13 was not willing to take. And whereas there had
14 been a number of cases over the years where the Air
15 Force had taken cases at civilian jurisdictions
16 that were not willing to cover.

17 Logistics is also a very important part of
18 this. Professor Fidell's last submission before
19 the break in which he talked about the fact that
20 we've been able to have courts martial in deployed
21 environments going back to Vietnam to the present
22 day is an indicator of how important command

1 involvement is. Somebody owns the planes, the
2 trucks, the ships, provides orders, provides funds,
3 gets people in theater. We even have a pretty
4 robust system for getting civilian defense counsel
5 into theater at the command's expense to help
6 provide legal assistance to soldiers who are
7 accused of crimes.

8 So I believe that the commander needs to
9 maintain the preeminent position not only in our
10 military force as a whole, but also when it comes
11 to military justice because there's no sense in
12 having a military justice system that doesn't
13 support good order and discipline. And there is
14 nobody who is responsible for good order and
15 discipline other than a commander.

16 PROFESSOR HANSEN: If I may, before we go
17 to the international side of this, I think that
18 Professor VanLandingham and Professor Corn's
19 suggestion is intriguing. But I suspect that, as
20 your question might suggest, that mere training is
21 probably not going to be enough or even perhaps
22 formalizing the relationship. I think there indeed

1 are aspects that we currently entrust to commanders
2 as part of the command-centric system that don't
3 make sense. And those include commanders selecting
4 panel members. I just don't see that there's a
5 necessity for that. That doesn't strike me as the
6 essence of what a commander needs to do to maintain
7 good order and discipline.

8 I think questions of witness funding and
9 those kinds of questions that we would typically
10 have a judge decide, it does not make sense to me
11 or has any basis in maintaining important command
12 functions to allow the commander or have the
13 commander making those kinds of preliminary
14 decisions, that those could easily be made by a
15 military judge who's much legally trained and could
16 be done much earlier in the process than currently
17 takes place.

18 As it stands right now, a military judge
19 does not get involved in the courts martial until a
20 case is referred to trial. There's lots of
21 preliminary matters that are litigated and then re-
22 litigated once a judge gets involved, and I think

1 there are many aspects where none of that has to
2 do, in my opinion, with the essence of command
3 beyond training. But I would recommend that this
4 Panel look at some of those issues and see what is
5 so essential about that function to a commander's
6 role in maintaining good order and discipline.

7 PROFESSOR VANLANDINGHAM: If I may add to
8 my proposal with Professor Corn, I don't think -- I
9 think we should emphasize that it's not merely
10 formalizing what already happens, that giving a
11 staff judge advocate a statutory role in
12 prosecution and managing, balancing that
13 commander's role will enhance the credibility of
14 the system.

15 There is a sense, at least in this area,
16 that there is arbitrary -- there are arbitrary
17 dispositions and arbitrary decisions made by
18 commanders. And if there's a statutory role that
19 victims know that it's not just the commander
20 making the decision, it is the commander with their
21 lawyer, and that's where I do have to counter
22 Professor Behan's point that commanders get to make

1 decisions in everything else. No, they don't.
2 Commanders don't practice medicine. Commanders
3 aren't in the operating room. And there are other
4 areas in which we do vest professional decision
5 making in other individuals besides the commander.
6 Here I think the commander should be balanced by a
7 formal role by the -- by a judge advocate.

8 And finally, regarding the empirical
9 evidence that Admiral Houck rightly brought up
10 earlier, shifting things purely to a civilian --
11 purely to a military prosecutor is not -- does not
12 necessarily lead to the conclusion that there will
13 be greater prosecutions. In fact, I would refer
14 the Panel to footnote 5 in Professor Corn's and my
15 submission, in which there was a terrific recent
16 study completed last year stating that in many
17 current civilian studies, failure to account for
18 the attrition that occurs prior to prosecutors
19 accepting a case leads to inflated rates of
20 prosecution, the incentivizing of prosecutors to
21 filter out weak cases that would lower their
22 conviction rates, the acquittal avoidance, and

1 that, in fact, out of 100 forcible rapes in U.S.
2 civilian jurisdictions, an estimated .4 to 5.4 are
3 actually prosecuted in the civilian sector, which
4 is a shockingly low, low number.

5 So I would just caution against making the
6 leap that purely changing who makes a decision is
7 going to have a huge change in outcome, and, in
8 fact, that it's more than just adding a few ethical
9 standards. It's providing robust comprehensive
10 policy guidance of when to actually prosecute.
11 Should it be as it seems to be an opinion that any
12 allegation of -- with probable cause of a sexual
13 assault should automatically go to a court martial.
14 And I would take great pause with that. I think
15 there needs to be more decisions as I know the
16 Honorable Holtzman, there are more factors that
17 need to be taken place. A prosecutor does not want
18 their hands tied, but they want guidance and
19 scenarios and factors to help make that decision.

20 So I think a more robust structural policy
21 guidance such as the type provided in the DoJ
22 manual in Chapter 9, that, combined with the

1 synergistic effect of maximizing a military
2 attorney with the commander's good judgment
3 decision making, will get to the end of justice.

4 And I agree with Professor Corn and others
5 that it's a false dichotomy between the unit and
6 the victim. In fact, the unit -- it's the unit's
7 interest, the victim's interest within both of
8 those constituencies and trusts for justice to be
9 done. And justice includes the assurance of
10 punishment, deterrence, and the protection of the
11 public. The protection of the public in large part
12 in the military is that military community, and it
13 is the commander who is the expert in that military
14 community.

15 COLONEL (RET.) COOK: And on the
16 international side, like I said, we've looked at
17 whether we keep it the way it is where we've got
18 the commander and the JAG in it, or make the lawyer
19 elevated. In your systems, you've either taken the
20 lawyer -- you've either taken the commander out or
21 you've left the commander in for disciplinary
22 purposes, but you've left the lawyer in as a lead

1 role in your prosecutorial decisions. How is that
2 impacted, that relationship?

3 PROFESSOR GUIORA: So if I may begin, in
4 the IDF, my commander was the JAG. The JAG is the
5 one who filled out, I think, what's called a yearly
6 evaluation form. The commander had no say in that
7 whatsoever. So I serve solely under the Judge
8 Advocate General of the IDF.

9 As I said earlier, we have a unified
10 command. There's not an Air Force JAG or a Navy
11 JAG or an Army JAG. There's one JAG, and I served
12 under him. When I was appointed to a particular
13 position, I would have a courtesy visit with the
14 person who would be -- whose commander I would be
15 his legal advisor. But he did not have the right
16 to say I don't want Amos Guiora, which is a
17 pleasant 20-minute visit. And from that moment on,
18 as I said earlier, I served a double capacity, dual
19 role of being both the legal advisor for
20 operational matters and the judge for prosecutorial
21 matters. So that's part one.

22 Part two, I need to add also that in the

1 context of my IDF service, I also was a commander,
2 and I never felt in any way undermined when I had
3 soldiers who committed crimes and the JAG, not me,
4 but another JAG determined their fate. And that
5 struck me as perfectly reasonable in the context of
6 our system is structured. I didn't feel that my
7 soldiers viewed me negatively because I didn't have
8 the command authority to determine what to do with
9 my own soldier. That's what JAGs do, and it was a
10 soldier serving in the JAG Corps.

11 With respect to the question of
12 prosecutorial crime/disciplinary matters, as I said
13 earlier, commanders have the disciplinary
14 authorization or the authority. Again, not to
15 repeat myself because others want to jump in also.
16 The prosecutorial decision making is solely in the
17 hands of the JAG.

18 And I need to add in the context of
19 wearing the dual hat, which indeed can complicate
20 it, because on the one hand, you're providing
21 operational advice and the same day you're meeting
22 with somebody in a meeting, and the same day you

1 have to go make a prosecutorial decision, it's
2 creates some kind of -- I apologize for the
3 expression -- some kind of a wall, like a Chinese
4 wall, between this and that.

5 A couple of years ago it was determined
6 that it probably was not the healthiest thing, and
7 so today there's an effort to remove the legal
8 advisor hat for operational purposes from, for
9 instance, the position I formally held. But when I
10 held it, two hats, one position. But again, the
11 broader context, I don't think that the system that
12 we employ in Israel -- I said that wrong. The
13 system we have employed in Israel, I think, does an
14 effective job of dividing between the role of the
15 commander and the role of the JAG.

16 MR. BRYANT: Madam Chairman --

17 PROFESSOR DRAPEAU: I'll be brief. In
18 Canada --

19 CHAIRWOMAN JONES: We'll just hear from
20 Professor Drapeau.

21 MR. BRYANT: Thank you.

22 CHAIRWOMAN JONES: And then I'll call on

1 you, Mr. Bryant.

2 MR. BRYANT: All right, thank you.

3 CHAIRWOMAN JONES: Thank you.

4 MR. BRYANT: Maybe we need to control how
5 they respond to each other instead of through you.

6 CHAIRWOMAN JONES: Go ahead.

7 PROFESSOR DRAPEAU: In Canada, unit
8 commanders are still involved at the disciplinary
9 level for summary trials. That hasn't changed.
10 For prosecutorial offenses, we have a separate
11 director of military prosecution. And the
12 commanders of those who are prosecuted, they have
13 cut the umbilical cord. They have nothing to do at
14 all with it. They're totally taken out of the
15 equation.

16 The only difference that remains in
17 Canada, we still have suspending authorities and
18 reviewing authorities, although those have been
19 less frequent over the past 20 years. Very, very
20 seldom used. But it is on the books, and those
21 could be activated whenever the right set of -- the
22 right set of circumstances surfaces.

1 My position is quite clear. The chain of
2 command -- the entire chain of command should be
3 taken out of anything but the disciplinary system.
4 Any criminal offenses should be left to the
5 military justice system.

6 CHAIRWOMAN JONES: Mr. Bryant, you had a
7 question.

8 MR. BRYANT: Thank you, Madam Chairman.
9 My question relates to the effect on morale and
10 discipline in a military unit in the United States
11 when, at least in our area, hundreds, and I assume
12 in San Diego and other places going back to my
13 experience in the U.S. Attorney's Office. Hundreds
14 of military members are brought into Federal Court
15 to be prosecuted by civilians for maybe not
16 anything more serious, although it is a serious DUI
17 for which they can be put in jail and other
18 misdemeanor offenses that are initiated not by the
19 commander, but by a civilian-based police officer
20 many times, sometimes by a military police officer.

21 In addition to that, the U.S. Attorney's
22 Office, at least in my experience because I've done

1 it personally, have prosecuted crimes that occurred
2 on the base, not on concurrent jurisdiction, but on
3 the base, at the request of the military commander
4 -- rape, murder, malicious wounding. A lieutenant
5 who robbed the payroll office ship at Little Creek,
6 we did those in civilian court, in Federal Court
7 through the U.S. Attorney's Office.

8 In addition, my office and other offices
9 in military areas prosecute military members who
10 have committed murder, rape, DUI. And, frankly,
11 and nobody is proud of this, probably a thousand of
12 the 2,500 DV -- domestic violence cases we do per
13 year are military members.

14 Not once have I heard military commanders
15 say, boy, these civilian prosecutions are just
16 killing me. Nor have I heard, you know, gee, I
17 wanted to be the paternal person in charge here,
18 but you all have taken that away from me, you're
19 ruining morale and discipline in my unit. Nor have
20 I seen one service member -- well, maybe they have
21 and I wouldn't know about it -- say, gee, Mr.
22 General, gee, Mr. Admiral, I thought you were going

1 to protect me in this situation, but I'm thrown to
2 the wolves here with the civilians.

3 Could you respond to that, please? I
4 mean, is it affecting morale and discipline, all
5 these civilian prosecutions of military members,
6 many of which are military on military.

7 PROFESSOR CORN: Well, I think that the
8 paradigm that you discuss, which is a very common
9 paradigm throughout the country, simply indicates
10 that there is no mandatory requirement that you
11 take a case to military court. There are a range
12 of disciplinary options that serve the interests of
13 justice and ultimately good order and discipline.
14 And there are cases where a commander will decide
15 in conjunction with the staff judge advocate that
16 the interest of justice would be better served by
17 letting the civilian authorities handle the case.

18 The minor offenses you talked about, the
19 Federal magistrate court offense, I think we have
20 to remember that they will almost always also
21 trigger collateral disciplinary measures, like an
22 administrative separation or some other

1 administrative sanction that the commander will
2 use. So it may be the most efficient means to deal
3 with the service member that the commander decides
4 is a problem for the unit. Let the magistrate
5 court handle the DUI, then we process an
6 administrative separation, and the interests of the
7 unit are served.

8 On the more severe cases, I think it would
9 be foolish to suggest that the only venue for
10 jurisdiction would be the military venue. You
11 could have a case, for example, where you might
12 want to join two offenders. Maybe a husband and
13 wife abuse their child, and the wife is immune from
14 military jurisdiction, and it simply would be
15 inefficient to do a military or civilian trial.

16 It may also be the case that you might
17 want to leverage the fact that the State
18 jurisdiction and the military jurisdiction are
19 separate sovereigns for double jeopardy purposes on
20 a very severe case where you would bring the case
21 in one jurisdiction first to see what the penalty
22 is and then reserve the option of going to the

1 other jurisdiction.

2 So I think those examples simply
3 contribute to the conclusion that the commander's
4 ability to be involved in this disposition process
5 is connected to the commander's goal of seeking
6 good order and discipline. It doesn't mean it
7 always has to be handled in military court. In
8 some cases, you get a better outcome in the
9 civilian court, and we use that system.

10 MR. BRYANT: But often when they are in
11 civilian court, the commander has no input
12 whatsoever. He gets a notice the next morning that
13 Lieutenant So and So was arrested for rape, and
14 that's basically it. It goes from there. He's in
15 the local jail.

16 The only point I'm trying to make with
17 these examples is when we say that military
18 commanders are disadvantaged when we take them out
19 of the decision making process for prosecution, we
20 have thousands of cases across the country per year
21 where they're not involved at all.

22 PROFESSOR CORN: Well, first off, with all

1 due respect, I don't believe they're not involved.
2 In many installations, there are memoranda of
3 understanding between the base commander and the
4 staff judge advocate and the local district
5 attorney that lay out an equation for managing
6 concurrent jurisdiction. I also think that in any
7 serious case, the staff judge advocate is going to
8 be consulting with the military commander. And the
9 mere fact that the State jurisdiction may exercise
10 jurisdiction first doesn't deprive the military
11 commander of exercising jurisdiction.

12 So the -- and the last point I'll make is,
13 I don't believe I nor Professor VanLandingham have
14 said that removing the commander will destroy the
15 commander's ability to command a unit. What we're
16 arguing is that retaining the role of the commander
17 in this process enhances the entire process. It
18 enhances the pursuit of justice because you get the
19 advantage of the expertise of the legal expert and
20 the person whose most in tune with the needs of the
21 unit and the mission. And it enhances the
22 perception of justice because, contrary to my

1 colleague, I do believe military lawyers are in a
2 position periodically to override decisions of
3 commanders. The commander says he's going to do
4 something illegal. The lawyer elevates that to the
5 next level of command, and that's all we're
6 proposing.

7 PROFESSOR HILLMAN: Madam Chair?

8 MR. BRYANT: Thank you.

9 CHAIRWOMAN JONES: Yes? Where are you?

10 PROFESSOR HILLMAN: Madam Chair, may I
11 jump in?

12 CHAIRWOMAN JONES: Yes, Professor Hillman,
13 please.

14 PROFESSOR HILLMAN: If we did have the
15 perception of confidence in the military justice
16 system with respect to sexual assault, we wouldn't
17 all be sitting here talking to you. We're in a
18 situation where we have to do -- we have to
19 consider what the alternatives are to address that
20 because you're our experts in military justice
21 really, not so much our experts in sexual assault
22 or empirical data with respect to what the

1 statistics tell us, although we've heard some of
2 these statistics. We know that the truth is hard
3 to discern through the numbers that we have, and we
4 recognize that the numbers that we have are
5 insufficient to fully understand the problem.

6 We also know we're in a weird, strange
7 subset of criminal activity which is sexual
8 assault, where our primary problem is something
9 that doesn't exist in other types of criminal
10 prosecution. And that is, we just don't know most
11 of the time when these things take place. So
12 solving that particular piece of the problem of
13 military sexual assault, and of sexual assault at
14 large is what we need to do.

15 Now, I'd like to turn you towards where
16 your core expertise really does lie, and that's in
17 how a military justice system affects the
18 operations of the force. I think you're well
19 positioned -- as well positioned as anyone we'll
20 hear from but for those in the services today we'll
21 hear from later today and then tomorrow, to talk to
22 us about the other consequences of making changes

1 that are on the table, changes that would remove
2 the commander from different aspects of his or her
3 current role.

4 So to that end, one of the arguments that
5 was raised to us in preparatory sessions was
6 specifically about crimes of war. It was about
7 violations of the laws of war and a very strong
8 suggestion from some that removing the commander
9 from this process in U.S. military justice would
10 undermine the United States' ability to engage in
11 actions that could result in prosecutions for law
12 of war violations committed by service members of
13 other forces, who might be subject to some civilian
14 or non-command centric criminal prosecution.

15 In other words, the argument that our
16 military -- the U.S. military will be less
17 effective on the ground in multinational
18 deployments where service members of other nations
19 cannot be ordered to undertake the most dangerous
20 -- the most important missions because the United
21 States insulates its service members from criminal
22 prosecution outside this command-centric military

1 justice system. And that insulation is critical to
2 the United States being successful on the ground.
3 This is a very troubling argument to me.

4 I want to know your reaction to it. Do
5 you think that it's right, and do you think --
6 first, do you think that that's true, it would
7 inhibit a commander's options on the ground, and,
8 second, do you think that would or would not be a
9 salutary consequence?

10 PROFESSOR HANSEN: So I'm troubled by the
11 argument as well, and making sure I understand what
12 the argument is, that by having the commander in
13 charge of military justice, that somehow that
14 serves as a protection for soldiers that allows
15 them to do things that they otherwise might face
16 criminal sanction for.

17 PROFESSOR HILLMAN: That's right.

18 PROFESSOR HANSEN: Yeah, I don't buy that
19 argument. I don't think that's accurate under the
20 law of war, under the doctrine of command
21 responsibility either, that that's -- or that
22 that's a reason to keep the commander in charge of

1 the system.

2 I think my point on that very issue is
3 just the opposite, that keeping the commander in
4 the system, because the commander can't avoid that
5 responsibility. That's a responsibility that the
6 commander is going to have as a result of his or
7 her position. And so, to take away from the
8 commander the tool -- that important tool to impose
9 punishments has exactly the wrong effect, is that
10 they now have less ability to ensure good order and
11 discipline, and specifically ensure compliance with
12 the law of armed conflict that they can't avoid by
13 simply insulating or somehow trying to insulate a
14 subordinate from the consequences of their illegal
15 conduct. I think that argument has it exactly
16 backwards.

17 BRIGADIER GENERAL (RET.) DUNN: May I
18 interject here for just one moment, because I
19 think, you know, I understand exactly what you're
20 saying, Professor Hansen. But I don't think what
21 we're talking about is commanders remaining in the
22 system, allowing them to protect soldiers on the

1 ground or commit violations of the law of war. I
2 think what the previous discussion was addressing
3 is the concept of, you know, a commander with the
4 advice of a lawyer operating on the ground, you
5 know, has the soldier engaged in certain conduct.
6 And then you have a civilian system back in the
7 homeland that has the ability to reach in and
8 address that -- you know, address that operation in
9 a, you know, completely independent manner with a,
10 you know, no military experience, no understanding
11 really of the law of war, no --

12 And, you know, quite frankly, I
13 participated in a process like that with the
14 Italians in Afghanistan, and I also had some
15 different issues, but rising sort of out of that
16 same concept with some lawyers who worked for me in
17 Iraq, some Allied lawyers who worked for me in
18 Iraq, who --

19 PROFESSOR HANSEN: So I think I understand
20 your point, ma'am, and that is a different issue.
21 And I think that having civilians some miles away
22 come in and either arm chair or second guess is a

1 problem. My suspicion is that, frankly, that in
2 many ways, they might be more lenient to the
3 conduct of a soldier in combat than perhaps a
4 commander is who can better contextualize what the
5 consequences of that misconduct or what those
6 actions are and given that the commander would
7 ultimately be responsible for ensuring that
8 discipline. I see that concern, and I agree that
9 that would additionally be problematic taking the
10 commander out of that decision making process.

11 LORD THOMAS: I wonder if I could comment
12 on this. I was involved in a trial, the Baha Mousa
13 case, in which war crimes were alleged against the
14 soldiers. You may remember that an Iraqi civilian
15 was arrested by soldiers and was held in custody,
16 and one of them was beaten up to such an extent
17 that he died, and that was held to be a war crime.
18 Indeed, that individual pleaded guilty to a war
19 crime, the very first and only British soldier to
20 have been convicted of a war crime. But his
21 commanding officer who commanded the regiment was
22 also tried for failing to ensure that there were

1 systems in place which would prevent such a thing
2 from happening.

3 Now, I think that the system that we have
4 does not take the commander totally out of it, as
5 my colleague, Professor Drapeau, has said. What
6 happens is that the rules require a service police
7 officer to notify the commanding officer of
8 anything that comes to his attention by way of a
9 crime. And the commanding officer can put forward
10 to the Director of Service Prosecutions any
11 relevant factors he thinks fit.

12 So in the situation that was envisaged by
13 the Brigadier General, the CO would be able to put
14 before that civilian independent prosecutor any
15 matters relating to the incident which was under
16 investigation that he thought fit. And
17 furthermore, the CO is not taken out of the system
18 entirely because he is informed of the progress of
19 the investigation by the Director of Service
20 Prosecutions, and the CO is required to sign the
21 charge sheet personally. He has no choice about
22 it, rather like the system suggested by Professor

1 Corn and Professor VanLandingham.

2 The CO signs the charge sheet that
3 Director of Service Prosecutions puts before him to
4 sign, and to that extent has ownership of it and
5 knowledge of it, and can communicate to his --
6 those under his command that he has a part to play
7 within the system of the prosecution of the
8 individual. And that seems to me to be a rather
9 more satisfactory solution than keeping the CO out
10 altogether, or involving him in the actual decision
11 making as opposed to putting his imprimatur on a
12 decision that's already been taken.

13 And I would say about Professor Corn and
14 Professor VanLandingham's proposition, that
15 although if the CO has to follow the legal
16 advisor's advice, nevertheless, it would differ
17 very much from the UK system because it's conceded
18 that the CO would be entitled to report on the
19 competence of his legal advisor and could affect
20 his career. So there isn't that independent
21 element in the suggestion that has been put
22 forward.

1 To sum up, it seems to me that the CO does
2 have a role in making representations to the
3 Director of Service Prosecutions and putting
4 forward the sort of matters of concern. He does
5 have a formal part to play by signing the charge
6 sheet, but the independent prosecutor remains
7 independent and makes that decision independently.
8 And I would commend that system above the other
9 system -- the existing system and the suggestions
10 that Professor Corn and Professor VanLandingham
11 have put forward.

12 PROFESSOR DRAPEAU: And if I may, I did
13 not want to remove the commanding officer totally
14 from that process. He does exactly the same in
15 Canada. He does sign the charge sheet, and he is
16 involved in speaking to and informing the Director
17 of Military Prosecution of any factors. But he's
18 not making -- he doesn't have decision powers in
19 this stage.

20 PROFESSOR CORN: The issue of
21 multinational operations and national caveats is
22 influenced obviously by all -- other factors as

1 well. I mean, there are perceptions. For example,
2 our European allies have to contend with the
3 reality that their forces are under the
4 jurisdiction of the European Court of Human Rights,
5 and that means there may be some missions that are
6 better suited to our forces than their forces. I
7 mean, that's why for four or five years in Kosovo,
8 the United States ran the detention facility at
9 Camp Bondsteel.

10 I think in direct response to the concern
11 that was raised, I think there are gradations of
12 attenuation between the military prosecutor and the
13 command itself that influence that concern. So I
14 would agree that obviously the examples that we're
15 being exposed to here from the United Kingdom and
16 Canada and Israel, there is not substantial
17 attenuation between the military prosecutors and
18 the commander.

19 There are countries where there is
20 substantial attenuation. For example, in Colombia,
21 the Fiscalia, the federal prosecutors, decide who
22 gets prosecuted for misconduct in battle. There

1 are constant concerns raised by the Colombian armed
2 forces that they cannot make a distinction between
3 combat activities and non-combat activities, and
4 that is a profoundly significant distinction, as
5 you know, in terms of what is or is not a
6 justifiable act of violence.

7 So I think -- but I don't think that that
8 is the principle concern. I think that if you're
9 going to think about operational legal compliance,
10 you have to start at the other end. The law of war
11 is a regulatory body of law. It is not a
12 responsive body of law that's designed principally
13 to sanction. It's designed to prevent the
14 violations that have to be sanctioned, the sanction
15 as supposed to the exception.

16 The compliance is supposed to be the rule.
17 And we should be rightly proud of the fact that we
18 have enhanced the role of the military lawyer in
19 the battle command process to a level that we've
20 never seen before. I mean, they are absolutely
21 central to the process, and our joint doctrine
22 reflects that now, both in the role of the military

1 lawyer and the role of legitimacy as a core tenant
2 of military operations right up there with
3 objective and security and initiative, all those
4 traditional objectives of war.

5 My concern is that the more you
6 compartmentalize the function of the military legal
7 advisor in garrison, the more compartmentalized
8 that function is going to be perceived in
9 operations. And it's this interaction that builds
10 that level of confidence between commanders and the
11 military legal profession writ large that has paid,
12 in my view, a very significant dividend.

13 And I'm not in any way suggesting that you
14 couldn't develop those relationships without that.
15 I just raise the question why wouldn't you want to
16 maximize that relationship if you could do it in a
17 way that enhanced the credibility of the criminal
18 system instead of diminished it.

19 PROFESSOR HILLMAN: Just to follow up very
20 briefly, there's a question as to whether we've
21 legalized the military or militarized the lawyer in
22 the armed forces. And there's a real question as

1 to whether the mission creep of judge advocates has
2 made it very difficult for them to act as the
3 independent prosecutors that our systems of
4 criminal justice portend to protect. So that's
5 part of what you're pointing towards has absolutely
6 happened in recent decades with the rise of law in
7 the conduct of military operations.

8 The question is, can that attorney, that
9 staff judge advocate, that senior legal advisor,
10 perform all of those different roles at one time,
11 especially in this very specialized piece of
12 criminal prosecution, which is the investigation,
13 the weighing, the incredible complexity that we end
14 up in some of these sexual assault cases.

15 PROFESSOR CORN: So my response to that
16 would be to compare the record of prosecutions for
17 operational misconduct today, which -- that which
18 existed in early eras. I think that by having the
19 JAG as an integral part of that battle staff, yes,
20 does it create risk that the JAG will become too
21 inculcated into that culture to be objective? I
22 think that's a risk, but I think the evidence

1 actually points to the opposite, that their
2 exposure to everything that's going on in the
3 course of that mission actually exposes them to
4 situations of misconduct early on.

5 Certainly in my career, I can never
6 remember a time where we have court martialed and
7 sentenced to lengthy periods of confinement
8 commissioned officers, captains, lieutenants. We
9 have a general on trial now. I mean, this is not
10 insignificant in my view.

11 I think that it is a reflection that the
12 integration of the judge advocate into the battle
13 command process itself has provided a level of
14 situational awareness that in the past we had to
15 rely on the unit itself to provide the information
16 to the JAG.

17 CHAIRWOMAN JONES: Ms. Holtzman?

18 CONGRESSWOMAN HOLTZMAN: I just want to
19 ask a very quick question. I don't think it's been
20 addressed. If a change is made -- some of you have
21 suggested more modest changes, others have
22 suggested more dramatic changes with regard to the

1 role of the commander. What's prompted this Panel
2 and what's the scope of our jurisdiction is really
3 the issue of sexual assault in the military. None
4 of you have suggested -- I just want to make sure
5 that I'm not misinterpreting your silence on this
6 point. None of you have suggested that any of the
7 changes that are made should be limited just to the
8 cases of sexual assault. Is that correct?

9 SPEAKERS: Correct.

10 CONGRESSWOMAN HOLTZMAN: Okay.

11 CHAIRWOMAN JONES: All right. I want to
12 thank each and --

13 CONGRESSWOMAN HOLTZMAN: Thank you all
14 very much for coming.

15 CHAIRWOMAN JONES: And I want to thank
16 each and every one of you. It's been a terrific
17 panel. We could sit here for the rest of the day
18 and have more questions.

19 Mr. Bryant instituted a procedure at our
20 first hearings, and that is the written question.
21 So if you would all be kind enough should we have
22 any further written questions of you, we'd love to

1 get a response from you. And we'd appreciate it
2 very much. Thanks again.

3 We're going be in adjournment until 1:00.

4 (Whereupon, a luncheon recess was taken.)

5 COLONEL HAM: Madam Chair, are you ready
6 to begin?

7 CHAIRWOMAN JONES: Yes, we are. First,
8 let me apologize for our late start. I can't
9 explain it. I can only apologize for it.

10 (Laughter.)

11 CHAIRWOMAN JONES: All right. We're very
12 pleased today to have representatives from Canada,
13 Australia, and --

14 SPEAKER: UK.

15 COLONEL HAM: Ma'am, we're starting with
16 Canada. This is Major General Blaise Cathcart and
17 Major General Noonan.

18 CHAIRWOMAN JONES: All right. I didn't
19 think we had enough people at the main desk there.
20 All right. We'll be pleased to hear from you then.
21 Major Cathcart?

22 MAJOR GENERAL CATHCART: Thank you, Madam

1 Chair, and other esteemed panel members for the
2 invitation to come and speak to you about this
3 important matter. Also just quickly before I
4 begin, I'd also like to, one, bring greetings from
5 your neighbors north in Canada from our Minister of
6 Chief of Defense Staff, but also to extend our
7 condolences to the victims and families of the
8 naval shooting, obviously still very fresh in all
9 of our minds. So we wanted to pass that along.

10 But we're here obviously to speak
11 specifically about the important topic of
12 combatting sexual misconduct in the armed forces.
13 I have, and my colleague, Major General Steve
14 Noonan have, some brief -- I know that's always
15 dangerous with lawyers -- brief opening remarks,
16 and I hope you can bear with us.

17 As the Judge Advocate General of the
18 Canadian forces, it is my statutory role to act as
19 legal advisor to the Governor General, the Minister
20 of National Defense, the Department of National
21 Defense, and the Canadian armed forces in matters
22 relating to military law and to superintend the

1 administration of our military justice system. I
2 report directly to the Minister of National
3 Defense. So perhaps in context with your own
4 TJAGs, I would loosely say I'm more akin to a DoD
5 General Counsel in my access to the political level
6 and that my boss is the Minister of National
7 Defense.

8 In carrying out my duties and functions,
9 I'm assisted by the Office of the Judge Advocate
10 General, an organization that I command and that
11 includes all of the legal officers, regular and
12 reserve force, whose duty it is to provide legal
13 services to the Canadian forces. In appearing
14 before you to discuss Canada's military justice
15 system, I am fully cognizant of how difficult it
16 can be to compare the military justice systems of
17 armed forces that have different sizes and
18 different operational commitments, but, most
19 importantly, that form part of different legal
20 systems, which are reflective of the fundamental
21 values and constitutional landscapes of each
22 country.

1 Even between countries as similar as
2 Canada and the United States, there are many
3 differences in our military justice systems that
4 result from our different paths that we have
5 followed from our common heritage. As you are
6 aware, the Canada military justice system underwent
7 significant structural changes during the 1990s. A
8 number of the changes were similar to those that I
9 understand have been proposed for the UCMJ.

10 I want to be clear that while we believe
11 that the changes made to the Canadian military
12 justice system have been very beneficial, neither I
13 nor Major General Noonan are here to specifically
14 advocate for our system as a model for change. Our
15 goal is to describe and discuss our system and how
16 it came to be.

17 Like the United States and Australia,
18 Canada's military justice system finds its roots in
19 the British tradition where the commanding officer
20 held a central and prosecutorial function within
21 the disciplinary system. Canada modified this,
22 what I'll call, traditional role as part of the

1 major amendments to the National Defense Act in
2 1999. One factor behind the change was
3 developments in Canadian law following the
4 enshrining of the Canadian Charter of Rights and
5 Freedoms as part of our constitution in 1982.

6 Another factor was the increased public
7 scrutiny of military discipline in the military
8 justice system over the course of the 1990s,
9 scrutiny arising from a number of high profile
10 cases, including several relating to the misconduct
11 of a small number of Canadian forces members during
12 deployed operations where both the individual's
13 conduct and the chain of command's handling of the
14 cases were questioned.

15 This scrutiny culminated in the 1997
16 reports of the Commission of Inquiry in the
17 deployment of Canadian forces to Somalia, otherwise
18 referred to as the Somalia Inquiry and the Special
19 Advisory Group on Military Police and Investigation
20 Services. This latter report, known as the Dixon
21 Report after the group's chair, the Right Honorable
22 Brian Dixon, the retired chief justice of Canada

1 and himself a wounded veteran of the Second World
2 War, was particularly influential in the
3 development of the 1999 amendments.

4 The 1999 amendments to the National
5 Defense Act removed from the chain of command a
6 number of traditional authorities and created a
7 director of military prosecutions, a court martial
8 administrator, and a specialized unit of the
9 military police, referred to as the Canadian Forces
10 National Investigation Service, CFNIS, all of whom,
11 like the military judges who preside at courts
12 martial, carry out their functions independent from
13 the chain of command. Notwithstanding these
14 changes, the critical role that the chain of
15 command also plays in the military system continues
16 to be acknowledged. As Chief Justice Dixon put it:
17 "The commanding officer is at the heart of the
18 entire system of discipline."

19 Allow me to turn then to a description of
20 our current system and to the role played by both
21 the chain of command and the independent actors
22 within it. A disciplinary process typically begins

1 with a complaint that gives rise to an
2 investigation carried out by either a unit, the
3 military police, or the CFNIS. The NIS
4 investigates serious or sensitive offenses which
5 typically includes offenses of a sexual nature.
6 NIS investigators are authorized to lay charges and
7 to cause those charges to be referred to the
8 Director of Military Prosecutions, powers that
9 enhance the NIS' independence when dealing with
10 serious and sensitive matters.

11 In cases that are investigated at the unit
12 level or by military police other than the NIS, the
13 chain of command retains authority to lay charges.
14 Once charges are laid, the commanding officer has
15 discretion to choose not to proceed with the
16 charges or, depending upon the nature of the
17 charges, to deal with them summarily. Indeed,
18 approximately 95 percent of the charges laid in any
19 given year in our system are at the summary trial
20 level conducted by the chain of command.

21 Even if the charges are serious enough to
22 warrant a trial by court martial or if the accused

1 has elected to be tried by court martial, the chain
2 of command continues to play a vital role. In such
3 cases, the commanding officer will apply to a
4 referral authority -- this is an officer higher in
5 his or her chain of command -- to have the charges
6 disposed of by the court martial.

7 A referral authority who received this
8 application must refer it to the Director of
9 Military Prosecutions. The Director of Military
10 Prosecutions, or DMP, reviews the file and makes an
11 independent decision as to whether charges should
12 be prosecuted before a court martial. He does on
13 the basis of a review of the evidence available and
14 a consideration of the public interest in
15 proceeding with the charge.

16 In this latter analysis, he will consider
17 the representations of both the commanding officer
18 and the referral authority, senior officers in the
19 accused person's chain of command who can speak to
20 such things as the seriousness of the alleged
21 offense, and the impact of alleged offense on
22 discipline and morale in the unit. The DMP

1 determinations are made in a a quasi-judicial
2 manner similar to the way that such determinations
3 are made by civilian prosecutors who operate under
4 the authority of the attorney general in Canada's
5 criminal justice system.

6 If DMP decides to prefer charges, then the
7 court martial administrator, who acts under the
8 general supervision of the chief military judge,
9 and is also independent from the chain of command,
10 shall convene a court martial. In the case of
11 general court martial, the court martial
12 administrator will also select, using a random
13 methodology, the members of the panel who will
14 serve as triers of fact.

15 When an accused person is found guilty at
16 court martial, members of the chain of command will
17 often be called upon during the sentencing phase of
18 the trial so that evidence of the impact of an
19 offense on discretion and morale can be received
20 directly from those who are responsible for such
21 matters and who have seen most closely the impact
22 of any offenses.

1 The verdict and sentence of a court
2 martial can be appealed to the Court Martial Appeal
3 Court of Canada and ultimately the Supreme Court of
4 Canada. Decisions made by court martial are not
5 reviewable by the chain of command.

6 To summarize, the 1919 -- excuse me --
7 1999 changes to the National Defense Act have
8 preserved a critical role for the commanding
9 officer and the chain of command in maintaining an
10 efficient and disciplined armed force, while
11 providing greater transparency for victims and
12 protecting the rights set forth in the Canadian
13 Charter of Rights and Freedoms.

14 Let me now turn quickly to the issue of
15 sexual assault in the Canadian armed forces and in
16 the military justice system. The Canadian armed
17 forces take all allegations of sexual misconduct
18 very seriously, and in all cases investigations are
19 conducted to determine the facts, analyze the
20 evidence, and, if warranted, lay appropriate
21 charges.

22 In Canadian law, "sexual assault" is a

1 term used to describe a wide range of sexual
2 conduct. A sexual assault is an assault committed
3 in circumstances of a sexual nature such as to
4 violate the sexual integrity of another person.
5 This can range from rape to non-consensual touching
6 of a sexual nature.

7 One sign of the seriousness with which the
8 government of Canada takes the issue of sexual
9 assault in the armed forces is the fact that in the
10 1999 amendments, for the first time the government
11 gave the Canadian armed forces disciplinary
12 jurisdiction over sexual assault committed in
13 Canada by individuals who are subject to our Code
14 of Service Discipline. As is the case with other
15 serious offenses, the amendments also provide that
16 any such charge of sexual assault dealt with by the
17 military justice system can only be tried by court
18 martial, not by summary trial.

19 Since 1999, courts martial have annually
20 dealt with a small but significant number of sexual
21 assault charges. In the 2005 to 2010 period, the
22 most recent for which statistics are publicly

1 available, there has been no discernible trend with
2 a range between three to 10 courts martial per year
3 out of a total of 40 and 67. Of course, these
4 numbers also reflect the relative size of the
5 Canadian armed forces at roughly one-twentieth that
6 of the U.S. armed forces.

7 Canada's military justice system has not
8 remained static since 1999. For example, in
9 addition to the ongoing analysis and review
10 conducted by my office on an annual basis, the
11 system has been subject to two statutorily mandated
12 independent reviews. These reviews completed in
13 2003 and 2011 were supportive of the 1999
14 amendments, while suggesting certain modifications
15 to improve the system. One key point of note is
16 that both reviews recognize the continuing
17 importance of the chain of command in the
18 maintenance of discipline.

19 Another former chief justice of Canada,
20 Antonio Lamer, recognized in his report of the
21 first independent review that maintaining
22 discipline by the chain of command is essential to

1 a competent and reliable military organization. A
2 former chief justice of the Ontario Superior Court
3 of Justice, Patrick LeSage, reinforced this point
4 more recently in his report of a second independent
5 review, stating "A critical component of military
6 justice system is the strong effective functioning
7 of the chain of command." That being said, Chief
8 Justice LeSage also recognized what my predecessors
9 and I have attempted to do on a daily basis; that
10 is to ensure the legitimacy and credibility of the
11 military justice system by balancing the needs of
12 the chain of command to maintain discipline with
13 the impartial investigation and adjudication of
14 service offenses.

15 In conclusion, allegations of sexual
16 assault in the Canadian armed forces are taken
17 extremely seriously. The Canadian armed forces
18 require a robust and fair military justice system
19 to investigate, prosecute, and adjudicate
20 allegations of sexual assault. As the
21 superintendent of the administration of the
22 Canadian military justice system, I am confident

1 our system meets the disciplinary needs of the
2 chain of command while addressing the interests of
3 victims and reflecting the constitutionality
4 protected Canadian values of fairness,
5 transparency, and the rule of law.

6 As you know, Canada was recently engaged
7 in high intensity combat operations in Afghanistan
8 for almost -- excuse me -- 10 years. The 1999
9 changes to the military justice system were battle
10 tested in the theater of active operations and, in
11 my view were a key contributor to the combat
12 effectiveness of the Canadian armed forces. The
13 current military justice system contributed
14 substantially to the fielding and sustainment of a
15 disciplined and efficient force with high morale.

16 And on that note, I would pass to my
17 colleague and operator and former commander, Major
18 General Steve Noonan.

19 MAJOR GENERAL NOONAN: Madam Chair and
20 members of the Panel, my thanks for allowing me to
21 participate this afternoon. If you would allow me
22 to provide some complementary remarks from a

1 commander's perspective, the context within which I
2 have been able to -- I've been fortunate and
3 honored to command our Canadian troops in theaters
4 of operations prior to 1999 and post-1999 at all
5 levels up to and including divisional level.

6 CHAIRWOMAN JONES: General Noonan, could
7 you move that microphone a little closer? Thanks.

8 MAJOR GENERAL NOONAN: I can. Up to and
9 including the divisional level, and culminating in
10 command of all Canadians in Afghanistan in '05,
11 '06. I have had the privilege to serve alongside
12 your own country's sailors, soldiers, airmen, and
13 airwomen, and I proudly wear your Bronze Star medal
14 as testament to that service. In that particular
15 time frame, we moved decisively into combat
16 operations.

17 It's certainly not my intent today to
18 compare any of the justice systems, nor provide
19 comment on advantages/disadvantages of various
20 approaches. My intent is simply to inform the
21 Panel that as an operational commander, I'm very
22 comfortable with where we have evolved to,

1 recognizing the continued key role of the
2 commanding officer in the system, and the latitude
3 that the system still provides for us to maintain
4 good order and discipline, two key elements of
5 operational effectiveness.

6 I strongly concur with the comments by
7 General Cathcart that the Canadian armed forces
8 takes allegations of sexual assault very seriously.
9 The armed forces members are held to the highest
10 standard of conduct and are subject to Canadian law
11 and the Code of Service Discipline.

12 Sexual assault is not tolerated in the
13 Canadian armed forces. It destroys the basic
14 social and military values and undermines
15 discipline and morale in the forces. All of our
16 members are obligated to report these incidents to
17 the appropriate authorities. And as a commanding
18 officer, if I were to receive such a complaint, I
19 would obtain legal advice from my legal advisor and
20 then refer the matter to the appropriate military
21 police organization for investigation. Further,
22 it's also important to note that as a commanding

1 officer, I would ensure that the victim receives
2 the proper medical and other support that is
3 required in those circumstances.

4 I understand that the -- you would have
5 some interest in the role of the CO in the system
6 following the changes that we made in 1999. As
7 General Cathcart stated earlier, the role of the
8 chain of command was altered in the late 1990s, but
9 remains critical to ensuring the good order and
10 discipline in the forces. As alluded to
11 previously, in terms of numbers, the chain of
12 command determines roughly 95 percent of
13 disciplinary matters at the summary trial level.
14 And I am heartened to hear, as the JAG has
15 continued to advise me, of that comment by the
16 Chief Justice LeSage when he conducted that second
17 review that "The summary trial system is vital to
18 the maintenance of discipline at the unit level,
19 and, therefore, essential to the life and death
20 work the military performs on a daily basis." I
21 could not agree more.

22 In terms of the role of the commanding

1 officer in the court martial process, in sensitive
2 matters, like an alleged sexual assault, we believe
3 it is in the best interest of the chain of command,
4 the accused, and the complainant to have an
5 independent investigator assess the evidence and
6 lay charges, an independent prosecutor determine
7 whether or not to proceed, and an independent court
8 martial administrator convene a court martial. All
9 of these actors, in my view, strengthen my role in
10 the chain of command as those under my command can
11 be confident in the real and perceived independence
12 of the military justice system.

13 As part of the chain of command, I've also
14 used the military justice system in various
15 operational theaters, the most recent being in
16 Afghanistan. I've commanded men and women from the
17 early 1990s in combat arms roles in active theaters
18 of operations. As you may know, the Canadian force
19 is integrated such that women can enroll in any
20 Canadian armed forces occupation, including combat
21 arms, and serve in any environment -- Army, Navy,
22 Air Force.

1 From the operator's perspective, the
2 ability I had as a Canadian task force commander to
3 instill discipline in the Canadian context did not
4 appear to me any different than my American and
5 British colleagues, along whose side I fought.
6 While I appreciate that our allies may have
7 slightly differently military justice systems, I
8 was confident as a Canadian task force commander in
9 our system.

10 At no time did I feel that our soldiers,
11 Canadian soldiers, were less disciplined than those
12 from other countries, nor more hesitant to execute
13 their assigned tasks. That is to say, the Canadian
14 military justice system worked in the theater of
15 operations. In my view, that is the highest
16 compliment I can give it.

17 In conclusion, I am of the view that the
18 Canadian military justice system works for us in an
19 operational context, striking the right balance
20 between supporting the chain of command and
21 maintaining good order and discipline while
22 recognizing the rights of the accused in accordance

1 with the Canadian charter. This allows the chain
2 of command to focus our efforts to establish
3 conditions, what we call left of the event or prior
4 to the event, before they occur, and then set the
5 conditions for an independent third party or
6 parties to work the issue in a perceivable unbiased
7 and standardized manner.

8 As a senior leader in the Canadian armed
9 forces, sexual assault is simply not tolerated.
10 Canadian forces are committed to ensuring that all
11 allegations of sexual assault are reported,
12 investigated, and, where warranted, proceeded with
13 in the military justice system while supporting the
14 victim through this difficult time.

15 My thanks, and obviously ready for your
16 questions or not.

17 CHAIRWOMAN JONES: If I heard you,
18 General, correctly, I gather that in your military
19 justice system, sexual assaults are treated
20 differently than other categories of conduct. Is
21 that right? The commander at a certain level must
22 just refer if it's a sexual assault charge. Is

1 that correct?

2 MAJOR GENERAL CATHCART: Correct. We have
3 a number of charges that go directly to a court
4 martial. When I say that, meaning that it goes to
5 the Director of Military Prosecutions for
6 determination, and then preferral to the court
7 martial for a convening at that point. And then,
8 there are a large number of charges that are
9 electable; that is to say, the accused has the
10 right to elect summary trial or court martial. And
11 again, any charge that goes towards a court martial
12 goes from the chain of command to the Director of
13 Military Prosecution.

14 CHAIRWOMAN JONES: I guess what I'm asking
15 is if there's a charge of sexual assault, there is
16 no election.

17 MAJOR GENERAL CATHCART: Correct.

18 CHAIRWOMAN JONES: It must go to court
19 martial, is that right?

20 MAJOR GENERAL CATHCART: Correct.

21 CHAIRWOMAN JONES: And what other charges
22 must go to court martial?

1 MAJOR GENERAL CATHCART: Well, they're
2 usually the most serious in terms of relating to
3 matters of violence. It is possible for a simple
4 assault, for example, to be held at a summary trial
5 level, but there -- and we can -- you know, if
6 you're interested, I think we sent a package of
7 material that broke down the numbers.

8 CHAIRWOMAN JONES: Okay.

9 MAJOR GENERAL CATHCART: There's a number
10 that go directly. Most I would categorize as
11 electable, and then five that are basically purely
12 for summary trial.

13 CHAIRWOMAN JONES: And did you pass
14 legislation, though, to make all sexual assault
15 allegations in the non-electable category?

16 MAJOR GENERAL CATHCART: Correct. When we
17 had the amendments that allowed us to have
18 jurisdiction to do sex assaults inside Canada in
19 1999, that's when the same changes were done to say
20 it's automatic for court martial.

21 BRIGADIER GENERAL (RET.) DUNN: Now, could
22 I ask a question? I believe you said that as part

1 of the reforms, the ability for the military to
2 handle sexual assaults was given to the military.

3 MAJOR GENERAL CATHCART: Correct.

4 BRIGADIER GENERAL (RET.) DUNN: Where had
5 it -- I find that interesting because it sounds
6 like the confidence was with the military in terms
7 of, you know, this is important, commanders need to
8 be involved in it.

9 MAJOR GENERAL CATHCART: Yeah.
10 Essentially, the issue was outside of Canada on
11 deployments because our Code of Service Discipline
12 follows the troops. That essentially was the only
13 way to have jurisdiction, so we had jurisdiction
14 outside of Canada. But if the same offense inside
15 of Canada, sexual assault in this case, it would
16 have to be referred to civilian authorities.

17 Civilian authorities maintain to this day
18 concurrent jurisdiction, and there often can be a
19 discussion between our prosecutors and civilian
20 prosecutors. But it was a decision saying that
21 particularly as a result of the chain of command
22 indicating how important it was to show within the

1 military justice system discipline being maintained
2 for sexual assaults specifically, that jurisdiction
3 was given back or given to the military.

4 BRIGADIER GENERAL (RET.) DUNN: Okay,
5 thank you. And I have one additional question,
6 which is, for those offenses which you must refer
7 to the court martial authority, does that mean then
8 the case must, in fact, be tried by court martial,
9 or you just put it into a different decision making
10 system, which may or may not in the end decide to
11 proceed with the prosecution?

12 MAJOR GENERAL CATHCART: Yeah. Again,
13 it's the review by the Director of Military
14 Prosecution. If it ends up actually maintaining,
15 you know, the credibility as a sexual assault
16 charge, it's for court martial. If the facts
17 somehow are different that it's not really a sexual
18 assault, but maybe another type of sexual
19 misconduct, it could also still continue to court
20 martial, but there may be consideration to refer it
21 back to a summary trial. But sex assault always to
22 a court martial.

1 CHAIRWOMAN JONES: Where do the -- where
2 does the investigation occur, the bulk of the
3 investigation? What levels or level?

4 MAJOR GENERAL CATHCART: Of sex assault
5 offenses?

6 CHAIRWOMAN JONES: Sex assault, sorry.
7 Yes.

8 MAJOR GENERAL CATHCART: Yeah. Wherever
9 they occur whether it's within Canada or --

10 CHAIRWOMAN JONES: Oh, I'm sorry. I meant
11 within the command as opposed to being referred to
12 the higher -- to the DMP.

13 MAJOR GENERAL CATHCART: Right.

14 CHAIRWOMAN JONES: What level of
15 investigation do you do before it gets referred to
16 the DMP?

17 MAJOR GENERAL CATHCART: Well, normally if
18 the complaint is certainly clearly from the start
19 one of sexual assault, the investigation is sent
20 directly at that point to the National
21 Investigation Service, the specialized military
22 police I mentioned. They have the jurisdiction to

1 deal with sensitive and serious matters. Sex
2 assault would always be considered in that
3 category. So that NIS once they got the complaint
4 would launch their investigation at that point.

5 CHAIRWOMAN JONES: And do they come back
6 to the commander?

7 MAJOR GENERAL CATHCART: They can come
8 back to the commander. When they're finished their
9 investigation, obviously they have options like any
10 police. They have the power to lay a charge, in
11 which case they could lay a charge and then refer
12 it to the commanding officer at that point for the
13 commanding officer then to proceed or not proceed.
14 But also in our system, if the commanding officer
15 does not proceed with the charge, it is open for
16 the National Investigation Service to still take
17 the charge directly to the prosecutors for
18 consideration.

19 BRIGADIER GENERAL (RET.) DUNN: And does
20 the National Investigation Service investigate only
21 military misconduct?

22 MAJOR GENERAL CATHCART: Well, they have

1 the jurisdiction is what drives it, and it's
2 primarily that. Having said that, there can be
3 obviously cases where civilians are under the
4 jurisdiction, whether outside of Canada or inside,
5 and they can do an investigation, say, of a
6 civilian dependent of a military member for sex
7 assault. And they could then do the investigation
8 because they have the jurisdiction and refer the
9 charge, if there is a charge, to the local civilian
10 prosecutor.

11 Quite often they'll also work with local
12 police at that point to determine whether the
13 police or local civilian police would want to be
14 involved or take over the investigation. So it's
15 really a question of, yes, it is possible for them
16 to have jurisdiction for non-military members, but
17 that's fairly limited.

18 BRIGADIER GENERAL (RET.) DUNN: Okay. So
19 it's generally focused on investigating military
20 misconduct as a general rule.

21 MAJOR GENERAL CATHCART: Correct.

22 BRIGADIER GENERAL (RET.) DUNN: Thank you.

1 CHAIRWOMAN JONES: Admiral Houck and then
2 Professor Hillman?

3 VICE ADMIRAL (RET.) HOUCK: General
4 Noonan, General Cathcart, thanks for your service
5 and thank you for being here, both of you.
6 Understanding that the system is working well from
7 your standpoint, and that most of the changes, if
8 not all, but sort of a sea change was made in 1999,
9 do you have any sense of a comparison from before
10 and after that change as to how these changes would
11 relate to specifically the issue of sexual assault,
12 a control group, if you will, in terms of how it
13 worked before visa vis sexual assault.

14 And then secondly, if you would, and then
15 I'll let you all talk, if you could speak to other
16 majors that -- you've spoken of the seriousness
17 which Canadian armed forces take the issues of
18 sexual assault. If you could speak to some of the
19 other things that Canadian armed forces do to
20 address the issue of sexual assault, be it the
21 interaction of and the integration of troops, the
22 role of alcohol, some of these other factors and

1 how they play into your strategy for this.

2 MAJOR GENERAL CATHCART: Thank you,
3 Admiral Houck, and good to see you again as well.
4 Yeah, regarding the first question, as I said, our
5 changes -- the sea changes that you referred to
6 that we made were not really driven by sex assault
7 in terms of an issue. They were driven by broader
8 concerns that I mentioned about changes in our
9 charter, events coming out of Somalia, and just an
10 evolutionary process that occurs in any event.

11 So we never started from the position that
12 we, you know, viewed it as a specific problem,
13 i.e., sex assault, and to this day we still haven't
14 in terms of devoting resources to track it if
15 you're talking about sort of empirical data. The
16 best we can say is we've seen and we do our annual
17 report to monitor all offenses. We've certainly
18 never seen a spike one way or the other up or down
19 in terms of more complaints or less complaints. It
20 seems rather steady, and the feedback that we get
21 also through other sources, like the chain of
22 command and medical folks as well indicates that

1 there seems to be a sense that the system is
2 working for victims and accused in those
3 circumstances. But as far as hard numbers, we
4 haven't tracked them from the start, and we're not
5 currently tracking them in that sense.

6 Just quickly, and I'll see if General
7 Noonan would like to add things, the other aspects,
8 because that's a very important point. There's a
9 tendency, I think, in all of our countries,
10 certainly in the public, to rush towards, you know,
11 got to be seen to be doing something, and usually
12 that ends up being charge laying, courts martial,
13 that sort of stuff. Extremely important, but in
14 terms of the overall context, the holistic picture
15 of dealing with sexual -- what we broadly term as
16 sexual misconduct, which can include sexual
17 assault, we've taken a number of measures,
18 obviously starting from start in terms of screening
19 recruits, educating recruits all through their
20 processes -- Army, Navy, Air Force.

21 We're a joint force, so we have the same
22 standards, same policies. We created policies that

1 interact, so that if it's sex assault, there may be
2 also, as you've indicated, alcohol or drug issues
3 involved. So the policies actually mesh fairly
4 well together to do two things, to address the
5 issue, but also say, you know, is there a way that
6 we can help the individual if they are suffering
7 from psychological trauma or abuse of alcohol or
8 drugs.

9 So it's really a holistic approach from
10 day one in which we combine policies, education,
11 reinforcement, training, so that, you know, we do
12 our best to avoid obviously any incidents along
13 those lines.

14 Steve, do you want to --

15 MAJOR GENERAL NOONAN: I did want to just
16 reinforce where General Cathcart was coming from,
17 and that's the point of I had mentioned in my
18 opening comments about focusing our efforts left of
19 the event or before the event occurs, which is much
20 more than just an education program saying don't do
21 that. It's got a lot to do with the alcohol
22 policies that we've put into place, the behavioral

1 change that we would like to see occur that
2 reflects the expectations of society as a whole.

3 And so, no longer -- when I first joined
4 the forces, it was a different force back in 1978
5 as opposed to what it is today. There's no doubt.
6 There is a written code of conduct. There are
7 written ethics and values that our soldiers,
8 sailors, and airmen, officers, senior NCOs, and
9 soldiers, and other ranks are trained in. And our
10 behavior is set by this senior leadership right
11 down to the master corporal or corporal in act --
12 do as I act, not as I say. And that's the type of
13 activities that we do that, as I was trying to
14 describe, that left of the event type of activity.

15 BRIGADIER GENERAL (RET.) DUNN: Just out
16 of -- really out of curiosity, what percent of your
17 force is female -- of your active force is female?

18 MAJOR GENERAL CATHCART: We have --
19 obviously numbers vary, but today I think our last
20 stat was, what, 16 percent.

21 BRIGADIER GENERAL (RET.) DUNN: Sixteen?
22 Okay. So it's a pretty significant number.

1 MAJOR GENERAL CATHCART: Yeah. And during
2 our time in Afghanistan as compared for operations
3 in theaters, it varies, but roughly about 10
4 percent of our various rotations in Afghanistan
5 were women.

6 BRIGADIER GENERAL (RET.) DUNN: Were
7 women. Okay. Thank you very much.

8 PROFESSOR HILLMAN: General Cathcart, I
9 last saw you when you were welcoming the
10 International Society for Military Law and the Law
11 of War to Quebec City. And it's good -- I
12 appreciated that welcome, and I appreciate your
13 presence here. It's hugely helpful to us.

14 MAJOR GENERAL CATHCART: Thank you.

15 PROFESSOR HILLMAN: A few quick factual
16 questions, and then I'll ask you to take a big step
17 and try to establish a baseline for us. First, you
18 mentioned the joint force nature of the Canadian
19 forces. Has that been an evolution or has there --
20 how long has there been a single discipline code
21 and set of processes across the branches of
22 service.

1 MAJOR GENERAL CATHCART: We went through
2 our main changes in the 50s, 60s, and early 70s in
3 terms of unification and integration into the force
4 that you roughly see today. And that also took
5 with it the amendments and changes from the
6 various, like in most countries and Allies, the
7 various service disciplinary acts into one under
8 the National Defense Act, which is now Part 3 of
9 what's called the Code of Service Discipline. That
10 was, again, from the 1950s.

11 PROFESSOR HILLMAN: Has that altered the
12 identity of members of the branches of service? In
13 other words, I got a "like this" from General
14 Noonan, so --

15 MAJOR GENERAL CATHCART: I'll let the
16 operators add to that one.

17 PROFESSOR HILLMAN: Okay.

18 MAJOR GENERAL NOONAN: No, the tribes are
19 alive and well.

20 (Laughter.)

21 PROFESSOR HILLMAN: Okay. My next
22 question, is there a place to consider the good

1 military character and military service of the
2 accused in the decision about whether to prosecute?
3 Is that a specified or an unspecified criteria
4 that's considered by the Director of Military
5 Prosecutions, or perhaps by the commander and the
6 commander's advice regarding the --

7 MAJOR GENERAL CATHCART: Yeah. Not -- as
8 you may be aware, and I know you got flooded with a
9 lot of materials from all the Allies, I understand.
10 But in our materials, we have the Director of
11 Military Prosecution policy for essentially charge
12 screening. And again, the two criterion are the
13 sufficiency of the evidence and in the public
14 interest. It would -- might be not for the
15 prosecutor directly to consider the good character
16 or otherwise of the accused. That might come out
17 of the chain of command in its referral of the
18 matter in which they comment perhaps, you know, in
19 the context of public interest that here's the
20 individual. But I think from purely the
21 prosecutor's decision making process, that would
22 not likely be a factor.

1 PROFESSOR HILLMAN: Okay. And then, my
2 last question, which requires you to venture a
3 little more broadly than you have so far. One of
4 the struggles we have is to establish a baseline
5 for how big the problem is and what the problem
6 really looks like when we only see a tip of the
7 iceberg because of the struggle that we have to get
8 reports of this particular criminal activity.
9 What's your sense of the baseline problem in the
10 Canadian forces with sexual assault?

11 MAJOR GENERAL CATHCART: Yeah. Well,
12 frankly, from my sense, again, as a superintendent
13 of the military justice system and in coordination
14 with folks like General Noonan and also our chief
15 of military personnel who have the broader
16 responsibilities for the full picture I was
17 describing about policies for sexual misconduct and
18 harassment, from our, you know, fairly frequent
19 discussions at my level about it, the baseline
20 seems to be, as I said before, low and stable,
21 meaning that while there are cases, and every case
22 is an important one to deal with, we haven't seen

1 an appreciative, again, spike or decline in any
2 sort of reporting --

3 PROFESSOR HILLMAN: Give us a sense of
4 what a case looks like. What's a typical case?

5 MAJOR GENERAL CATHCART: Well, it's
6 difficult to say. Again, it varies depending on
7 the factors at the time. Of recent times, a
8 typical case of sexual assault tend to be, what
9 I'll call, at the low end of the spectrum assault,
10 sexual touching in a sexual context, cases that,
11 frankly, probably in our civilian system would not
12 be proceeded with given the case loads and
13 workloads, but also, importantly, the difference of
14 approach, because ultimately our goal is to
15 maintain discipline that even a low level sexual
16 assault would be proceeded with with all the proper
17 reviews by DMP, of course, because it's important o
18 to maintain discipline in that context.

19 Have there been cases of more violent
20 sexual assaults? Yes, there have, but again, from
21 my view of the statistics, they don't seem to be
22 nearly in the majority. It's far at the lower end

1 of sex assault.

2 PROFESSOR HILLMAN: Thank you.

3 CHAIRWOMAN JONES: Ms. Holtzman?

4 CONGRESSWOMAN HOLTZMAN: Thanks. I have a
5 couple of factual questions, too. I just want to
6 make sure I understand how your system works.
7 Somebody makes a complaint that they've been
8 sexually assaulted. To whom do they complain?

9 MAJOR GENERAL CATHCART: They could
10 complain to whoever they wish to. What we try to
11 do, i.e., they can complain to the chain of
12 command, their own unit. They can complain to
13 military policy. They could complain to the
14 National Investigation Service, the special unit.
15 They could complain to legal advisors. Really
16 there's a multitude of intake avenues.

17 CONGRESSWOMAN HOLTZMAN: Once such a
18 complaint is received, the recipient must forward
19 that complaint to the national police, the --

20 MAJOR GENERAL CATHCART: Correct.

21 CONGRESSWOMAN HOLTZMAN: The military
22 police, whatever you call it.

1 MAJOR GENERAL CATHCART: The National
2 Investigation Service.

3 CONGRESSWOMAN HOLTZMAN: Okay.

4 MAJOR GENERAL CATHCART: Again, as you can
5 appreciate, particularly with low level allegations
6 of sexual assault, sometimes the line between the
7 assault and just harassment, for example, may be a
8 bit blurred, so it's not automatic that they go.
9 But we tend to err, if I could use that term, on
10 the side of caution, and advice is often given
11 certainly by legal advisors that if there's any
12 doubt, refer it to the National Investigation
13 Service.

14 CONGRESSWOMAN HOLTZMAN: So it goes to the
15 National Investigation Service. Concurrently, what
16 does the chain of command do with that? At some
17 point, the chain of command refers the case? Is
18 that after the investigation is complete or when
19 the complaint is received?

20 MAJOR GENERAL CATHCART: Once the chain of
21 command has referred it to the NIS, then it's
22 totally in the hands of the NIS to investigate.

1 CONGRESSWOMAN HOLTZMAN: When does the
2 chain of command get confronted with the need to
3 decide whether to refer? Is that --

4 MAJOR GENERAL CATHCART: Well, again --

5 CONGRESSWOMAN HOLTZMAN: Let's say the
6 referral has not -- the complaint has not been made
7 to the chain of command. Let's say the complaint
8 is made to the national police unit.

9 MAJOR GENERAL CATHCART: Yep.

10 CONGRESSWOMAN HOLTZMAN: How does the
11 chain of command get advised, and at what point
12 does the chain of command take action one way or
13 the other to do nothing or to refer?

14 MAJOR GENERAL CATHCART: Right.
15 Generally, what happens then is the NIS will,
16 again, depending on the case, obviously if the
17 commanding officer might've been the subject of the
18 complaint, they're not likely to rush to them and
19 tell them that they're going to investigate it.
20 But otherwise, if the commanding officer is not,
21 the NIS would advise. They also have the -- a
22 report in which they take in complaints, and those

1 reports are distributed to the chain of command not
2 only for disciplinary purposes, but for a multitude
3 of purposes, administrative and information.

4 So the chain of command can become aware
5 of it. They would then probably engage both the
6 NIS in terms of saying, well, we want to make sure
7 we're not in your lane and possibly taint any
8 criminal investigation so, you know, tell us, you
9 know, when you want us to be involved or not in
10 terms of assistance. They would also likely
11 consult their own legal advisor to determine what
12 action, if anything, would need to be done in terms
13 of administrative action of removing, for example,
14 the accused from the workplace or the person
15 alleged to have complained against from the
16 workplace, a multitude of sort of administrative
17 activities.

18 Both the NIS and the prosecutors, if it
19 gets to that point, also have in their policies
20 directions to deal with victims to make sure
21 they're properly supported medically,
22 psychologically, spiritually, anything they need of

1 those natures. But the NIS, once it has it, is
2 then off doing its police investigating piece.
3 Then at the end of that process, if they determine
4 that there is a charge warranted, they will lay the
5 charge and refer it to the chain of command for
6 disposition at that point.

7 CONGRESSWOMAN HOLTZMAN: That point then,
8 the chain of command can say, nope, don't want to
9 go forward. Is that correct?

10 MAJOR GENERAL CATHCART: That is correct.

11 CONGRESSWOMAN HOLTZMAN: And the
12 commanding officer at that point, does that
13 commanding officer have to talk to the equivalent
14 -- the legal advisor, or can he or she make that
15 determination on his or her own?

16 MAJOR GENERAL CATHCART: They can make
17 their determination on their own. Normally by that
18 point, there's already been legal input on the NIS
19 side.

20 CONGRESSWOMAN HOLTZMAN: Right.

21 MAJOR GENERAL CATHCART: But importantly,
22 as I referred to earlier, if the chain of command

1 commanding officer says no, then NIS still has
2 independent authority then to still it to the
3 prosecutor themselves.

4 CONGRESSWOMAN HOLTZMAN: Okay. And the
5 prosecutor can commence the case. And let's just
6 say the chain of command says, no, we're not going
7 forward. The NIS says, yes, we're going forward.
8 They go to the prosecutor. The prosecutor can then
9 go forward and proceed full steam ahead under the
10 system.

11 MAJOR GENERAL CATHCART: Correct. The
12 prosecutor then is another independent player, and
13 it can choose to proceed with the case, perhaps
14 determine it could be referred back to a summary
15 trial, not likely in a true sex assault matter, or
16 not proceed at all because it didn't meet their
17 criteria for preferring.

18 CONGRESSWOMAN HOLTZMAN: Do you have any
19 statistics on the incidence -- number of times in
20 which the chain of command says no and the
21 investigative service, the police service says
22 we're going ahead, and the case is prosecuted? Is

1 that common, infrequent, rare?

2 MAJOR GENERAL CATHCART: I would describe
3 it as rare because most of the time the chain of
4 command understands and they understand the
5 importance, although they still have a role to say
6 whether they're going to proceed or not. They're
7 not certainly bullied into those circumstances.
8 They make their own assessment. But it is usually
9 rare because the cases are, you know, clear enough
10 that they can make a decision one way or the other.

11 And from our experience, we don't track
12 certainly cases of sex assaults. I mean, we
13 probably have a global figure if we went to each
14 case and say, well, was that proceeded with by the
15 chain of command or not? From my perspective as
16 superintendent, I would notice a spike if there was
17 a lot of noes going on, and we just don't see that.

18 CONGRESSWOMAN HOLTZMAN: Okay. I just
19 have two questions. I guess one of them might be a
20 big question. Major General Noonan, you talked
21 about the importance of having, and these, I think,
22 are quotations from you, "real and perceived

1 independence in the prosecution of the cases." And
2 you talked about "perceivable unbiased" -- in
3 handling the cases in a "perceivably unbiased
4 manner." Why is that important and to whom is it
5 important? And who is perceiving?

6 MAJOR GENERAL NOONAN: Right, the troops
7 under my command. As I've established an
8 environment as a commanding officer, I would hope
9 that at a certain point they would trust my
10 judgment going forward. And as you prosecute the
11 commander of your unit, you're trying to be fair,
12 unbiased, all that kind of good stuff, although
13 some -- from time to time, you will interact with
14 certain individuals more than others. And there
15 will be, whether you like it or not, a perception
16 that you're buddies with this guy or this girl or
17 whatever.

18 When you get into some serious allegations
19 of criminal activity, it would be -- I find it very
20 useful that I don't have to fight that perception
21 on my own, so I have an option --

22 CONGRESSWOMAN HOLTZMAN: So you think, in

1 other words, that it enhances your image and
2 enhances your strength as a commander not to have
3 to be involved in making some of these decisions.

4 MAJOR GENERAL NOONAN: On some of them,
5 exactly. And one of the things --

6 CONGRESSWOMAN HOLTZMAN: Particularly with
7 regard to prosecution.

8 MAJOR GENERAL NOONAN: Right. Summary
9 trials are important.

10 CONGRESSWOMAN HOLTZMAN: Do you think that
11 that opinion is shared by other commanders in the
12 Army?

13 MAJOR GENERAL NOONAN: Absolutely. The
14 summary trial is really important. It's the one
15 where the CO will guard because he's looking after
16 his or her troops. And the harder ones, and that's
17 that threshold piece, I value that independent
18 perception of being unbiased.

19 CONGRESSWOMAN HOLTZMAN: And I don't know
20 if you were asked to provide -- I don't want to
21 take your time now -- information about what you do
22 -- what you called, Major General Noonan, getting

1 to the left of what happens, but I'm sure we would
2 appreciate -- at least I would -- more information
3 on that when you have an opportunity. And let me
4 say thank you so much for being willing to share
5 your experiences with us. I for one really value
6 it.

7 CHAIRWOMAN JONES: Colonel Cook?

8 COLONEL (RET.) COOK: Yes. Thank you,
9 gentlemen, for being here. General Noonan,
10 following on some of the questions you were just
11 answering, the comments, if I wrote it correctly,
12 "fair for the accused, for the complainant," and
13 that by your being removed in the court martial
14 type cases, it seems to enhance or help your role
15 as a commander.

16 Two questions. Well, the first question
17 would be, would you -- if the cases -- I mean, we
18 got some statistics. Were you given a copy of the
19 statistics that we have comparing the Canadian and
20 the U.S. courts martial procedures as well?

21 MAJOR GENERAL NOONAN: Yes.

22 COLONEL (RET.) COOK: Because I look at

1 that. Does your answer stay the same, or would you
2 have more of a concern? When I look at the
3 information that was provided to us and I look at
4 in the year 2012 that there were a total of five
5 sexual assault cases that had been referred to a
6 courts martial, and only four of them went to
7 trial, and two of them were incarcerated, the
8 biggest one was for 12 months, as compared to
9 Department of Defense, the U.S. military in that
10 same time frame where we had -- it was 2,510 cases
11 that went to courts martial all for sexual
12 assaults. I mean, 39 times more courts martial
13 with a force that's 20 times the size of the
14 Canadian force. And I'm not -- I mean, again, you
15 came today to explain your system, not to
16 necessarily compare which is better.

17 But if those numbers in that magnitude was
18 that great in the Canadian force, would your role
19 as a commander -- would you be more concerned by
20 your inability to have input for cases that
21 automatically go to a DMP, get referred to court
22 with little or no input by you, or would you still

1 say, you know what? I'm glad I don't have that
2 workload on me as well.

3 MAJOR GENERAL NOONAN: I would still say
4 that because of my preoccupation with prevention
5 rather than the follow-through of after the event.
6 And so, I'll be careful here, but I'm seeing that
7 the military justice system is reinforced by other
8 programs of prevention, of education, of
9 integration of women into the forces, of a less
10 than preoccupation with alcohol as the center of
11 your social activities, with a written code of
12 ethics and values that people are trained in and
13 understand the application of. And so much more
14 than the military machinery -- military justice
15 system machinery.

16 COLONEL (RET.) COOK: And I'll add to what
17 Representative Holtzman had asked. It would be
18 great to hear some of what you're doing on the left
19 of the event.

20 MAJOR GENERAL NOONAN: Right.

21 COLONEL (RET.) COOK: Would you also
22 include to the extent your commanders -- again, the

1 numbers are smaller, so this may not be as
2 difficult in your circumstances. But to the
3 extent the commanders are dealing with having both
4 an accused and a complainant, as you called the
5 person, in your ranks, how do you deal with taking
6 care of the interests of both of them while the
7 process of justice does its course?

8 MAJOR GENERAL NOONAN: Yeah.

9 COLONEL (RET.) COOK: Thank you.

10 PROFESSOR HILLMAN: Just a quick comment,
11 Madam Chair. Because the numbers are -- for those
12 of you who are listening without all the papers in
13 front of you, the numbers aren't quite that bad.
14 In terms of the high numbers in the United States,
15 it's more than 300 -- 302 referred on military
16 sexual assault. It's the second paragraph on there
17 rather, not 2,500. Those were all of the courts
18 martial, right. So it's many more, but not quite
19 that order of magnitude.

20 MR. BRYANT: Madam Chairman?

21 CHAIRWOMAN JONES: Yes, Mr. Bryant?

22 MR. BRYANT: First of all, thank you both

1 for coming. General Cathcart, you mentioned in
2 terms of when a case is referred to a courts
3 martial, the panel is selected by a random
4 methodology. Could you explain more specifically
5 what that methodology is?

6 MAJOR GENERAL CATHCART: Yes. Essentially
7 again, it's under the purview of the court martial
8 administrator. That is a position that is
9 appointed by our chief military judge and works
10 under the general supervision of our chief military
11 judge, and, therefore, is independent again from
12 the chain of command.

13 The court martial administrator has a
14 process -- well, no surprise. It's basically
15 computer generated. It has all the names and ranks
16 of people eligible to sit on the panels because
17 everybody in the Canadian forces would be eligible
18 to sit, you know, at certain rank levels and
19 certain positions, like lawyers and police officers
20 -- not. And we've increased it also for non-
21 commissioned members under our new changed
22 legislation to sergeants, not below sergeants.

1 So that list is generated for every court
2 martial randomly, and then the court martial
3 administrator takes the list of names and goes out
4 to the panel -- potential panel members to see if
5 there's any particular reason in which they cannot
6 serve on the panel in that case. Obviously the
7 goal is to have them sit as part of the panel, but
8 there may be reasons, mostly operational ones if
9 they're a colonel, you know, fighting the war in
10 Afghanistan to take them out of that war to be a
11 panel member of the court martial, the
12 administrator would move on from there. But the
13 whole process is controlled by the courts martial
14 administrator.

15 MR. BRYANT: Thank you very much. I have
16 one more question, Madam Chairman. You mentioned
17 that it's the commander's responsibility to see
18 that the victim gets victim services, and you
19 mentioned several categories. Is there a
20 formalized victim services agency or person in the
21 Canadian military?

22 MAJOR GENERAL CATHCART: Not that

1 formalized in that sense. There are elements of,
2 for example, the military police and the National
3 Investigation Service who have folks who are
4 identified to assist victims of crimes, but
5 particularly in case of sex assault. And obviously
6 in cases where the event is being referred to
7 civilian authorities, they have a very good link to
8 local civilian authorities who have social work and
9 networks, medical networks that they can use to use
10 to support it.

11 Obviously, you know, we're not claiming to
12 be perfect in any way, and there's still a lot of
13 work to be done. In fact, our entire government as
14 a whole is now looking at a victim's rights bill to
15 augment, and that would obviously have an effect on
16 the military system as well. But there are, what I
17 understand, to be very useful and practical
18 individuals under the policies of prosecutors and
19 military police and our medical people to assist
20 victims.

21 MR. BRYANT: Thank you very much.

22 CHAIRWOMAN JONES: Yes, Admiral?

1 VICE ADMIRAL (RET.) HOUCK: How many
2 people are in your -- I'm not sure I have the right
3 term -- but your independent prosecutor's office,
4 the group that makes the decisions? What's the
5 staffing of that?

6 MAJOR GENERAL CATHCART: We have -- I
7 should know off the top of my head, but I think we
8 have, Admiral, about 30 folks. The bulk are in the
9 headquarters of the Military Prosecution Service in
10 Ottawa, and then we have regional prosecution
11 offices in the eastern part of Canada and the
12 western part of Canada. And they have -- they're
13 usually at the level of a lieutenant colonel, and
14 that's usually a two-person office that looks at
15 the charges that arise from those regions.

16 The Director of Military Prosecution in
17 Ottawa ultimately is the head of the organization,
18 and they'll make the calls on those issues. They
19 also look after appeals that go to the Court
20 Martial Appeal Court or the Supreme Court of
21 Canada.

22 CHAIRWOMAN JONES: Thank you very much,

1 General Noonan, General Cathcart. Much
2 appreciated.

3 MAJOR GENERAL CATHCART: Thank you.

4 CHAIRWOMAN JONES: All right. We'll now
5 hear from Air Commodore Paul Cronan, who is the
6 Director General, Australian Defense Force Legal
7 Service. Good afternoon, Commodore Cronan. Thank
8 you so much for coming.

9 AIR COMMODORE CRONAN: Good afternoon,
10 Madam Chair, and Panel members. And thank you for
11 the opportunity to appear before you this
12 afternoon.

13 I think you have a Power Point
14 presentation which I have provided to you
15 separately. It doesn't need to be on the, but as
16 long as you have the slide packet, it would be
17 helpful. You would also have a copy of my
18 biography, and I won't go through that. But I'm
19 the Director General of the ADF Legal Service. We
20 have a tri-service legal service; that is, one
21 legal service of which I'm the director general.
22 We have about 140 permanent lawyers spread across

1 Australia and about 390 reserve lawyers in support
2 of our organization.

3 I note that in accordance with the Panel's
4 charter, you have the task of comparing similar
5 military justice systems with a specific focus on
6 the investigation, prosecution, and adjudication of
7 adult sexual assault crimes. This comparison is to
8 include an assessment of the differences in
9 providing support and protection to victims of
10 sexual assault crimes. It's against this
11 background I'll provide some opening remarks on how
12 the Australian Defense Force, or the ADF for short,
13 addresses these issues and endeavor to answer any
14 questions you may have on how Australia's military
15 discipline system operates this afternoon.

16 If I can provide one caveat to my remarks
17 today, I welcome any questions that you may have
18 regarding the ADF's military discipline system, and
19 particularly the significant challenges to the role
20 of command in that system in the last decade. I
21 will endeavor those questions as best as I can. I
22 am not, however, an expert in the U.S. military

1 justice system, and would respectfully note that
2 it's not appropriate for me, and I would not
3 intend, to comment or offer an opinion on the
4 current U.S. military justice system or any
5 proposals to modify that system. I thank you in
6 advance for your understanding on that issue. Next
7 slide.

8 At the outset, may I say that crimes
9 involving sexual assault and other sexual
10 misconduct are clearly very serious with our
11 military, and we've been grappling with them for
12 some time, but particularly in recent years. I
13 will say more about this later, but as you may
14 know, as a result of two very high profile sexual
15 offense related matters in 2009 and 2011 in
16 Australia, the then Minister of Defense launched in
17 2011 a series of seven cultural reviews into
18 various aspects of behavior in the ADF and the
19 department.

20 It was recognized then as now that there
21 is not one single element that contributes to the
22 incidence of sexual assault and other sexual

1 misconduct in the military. The cultural reviews
2 refer to -- range in scope from considering the use
3 of alcohol and social media in defense to the
4 treatment of women in our military academy, and the
5 treatment of women in the wider Australian Defense
6 Force.

7 The outcome of these seven reviews led to
8 the launch in March 2012 of a new strategy for
9 cultural change in the ADF called Pathway to
10 Change: Evolving Defense Culture. Pathway to
11 Change represents Defense's statement of cultural
12 intent and the blueprint for how we will achieve
13 that intent.

14 As of 5 August 2013, of the 175 items for
15 action under the Pathway to Change strategy, 114
16 have been finalized, seven of the 15 items have
17 been completed, 86 of the 160 recommendations have
18 been completed, and 21 recommendations have been
19 closed. It's been a big effort.

20 While this is good progress, the chief of
21 the Defense Force and the secretary of the
22 department are keen to maintain the impetus to

1 complete or substantially finalize all key actions
2 and events review recommendations in the first two
3 years of this five-year reform program.

4 As our Chief of Defense Force recently
5 stated, and I quote, "Tackling issues of sexual,
6 mental, and physical abuse is one of the key
7 challenges facing the Australian Defense Force in
8 the next five years." Simply put, we must be just,
9 inclusive, and fair-minded. Everyone at every
10 level has an active role to play in living the
11 defense values to ensure that the Australian
12 Defense Fund made our cultural intent to be
13 "trusted to defend, proven to deliver, and
14 respectful always."

15 I've included this reference to recent
16 initiatives underway in the ADF to address issues
17 of sexual assault and broader cultural issues to
18 highlight to the Panel that the U.S. military is
19 not alone in looking at these issues and ways to
20 address them. Next slide.

21 My opening remarks are essentially in
22 three parts, and I've attempted to anticipate, I

1 hope, some of the questions and queries you might
2 have over the next 45 minutes or so. First, I'll
3 provide you with an overview of some of the key
4 differences as they relate to the Panel's terms of
5 reference regarding the military justice systems of
6 Australia and the United States. Second, I will
7 outline the changes that were made to the Australia
8 military justice system between 2003 and 2006 that
9 were designed to improve the fairness and
10 impartiality of our military justice system.
11 Finally, I will provide you with an overview of
12 what the Australian Defense Force is currently
13 doing in order to address the problem of sexual
14 assault and sexual misconduct and improve support
15 for victims particularly of those offenses within
16 the Australian Defense Force. Next slide.

17 To begin, the starting point for any
18 understanding of the Australian military justice
19 system is its historical point of origin.
20 Australia's military justice system, like our
21 Canadian colleagues, is based on the UK's military
22 justice system. For that reason, until 1985, our

1 military justice system was a hybrid mix of UK
2 discipline law as nullified by various Australian
3 acts and regulations.

4 In 1985, however, the Australian
5 Parliament enacted the Defense Force Discipline
6 Act, or DFDA for short. The DFDA created one
7 military discipline system applicable to all three
8 arms of the ADF, being the Army, the Australian Air
9 Force, and the Australian Navy. The DFDA is the
10 Australian equivalent of the United States Uniform
11 Code of Military Justice. And while the DFDA is
12 similar to the UCMJ in many ways, given the Panel's
13 terms of reference, there are two very important
14 differences that I should draw to your attention.
15 Next slide.

16 First, the DFDA has a narrower
17 jurisdiction than the UCMJ. In contrast to the
18 service status test, which I understand applied
19 under the UCMJ, the DFDA applies what we call a
20 substantial purpose test or sometimes called a
21 service connection test, which has been articulated
22 and refined through a series of High Court of

1 Australia decisions in the past 25 years. The
2 substantial purpose test provides that jurisdiction
3 under the DFDA can only be exercised where
4 disciplinary proceedings under the DFDA can
5 reasonably be regarded as substantially serving the
6 purpose of maintaining or enforcing service
7 discipline.

8 The practical effect of the substantial
9 purpose test is that ADF cannot assert jurisdiction
10 over its members under the DFDA simply because they
11 are part of the ADF. Instead there must a
12 connection between the disciplinary offense the
13 member is accused of and the maintenance or
14 enforcement of service discipline.

15 Excuse me. It was a long journey. I'm a
16 little bit dry.

17 For example, if a private while on duty
18 was to assault his sergeant while located within an
19 Australian Army base, the DFDA would clearly apply.
20 In most circumstances, a charge of assaulting a
21 superior officer would be reasonably regarded as
22 substantially serving the purpose of maintaining or

1 enforcing service discipline. If, however, the
2 same private while off duty was to punch a civilian
3 at a civilian bar, the substantial purpose test
4 might not be satisfied, and that would not trigger
5 jurisdiction or might not trigger jurisdiction
6 under the DFDA. Next slide.

7 The second significant difference between
8 the DFDA and the UCMJ is that when it comes to
9 offenses against the ordinary criminal involving
10 members of the ADF, for example, sexual assaults or
11 other sexual offenses, the DFDA is complementary to
12 and not a substitute for the civilian Australia
13 criminal justice system. Consistent with this
14 approach, the DFDA expressly provides that the ADF
15 cannot deal with certain very serious offenses
16 alleged to have been committed within Australia
17 without the consent of the civilian commonwealth or
18 federal director of public prosecutions. These
19 very serious offenses include motor manslaughter,
20 treason, and the more serious sexual assaults.

21 I should say here that when we were refer
22 to sexual assault, we define it very narrowly

1 unlike some systems which define it very broadly.
2 Sexual assault under the DFDA very much refers to
3 allegations of rape or attempted rape. And it's
4 that narrow. We refer to the other matters as
5 other sexual offenses.

6 Consequently, the majority, although not
7 all, of these sexual assault cases alleged to have
8 occurred within Australia, and I emphasize that
9 because we have jurisdiction outside Australia, and
10 involving members of the ADF are dealt with by the
11 civilian criminal justice system.

12 If an ADF member is then convicted by the
13 civilian criminal justice system of such an
14 offense, the commander in the ADF may take
15 administrative action against the individual,
16 including, for example, by terminating the member's
17 ongoing service in the ADF. Less serious sexual
18 offenses, such as allegations of an act of
19 indecency without consent or obscene behavior can
20 be tried by a service tribunal under the DFDA
21 without consent of the civilian authorities where
22 the bringing of the charges is reasonably necessary

1 for the maintenance of service discipline.
2 However, as with all offenses that have a
3 counterpart under the general law, there's a
4 threshold jurisdictional issue of whether the
5 matter should be tried by a service authority or by
6 the civilian courts.

7 In accordance with a 2007 MOU between our
8 Director of Military Prosecutions and the various
9 civilian prosecuting authorities, in such cases the
10 ADF will consult with civilian prosecutors as to
11 jurisdiction if a matter satisfies the substantial
12 purpose test, but has characteristics which might
13 justify it being dealt with within the civilian
14 criminal justice system. For reference purposes,
15 you will find more detailed information about the
16 two differences between these systems in the
17 information paper I provided to you, and the Panel,
18 you would have a copy of the 2000 MOU, which I
19 previously provided. Next slide.

20 The flow chart which you all should be
21 looking at, if you've been keeping up with the
22 presentation, gives you an outline in broad terms

1 of the process that applies when the IDF is
2 determining whether the ADF or the civilian
3 authority will exercise jurisdiction over an
4 offense. Next slide.

5 I turn now to the changes that were made
6 to the Australian military justice system between
7 2003 and 2006. These changes were made with a view
8 of improving the impartiality and fairness which
9 military discipline is administered in the ADF.
10 These reforms are also very relevant to the work of
11 your Panel, I suspect, as they brought about a
12 fundamental change to the role played by senior
13 commanders in the Australian military justice
14 system. The origins of these reforms can be
15 tracked to 1997 when because of decisions of the
16 European Court of Human Rights impacting the
17 validity of the UK court martial structure, which
18 I'm sure you'll hear lots of shortly, the chief of
19 the Defense Force Commission, Brigadier Abodi, now
20 retired, but then a New South Wales Supreme Court
21 judge and a deputy Judge Advocate General, to
22 independently review the Australian military

1 justice system. Specifically, Brigadier Abodi was
2 asked to determine whether the Australian military
3 justice system satisfied civilian tests of judicial
4 impartiality and independence. Next slide.

5 At the time, Brigadier Abodi conducted his
6 review, the Australian military justice system more
7 closely resembled that of the UK and the United
8 States. In particular, DFDA still had convening
9 authorities, think senior officers usually of one-
10 or two-star rank, appointed by the Chief of Defense
11 Force or a service chief for the purpose of
12 convening a trial by court martial or Defense Force
13 magistrate, which is a single judge alone trial.

14 Convening authorities had a broad set of
15 powers, including the power to determine whether
16 there should be a trial, determine the nature of
17 the tribunal and the charges, select a Defense
18 Force magistrate or a judge advocate and court
19 martial panel members, select the prosecutor, and,
20 as the reviewing authority, then review the
21 proceedings.

22 On Brigadier Abodi's assessment, the

1 multiple roles of the convening authority were
2 problematic. Brigadier Abodi questioned the
3 ability of the Australian military justice system
4 to be impartial and fair given the involvement of
5 the convening authority in choosing who would sit
6 on the court martial panel and then ultimately
7 review the proceedings. Questions were also raised
8 in relation to the independence of the judge
9 advocate and the officers presiding at the court
10 martial given that both would be appointed by the
11 convening authority. Consequently, Brigadier Abodi
12 recommended that the many roles of the convening
13 authority should be significantly reformed. Next
14 slide.

15 You should have in front of you another
16 flow chart which sets out -- explains the way in
17 defenses would be handled by the ADF before 2006.
18 Next slide.

19 Between 1999 and 2002, the ADF
20 progressively made a number of administrative
21 changes to give effect to some of Brigadier Abodi's
22 recommendations in relation to convening

1 authorities. These included introducing a
2 prosecution policy to guide convening authorities
3 in exercising their discretion to proceed with
4 charges, excluding a convening authority from
5 conducting the review of a trial of court martial
6 proceedings or Defense Force magistrate where the
7 convening authority had been involved in the
8 administration of the trial, requiring the
9 convening authority to appoint only a judge
10 advocate or Defense Force magistrate nominated by
11 the Judge Advocate General, and establishing the
12 position of the judge advocate administrator.
13 Notably, Brigadier Abodi's recommendation that a
14 military director of prosecutions to replace the
15 role played convening authorities was not agreed at
16 that time. Next slide.

17 In 2003, most of the administrative
18 arrangements in the 2002 period were given
19 legislative force through the 2003 Defense Force
20 Legislation Act. That piece of legislation amended
21 the DFDA to bring about the following changes. The
22 multiple roles of convening authorities were

1 eliminated to ensure that a convening authority had
2 no role in the subsequent review of the outcome of
3 a court martial or Defense Force magistrate trial
4 convened by that convening authority. The
5 procedure for the JAG to appoint officers to act as
6 judge advocates for courts martial and for
7 nominating officers as Defense Force magistrates
8 was formalized, ensuring that these members were no
9 longer appointed by the chain of command.

10 The Judge Advocate General was empowered
11 appoint the president and members of courts
12 martial, as opposed to these members being
13 appointed by the military chain of command. The
14 position of the chief judge advocate was created as
15 a statutory appointment to assist the JAG in the
16 discharge of her functions, and the Chief Judge
17 Advocate and other members of the Judge Advocate or
18 Defense Force magistrates panels were given three-
19 year fixed terms subject to renewal. Next slide.

20 The 2003 reforms signaled the start of a
21 gradual shift towards what was perceived to be a
22 more impartial system of service discipline. That

1 shift reached its apex in 2005 when a Senate
2 committee released a report into the effectiveness
3 of Australia's military justice system. That
4 report, which built on the recommendations made by
5 Brigadier Abodi and roughly seven or eight separate
6 reviews of our discipline system between 1997 and
7 2005, led to the enactment of legislation which
8 resulted in the abolition of convening authorities
9 and the creation of four new positions, namely the
10 Director of Military Prosecutions, the Registrar of
11 Military Justice, Superior Authorities, and the
12 Director of Defense Counsel Services. These
13 reforms came into effect on June 6th, 2006.

14 The impetus for the 2006 reforms can be
15 traced to two factors. First, in incomparable
16 jurisdictions like the United Kingdom and Canada,
17 there had been judicial decisions indicating that
18 in order for service members to be guaranteed their
19 right to a fair trial within a military discipline
20 system, there was a need for commanding officers in
21 the chain of command to play less of a role in the
22 administration of that system. The second factor

1 was evidence which had been received by the Senate
2 committee that offered the 2005 report. That
3 evidence tended to indicate that there was a real
4 need for structural reform of the ADF discipline
5 system. For example, the Senate committee received
6 evidence of allegations of what we would call
7 bastardization, you would call hazing, I think is
8 the term you might be use, within the 3rd Battalion
9 of the Royal Australian Army Regiment, which had
10 gone unreported due a culture of science, which
11 appeared to have been endorsed by command. Next
12 slide.

13 More detail about the positions created by
14 the 2006 reforms can be found in the relevant
15 information papers which I've separately provided
16 to the Panel. What is worth drawing to your
17 attention here is that in abolishing convening
18 authorities, the 2006 reforms transferred the
19 responsibilities of convening authorities to the
20 newly-created positions. For example, the DMP, or
21 the Director of Military Prosecutions, was given
22 the power to decide what cases to prosecute at the

1 court martial and Defense Force magistrate level,
2 and who the prosecutor would be. The Registrar of
3 Military Justice was given the power to choose the
4 panel members on a court martial at a random -- on
5 a random basis, and Superior Authorities were
6 created to represent the service interest in
7 relation to the decision to prosecute.

8 Importantly, Superior Authorities who were
9 effectively senior officers who were convening
10 authorities in their previous role or previous
11 system were given the power to make non-binding
12 representations to the Director of Military
13 Prosecutions on the interest of the Defense Force
14 in relation to the prosecution of a matter. By
15 giving Superior Authorities that power, command was
16 able to retain some measure of input into the
17 administration of military discipline at the court
18 martial and Defense Force magistrate level. Next
19 slide.

20 As part of the reforms, the Director of
21 Defense Counsel Services was also established to
22 provide legal support to accused members. And as a

1 result of a series of cases where the military
2 police recommended serious offenses to command who
3 decided not to pursue them, the 2006 reforms also
4 enabled ADF military police to bypass command and
5 independently recommend serious charges directly to
6 the Director of Military Prosecutions. Next slide.

7 The flow chart which you should be up to
8 on this -- on that slide demonstrates the operation
9 of the ADF's military justice system after the 2006
10 reforms had come into place. The significant
11 differences between this flow chart and the
12 previous one that had the convening authorities on
13 it has a list of the convening authority's roles
14 and functions, and in this chart they've all been
15 replaced by those appointments, which I just
16 referenced. Next slide.

17 At this point, it's appropriate to reflect
18 on the effect of the reforms made to the Australian
19 military justice system in 2003 and 2006. These
20 reforms have undoubtedly had a significant and
21 positive impact on the efficacy, impartiality, and
22 perceived fairness of Australia's military justice

1 system. This a fact confirmed by a number of
2 subsequent independent reviews of the effectiveness
3 of the 2003 and 2006 reforms. In particular, in
4 2008, a highly respected Australian jurist, Sir
5 Lawrence Street, a former Chief of the Air Force,
6 Air Marshal Fischer, were asked to assess the
7 effectiveness of the reformed military justice
8 system in light of the reforms made in 2003 and
9 2006, and subsequent reforms in 2007 to replace the
10 court martial system or the stand alone Australian
11 military court.

12 Their independent review, which is known
13 as the Street-Fischer review, was completed after
14 they had conducted a total of 128 interviews with
15 members and functional groupings within defense,
16 along with 58 visits to ADF establishments,
17 commands and units over a six-month period. It was
18 indeed a comprehensive review.

19 As a result of their independent review,
20 they concluded that the reforms had been effective,
21 and that as a result of the reforms, "The military
22 justice system is delivering and should continue to

1 deliver impartial, rigorous, and fair outcomes.
2 Enhanced transparency and enhanced oversight is
3 substantially more independent from the chain of
4 command, and is effective in maintaining a high
5 standard of discipline both domestically and in the
6 operational theater."

7 While the 2007 reforms that established
8 the Australian military court were ultimately found
9 in 2009 to be unconstitutional by our high court,
10 the Street-Fischer review nonetheless commented
11 very positively on the independence of the military
12 discipline system from the chain of command. 2003
13 and 2006 reforms that established the independence
14 from the chain of command were not affected by the
15 high court's 2009 ruling.

16 The views expressed by the Street-Fischer
17 review team have been echoed by our independent
18 Inspector General of the ADF in his 2011 annual
19 report, and it's also a sentiment repeated by our
20 Director of Military Prosecutions and Judge
21 Advocate General in their own separate annual
22 reports to the Minister of Defense.

1 I have separately provided to the Panel an
2 information paper on the statistics that have been
3 gathered on the reporting, investigation, and
4 prosecution of sexual assault in the Australian
5 Defense Force. When reviewing these statistics, I
6 draw two points to your attention in any
7 interpretation of that material. First, until very
8 recently, the ADF did not have a single office
9 dedicated to keeping statistics related to
10 complaints investigations and trials of sexual
11 misconduct and sexual assault within the military.
12 With the establishment of the Sexual Misconduct and
13 Prevention Response Office, or SeMPRO as the
14 acronym is, on 23 July of this year in 2013,
15 looking into the future detailed stats on
16 complaints, investigations, and trials of sexual
17 misconduct and sexual assault will now be collated
18 and held for analysis purposes in one location.

19 Second, reporting of unacceptable
20 behavior, as the term was known -- as was broadly
21 known, included a range of behaviors ranging from
22 bullying and harassment to sexual misconduct and

1 sexual assault matters. Until relatively recently,
2 about 2008, it's been very difficult to ascertain
3 any reliable breakdown in the type of behaviors
4 that were broadly reported as "unacceptable."

5 One of the cultural reviews referred to
6 earlier, which was the review of treatment of women
7 in Australian Defense Force, the report's author,
8 Ms. Elizabeth Broderick, who's our sex
9 discrimination commissioner, noted that it was
10 difficult to reconcile the data provided by various
11 parts of defense, which was a significant
12 organizational deficiency that needed to be
13 urgently remedied. It was a result of Ms.
14 Broderick's comments that SeMPRO has been created
15 as a single point of data collection, analysis, and
16 mapping of all sexual misconduct and abuse matters
17 in the ADF. Next slide.

18 I just want to finish by saying a few
19 things about our current reforms. What is the ADF
20 currently doing specifically in this sphere of
21 sexual assault offenses, but also more generally to
22 improve the Australian military justice system and

1 the available mechanisms for providing support to
2 victims of sexual assault and sexual misconduct?
3 As mentioned at the beginning of these opening
4 remarks, in 2011, the Minister of Defense launched
5 seven separate reviews into the culture of the IDF,
6 which included the mechanisms of the law in the ADF
7 for dealing with sexual assault or sexual
8 misconduct related offenses.

9 These reviews were wide-ranging and
10 covered issues from alcohol use within the ADF to
11 the treatment of women and the use of social media
12 in defense. Of these reviews, the review into the
13 treatment of women in the ADF, led by Ms. Elizabeth
14 Broderick, has had an immediate and profound impact
15 on the Australian Defense Force. As one of the
16 proposed solutions to the issues identified in her
17 report, Ms. Broderick recommended the creation of
18 SeMPRO, an Australian patterned to the U.S.
19 Military Sexual Assault Prevention and Response
20 Program. The government accepted this
21 recommendation, and on 23 July of this year, the
22 Chief of Defense Force and our minister for defense

1 launched the SeMPRO office.

2 Consistent with Ms. Broderick's
3 recommendations, SeMPRO facilitates victims of
4 sexual misconduct to make one of two types of the
5 complaints to SeMPRO: a restricted disclosure or
6 what you might know as a restricted report, or an
7 unrestricted report. A restricted disclosure is a
8 disclosure of an allegation of sexual misconduct to
9 a member of SeMPRO that does not necessarily
10 trigger an investigation. And unrestricted report
11 is a report made through a member's chain of
12 command. The Australian Defense Force
13 Investigative Service, service police, or civilian
14 police may trigger a formal investigation. As
15 previously mentioned, SeMPRO also serves as the
16 single point of data collection analysis and
17 mapping of all sexual assault and misconduct
18 matters.

19 The creation of an avenue for restricted
20 disclosures to be made by victims of sexual assault
21 and misconduct have been viewed across the ADF as a
22 significant improvement to the ADF's ability to

1 deal with sexual assault or misconduct complaints.
2 At the heart of restricted disclosures is the idea
3 that by allowing victims of sexual assault or
4 misconduct to disclose incidents outside of the
5 chain of command, a victim will be able to seek the
6 support they require to assist them in dealing with
7 the trauma associated with being the victim of
8 sexual assault or misconduct. Next slide.

9 At the direction of our Chief of Defense
10 Force, work is also currently under way to ensure
11 that the Australian military justice system
12 adequately deals with the needs of victims.
13 Currently, the ADF military justice provides a
14 range of mechanisms to support victims,
15 particularly victims of sexual misconduct and
16 throughout the prosecution and trial of sexual
17 misconduct offenses.

18 Some of the existing mechanisms include,
19 for example, provisions that allow victims of
20 sexual misconduct in a limited set of circumstances
21 to provide their evidence remotely; laws
22 prohibiting the naming of a victim of sexual

1 misconduct from being published; the DMP's
2 prosecution policy which provides specific guidance
3 and relationship support for victims; several
4 initiatives being led by the ADF Investigative
5 Service to improve service police training in
6 relation to victims; a proposal apparently under
7 development to allow a victim to make a victim
8 impact statement during the sentencing of an ADF
9 service member at tribunal; and a proposal to
10 develop a program to provide dedicated legal
11 assistance for identified ADF members who are
12 victims of sexual assault or sexual misconduct
13 similar to the Special Victims Counsel Program in
14 the United States military. Next slide.

15 That concludes what's probably a longer
16 than expected opening statement on your behalf, but
17 I trust the broad overview of the significant
18 changes to our military system of the past decade
19 and the ongoing initiatives to support victims of
20 sexual assault and other forms of sexual misconduct
21 are helpful to the Panel. And I'll be happy to
22 take any questions that you might have.

1 CHAIRWOMAN JONES: Thank you very much.
2 The detail is actually very helpful.

3 PROFESSOR HILLMAN: Madam Chair?

4 CHAIRWOMAN JONES: Professor Hillman?

5 PROFESSOR HILLMAN: Air Commodore, that
6 was a terrific summary. And the materials you
7 provided to us are also very helpful.

8 In some of the assessments of whether --
9 the relevance of the Australian experience to the
10 potential changes we're contemplating, you've given
11 us a great sense of these intersecting
12 trajectories, not entirely together, the concern
13 about sexual assault and efforts to address that,
14 as well as the concerns about the role of the
15 commander in the military justice system and
16 attempts to address that.

17 My question is something that's not
18 addressed in your materials, and that's about the
19 impact on the operational readiness and
20 effectiveness of the Australian forces as a result
21 of the changes related to the reduction of the
22 commander's role. I wondered if you could talk

1 about that, talk about morale, operations, within
2 the military more generally, but also within the
3 JAG Corps in particular.

4 AIR COMMODORE CRONAN: Yeah, I'll do my
5 best noting that I'm a lawyer, not an operator, and
6 I'm restricted accordingly. But I think it's fair
7 to say that as a result of the 2006 reforms where
8 we took the convening authority out of play and
9 passed that role to the Director of Military
10 Prosecutions, we were then -- our legal court
11 certainly didn't notice any discernible problems
12 with morale or any difficulties that we found as a
13 result of that system.

14 We've actually found a larger effect on
15 our culture of issues, such as alcohol in the ADF,
16 social media issues in the ADF, the treatment in
17 the ADF, the fact that not all of our categories
18 were open to women in the ADF, although they are
19 now as a result of those recent reviews, and
20 looking to -- looking for ways to improve the
21 career progression of women in the ADF. They're
22 more of the cultural issues that have had, I think,

1 a deleterious effect on our military over the last
2 few decades or so. And those particular seven
3 cultural reviews that are in play as part of our
4 Pathway to Change Program are all targeted at
5 improving morale across the ADF and the operational
6 effectiveness of our organization.

7 PROFESSOR HILLMAN: May I ask one more
8 question?

9 CHAIRWOMAN JONES: Yes.

10 PROFESSOR HILLMAN: The scandals in
11 particular in 2009 and 2011 that triggered the most
12 recent round of reform and, in particular, the
13 cultural reviews, and really an adoption of some of
14 the U.S. efforts modeled on SeMPRO, what were
15 those? Can you just give us a sketch of what the
16 incidents were?

17 AIR COMMODORE CRONAN: The first incident
18 in 2009 involved an incident at our Australian
19 Defense Force Academy. We have a single training
20 academy for our cadets, and it involved an incident
21 of one cadet Skyping an act of sexual intercourse
22 with another cadet to six or seven of his cadet

1 mates in the room next door. And the second
2 incident involved a large commission inquiry into
3 incidents that occurred on board one of our ships
4 in Southeast Asia and involved sexual misconduct
5 and sexual offenses both ashore and on board the
6 ship. Both of those incidents had a significant
7 impact across our senior leadership, across our
8 Ministry of Defense, and our government in terms
9 of, I think, enough was enough and it was time to
10 do something. And that triggered those reviews.

11 PROFESSOR HILLMAN: Thank you.

12 CHAIRWOMAN JONES: One quick question. Do
13 you have any data, or even leaving data aside, do
14 you have any sense that after the 2006 reforms
15 where the commander was removed from the
16 prosecution function that reporting did increase in
17 the area of sexual assault?

18 AIR COMMODORE CRONAN: Not that I'm aware
19 of, and the reason I say that is the 2003 and the
20 2006 reforms, somewhat like my Canadian colleagues,
21 were not targeted at sexual assault matters
22 particularly, but rather behind it was what was

1 perceived to be an improvement in terms of
2 impartiality in fairness across the discipline
3 system across all ranges of offenses, not just
4 specifically sexual assault. So there were no
5 particular statistics that I'm aware of that are
6 tied to that particular matter.

7 CONGRESSWOMAN HOLTZMAN: Madam Chair?

8 CHAIRWOMAN JONES: Ms. Holtzman?

9 CONGRESSWOMAN HOLTZMAN: Thank you very
10 much, Air Commodore, for making this trip and for
11 enlightening us. We really appreciate it.

12 I guess I want to just go back to some
13 basic questions. You just mentioned the need for
14 impartiality and fairness. And that need was for
15 what purpose? I mean, why did you feel that you
16 needed to improve impartiality and fairness? Was
17 this -- and what was -- was it to improve
18 discipline? Was it to improve morale? Was it to
19 improve justice? Why do you think you had to do
20 that?

21 AIR COMMODORE CRONAN: Probably all of the
22 above.

1 CONGRESSWOMAN HOLTZMAN: And maybe some
2 others that I haven't even mentioned.

3 AIR COMMODORE CRONAN: Maybe a few others
4 as well. Certainly there was a perception, rightly
5 or otherwise, that the pre-2006 system where the
6 convening authority of the pre-2003 system where
7 the convening authority had all of those multiple
8 roles in our court martial system, that looking at
9 it through the lens of impartiality, fairness, that
10 whether it be in reality or one of perception, that
11 those elements needed to be and should be improved.
12 And the reason behind that sits I think both within
13 the military and also the external Australian
14 public looking on, that our people in uniform
15 deserved the best discipline system that we had to
16 offer them, and improving fairness and impartiality
17 was part of that process.

18 CONGRESSWOMAN HOLTZMAN: Have you had any
19 complaints from commanders? Are you aware of
20 complaints from commanders that the changes have
21 undermined their ability to lead their troops?

22 AIR COMMODORE CRONAN: I've been in the

1 ADF since 1985, so it's too long to remember, but
2 I've sort of spent a fair bit of time in both
3 systems, I guess, the pre- and post-2006 systems.
4 And I think it was fair to say when the reforms
5 came in 2006, there was a -- there was certainly, I
6 think, a certain degree of uncertainty amongst our
7 commanders, that there was a sense of loss of
8 control over that element of the discipline system.
9 But as time moved on, it's accepted, and I am not
10 aware of any concerns that our commanders have in
11 relation to the way our system works.

12 If you'll ask them, I think they would say
13 that having an independent legally qualified
14 military director of prosecutions whose separate
15 from the chain of command, who answers to no one
16 other than the Chief of Defense Force in an
17 administrative sense, is a fair and impartial way
18 of doing business. It's a little bit like when we
19 opened up the ADF to gays in the military in the
20 late 1980s. There was a lot of concern at that
21 time that there would be issues, but not
22 surprisingly there haven't been.

1 CONGRESSWOMAN HOLTZMAN: Okay. Thank you.

2 CHAIRWOMAN JONES: Admiral Houck?

3 VICE ADMIRAL (RET.) HOUCK: We have some
4 data. You mentioned that you may have provided
5 some separately. We also have some data that
6 suggests that you had one general court martial in
7 2012. Does that sound right?

8 AIR COMMODORE CRONAN: No, that doesn't
9 sound right. Actually I think the statistics that
10 I provided to you indicate that we had in relation
11 to sexual assault type or sexual offense type
12 matters in 2012, it looks like we had two trials.
13 And looking back on the previous 10 years, they ran
14 a high of 13 down to a low of two with an average
15 of seven and a half per year during that period.

16 VICE ADMIRAL (RET.) HOUCK: To be fair to
17 the data that I have, we've got something here that
18 cites a DMP report of in 2012, 11 restricted courts
19 martial, and one general courts martial, and 50
20 total misdemeanor and felony trials.

21 AIR COMMODORE CRONAN: The stats that I
22 provided to you separately, they were gleaned from

1 our Registrar of Military Justice last week, and
2 she has the -- her job is to convene all of our
3 courts and defense magistrate trials. So I'm happy
4 to go with her statistics, I guess.

5 VICE ADMIRAL (RET.) HOUCK: We'll double
6 check as well.

7 AIR COMMODORE CRONAN: Yep.

8 VICE ADMIRAL (RET.) HOUCK: Thank you.

9 COLONEL HAM: We do have those, Air
10 Commodore.

11 AIR COMMODORE CRONAN: I'm sorry?

12 COLONEL HAM: We do have those.

13 AIR COMMODORE CRONAN: Yeah, okay. Thank
14 you.

15 CHAIRWOMAN JONES: Any additional
16 questions? Remarks? Thank you so very much.

17 AIR COMMODORE CRONAN: My great pleasure.
18 Thank you very much for inviting me.

19 CHAIRWOMAN JONES: All right. Commodore
20 Spence? And, let's see. Brigadier Anthony
21 Paphiti. Commodore Spence is the Commodore, Naval
22 Legal Service, Royal Navy, United Kingdom. And Mr.

1 Paphiti, a former Brigadier, Prosecutions, Army
2 Prosecuting Authority, British Army. It's nice to
3 see you again. Thank you for coming, both of you.

4 COMMODORE SPENCE: Madam Chairman, thank
5 you for your welcome and those of the Panel as
6 well. I'm indeed Commodore Andrei Spence. I am
7 the head of the Naval Legal Services. I'm the
8 senior legal officer in the Royal Navy. I might
9 explain that previous posts I have held is the
10 Naval Prosecuting Authority, and I'll explain where
11 that lies in relation to our changes in the past
12 few years. I've also been a senior managing
13 prosecutor in the newly -- reasonably newly-created
14 Service Prosecuting Authority, which is now the
15 Director of Service Prosecutions. I've been a
16 member of the Armed Forces Bill Team that actually
17 wrote the Armed Forces Act '06. And I was the
18 deputy to the post that I currently occupy at the
19 moment.

20 I think what I can say at the outset
21 before describing briefly how we run our system in
22 the UK, the big watershed being the Armed Forces

1 Act '06, is what the Armed Forces Act '06 was
2 enacted not in anticipation of, and that was really
3 in terms of me explaining that it wasn't in
4 reaction to any particular issue or problem to do
5 with sexual offending or, indeed, any particular
6 type of offending in the round.

7 One of the major, if not the major,
8 sources of the change was the UK's increasing
9 expeditionary operations in a joint nature, which
10 meant that our previous undertakings that were done
11 under the Service Discipline Acts, the Army and Air
12 Force Act of 1955 and the Naval Discipline Act of
13 1957, were operating actually sometimes subtly
14 differently, sometimes very differently, from each
15 other. And, therefore, in anticipation that you
16 could have a soldier, a sailor, and an airman all
17 in front of a CO or court martial or being tried
18 under slightly different auspices with potentially
19 a situation which wasn't feasible in the longer
20 terms. So I would start by saying that that was
21 probably one of the major premises upon which AFA
22 '06 was begun and went through a number of years to

1 its progression and enactment in 2009, when the
2 secondary legislation was completed.

3 I think what I would say is that rather
4 than me actually going through, unless you want me
5 to, the chronology of where the UK Service Justice
6 System has arrived at now. I am aware that I think
7 the Panel has seen what I might say, respectfully,
8 is Lord Thomas' superb chronology of the -- of
9 what's happened since about 1996. And actually
10 beyond -- before that as well, I note, going back
11 into the eons of history. But really from 1996
12 have been some of probably the most important
13 developments in the Service Justice System in the
14 UK, and these have been marked by a couple of
15 landmark cases. It has to be said by some pressure
16 that the UK government has felt from the European
17 courts, not the only government to have done so,
18 and some reports of things, such as the deep cut
19 review into some military deaths in training. All
20 that has been prescient in the sense that it's led
21 to where we are at the moment.

22 So really where are we and how does the UK

1 actually run its justice system? Well, I think
2 what's very important to understand, and I know
3 that my Canadian colleague has already gone down
4 this route, is the reports in the Royal Navy, and I
5 suspect it's the same -- I know it's the same in
6 the Army and the Air Force. It's at least 95
7 percent of discipline criminal cases are dealt with
8 by the CO. There is a tiny proportion which
9 actually get referred to the Director of Service
10 Prosecutions, the service Prosecuting Authority.

11 One of the prime elements of AFA '06,
12 notwithstanding what I've said was actually the
13 underpinning reasons for it, was that the
14 commanding officer retained a central role in the
15 command function of discipline. And this is what
16 AFA '06 set out to achieve, and it did this with a
17 counter balance of removing some powers from a
18 naval CO, which were actually quite wide,
19 historically so, because of the geographical
20 dispersion of the naval force, and those of the
21 Army and Air Force were correspondingly uplifted to
22 achieve an appropriate balance of what a CO could

1 do.

2 The CO can actually deal with a large
3 number of disciplinary offenses and some criminal
4 conduct offenses which are listed in Schedule 1 of
5 the Act, and also in Section 53 that you may or may
6 not have had a chance to have a look at. What he
7 can't deal with in any sense are those listed under
8 Schedule 2, which include the most serious sexual
9 offenses. And with Schedule 2 offenses, if he
10 becomes aware, if someone complains that -- of an
11 allegation of one of those types of offenses has
12 occurred, what will happen is it's his duty by law
13 to inform the service police that such an
14 allegation has been made, and the service police
15 will then conduct an investigation. If it's one of
16 the serious sexual offenses, that will undoubtedly
17 be the special investigations branch of each of the
18 service police forces.

19 What then happens is that the service
20 police will conduct their investigations in the way
21 that you would expect with sometimes specialist
22 investigators in forensics, particularly sexual

1 crimes, that we have a lot of training for in the
2 U.S. -- in the UK, and that is predominantly done
3 actually in the civilian field actually from the
4 home office police forces. We use their resources
5 as well to do that. Once they've completed their
6 report, that report and where we differ slightly
7 from our -- the colleagues you've heard from today
8 is that that report goes direct to the Director of
9 Service Prosecutions. It does not come back to the
10 CO to make a determination or whatever.

11 As soon as the CO is aware and informs the
12 service police, effectively his role in the
13 investigation, preferment of charges, trial, and
14 sentence is ended. He has no role to play. Dare I
15 say it, and I don't wish this to sound flippant,
16 but he is merely used then as the post box that
17 when the papers come back from the DSP, they come
18 back to the CO, and he serves them to the man to
19 make sure that the man has got the papers and the
20 evidence against him and the charges to be laid
21 before him. So that is his involvement.

22 As I say, that's in relation to all

1 Schedule 2 offenses, serious sexual offenses of
2 which are but one. We do have a small lacunae in
3 the legislation that some of you may well have
4 noticed in that our Section 3 of the Sex Offenses
5 Act of 2003, and that's for the lower level, if I
6 may term them as that, the touching, voyeurism,
7 indecent exposure, that sort of thing, were not
8 included in Schedule 2. However, lest you think
9 that we don't take them seriously, we also didn't
10 put them in Schedule 1 either. So whilst they
11 don't directly go to service police for referral to
12 the DSP, the CO doesn't deal with them because he
13 doesn't have the power to either, and that's where
14 the lacunae actually rests at the moment.

15 In the naval service, and I think my Army
16 and Air Force colleagues are about to do the same,
17 we've sort of plugged that gap temporarily in that
18 if a CO is aware of any offense that has a sexual
19 element to it, he must -- must -- by policy refer
20 it for legal advice, and the legal advice will then
21 come to the command of what he should do in terms
22 of its disposal and what have you. So that's the

1 only sort of slight lacunae that we have.

2 Like our other colleagues from other
3 countries that you've heard from, serious sexual
4 offending in the RN is dealt with very efficiently,
5 we think is extremely serious, and is dealt with as
6 seriously. But however, it's mercifully very low
7 in occurrence rate and has been over a number of
8 years. Where it is reported, the mechanisms for
9 dealing with it, as I've mentioned, from
10 investigation, charging, ultimate prosecution, are
11 conducted by independent organizations who derive
12 their power statutorily, enacting these functions
13 free from interference from the chain of command.

14 Some of these reforms to the military
15 justice system occurred prior to AFA '06, such as
16 the prosecutors. Actually it goes back as far as
17 1996 and actually as the result of a case called
18 *Findlay*, which I'm sure you've all read about. And
19 actually the NPA was, in fact, the first of the
20 independent prosecutors to be set up in 1996. Its
21 first incumbent was a chap called Commander Nick
22 Hawkins, who now leads one of the UK's CPS regions

1 -- prosecution service regions.

2 We're not complacent in providing an
3 environment in which individuals have been subject
4 to any form of unwanted or repetitive sexual
5 behavior. But we do this, we believe, through a
6 multi-faceted approach of education at the new
7 entry. That's at Dartmouth and at Raleigh, which
8 is for enlisted men and women and our officers,
9 through career courses that's at various stages of
10 careers for non-enlisted persons and officers, and
11 also, and I think this is very important and is a
12 feature of the last few years, to our senior
13 management also, who very often with the greatest
14 of respect, we are so busy focusing on those that
15 we think that responsibility, it's actually very
16 often not including those most senior and
17 exercising the greatest of managerial oversight
18 over people.

19 We have a transparent and available system
20 through which service complaints can be made, a
21 summary hearing which I said the COs deal with 90-
22 odd percent of those, an independent court martial

1 system by which serious offending behavior can be
2 brought to trial before an independent judge and
3 jury.

4 Thus, I think the way I'd characterize it
5 in the Royal Navy, and I think I can say the same
6 for the Army and the Air Force, is we don't limit
7 ourselves simply to dealing with cases that can be
8 dealt with courts and culminating criminal
9 sanction. I think our approach is one of a
10 preventative architecture which we think is
11 designed to imbed a culture and understanding of
12 what behavior is and is not acceptable in our
13 forces.

14 I have briefly summarized what -- how we
15 deal with our systems, and I know I've skated over
16 it very briefly. But hopefully you've seen the
17 material which I forwarded to Admiral Crawford as a
18 result of a meeting I had with him over in London
19 three or four months ago.

20 Probably the most pressing question that
21 you need answering from me, and if I may preempt it
22 slightly at the risk of being too forthcoming, is

1 what's the effect on command of our changes? How
2 do they view it? Do they feel disempowered,
3 disenfranchised? I have to say that the simple
4 answer to that is no. We conducted our own review
5 in the naval system about two years into the Armed
6 Forces '06 implementation. And, in fact, as you
7 might expect, given the statistic of 90-odd percent
8 that I told you about at summary hearing, nearly
9 every single query was about refinements to the
10 summary hearing system, which, of course, is what
11 the COs are mostly involved with, if not solely
12 involved with.

13 There was not one case, to my knowledge,
14 which actually included a query or a commander
15 feeling that his position had been undermined
16 because suddenly he'd had a group of offenses, and
17 I characterize these deliberately -- my
18 deliberation -- as not just purely sexual offenses,
19 but all of those under Schedule 2, and that ranges
20 from murder to manslaughter to a whole heap of
21 other things -- drug offenses and what have you.
22 There was not one mention of that in our review,

1 and certainly as the top of shop now, it's not
2 something that I have any even vague knowledge of
3 to the commands with which I have quite a great
4 deal of interaction in my daily duties. I think
5 that's all I can say on that.

6 I think probably that their anecdotal
7 evidence to me suggests actually that there is a
8 degree of relief that commanders are not having to
9 deal with what are sometimes exceptionally
10 technical legal issues, albeit they'll always have
11 legal advice. But actually it is just that; it's
12 legal advice. The command decision is theirs, of
13 course, if they have it in those. So I think that
14 in that respect, I think many COs actually, not as
15 an abrogation, but actually unqualified lawyers and
16 having to make an ultimate decision, I think that
17 they feel more comfortable that it's being dealt
18 with by professionals who actually know the
19 intricacies and the technicalities of the offenses
20 and the law with which they're concerned with.

21 CHAIRWOMAN JONES: Thank you.

22 COMMODORE SPENCE: Tony?

1 BRIGADIER (RET.) PAPHITI: Thank you.
2 Madam Chairman, members, good afternoon. It's very
3 nice to be here, and I'm grateful for the
4 invitation. And it's also a great pleasure to put
5 some faces to the voices that I heard when I spoke
6 to you last in early August.

7 I'm the grandfather really of the
8 witnesses you've heard today certainly from the UK
9 military, having retired in 2006. I appreciate
10 you've had a lot of information today about the
11 various military systems and how the changes have
12 been introduced over the years, and I'm also
13 conscious that you've got a lot of written
14 materials that's been presented to you explaining,
15 certainly in the case of the United Kingdom, what
16 those change are. I also appreciate that you've
17 had some helpful papers and analysis that's been
18 done by some of the U.S. attorneys that have
19 presented submissions to you.

20 The last paper I've seen on this was by
21 Dean Schenck, who kindly sent her, I think, her
22 latest paper out a couple of days ago.

1 Unfortunately I wasn't in a position to respond to
2 that as I didn't bring a computer with me, and in
3 this technological age, it's a major disadvantage.
4 But having read some of the text from the letter --
5 the covering letter that she sent on my iPhone, I
6 don't think that substantially there are any
7 changes to the comments that I'm going to make.

8 I'm not going to deal with the statistical
9 analysis in any depth because I'm conscious that
10 the Director of Service Prosecutions is intending
11 to speak to you about the statistics, and I
12 understand he may be doing that in October, so not
13 too long hence. So I'm going to take a slightly
14 tongue-in-cheek look at the statistics, and I hope
15 you forgive me for that in due course.

16 Well, the approach that I'm going to take
17 this afternoon is really to look back to the
18 position in 1981 when I joined the Army Legal
19 Services as a prosecutor, and sort of walk through
20 the developments that I experienced and some of
21 which I was a party to. So it's very much a
22 personal experience in that respect.

1 Well, when I joined, the governing
2 legislation was the Army Act of 1955. That was the
3 Service Discipline Act that governed my service.
4 And there's no question that the commanding officer
5 and the chain of command had a very, very firm grip
6 on discipline. Has that changed? In my view, no,
7 it hasn't changed. There have been developments
8 which have enhanced the system, but their firm grip
9 on discipline within the system remains. And the
10 commanding officer is still very much the focal
11 point of discipline within his unit.

12 Back then, of course, a commanding officer
13 had the power to dismiss any charge -- murder,
14 rape, whatever it was. Even though he couldn't
15 deal with it himself, he had that power to dismiss
16 the charge. It could obviously give rise to
17 problems in some cases, and you may be conscious of
18 the case of Trooper Williams. I think Lord Thomas
19 has mentioned it in his submission, but if I may
20 just remind you of that case. Williams had been
21 charged with a homicide of an Iraqi, and it had
22 come, as it had to in those days, to his commanding

1 officer, and the commanding officer had dismissed
2 the charge. Well, the effect of that was to oust
3 military jurisdiction. It never went on to the
4 Prosecuting Authority for them to consider that
5 charge. Was it the end of the matter? Well,
6 actually it wasn't because in a homicide, there's
7 concurrent jurisdiction with the civil authorities,
8 and they decided to pass that case over to the
9 Crown Prosecution Service, and a prosecution was
10 commenced against Williams.

11 I can say that the prosecution was
12 eventually discontinued, but who knows whether
13 things would've necessarily turned out that way if
14 the case had followed the course that it should've
15 done if the matter had been referred to the Army
16 Prosecuting Authority as it was in those days. In
17 fact, I was serving as the Army Prosecuting
18 Authority in those days, and we had -- although we
19 knew of the course, we had no visibility or no
20 jurisdiction over it, I should say, because it
21 hadn't been formally referred to us.

22 What was interesting was that that power

1 of the commanding officer to dismiss any charge
2 actually subsisted until the 2006 act. That was
3 really when it was finally laid to rest with the
4 introduction of the Schedule 2 serious offenses,
5 which meant that all of those serious offenses had
6 to go directly to the Prosecuting Authority.

7 Well, the CO, of course, could refer a
8 case to higher authority if he wanted to send it
9 for trial by court martial, or if it was within his
10 powers he could deal with it himself if the charge
11 went on to higher authority -- sorry -- to the
12 convening authority for court martial. The
13 convening officer, as you have heard, and I think
14 it's similar with some of the other jurisdictions
15 you've heard today, appointed the members of the
16 court, approved the selection of charges, was the
17 direct superior to the prosecuting officer, and,
18 interestingly enough, had the power to dissolve the
19 court before its conclusion. I remember discussing
20 some of these powers with some civilian colleagues
21 of mine who were absolutely appalled that anyone
22 could actually pull the plug on a trial at any

1 stage prior to its conclusion. But that was the
2 power that he had.

3 If there were a conviction at the end of
4 the trial, he became the confirming officer, and
5 he, again, had this power to overturn the decision
6 of a lawfully constituted court and only ever acted
7 to the benefit of the accused. There was no
8 reference to the victim. The victim had no voice
9 at all. The prosecution had no voice at all.
10 There was no input to say the prosecution wouldn't
11 even know what was in the mind of the confirming
12 officer. So there was no chance to actually
13 understand the basis upon which the decision was
14 going to be overturned, and no chance to make any
15 form of representation. No chance, I should say,
16 for the victim, most importantly, to make any
17 representation.

18 Did I ever have any experience of this?
19 Yes, I did. I had experience of this in a serious
20 wounding case that I prosecuted where after a one
21 and a half trial, the defendant was convicted, and
22 he received 18 months imprisonment. And two weeks

1 after I returned back to my office two weeks later,
2 I had heard that the decision had been overturned
3 by the confirming officer. No formal reason was
4 given for that. But we had a victim who had been
5 severely injured, who had gone through a trial
6 process where all the witnesses had been -- had
7 their evidence tested, where the court was actually
8 in the wonderful position of actually assessing
9 credibility, and somebody who had read only a
10 transcript of the trial had overturned that
11 decision.

12 Well, that, of course, isn't the end of
13 the matter because after the confirming officer,
14 there was another layer, the reviewing officer, who
15 had a similar power to the confirming officer. And
16 there were two occasions when I personally was
17 aware of the reviewing officer actually overturning
18 convictions of rape after two-week trials in each
19 case. And for no apparent reason that was never
20 articulated formally, again, no right for the
21 victim to have a voice, and no right for the
22 prosecution to make representations.

1 So when the decision of *Findlay against*
2 *the UK* came along, it was a major turning point
3 because that role of the confirming officer
4 disappeared under *Findlay*, and that was when the
5 independent Prosecuting Authority was set up. And
6 it was actually, I think, the first stage -- it was
7 a major decision. It was the catalyst for further
8 change to come.

9 What I perhaps ought to also explain is
10 that some other changes that happened was the right
11 to appeal a commanding officer's findings and
12 sentence. That was a power that was also
13 introduced. The commanding officer had been
14 recognized by -- for some time there was a concern
15 over his -- the tribunal being an impartial and
16 independent tribunal. There were two key cases
17 actually that dealt with that. They were both in
18 the European Court.

19 And it started with the case of *Engel*,
20 which was a Dutch case back in the 70s, which
21 looked at what was a criminal charge. And, okay,
22 if it's clearly an obvious criminal charge, that's

1 pretty easy. But *Engel* went on to look at the
2 disciplinary offenses, and they said, well,
3 actually, you need to look beyond the obvious and
4 look at the sentence that can be imposed. What is
5 the punishment? And if the punishment is so severe
6 that it looks like a criminal punishment, then that
7 engages the fair trial provisions of the
8 Convention. So it's a very, very important
9 decision again. That was in the 70s.

10 And it was surprising that it took a
11 little while before there were challenges that
12 actually permeated. And the first of those
13 challenges was a case called *Thompson and the*
14 *United Kingdom*, and that was a challenge to the
15 commanding officer's powers. He was dealt with on
16 a criminal charge. I think it was an assault
17 charge. I'm not absolutely sure, but I think it
18 was a common assault charge. And the court there
19 looked at the structural position of that defendant
20 in relation to the commanding officer. And they
21 had a very, very genuine concern about that
22 structural proximity to the CO. And they felt that

1 that proximity had a direct impact upon his free
2 and unambiguous choice whether to be tried by
3 commanding officer or to elect trial by court
4 martial.

5 One of the other key findings of that
6 decision was that they said he's a layman. He's
7 not really in a position to evaluate his legal
8 position or the options that he might pursue, and,
9 in addition, there wasn't any legal representation
10 which was allowed to him. So when he has this
11 opportunity to elect trial by court martial, how
12 could he understand the significance of that
13 without the benefit of legal advice?

14 So the court actually found that in this
15 particular case of *Thompson*, there were bigger
16 structural problems than even in the *Findlay* case,
17 and they had no hesitation in saying that in those
18 circumstances there was a breach of Article 6. So
19 that was the first major blow against the summary
20 system of justice. It was followed later on by the
21 case of *Bell*, which was a disciplinary offense, in
22 fact. And they referred to the *Thompson* case, and

1 also looked at the *Engel* criteria and said that the
2 *Engel* criteria alternative, and not necessarily
3 cumulative, the criminal nature of the relevant
4 offense could in principle be determined solely on
5 the basis of the nature and severity of the
6 sanction. And they thought in relation to this
7 question of consent to summary dealing, that they
8 said, yes, you can waive your Article 6 rights, but
9 you must do it in an informed manner. So there
10 was, again, this question of advice that was -- the
11 availability of advice that was being given to the
12 soldier.

13 They also looked at the possible sanction
14 because back then a commanding officer could
15 sentence a soldier to 28 days detention, or if he
16 had authority from his higher authority, what we
17 called extended powers, he could send him to
18 detention for 60 days. That's now increased to 90
19 days actually under the Armed Forces Act. So quite
20 a severe punishment. And again, they had worries
21 about the structural independence and impartiality
22 problems that that case presented.

1 Well, have there been any -- since all of
2 these changes were introduced, we had a summary
3 appeal court that came into being which looked at
4 appeals from commanding officers' decisions. And
5 so, there was this general belief that the system
6 was now -- even the summary justice system was now
7 compliant. Have there been any challenges to that
8 system? There has been one challenge, as far as
9 I'm aware. That was a case of *Baines*. Baines was
10 somebody who'd been accused of assault, actually
11 bodily harm. He was accused of fracturing
12 somebody's arm.

13 Just before -- the matter was referred to
14 trial by court martial by the Prosecuting
15 Authority. Just before trial, new medical evidence
16 came to light that the arm wasn't fractured; it was
17 okay. So the defense properly approached the
18 prosecutor and said, look, is it absolutely
19 necessary now for this case to go to trial, or
20 would you agree to send it back to the commanding
21 officer for him to deal with? And it was agreed to
22 send it back to the commanding officer for him to

1 deal with.

2 The commanding officer gave Baines the
3 right to elect trial. He refused that right. He
4 declined. He was tried by the commanding officer
5 of common assault, a lesser offense. He was found
6 guilty. And he then appealed to the summary appeal
7 court making Article 6 points that the CO wasn't
8 independent, that his choice wasn't a free and
9 unambiguous choice, and that he'd had no right to
10 legal advice. Well, the judge at the summary
11 appeal court declined those arguments, and the
12 matter was then taken on judicial review to the
13 high court. And the high court said that the
14 soldier did enjoy Article 6 rights when he was
15 tried summarily because of this right to elect
16 trial by court martial and the right to appeal to
17 the summary appeal court.

18 So in a sense, that decision, I think, was
19 a decision which really cemented that structure in
20 place. And it's been interesting to look at the
21 way that the case law has developed in relation to
22 the system, how the system is being tested. And I

1 think -- I say this, others may disagree with me,
2 but I think it's been found to be shaping up
3 nicely. It's in good shape.

4 Well, the other aspect of -- sorry. The
5 other major case that I really want to reflect on
6 is one that, again, you'll be familiar with. But
7 as a prosecutor, it was a very important case, and
8 that was the case of *Morrison and the United*
9 *Kingdom*. It was an important case because it was a
10 direct attack upon the role of the military
11 prosecutor. The military prosecutor, and I speak
12 -- I appreciate that the same system is applied in
13 each service. But in the Army, the head of the
14 Army Legal Service, who was a two star, was also
15 appointed by Her Majesty as the Army Prosecuting
16 Authority. So there was this appearance this this
17 individual was actually being influenced by the
18 chain of command.

19 And I think it was a good point to
20 challenge in fact, because it needed -- although we
21 thought we had firewalls in place, it was a good
22 test to see whether the European Court of Human

1 Rights actually agreed with us. And they made, I
2 think, two key decisions in relation to this. One
3 that -- first of all, they agreed that a court
4 martial as a matter of principle can be an
5 impartial tribunal, and so, and an independent and
6 impartial tribunal for the purposes of Article 6.
7 But the key findings were that although the
8 Director of Army Legal Service was also the
9 Prosecuting Authority, they looked at this division
10 of responsibility that he had, and they said that
11 there were sufficient safeguards of independence in
12 place because in his role as head of service, he
13 dealt with policy, he dealt with service complaints
14 where people complained about conditions of
15 service.

16 He reported to the Adjutant General.
17 Disciplinary advice to the chain of command was
18 dealt with by the Brigadier Advisory. It didn't
19 involve the Director of Army Legal Services. There
20 was a separate officer who dealt with that, and he
21 had an advisory branch that actually provided that
22 advice in the divisions to to the commanders.

1 There was then the Prosecuting Authority
2 of which he was the head, but in respect of the
3 Prosecuting Authority, he was answerable to the
4 Attorney General. And that division was recognized
5 by the European Court of Justice. So that was a
6 very important recognition.

7 And secondly, they looked at review, the
8 second tier of confirmation. And they, I think,
9 made a very powerful assessment. They said the
10 power to give a binding decision, which may not be
11 altered by a non-judicial authority, is inherent in
12 the very notion of tribunal. So they didn't like
13 this idea of review. They knocked confirmation on
14 the head, and this really looked like the death
15 knell for review.

16 But it did pop up again, strangely enough,
17 in a subsequent case called *Cooper*, where the role
18 of the prosecutor was again confirmed, but they
19 looked at review and made the rather strange
20 finding in that case that it looked -- they didn't
21 really have a problem with it in those
22 circumstances because they felt it only ever

1 operated to the benefit of the accused. And if he
2 had a short sentence, by the time the appeal had
3 gone through, the individual would've served his
4 sentence. But I have a problem with that rationale
5 because I don't think that case would be decided
6 the same way today, if I may respectfully say that
7 in your presence. I hope nobody from the European
8 Court is here.

9 The reason I say that is because there is
10 so much concern now over victim's rights that the
11 idea that all the other jurisprudence looking to
12 say that it was unsatisfactory, in fact it offended
13 the notion of an impartial tribunal to have these
14 processes, these non-judicial processes. I think
15 -- I feel uncomfortable about that decision
16 actually being in any way the only decisions.

17 But the main reason I think that it
18 wouldn't hold sway again today is quite simply
19 because we have in place legislation which allows
20 an appellant to apply for bail pending his appeal
21 or her appeal. So this issue of somebody serving
22 their sentence, it's a non-starter really because

1 they can apply for bail in the same way as
2 everybody else can.

3 Commodore Spence has looked at the
4 development of the 2006 act. I was also a part-
5 time member of the Armed Forces Bill Team. I'm not
6 going to go over that ground again. I'm conscious
7 it's the end of the day. I have been speaking for
8 quite some time, and I don't want to repeat matters
9 that you have already heard mentioned.

10 The only thing that I would say about the
11 2006 act was it actually brought together the three
12 service prosecuting authorities into this tri-
13 service organization. And the test that they apply
14 in terms of determining whether or not to prosecute
15 a case is very similar to the test that's supplied
16 by the civilian prosecuting authorities. They look
17 at the evidence and they say, is there a realistic
18 prospect of conviction on the evidence? In
19 mathematical terms, is there more than a 50 percent
20 chance that that's basically the test?

21 If it gets through that part of the test,
22 they then look at the public interest part of the

1 test. The slight nuances in the services, they say
2 is it in the service interest, which is part of
3 public interest? The service interest is that
4 recognition that the services are different to the
5 rest of society. So that conduct, which, in the
6 rest of society may mean nothing more than you lose
7 a day's pay, or you may find that you have a small
8 disciplinary hearing -- not turning up for work.
9 It takes a different context when you're supposed
10 to report for duty and your unit is about to go off
11 on exercise or whatever. That's the service
12 interest. It's an aggravating factor. And so,
13 that's the test that they apply, and they apply
14 this test to all cases. There's no differentiation
15 between any of the types of conduct.

16 I did mention that I was going to very
17 briefly look at Dean Schenck's statistics because I
18 don't know whether you feel the same as me, Madam
19 Chairman, members of the Panel, but I think
20 statistics can be quite fun sometimes. And the
21 reason I say this, and it's in full recognition
22 that the paper is a very good paper. But I think

1 that it's the statistics and the extrapolations
2 where the fun starts really.

3 The first comparison, it really occurs in
4 Paragraph 4 of the paper, 4(e), because one looks
5 there at the statistics for prosecution of military
6 personnel and sex offenses. Sorry, I'm jumping
7 ahead of myself. There's an earlier one than that.
8 It's 4(a) is the first one, the first reference,
9 because it says in the former year 2012, the active
10 duty strength of the U.S. Department of Defense was
11 1.388 million --

12 CHAIRWOMAN JONES: Would you give me the
13 page number? I'm sorry.

14 BRIGADIER (RET.) PAPHITI: I'm so sorry.
15 It's on page 7.

16 CONGRESSWOMAN HOLTZMAN: It's page 9 for
17 us.

18 BRIGADIER (RET.) PAPHITI: I have an
19 earlier iteration. But it's four questions. And
20 so we've got 1.388 million serving personnel in the
21 U.S. armed forces, and the UK, it's pointed out,
22 has 175,000. And the author says, well, that's,

1 you know, the U.S. forces are eight times -- nearly
2 eight times as big as the UK, and that's accepted.
3 That's not exceptional. And she says that we
4 averaged in the UK 698 courts martial over a five-
5 year period. And the DoD averaged -- where are we
6 -- 2,510.

7 Now, I'm going to be a bit mischievous
8 here because if the U.S. is eight times bigger than
9 the UK, then shouldn't we multiply eight times 698
10 to get 5,584 if we're extrapolating? It's a
11 mischievous use of statistics. But the point that
12 I'm making is what are we comparing here? We know
13 that in the UK, we prosecute fewer cases.

14 The only other reference is in Paragraph
15 (e) of that letter, there's a 4(e). There's a
16 reference now not for comparison with the U.S.
17 forces, but with one selected military base, Fort
18 Hood. So we're now comparing the entire UK armed
19 forces with Fort Hood. And the statistics there
20 show that in 2011, Fort Hood prosecuted 18
21 offenses, sex offenses, and in 2012 prosecuted 26
22 offenses. And this was significantly more than the

1 whole UK armed forces.

2 Well, I'm not quite sure, again, what
3 that, in fact, proves other than the fact that
4 there seems to be more sex crime in Fort Hood than
5 in the entire British armed forces. Again, that's
6 a mischievous use of statistics, because when we
7 look at a statistical analysis, of course bearing
8 in mind that the systems are different. We have to
9 look at the charging standards, the standards of
10 the evidence, how cases are actually dealt with in
11 court. There are a whole range of factors, I
12 think. And although I made those two mischievous
13 remarks, these are, in my respectful submission to
14 you, important considerations to take into account
15 when looking at any statistical analysis. At the
16 end of the day, your concern is, as I understand
17 it, to ensure that your system operates fairly.
18 And a statistical analysis may be helpful in
19 looking at the general way that matters are handled
20 in the armed forces.

21 But, of course, does it help you to know
22 that you have prosecuted more cases than virtually

1 anyone else? No. The question is, I would
2 respectfully suggest, whether you think that the
3 processes that those who have come before you to
4 give the benefit of their experiences offer
5 anything to you. I certainly haven't come here to
6 try and sell the UK system to you, but what I hope
7 to do, and I'm sure the same goes for Commodore
8 Spence, is to make clear where we came from and
9 where we are now. And as I am reminded constantly
10 when I speak to my colleagues, the system is
11 working well in the UK.

12 Thank you. I've gone on for a long time,
13 but --

14 CHAIRWOMAN JONES: No, thank you very,
15 very much. Questions? Go ahead, Admiral.

16 VICE ADMIRAL (RET.) HOUCK: Thank you both
17 for coming here and for giving your time to be a
18 part of this process for us. Commodore Spence, you
19 made reference early on to -- very early in your
20 statement about that reduction of authorities in
21 the Royal Navy, and that at one point they had
22 authorities that were based -- grounded in the size

1 and the dispersion of those forces now that those
2 authorities have been reduced. Can you talk about
3 the reduction in the size and dispersion of the
4 forces that may underlie the reduction of those
5 authorities.

6 COMMODORE SPENCE: Certainly, Admiral.
7 The points that I was trying to make by introducing
8 that particular issue was that up to the point of
9 the first times that we were reviewing powers,
10 summary powers, for, and I'm going into my rabbit
11 hole of the naval jurisdiction, was that actually
12 COs had actually very wide-ranging powers, not just
13 to deal, but in terms of punishment, that they
14 could mete out. And that went beyond detention.
15 That was imprisonment.

16 I won't go back too far in time because it
17 actually was even worse than that. But you
18 probably are quite aware of what I'm referring to.
19 Keyholing isn't a word that we use these days. But
20 nonetheless, the reasons for that, to be clear, of
21 course were that I those days, and I'm only going
22 back even into the early 20th century and into the

1 19th century. Of course, our forces -- maritime
2 forces were dispersed throughout the world. It was
3 only up until the 1960s that we didn't have Far
4 Eastern fleets, Mediterranean fleets, home fleets,
5 which meant that actually the majority of those in
6 command at sea effectively were far away from land
7 -- lines of communication are nothing what they are
8 today, referral back to authority to legal advice
9 such that it was in those days, was extremely
10 difficult.

11 I think the law chips at the admiralty
12 obviously over a series of centuries obviously
13 developed the understanding and the ethos that COs
14 needed and required not only the ability to deal
15 with their men in far flung parts of the world, but
16 also punish them summarily at the time, swift
17 justice, swiftly investigated, swiftly dealt with,
18 which is, of course, a mantra, I think, which all
19 of us would agree is a good starting system for any
20 justice system, if it could be maintained.

21 Of course, these days the biggest single
22 change, apart from the reduction in the size of the

1 Royal Navy, not in terms of where it operates
2 because we're still exceptionally thinly spread
3 these days, of course has been communication and
4 the ability to actually get back to command -- to
5 get back to legal advisors, even if it's not by
6 telephone, Skyping, VTC, or the rest of it. And,
7 therefore, you can get a very real sense as a legal
8 advisor from a commander speaking in the middle of
9 the Pacific Ocean of exactly what the circumstances
10 are before you actually deliver advice to him in
11 respect of what he should if he's in difficulty and
12 can't actually extract it from the Armed Forces Act
13 for himself.

14 So it's really a combination of the
15 explosion of communication avenues open for
16 command, and also, you know, the sheer reduction in
17 size of the Royal Navy, you know, at sea in
18 particular -- dare I say it -- and lamentably so.
19 There aren't that many people in command these days
20 as there were perhaps in the 1940s, 50s, and 60s.

21 VICE ADMIRAL (RET.) HOUCK: Do you have a
22 sense of how many deployed ships the Royal Navy has

1 at one point?

2 COMMODORE SPENCE: Well, right at the
3 moment, and I'm very glad you asked that, Admiral.
4 Of course, actually as it so happens, we have about
5 60 percent of our fleet at sea at the moment. In
6 fact, I was at a command update briefing only last
7 week, and I think the percentage is actually
8 slightly higher. And actually it's been on that
9 footing for a little while now.

10 But again, we have in major exercises
11 something called Exercise Cougar going on at the
12 moment. We have deployed legal advisors with
13 those. We have deployed -- we have legal advisors
14 in Bahrain. Don't have them sadly in the Pacific
15 Ocean. But there is advice available to command
16 literally 24 hours a day, and my service provides
17 24-hour a day coverage. There's always duty
18 lawyers on duty at the end of a telephone.

19 VICE ADMIRAL (RET.) HOUCK: The last
20 question I had was if you have a sense of whether
21 or not the reporting for sexual assaults has
22 changed as a result of changes that you've made in

1 your structure over the years?

2 COMMODORE SPENCE: Admiral, I can't say
3 that it has. The incident rate -- the incidence
4 rate was -- has been historically low for as long
5 as I've been in service, which is nearly 30 years.
6 In the Royal Navy, we've not had -- we've never had
7 a great incidence of what I would term, forgive me,
8 as serious sexual offenses. There have been a
9 steady stream of the lower level sexual offending.
10 But, no, there hasn't. There's just no
11 discernible.

12 And if I can summarize it in this way, we
13 don't keep specific statistics on just that type of
14 offending because it actually -- its significance
15 in terms of statistical significance is just so
16 very low. I do appreciate I do caveat that, of
17 course. That does, of course, always depend on
18 people reporting various acts, and there is always
19 a balance to be had there, not just in the
20 military, but actually in civil society as well of
21 people who are prepared to come forward with
22 allegations or complaints or whatever it is.

1 VICE ADMIRAL (RET.) HOUCK: Thank you.

2 CHAIRWOMAN JONES: Ms. Holtzman?

3 CONGRESSWOMAN HOLTZMAN: Just a factual
4 question first and then another question. Do you
5 -- do civilian authorities have concurrent
6 jurisdiction to prosecute your cases? You might've
7 testified, but I just wanted to be clear about
8 that.

9 COMMODORE SPENCE: They do, ma'am, yes, in
10 certain offenses. And I think one of my
11 colleague's prior comments were very similar. If
12 something was to happen on a naval base, Army
13 barracks, Air Force base, between two members of
14 the armed forces, it's reasonably inconceivable
15 that service police forces in the service justice
16 system wouldn't kick in in those respects. Where
17 it becomes slightly more difficult are, as I think
18 you've heard, the ballroom brawl that occurs
19 between serving members and civilian personnel, or
20 even a serious sexual assault by a serving person
21 on a civilian or vice versa.

22 Then, of course, quite often, and this

1 sounds haphazard, but it actually isn't so much so.
2 In those scenarios, it'll be very much the police
3 force that's first on the scene, of course. If it
4 happens to be home office police and it's an
5 allegation, for instance, of rape, it's pretty
6 unlikely that they're going to remit it back to the
7 services to deal with, unless there are any special
8 circumstances, and I can't really think of those
9 offhand. And that will be that within the civil
10 justice system.

11 And likewise, you know, if that ends up
12 being a conviction and a sentence for that type of
13 offense, it will almost inevitably be imprisonment.
14 That would trigger administrative action, you know.
15 We call it discharge and what have you.

16 CONGRESSWOMAN HOLTZMAN: The second
17 question has --

18 COMMODORE SPENCE: Sorry, Tony.

19 BRIGADIER (RET.) PAPHITI: If I may just
20 add to that, of course. In jurisdiction where the
21 NATO status of forces agreement applies, certainly
22 in relation to British troops in Germany, if an

1 offense is committed off base, the German
2 authorities under the provisions of the NATO SOFA
3 will pass jurisdiction over to the military
4 authorities. And so, in those circumstances it
5 doesn't matter how severe the case is, the military
6 authorities will end up exercising jurisdiction
7 there.

8 CONGRESSWOMAN HOLTZMAN: The second
9 question has to go, since you've had experience now
10 with national prosecution force for some time. My
11 second question really has to go to the issue of
12 how progressive, how aggressive, these prosecution
13 forces are. And perhaps I'll give you a little
14 history here, but a number of years ago in the
15 United States, prosecutors poo-poo'd the issue of
16 sexual assault, and the victim was blamed.

17 It took a long time and the development of
18 a lot of new theories and new approaches before
19 appropriate changes were finally put in place. I'm
20 not saying the system is perfect. I haven't been a
21 prosecutor for some time now. But important
22 changes were made. Some of them were made

1 internally by prosecutors themselves, but there
2 were also victims groups, the academic community
3 that kept pressing for kinds of changes.

4 And my question to you is, how -- well, to
5 use an overworked word. How proactive are these
6 prosecution -- is this prosecution force? Is it
7 bureaucratic? Is it sclerotic? Is it, you know,
8 we've always done it this way and this is how we're
9 always going to do it?

10 COMMODORE SPENCE: No, no.

11 CONGRESSWOMAN HOLTZMAN: Or are they
12 innovative, creative, aggressive, and do you have
13 some examples?

14 COMMODORE SPENCE: I very much get the
15 point I think you're trying to make, ma'am. No, I
16 think the word that you first used, "aggressive,"
17 the SPA, the Service Prosecuting Authorities, are
18 properly aggressive, if I can put it in those
19 terms. How do I qualify that? Every case,
20 regardless of it being sexual in nature is
21 prosecuted on the test that the attorney has
22 outlined without favor or affection at all. I

1 think the difference with sexual crimes, and
2 certainly since the appointment, if I may so, of
3 the current Director of Service Prosecutions, Bruce
4 Houlder, Q.C., has very much been on excellence in
5 specific areas. And one of those areas has been in
6 sexual offenses, particular type of sexual offense,
7 rape. There are a whole series of courses,
8 specific training, that is given in the UK, as I'm
9 sure in the U.S. as well, for this type of
10 prosecuting if this is the type of prosecuting that
11 you do. And I know that in the SPA at the moment,
12 there is a small cohort of officers who do very
13 little else other than prosecute sexual offenses,
14 and that's from a fairly low level, if I can term
15 it that way, to the most serious of sexual
16 offenses.

17 And so, what I think Bruce has tried to do
18 is develop a professional, an expertise, and
19 consolidate that through from the most junior
20 prosecutors dealing with the more low level cases,
21 and as you work for your career at the SPA when you
22 visit there in the course of a career, you get onto

1 bigger -- I was going to say -- use the wrong word
2 there, "better" -- more difficult, more challenging
3 sexual offense cases. So I think in those terms --
4 he's done the same with fraud as well, if I might
5 add that.

6 CONGRESSWOMAN HOLTZMAN: My question
7 wasn't only on -- I think that's a very important
8 point about professionalism and expertise. But my
9 point was also about creativity and challenging the
10 status quo because in every -- we're up against so
11 many cultural inhibitions in the prosecution of
12 sexual assault where it's blame the victim. And we
13 still have those problems. And that's really the
14 question I'm getting at, too.

15 Yes, I really appreciate it, and I think
16 that's very important, the expertise. But what
17 about the creativity, and rethinking approaches,
18 and trying to improve how these cases are handled?
19 Can you speak to that? Or if you can't and you can
20 provide some information to me at a later time, I
21 would very much welcome that.

22 COMMODORE SPENCE: Well, I think all I can

1 say is from my experience as a naval prosecutor and
2 as a prosecutor within the Service Prosecution
3 Authority and having prosecuted those types of
4 offense, I think all I can say is innovative -- I'm
5 not quite sure I grasp the nuance of that. But in
6 terms of how I approached the offense, yes, there
7 very much is. You know, we have something called
8 the victim's charter, the prosecutor's charter when
9 dealing with victims of sexual offenses. These are
10 all things I think that Bruce has brought from
11 civilian independent practice at the bar that
12 really did not exist before the formation of the
13 SPA. And I can say that, with all honesty as well,
14 having been an MPA, we just didn't view it through
15 that particular lens.

16 But I know that it very much is so now in
17 comparison to what we did and in comparison to what
18 we are doing at the present. I think that's -- I'm
19 sorry if that's not an adequate answer, but it's
20 the only one I think I can give reasonably. Tony,
21 do you have anything to add on that?

22 BRIGADIER (RET.) PAPHITI: I was only

1 going to add really that we did have a process
2 which sadly didn't survive the 2006 act. It was
3 called the formal preliminary examination. And
4 what this was was a prosecutor's tool because in
5 some really difficult cases, like, for example,
6 serious sexual assaults, rape, the prosecutor was
7 able to call a certain number of witnesses and go
8 -- it wasn't a trial, but it was a formal process
9 of testing the evidence because clearly to
10 establish that the evidence was strong enough to
11 meet the prosecution test, which had to be
12 satisfied.

13 And when did he make that decision? He
14 made that decision if he looked at the papers and
15 it was at first sight not thought to be a terribly
16 strong case. And we had a case which when we
17 looked at the papers was a weak case because it was
18 a serious attempted rape which had taken place in
19 the main office of a railway station in Germany in
20 full view of people. And people who saw it thought
21 that the girl was consenting, so we thought, well,
22 this isn't going to go very far.

1 But we had the formal preliminary
2 examination. She gave a very good account of
3 herself as to why she had behaved the way she had.
4 She explained why other people may have
5 misconstrued what was going on. And we then put
6 that together with evidence that corroborated her
7 account from the taxi driver, who described her
8 disheveled state of dress, and so on. That case
9 was successfully prosecuted at court martial, and
10 he received eight years imprisonment.

11 So that process actually was a tool that
12 assisted the prosecutor in looking at these
13 difficult cases and helping him or her make that
14 decision as to whether or not the case was going to
15 prosecute. I'm hoping that that process will come
16 back in due course because it's a brilliant tool.
17 And the civilian system has now actually emulated
18 that in serious cases. They do it themselves.

19 CHAIRWOMAN JONES: Do you have any type of
20 probable cause hearing with evidence before there's
21 a decision for court martial? I think you were
22 saying you had one, but now it's gone.

1 BRIGADIER (RET.) PAPHITI: Well, the
2 formal preliminary examination was a prosecutor's
3 tool to look at those difficult cases where it was
4 felt that the evidence maybe wasn't up to the
5 standard.

6 CHAIRWOMAN JONES: But they could choose
7 to do that or not.

8 BRIGADIER (RET.) PAPHITI: Yes. It was
9 the prosecutor's choice. But it would be a very
10 brave prosecutor who -- and it wouldn't be his or
11 her sole decision. They'd have to consult. And
12 when I ran the Prosecuting Authority, they'd have
13 to come to me if they were going to make a decision
14 like that, because sexual cases were always staffed
15 up to the highest level, not only sexual cases, but
16 obviously serious cases. And the same applies now
17 with Bruce Houlder, who's the service Prosecuting
18 Authority, that that those cases come to him for
19 his advice, and he makes sure that there are proper
20 specialist prosecutors that are appointed.

21 CHAIRWOMAN JONES: So the investigators
22 will present the evidence to the Prosecuting

1 Authority, but there won't be any -- there's no
2 necessity for any type of hearing?

3 BRIGADIER (RET.) PAPHITI: No, the report
4 comes to the Prosecuting Authority --

5 CHAIRWOMAN JONES: Right.

6 BRIGADIER (RET.) PAPHITI: -- on referral,
7 and now there isn't that preliminary or the option
8 of a preliminary hearing.

9 CHAIRWOMAN JONES: I see. Yes?

10 COMMODORE SPENCE: Might I just make one
11 additional point in answer to the previous question
12 as well? Of course, I concentrated on the
13 question, which was actually regarding the
14 prosecuting innovative ACUs and how they dealt with
15 it. Of course, the flip side of the coin before
16 the prosecutor ever gets a chance to consider
17 evidence, of course, is in the investigator phase.
18 And also what we have vastly improved over the last
19 10 years in particular is the ability of those
20 parts of the special investigations branch to
21 actually conduct those courts specifically for
22 investigating crimes of a sexual nature, which is,

1 as you will understand, quite different in many
2 respects than normal run of the mill crime, if I
3 can put it that way.

4 So actually I think it's not just the
5 prosecutorial thing, which has its independence
6 with it. It's the service police issues which also
7 have their own investigatory independence by
8 statute now as well as the expertise and knowing
9 how to conduct what evidence to collect, in what
10 manner, et cetera, so the prosecutor doesn't have
11 to start scrambling around. He may have other
12 questions and ask them to through the lines of
13 inquiry, of course. But I have to say in nothing
14 like the same way as when I first started out 20
15 years ago. I would say there's been a vast
16 professionalization in both aspects of this.

17 CHAIRWOMAN JONES: Any further questions?

18 (No response.)

19 CHAIRWOMAN JONES: I can't thank you
20 gentlemen enough for coming. We've heard now from
21 you, Brigadier Paphiti, on two occasions, both
22 terrific, much appreciated. And I think what we'll

1 do now is we're expecting comments from Senator
2 Gillibrand at 4:15, so we'll take a break until
3 4:15. Thank you very much.

4 (Whereupon, a recess was taken.)

5 CHAIRWOMAN JONES: Colonel?

6 COLONEL HAM: Yes. Everyone, we need to
7 announce just a slight change in the agenda. We
8 just received a request a short time ago that
9 Senator McCaskill appear. We're going to start,
10 and my understanding is she'll be joining us at
11 some point. Again, it's a recent change to the
12 agenda. Thank you, ma'am.

13 CHAIRWOMAN JONES: Let me welcome you,
14 Senator Gillibrand. It's great to see you. We
15 very much appreciate your attending the public
16 hearing today and look forward to your comments.

17 SENATOR GILLIBRAND: Thank you so much,
18 Madam Chairwoman. It's a delight to appear before
19 your Panel. I want to thank every single one of
20 you for this public service you are offering to our
21 country. It is invaluable, and I'm grateful for
22 your time and deliberate consideration.

1 I really want to thank you for the
2 opportunity to actually address the Panel. I know
3 that we all share the same goals of changing the
4 status quo to protect our men and women service
5 members from the crisis of sexual assault occurring
6 across services and academies, and finding
7 solutions that will better hold perpetrators of
8 these horrific acts accountable. So I appreciate
9 the opportunity to share the insights of victims
10 and commanders that I have heard over the last
11 several months.

12 I want to begin by reminding this Panel
13 that a strong and growing bipartisan coalition in
14 Congress has shown that ending sexual assaults in
15 the military by creating an independent and
16 accountable military justice system where trained
17 military prosecutors make the little -- make the
18 critical legal decision about whether alleged
19 crimes move forward to trial is not partisan. It's
20 not ideologic. It's just the right thing to do.

21 Our carefully crafted common sense
22 proposal, written in direct response to the

1 experiences of those who have gone through a system
2 rife with bias and conflict of interest, is not
3 Democratic. It's not Republican. Senators from
4 both sides of the aisle have listened to the
5 victim's voices and agreed that what's right is not
6 just tweaking the status quo, but a real
7 transformational change required to give victims
8 the hope of a fair shot at justice so that they are
9 willing to come forward and report the heinous
10 crimes committed against them. So as you move
11 forward in your work, I hope you will listen loudly
12 and clearly to the voices of the victims because
13 what you will hear is eye opening and alarming.

14 The mother of one survivor, whose name I
15 am not at liberty to divulge, wrote: "I
16 reluctantly supported my daughter going into the
17 Army, fearing that she may be a casualty victim in
18 combat overseas by some foreign enemy. I never
19 imagined she would be a victim on U.S. soil from
20 the Army she partnered with to protect the USA and
21 our rights. She was sexually assaulted at the end
22 of 2012, which is a case still pending. She's lost

1 her lust for life. She's become dependent on drugs
2 to mask the pain and is now being pushed out of the
3 Army because the captain is derelict in his
4 responsibilities and failed to respond to her
5 plight. He has re-victimized her emotionally by
6 exposing her to unsafe conditions, verbal abuse,
7 and total disregard for her as a soldier and as a
8 woman. Please help me."

9 Sarah Plummer, who was raped as a young
10 Marine in 2003, said, "I knew the military was
11 notorious for mishandling rape cases, so I didn't
12 dare think anything good would come of reporting he
13 rape." She said, "Having someone within your
14 direct chain of command just doesn't make any
15 sense. It's like getting raped by your brother and
16 having your dad decide the case."

17 Army Sergeant Rebecca Havilla, who served
18 in Afghanistan and was raped in 2007, said
19 reporting the crime to her commanding officer was
20 unthinkable. "There was no way I was going to
21 report to my commander. He made it clear he didn't
22 like women."

1 Airman First Class Jessica Hynes was raped
2 in 2009 by a co-worker who broke into her room at
3 3:00 a.m. "Two days before the court hearing, his
4 commander called me on a conference at the JAG
5 office and he said he didn't believe that the
6 offender acted like a gentleman, but there wasn't
7 reason to prosecute. I was speechless. Legal had
8 been telling me this is going to go to the court.
9 We had the court date set for several months. And
10 two days before, his commander stopped it. I later
11 found out the commander had no legal education or
12 background, and he had only been in command for
13 four days." Her rapist was given the award for
14 Airman of the Quarter, and she was transferred to
15 another base.

16 We must not forget that this is a crime
17 that does not only affect women. More than half of
18 the victims, as you know, are men. Blake Stevens,
19 now 29, joined the Army in 2001, just seven months
20 after graduating high school. "The verbal and
21 physical attacks started quickly," he says, "and
22 came from virtually every level of the chain of

1 command." In one of the worst incidents, a group
2 of men tackled him, shoved a soda bottle into his
3 rectum, and threw him backwards off an elevated
4 platform onto the hood a car. When he reported,
5 Steven says his drill sergeant told him, "You're
6 the problem. You're the reason this is happening."
7 And he refused to take action. Blake said, "You
8 just feel trapped. They basically tell you they're
9 going to have to keep working with these people day
10 after day, night after night. You don't have a
11 choice." His assailants told him that once he
12 deployed to Iraq, they would shoot him in the head.
13 "They told me they were going to have sex with me
14 all the time when we got there."

15 These are just a few stories of the many
16 stories that I've heard from survivors over these
17 last few months. But if the victims' voices are
18 not enough, you can also listen to the generals
19 themselves, the commanders and JAG officers, who
20 have spoken on this issue.

21 Retired General Lieutenant Claudia
22 Kennedy, the first woman to become a three-star

1 general in the Army, wrote to me, "Having served in
2 leadership positions in the U.S. Army, I have
3 concluded that if military leadership hasn't the
4 fixed the problem in my lifetime, it's not going to
5 be fixed without a change to the status quo. The
6 imbalance of power and authority held by the
7 commanders in dealing with sexual assaults must be
8 corrected. There has to be independent oversight
9 over what's happening in these cases. Simply put,
10 we must remove the conflicts of interest in the
11 current system, the system in which a commander can
12 sweep his own crime or the crime of a decorated
13 soldier or friend under the rug, protects the
14 guilty and protects serial predators. It harms the
15 military readiness. Under leadership -- until
16 leadership is held accountable, it won't be
17 corrected. To hold leadership accountable, it
18 means there must be independence and transparency
19 in the system. Permitting professionally trained
20 prosecutors rather than commanding officers to
21 decide whether to take sexual assault to trial is
22 measured with a first step towards accountability.

1 I have no doubt the command climate, unit cohesion,
2 and readiness will be improved by these changes."

3 Retired Brigadier General Lori Sutton, the
4 former top psychiatrist in the Army, wrote,
5 "Failure to achieve these reforms would be a
6 further tragedy to an already sorrowful history of
7 inattention and ineptitude concerning military
8 sexual assault. In my view, achieving these
9 essential reform measures must be considered as a
10 national security imperative demanding immediate
11 action to prevent damage to individual health and
12 well-being, vertical and horizontal trust within
13 units, military institutional reputation,
14 operational mission readiness, and the civilian
15 military compact.

16 Far from stripping commanders of
17 accountability as some detractors have suggested,
18 these improvements will remove the inherent
19 conflict of interest that clouds the perception and
20 all too often the decision making process under the
21 current system. Implementing these reforms will
22 actually support leaders to build and sustain unit

1 cultures marked by respect, good order, and
2 discipline."

3 Retired Brigadier General, David
4 McGuinness, a former Pentagon appointee, wrote: "I
5 am a believer that there is nothing in the Military
6 Justice Improvement Act that is inconsistent with
7 the responsible or authority of command. Your
8 efforts in this regard will actually strengthen
9 good order and discipline of our military."

10 Retired Air Force General, Martha
11 Rainville, the first woman in the history of the
12 National Guard to serve as a State Adjunct General,
13 who served 14 of her 27 years in command positions,
14 wrote: "As a former commander, endorsing a change
15 that removes certain authority from military
16 commanders has been a tough decision. It was
17 driven by my conviction that our men and women in
18 uniform deserve to know without doubt that they are
19 valued and will be treated fairly with all due
20 process should they report an offense and seek help
21 or face being accused of an offense. When
22 allegations of serious criminal misconduct have

1 been made, the decision of whether to prosecute
2 should be made by a trained legal professional.
3 Fairness and justice requires sound judgment based
4 on evidence and facts independent of preexisting
5 command relationships."

6 Retired Army General Major, Stennis Leach,
7 has said publicly, "We have relied on the chain of
8 command to deal with this issue, and the chain of
9 command has failed for decades. America gives us
10 their sons and daughters, and we failed to
11 discharge the responsibility to take care of them."

12 Retired U.S. Navy Captain Lori Manning,
13 who served active duty in the U.S. Navy for 25
14 years, and served as commanding officer and court
15 martial convening authority for almost 400 people
16 who were part of her command, wrote: "As a former
17 commanding officer and convening authority, I
18 completely understand the service's insistence that
19 commanders must retain their authority to dispose
20 of charges of sexual assault. However, as an
21 advocate for military women and men, it is crystal
22 clear to me that too many commanders have betrayed

1 the trust placed in them by their subordinates,
2 their services, and their fellow citizens, because
3 they have not used this authority properly. I
4 have, therefore, come to the reluctant conclusion
5 that this authority must be removed from the chain
6 of command and placed in the hands of trained
7 military prosecutors, who can serve as an unbiased,
8 professional expert on the disposition of sexual
9 assaults and other felony cases. This is critical
10 to ending sexual assault in the military."

11 Former JAG Corps officer in the U.S. Navy
12 and Executive Director of Protect our Defenders
13 Tarin Meeks, wrote: "In my experience, mid-level
14 commanders, department heads, and military
15 leadership do not want this responsibility. They
16 don't want the burden of convening a court martial,
17 and the entire process is a distraction from their
18 mission. These mid-level leaders are busy with
19 operational demands, and handling complex sexual
20 assault cases occupies their time and energy and is
21 counterproductive to the mission of readiness."

22 Former Army JAG officer with the U.S. 82nd

1 Airborne Division while stationed in Iraq from '03
2 to '04, and former congressman, Patrick Murray --
3 excuse me, Patrick Murphy, wrote an op-ed. "It's
4 time for real common sense changes. District
5 attorneys and attorneys general don't have to get
6 permission from mayors and governors to prosecute
7 cases because they're independent. At the felony
8 level, military judge advocates should be
9 independent, too."

10 And if listening to the victims plus the
11 testimony of retired generals, commanding officers,
12 and JAGs is not yet enough, I hope you'll listen to
13 the current commanders themselves when they speak
14 truthfully about this issue.

15 In a speech on April 19th of this year at
16 Paris Island, Commandant of the Marine Corps,
17 General James Amos said, "Why wouldn't female
18 marines come forward? Because they don't trust us.
19 They don't trust the command. They don't trust the
20 leadership." And then went on to lament a climate
21 in which leaders have "become so soft" on holding
22 wrongdoers accountable.

1 In response to questions regarding sexual
2 assault crimes on May 17th of this year, Chairman
3 of the Joint Chiefs of Staff, General Martin
4 Dempsey, said, "You might argue that we have become
5 a little too forgiving because if a perpetrator
6 shows up a court martial with a rack of ribbons and
7 has four deployments and a Purple Heart, there
8 certainly is a risk that we might be a little too
9 forgiving of that particular crime."

10 What the testimony I have just read tells
11 me quite clearly is that among other things, there
12 is no accountability because the trust that any
13 justice will be served has irreparably broken under
14 the current system where commanders hold all the
15 cards whether a case moves forward to prosecution.

16 I strongly believe it is time that we
17 restore this trust. It's time to move the sole
18 decision making power over whether serious crimes
19 akin to a felony go to trial from the chain of
20 command into the hands of non-biased,
21 professionally trained military prosecutors where
22 it belongs. Critics say moving these decisions

1 outside the chain of command will diminish good
2 order and discipline. The truth is our bipartisan
3 bill is carefully crafted to leave 37 serious
4 crimes that are unique to the military within the
5 chain of command, such as insubordination or going
6 absent without leave, in addition to crimes
7 punishable by less than a year of confinement under
8 Article 15.

9 Second, I know you've heard testimony from
10 other jurisdictions who have removed this decision
11 making from the chain of command, the UK, Israel,
12 Australia being some of them. And they do not see
13 a lack of good order and discipline because this
14 one legal decision isn't being made in their chain
15 of command. They will not tell you that they lack
16 good order and discipline. They will not tell you
17 that their militaries have fallen apart. They will
18 not tell you that their commanders have no ability
19 to set the command climate without this one ability
20 to make a legal decision.

21 And I would like you to consider the
22 record before Secretary Hagel removed -- requested

1 that we remove one other legal decision making
2 authority. Secretary Hagel requested that we
3 remove Article 60, the ability to overturn a jury
4 verdict out of the chain of command because he was
5 so offended by instances where that's exactly what
6 commanders did, overturning a jury verdict,
7 inappropriately in his view.

8 The day before he said that, the entire
9 military brass said you cannot possibly remove that
10 decision making from the chain of command. Article
11 60 is essential for good order and discipline. And
12 I can give you the testimony. The day after
13 Secretary Hagel suggested we remove this from the
14 chain of command, every one of the service chiefs
15 wrote a letter to Chairman Levin saying of course
16 we can do this. It's a vestige of pre-World War I.

17 So I assert to all of you that removing
18 this second legal decision, this Article 30
19 decision of whether to go to trial, is something
20 that should be removed so we have objectivity and
21 no bias, and will not undermine the commander's
22 ability to instill good order and discipline.

1 A second argument you will hear about this
2 will let commanders off the hook. That could not
3 be farther from the truth. Only commanders are
4 responsible for setting command climate. Only
5 commanders are responsible for good order and
6 discipline. And now with the underlying NDAA bill,
7 we are making retaliation a crime.

8 But what I can tell you is this is where
9 commanders are failing. They are not maintaining
10 enough good order and discipline because we had
11 26,000 rapes, unwanted sexual assault -- unwanted
12 sexual contact and assaults a year, and only 3,300
13 reporting. That means under the current command
14 climate, it is not sufficient to prevent these
15 rapes. The current command climate is not
16 sufficient for retaliation not to happen. And
17 under the current command climate, it is not
18 sufficient for victims willing to come forward.

19 The last point I want to make. Only
20 commanders can possibly protect victims if they
21 come forward, so you must leave this under the
22 commander's authority. Well, there, too, we see

1 enormous failure because of the 3,300 cases that
2 were reported last year, 62 percent of the victims
3 were retaliated against. So in 62 percent of the
4 cases, those commanders did not protect the victim,
5 did not have his or her back to make sure no
6 retaliation could happen. So I see no reason why
7 you'd think that commanders are protecting these
8 victims and only commanders can protect these
9 victims if they are the one deciding the case.

10 I am sure there are many individual
11 examples where a commander did do the right thing,
12 had the back of the victim, made sure it went to
13 trial, made sure the evidence was marshaled and got
14 a conviction. But last year, we had less than 300
15 convictions. So you can say in one out of 100
16 cases, the commander might've got it right. It's
17 not good enough. And this is a problem you will
18 never train your way out of. You have too many
19 commanders, at least 62 percent, who allowed
20 retaliation to happen against victims who reported
21 last year.

22 I don't think it possible. I think what

1 we need so urgently is transparency, and
2 accountability, and an objective review of facts by
3 someone who knows what they're doing, who is
4 trained to be a prosecutor, who understand
5 prosecutorial discretion. And these cases on a
6 good day for any prosecutor in America to get right
7 is difficult. So why would we be giving it to
8 someone who doesn't have a law degree, who knows
9 nothing about sexual assault, who may have a bias
10 against women in the military, who may have a bias
11 against gays in the military, who may know the
12 perpetrator, who may know the victim? The
13 possibility for bias is so severe. I think we're
14 kidding ourselves if we think leaving the status
15 quo in place, having these commanders have this
16 responsibility is just naïve.

17 And probably the most disturbing thing is,
18 we have allowed the Secretaries of Defense to say
19 for 20 years, since Secretary Cheney said, we have
20 zero tolerance for sexual assault. We've not had a
21 Secretary of Defense who hasn't said that in the
22 last 25 years. When are we going to change? When

1 are going to actually fix the problem? And if
2 there's any responsibility that you feel you have,
3 I believe it's the responsibility to change the
4 system. It needs to be changed. It's not working.

5 And we are failing the men and women who
6 do everything, who give us everything to protect
7 this country. And please in your own mind imagine
8 it's your son or your daughter who is so
9 brutalized, and then their command and their unit
10 turns its back on them. You cannot survive that.
11 And when you look at the percentages of women who
12 leave the military, who have post-traumatic stress
13 disorder, they don't survive it. The suicide rate
14 is astronomical.

15 Thank you.

16 CHAIRWOMAN JONES: Thank you very much,
17 Senator, for your comments. Questions?

18 MR. BRYANT: I just have one.

19 CHAIRWOMAN JONES: Mr. Bryant?

20 MR. BRYANT: Senator, thank you for coming
21 over this afternoon. You mentioned 26,000 unwanted
22 sexual conduct cases estimated in the survey that

1 revealed over 3,000 actual reports. That 26,000 is
2 actually an estimate.

3 SENATOR GILLIBRAND: Correct.

4 MR. BRYANT: I mean, it's not an actual
5 number. And there are those who are in the
6 statistics business, and I'm certainly not, who --
7 and even if it's just half, that's too many. I'm
8 not saying that. But there are those who say that
9 that is a -- that figure is way inflated.

10 SENATOR GILLIBRAND: We don't know what
11 the real figure is because it's an estimate. But
12 what we do know -- put aside 26,000. Let's just
13 look at the 3,300. Let's assume the problem is
14 literally only 3,300 cases. Well, what we know of
15 those 3,300 cases is that 70 percent of them were
16 violent assaults and rapes. So that population
17 alone is outrageous, it demands immediate response.

18 So you don't even have to believe the
19 estimate or even attribute what happened to those
20 26,000 cases. If you just look at the 3,300 that
21 were reported and that 62 percent of those people
22 who reported were retaliated against, you've got a

1 massive problem that you have to fix.

2 MR. BRYANT: I understand the numbers. In
3 my jurisdiction we do twice the 3,500 per year, not
4 sexual assaults, but total number of charges. So I
5 understand what that means in terms of victims.
6 Thank you.

7 CHAIRWOMAN JONES: Senator, could you
8 describe the military prosecution system that you
9 have in your bill, the numbers of lawyers that
10 might be required, the resources that might be
11 required? These are questions that are coming up.

12 SENATOR GILLIBRAND: Well, the issue is we
13 have a requirement that the decision is made by an
14 independent JAG officer who's not within the chain
15 of command. Those JAG officers exist today, and
16 they report straight up to the Secretary of the
17 Services.

18 Our goal is that reporting would stay the
19 same. You could report anywhere you like. Today
20 you can report anywhere you like. You can report
21 to your pastor. You could report to your chain of
22 command. You could report to a colleague. You can

1 report outside the chain of command. There's lot
2 of places you could report, and that would stay the
3 same. What's different is the decision maker would
4 no longer be the commander. The decision maker
5 would be the trained military prosecutor who would
6 decide one way or the other.

7 The military would have to make their own
8 estimates about how much they believe reporting
9 would increase. I don't think you need a staffing
10 change if it stays the same if you have the same
11 number being reported that are reported today. But
12 our hope is that if you create transparency, that
13 some number between 3,300 and 26,000 will be
14 reported. And if we can increase that by 5,000
15 more cases, 10,000 more cases, 15,000 more cases
16 being reported, you're going to see a massive shift
17 in how these cases are being handled, because with
18 more reporting, you're going to have more
19 convictions. The more accountability, it will
20 become more obvious that this is unacceptable
21 behavior and the climate will begin to change.

22 So the military can assess it themselves

1 as they see reporting increasing and train the
2 lawyers that they need. But keeping it where it is
3 today doesn't work.

4 One of the other points I would to make
5 is, you know, every one -- every member of
6 Congress, all of the senators that are working on
7 this are so sincere about this. There's no one who
8 is not trying their utmost best to come up with
9 what's best for victims, what's best for readiness,
10 what's best for good order and discipline.

11 But I do want to comment on the proposal
12 that Carl Levin made. The one change he made to
13 address this issue, in addition to all of the other
14 ones that we've already passed through. There was
15 about 20 recommended changes. They've all gone
16 forward unanimously out of committee. The only one
17 that I'm seeking to change is who decides whether a
18 case goes to trial.

19 What Chairman Levin suggested is if the
20 commander disagrees with their lawyer who does the
21 investigations for them, then those cases get
22 immediately appealed. I believe that is a solution

1 without a problem because the commanders and their
2 lawyers only disagree in approximately one percent
3 of the cases. So that's very, very few, so that's
4 one percent of the 300 cases that are going to
5 trial, maybe three cases.

6 So you're talking about a very small
7 population that will actually be appealed, and
8 those are the cases that are actually being
9 handled. They're already reported. The command
10 climate was sufficient that the victim felt
11 comfortable coming forward. That's the 3,300 cases
12 that get elevated there. It doesn't address at all
13 the 23,000 cases that are never reported because
14 those are the instances where the commanders are
15 either retaliating directly, convincing the victim
16 not to testify, the victim won't trust their
17 commander that the outcome will be positive.

18 We know from the confidential survey that
19 the reason why people don't report who had
20 experienced unwanted sexual contact, rape, or
21 assault, about half said they think nothing will be
22 done with their case. Less than half said they've

1 witnessed retaliation, and less than half said they
2 feared retaliation. So we know -- they've given us
3 a reason why they didn't bring those cases forward.

4 So Chairman Levin's proposal just doesn't
5 address those because the ones that do get reported
6 are handled. One in 10 do go to trial. And once
7 they go to trial, it's a 95 percent conviction
8 rate. So that area of disagreement between lawyers
9 and counsels is really rare.

10 CONGRESSWOMAN HOLTZMAN: Senator
11 Gillibrand, first of all, let me thank you for your
12 testimony, for coming here. Thank you also for
13 your leadership on this issue. You've helped to
14 focus the whole country on the question and the
15 need for change. So I personally am enormously
16 grateful and appreciate your testimony here.

17 I just want to ask you a couple of
18 questions about some of the testimony we've heard
19 and some things that you may have given some
20 thought to. First of all, we had a proposal today
21 that the solution was to have a joint decision
22 required by the JAG and the commander, and that

1 would be statutorily required.

2 SENATOR GILLIBRAND: An independent JAG,
3 not the commander's JAG officer.

4 CONGRESSWOMAN HOLTZMAN: Well, the
5 commander's JAG.

6 SENATOR GILLIBRAND: The commander's JAG?

7 CONGRESSWOMAN HOLTZMAN: Yeah.

8 SENATOR GILLIBRAND: That's how it is
9 today.

10 CONGRESSWOMAN HOLTZMAN: Well, if they
11 wanted to put it in statutory form --

12 SENATOR GILLIBRAND: It's irrelevant.

13 CONGRESSWOMAN HOLTZMAN: Okay. So your
14 view is -- your answer to that is the same that you
15 just gave to the Chair.

16 SENATOR GILLIBRAND: Well, imagine this.
17 I have a general counsel in my office. She works
18 for me. We disagree sometimes, but not very often,
19 and she definitely knows how I feel about issues in
20 advance. So I think that's one of the reasons why
21 there's so little disagreement today between the
22 JAG officer who works for the commander, who is

1 judged by the commander, who is reviewed by the
2 commander, who is entirely dependent on the
3 commander. Those disagreements just happen so
4 rarely, and it doesn't solve the problem the
5 victims are asking you to solve. It's not taking
6 it out of the chain of command. It's the chain of
7 command they don't trust.

8 Look at Admiral -- I mean, look at General
9 Amos' own words. "They don't trust us. They don't
10 trust the command." Everyone knows that's the
11 fact. Even the people who oppose my legislation
12 know that's the fact because there are too many
13 commanders who don't get it, and too many
14 commanders aren't doing the right thing, and too
15 many commanders don't have the backs of the
16 victims. And I don't think you can train your way
17 out of those commanders.

18 CONGRESSWOMAN HOLTZMAN: Just a question
19 that's not quite related to this Panel, but sort of
20 related.

21 SENATOR GILLIBRAND: Yeah.

22 CONGRESSWOMAN HOLTZMAN: What is the

1 accountability of commanders? For example, you
2 spoke about commanders who overturn decisions that
3 seem to be irrational or bad decisions, or
4 commanders who don't refer cases in situations that
5 are egregious.

6 SENATOR GILLIBRAND: Today there's not
7 accountability.

8 CONGRESSWOMAN HOLTZMAN: No
9 accountability. Could there be accountability
10 under the existing system?

11 SENATOR GILLIBRAND: Yes, and what we --
12 one of the things we put in the underlying NDAA in
13 the panoply of issues we all agreed on was we
14 created a sense of the Senate that we would like
15 the military to create a review structure so that
16 every commander is reviewed on command climate with
17 regard to three issues: are there rapes and
18 assaults happening under your command, is the
19 command climate sufficient that those victims come
20 forward, is there retaliation after the fact. And
21 actually make those three issues be reviewed in
22 some appropriate way that the military can devise

1 themselves so that there's accountability.

2 When we first proposed that, Lindsey
3 Graham and I were working on it along with Chairman
4 Levin. We were proposing it as a requirement.
5 Somehow between then and the final NDAA bill that
6 we got to vote on, it was watered down to a sense
7 of the Senate. But I'm urging people to work on
8 that, to actually come up with measurables. I
9 think it would be useful.

10 CONGRESSWOMAN HOLTZMAN: Just one other
11 question on the line of an alternative to the
12 commander, and this is a concern that was raised by
13 somebody who had either appeared before the
14 committee or the Panel or somehow contacted us.
15 And that is that turning the prosecutorial decision
16 to an independent group may solve the problem of
17 conflict of interest or favoritism. But would it
18 necessarily solve the problem of aggressive
19 prosecution because -- just bear with me one
20 second. And this is just a question. I'm not
21 saying this is my view. I'm just throwing this out
22 for your comment.

1 If we're talking about cultural obstacles,
2 there's no reason to think that those attitudes --
3 women don't belong in the military, or you can't
4 trust the victim, or it's the victim's fault --
5 won't also infect the views in an independent --

6 SENATOR GILLIBRAND: Of the JAG lawyers.

7 CONGRESSWOMAN HOLTZMAN: Yes. How do you
8 deal with that?

9 SENATOR GILLIBRAND: Well, the hope is
10 that these are highly trained JAG officers who
11 understand the nature of these crimes, know how to
12 investigate them and weigh evidence. But at the
13 end of the day, you want to have as close to an
14 unbiased system as possible. I don't want to weigh
15 the scales of justice in favor of the victim. I
16 don't want to weigh the scales of justice in favor
17 of the defendant. I want it to be even. I want it
18 to be even. I want justice to be blind. That's
19 the whole point. And in today's system, it is not
20 blind. It is too often this or this.

21 And if you want to talk about defendant's
22 rights for a moment, which is relevant to many of

1 my colleagues, one of the reasons the UK changed
2 their system was because of defendants' rights.
3 The UK changed their system five-some years ago, I
4 believe, because of a murder trial, and the accused
5 said I can't possibly get a fair trial, my
6 commanding authority thinks I'm guilty. I need
7 some different level of review. And they agreed,
8 and they decided let's take it outside the chain of
9 command because this guy's life is on the line.
10 He's being tried for murder, and he deserves an
11 objective system, and his civil liberties are being
12 at risk. We want to protect it.

13 We're creating a climate through these
14 hearings, through this Panel, through this issue,
15 where I think it's going to be very difficult for
16 any commander not to move forward to a trial. I
17 think he's going to feel, oh, well, if I don't move
18 forward or if I disagree with my lawyer, it's going
19 to be appealed, and then I'm going to my wrist
20 slapped because I didn't move forward. That's not
21 blind justice. That is weighing the scales in
22 favor of any victim over any defendant even if that

1 defendant is innocent. And we don't want that
2 either.

3 Some opponents will say, you know, a lot
4 of these cases go to trial because the commander is
5 more aggressive, because he wants to, like, teach
6 that guy a lesson. The cases that go forward
7 should be the cases that can be tried, proven, and
8 result in a conviction. If you just send cases
9 forward because you want to be mean and aggressive
10 and you just want to have a great record of sending
11 cases forward, if you have a number of cases that
12 keep ending in acquittal, do you think victims are
13 going to feel confident that they'll be protected
14 in the system or that this could possibly work out
15 for them? No.

16 Prosecutors make a prosecutorial judgment
17 is this a case that I can bring forward. And to
18 clarify the record, JAG prosecutors do not have win
19 and loss records. They're not running for governor
20 next year. It's not a political issue for them.
21 They are there to do their jobs. That is why the
22 military prosecutorial system is so strong.

1 They're not being rated on how many convictions
2 they get. They're being rated on whether do a good
3 job period.

4 And so, if they assess these cases, which,
5 again, for those of you who have been prosecutors,
6 these are the most difficult cases in the world to
7 prove. They're he said/she said half the time,
8 sometimes no evidence. And so, the prosecutors
9 have to use that judgment, years, decades of
10 training, to say this is the right case forward.

11 So it's not about just moving more cases
12 forward. It's about creating a system that's
13 objective, honest, and that justice is possible so
14 victims come forward. I'm not worried about that
15 handful of cases where the lawyer and the commander
16 disagree. I'm not. That case has been reported.
17 There's now a record of it. Something will be
18 done.

19 And today's record is not horrible. One
20 in 10 go to trial, and then once they go to to
21 trial, the conviction rate is extremely high.
22 That's not the problem in the system. The problem

1 in the system is no one trusts the system, so they
2 don't enter the system. They don't trust they can
3 possibly have justice. And that's why creating an
4 independent system is what's meaningful.

5 Now, you may be told, you know, these
6 other jurisdictions, they don't have less sexual
7 assault than ours. They don't have -- we don't
8 have records that their system is working. That's
9 not why we're citing them. We're citing them
10 because their militaries didn't fall apart when the
11 commanders didn't have this authority. The day the
12 commanders didn't get to make this one legal
13 decision, their militaries didn't fall apart. Just
14 look at Israel. Look at the UK. Look at
15 Australia. Yes, they're different militaries than
16 us. You can have a panoply of differences. But
17 they still have good order and discipline and have
18 been able to maintain a command climate without
19 this one legal decision.

20 PROFESSOR HILLMAN: Senator Gillibrand, I
21 wanted to thank you for coming today, and also
22 thank you and Senator McCaskill and your colleagues

1 for that hearing in June facing down the service
2 chiefs, for which I was very grateful, and lots of
3 other veterans were, too.

4 I wanted to push you on what you just
5 described as that one little decision. Why is that
6 enough? You said that the Article 60 piece was not
7 enough, the post-trial review. What about the
8 Article 32 preliminary hearing? What about the
9 wide open jurisdiction of our military criminal
10 justice system? Is that something we should be
11 looking at, too?

12 SENATOR GILLIBRAND: I agree with you it's
13 not enough. There is no silver bullet. And, you
14 know, Claire and the other senators -- Senator
15 Levin -- worked really hard on coming up with every
16 idea of reform we could put forward, and we did put
17 forward a very large package of things that I think
18 will make a difference, like having victims
19 advocates for every victim, having retaliation be a
20 crime, the sense of the Senate that you should be
21 reviewed on these issues, fixing a lot of the
22 recordkeeping. That's something that Senator

1 Klobuchar worked very hard on to make sure that
2 recordkeeping is better.

3 All of those reforms are helpful, all of
4 them. But because the victims have told us the
5 problem for them has been the chain of command, I
6 think doing nothing on that issue would be unwise
7 and is not the kind of reform that's
8 transformational.

9 This reform is also broader breadth in
10 terms of both preserving victims' and defendants'
11 rights because it takes all felonies out of the
12 chain of command. They don't have felonies in
13 military justice, but the equivalent of felonies.
14 So all crimes that have more than a year or more of
15 penalty so that justice can be blind, so that you
16 can have an unbiased system being created.

17 The second thing is that I think with
18 regard to other reforms, we're going to have to
19 wait and see how it happens. We don't know whether
20 this will increase reporting. The victims tell us
21 they believe it will. Maybe it won't. But having
22 this reform is a very good first step. And so,

1 that's why I think it's so important because
2 without creating an unbiased review, you're lacking
3 objectivity, and then you're lacking faith in the
4 system. So we don't know that it is enough. I
5 think it's a good approach, and I think it's one
6 that can be done without undermining unit cohesion,
7 good order and discipline.

8 The other reason why I get very frustrated
9 with the military's response is they've used this
10 response every time a major change was needed in
11 the military. They said they couldn't possibly
12 integrate African-Americans because it would
13 undermine good order and discipline. They said
14 they couldn't possibly have women in the military
15 because it would undermine good order and
16 discipline. They said they couldn't possibly have
17 gays in the military and unwind Don't Ask, Don't
18 Tell because of good order and discipline. And
19 then again most recently, couldn't possibly take
20 away Article 60 because it would undermine good
21 order and discipline.

22 So it doesn't ring true. And given these

1 other jurisdictions still have good order and
2 discipline and they don't have this legal decision,
3 I'm confident our military can also do the same.
4 But with that added transparency, I'm hopeful that
5 the climate will begin to change.

6 PROFESSOR HILLMAN: Thank you.

7 CHAIRWOMAN JONES: Admiral Houck?

8 VICE ADMIRAL (RET.) HOUCK: Thank you,
9 Senator. In a sea of issues that people can
10 disagree about in good faith, I wanted to say how
11 much I appreciated your comments about military
12 lawyers not having win and loss records, and not
13 pursuing prosecutions based on those kind of
14 considerations, that they're not running for
15 governor or such.

16 I do want to take issue, though, with the
17 implication that a judge advocate who works for a
18 commander -- you used the analogy that of your own
19 lawyer who knows what you think and, therefore,
20 might be afraid to disagree with you. I do want to
21 on the record, and particularly in a room full of
22 military lawyers, take issue with the notion that

1 military attorneys would be intimidated from
2 expressing their honest views to commanders.
3 Having been one of those highly trained judge
4 advocates for 27 years myself, I can't can't how
5 many times I disagreed with commanders. And I
6 can't count how many times commanders forcefully
7 spoke back to me about my disagreement to them.
8 But in the overwhelming majority of cases, and in
9 no cases in which it would've been illegal or
10 immoral for them to have done otherwise, they
11 generally followed the advice.

12 And so, I think that to the extent that it
13 feeds into a public perception that military people
14 just follow orders of commanders blindly, I would
15 like to just from my own personal experience go on
16 the record as saying I disagree with that.

17 SENATOR GILLIBRAND: Well, from what I
18 heard, it's the exact opposite, that commanders do
19 what their JAGs recommend. I probably didn't state
20 that properly. Because the JAGs do the
21 investigations. They do all the work. They make a
22 recommendation. And the statistics that we've

1 received is that the commanders by and large will
2 accept the JAG's recommendations. We also know
3 that in some instances, the commanders may decide
4 to be more aggressive because they want to be and
5 they don't care if they enough evidence, and they
6 just say I want to punish this guy and push forward
7 a case.

8 In the last set of numbers I saw on that,
9 about half resulted in conviction, and about half
10 resulted in acquittals. So in those cases that
11 resulted in convictions, those victims really
12 benefitted from an aggressive commander who wanted
13 to move forward. But I should've said it
14 differently. Commanders usually do defer to what
15 their lawyers recommend. I was just making the
16 point that that disagreement is very rare. And
17 when it does go forward, the commanders often push
18 a case forward and do get a conviction, but about
19 half do end in acquittal.

20 CHAIRWOMAN JONES: You know, you said
21 something interesting before. Many things, but one
22 comes to my mind at the moment. The gentlemen who

1 testified here earlier this afternoon from Canada,
2 the UK, and Australia all basically said that there
3 wasn't any change in reporting that they could
4 certainly show, you know, statistically. And I
5 think one or two may have said they didn't have a
6 sense that there was, you know, an increase in
7 reporting when they made this significant change to
8 take the prosecutor -- or take commander out of the
9 military. And I don't think -- and I think you've
10 said today that there's no guarantee that that
11 won't happen.

12 I guess my question is -- and I guess the
13 other thing that was said was there were
14 tremendous, however, innovations in the kinds of
15 services that were given, the awareness that
16 commanders themselves were given, and the climates
17 that they were able to foster in each of those
18 foreign Allied militaries, to which they attributed
19 an awful lot of the success they believe they had
20 with respect to sexual assaults.

21 So my question is, would it be wiser to,
22 as I believe is conceded already by the Secretary

1 of Defense, remove the Article 60 clemency power,
2 and then take a look at how court martials panels
3 are staffed, and perhaps a number of other
4 suggestions that have been made -- and not
5 suggestions. They're all in the legislation. And
6 give those a chance before we remove the
7 commanders, because what I've -- the thought in my
8 head from the beginning is that we're swapping one
9 set of JAGs for another.

10 I don't think the results are going to be
11 different, so I don't think the victims are going
12 to expect -- and I don't think victims may even
13 expect that. I think what you say is what I've
14 also heard, which is that we don't care. It's the
15 perception of the system.

16 But the notion that results wouldn't be
17 different and we're not going to let some other
18 things be tried before we go to the, what I
19 consider, a rather large and dramatic to our
20 system, is a question that I have.

21 SENATOR GILLIBRAND: Well, other senators
22 have looked at this issue for decades, and even

1 Olympia Snowe said 10 years she tried to change the
2 system because everyone said the same thing then:
3 let's just try these reforms and see how it goes.
4 And she said that she regrets that she didn't get
5 more because the military continually asks to be in
6 charge. They keep saying we've got this, we've got
7 this, let us do this, we can fix anything, and they
8 keep failing.

9 So I just don't want one more victim to be
10 on our heads because we didn't do enough. I don't
11 want one more victim to have to suffer through the
12 current system and not trust her commander enough
13 to report her case.

14 Now, the other jurisdictions, we don't
15 have any statistics from them. I don't have the
16 statistics of how many rapes they have, how many
17 get reported, how many don't. That's not the
18 apples to apples comparison. The only apples to
19 apples comparison is that their militaries didn't
20 fall apart when this legal decision was taken away.
21 And Israel took it away in 1955, so it's not like
22 it's something that hasn't been tried and worked

1 well for existing militaries.

2 Now, of course, those militaries are
3 smaller than ours. They're not exactly the same.
4 I'm just asserting that this judgment doesn't have
5 to be within the chain of command for the commander
6 to be in charge. And arguably the commander is the
7 only one in charge because he's the only one
8 setting command climate. He's the only one
9 ensuring good order and discipline. He's the only
10 one who can create a climate where these rapes
11 aren't going to happen. He's the only one who can
12 protect the victims to make sure retaliation isn't
13 happening. And he's the only who can make sure
14 that the command climate is sufficient that they
15 can reported. He's going to have all those
16 responsibilities whether or not a case goes to
17 trial. And again, him pushing forward a case that
18 may not merit trial is not the solution either.
19 Again, justice is supposed to be blind. It's just
20 not pushing forward for pushing forward sake. It's
21 have somebody look at it.

22 Now, the reason why we've suggested this

1 solution is because it's what the victims have said
2 over and over and over again. In cases whether
3 they didn't report or in cases where they have
4 their own experience, they'll say the problem is
5 that our only decision maker is in the chain of
6 command. They know the victim. They know the
7 perpetrator. They have too many reasons to be
8 biased. So it's their suggestion.

9 So I wouldn't wait two years. I don't
10 think the numbers are going to go down that fast.
11 And in two years, let's say instead of 26,000 cases
12 reported, there's 20,000. Let's say there's
13 15,000. Again, it's not enough. So I feel like we
14 should do the kind of reforms that respond to what
15 the victims have asked for, create a transparent
16 and objective system that should be created anyway
17 for both victim's rights and defendant's rights.
18 We're passing up an opportunity to do something
19 meaningful now, and just putting it off until
20 later. And I think that's unwise. There will be
21 more crises. There will be more victims coming
22 forward.

1 BRIGADIER GENERAL (RET.) DUNN: I have a
2 question.

3 CHAIRWOMAN JONES: Yes?

4 BRIGADIER GENERAL (RET.) DUNN: Senator
5 Gillibrand, how do you see the -- in terms of
6 addressing sexual assault, the importance of the
7 prosecutorial function, which is what we seem to be
8 discussing primarily today, relative to developing
9 and really staffing and resourcing properly other
10 support systems for victims? You know, it seems to
11 me, you know, from my experience in 29 years in the
12 military that, you know, by the time you're talking
13 about a victim in a prosecutorial environment, you
14 are, you know, months down the road.

15 SENATOR GILLIBRAND: Right.

16 BRIGADIER GENERAL (RET.) DUNN: And that
17 the sort of encouragement to report and the --
18 having a kind of a safe place to do that is a
19 system that should be set up.

20 SENATOR GILLIBRAND: And we fixed that
21 part of the work --

22 BRIGADIER GENERAL (RET.) DUNN: That's

1 easy to access and is much --

2 SENATOR GILLIBRAND: Yeah. As part of the
3 work the committee did this year, they really put
4 forward a number of proposals that really do
5 protect the victim, give them assurances that
6 they're being heard, having a victim's advocate,
7 which was a pilot program, I believe, in the Air
8 Force, and assisting in all services in all cases I
9 think is incredibly meaningful and very helpful.

10 I think making sure victims -- so, for
11 example, in the recordkeeping department, which I
12 thought was very smart to address, the victim was
13 the one who had to say retain these records. In
14 many instances, a victim wouldn't want to do that
15 or he or she would be intimidated to do that.
16 Making it automatic what's in the underlying
17 legislation that the records will be retained. So
18 we -- if a perpetrator winds up being a recidivist,
19 that victim has time to go back later and say I'm
20 willing to make my record public because I just
21 heard this guy just did that to somebody else. So
22 a lot of the changes that we did do will be very

1 helpful and will create the system around and
2 devote the resources to that goal. And I think
3 that's incredibly helpful.

4 The one area where we don't have anything
5 in the underlying NDAA is the Article 32, as you
6 mentioned, which some of the problems of it just
7 came to light with this horrible case about the
8 students in the military academy and what happened
9 to the victim in that Article 32 proceeding. So I
10 suspect it'll be an area where we will work on to
11 try to improve because I think -- I don't think
12 it's addressed in the underlying bill right now or
13 certainly not addressed enough. So that'll be
14 another area we probably need significant work.

15 BRIGADIER GENERAL (RET.) DUNN: Thank you.

16 CHAIRWOMAN JONES: Senator Gillibrand,
17 thank you very much.

18 Senator McCaskill, welcome, and we're very
19 pleased to see you here today. Please take a seat.

20 SENATOR MCCASKILL: Thank you. I will
21 just take a few minutes, and then hopefully have a
22 chance to address some of the questions and maybe

1 even address some of the questions that you
2 proposed to Senator Gillibrand.

3 By way of explanation, I spent part of my
4 adult life in the courtroom as a prosecutor, and it
5 was at a time when there weren't a lot of women
6 prosecutors. And my boss thought it was a good
7 idea for me to handle all the sexual assault cases.
8 I'm sure Ms. Holtzman remembers those days when the
9 women were assigned the sexual assault cases. So I
10 have handled hundreds of rape cases in the
11 courtroom.

12 I don't think anyone in the Senate has
13 cried with more victims, talked to more victims, or
14 spent more time with victims than I have. I'm not
15 sure anybody in the Senate understands better the
16 challenges of these cases and the kinds of
17 challenges they represent.

18 I think that Senator Gillibrand and I have
19 the exact same goal, to hold commanders
20 accountable, to protect victims in a safe space,
21 and to encourage reporting so that justice can be
22 served. We have an honest disagreement about the

1 best way to achieve that result, and that revolves
2 around the simple question, do you remove
3 commanders from any decision point in any criminal
4 case that would be punished similar to a felony?
5 And I believe that is a mistake in terms of
6 commander accountability.

7 I believe that we are not likely to hold
8 commanders accountable for the environment, for
9 example, that the Panel member asked about what
10 happens in the early days after an assault, way
11 before an investigation has been completed and
12 prosecutors have made recommendations or JAGs have
13 made recommendations. What is that climate like?

14 And I would just ask all of you that have
15 spent time in the military -- and by the way, I've
16 spent hundreds of hours with JAGs since I've been
17 in the Senate. There has been some that have
18 commented in the press that senators should not be
19 talking to the military about this legislation. I
20 couldn't disagree more. I believe it's absolutely
21 essential that we continue to talk to the military
22 if we're going hold them accountable for the shared

1 goals that Senator Gillibrand and I have.

2 But I think if you're a victim and you're
3 returning to your workplace, that commander having
4 no say as to what happens to that case does not
5 encourage an environment of protection. If you
6 return to your unit and word gets out that this
7 happened and you've reported it, and some lawyer a
8 half a continent away, some JAG officer a half a
9 continent away is mulling over the case and whether
10 or not it's going to go forward. In which
11 environment will be the victim be more protected,
12 when the commander is still accountable for what
13 happens going forward or the commander no longer
14 has any role?

15 I believe the victim will be better
16 protected when the commander is still accountable
17 for the decisions that are going to be made, not
18 after a jury has made it decision. Those of you
19 who watched the hearing in June or have watched me
20 on the Armed Services Committee, somebody said that
21 I was coddling the military. Well, they haven't
22 been paying attention because I guarantee you that

1 nobody in the military thinks I've been coddling
2 them. But I do believe the environment would be
3 more protective for a victim keeping commanders'
4 accountability for the initial decision.

5 Encouraging reporting. With all due
6 respect to my colleague, I heard her in the Armed
7 Services Committee say that, in fact, that our
8 Allies did have an increase in reporting, and that
9 was a reason to make this change because there
10 would be an increase in reporting. In fact, it was
11 even cited that Israel had had an 80 percent
12 increase in reporting. Well, as it turns out,
13 that's not completely accurate because if you go
14 back over a four-year period, there wasn't a
15 meaningful increase in reporting. In fact, none of
16 our Allies have seen an increase in reporting. And
17 if our goal -- if this is going to be the magic
18 that is going to all of a sudden make victims feel
19 comfortable coming forward that the commanders are
20 removed, wouldn't we have seen an increase in
21 reporting in all of those jurisdictions?

22 During the period of time those changes

1 have been made in Allies' UCMJs and their military
2 justice systems, their reporting has not gone up at
3 all. Meanwhile in the United States, it's gone up
4 almost 100 percent in the same period of time. And
5 that's before we have enacted the historic and
6 major reforms that are in this bill. I can't
7 imagine what it would be like when I was
8 prosecuting rape cases if every victim had their
9 own lawyer. That's a luxury that we don't have in
10 the civil system. Victims don't get their own
11 lawyers in the civil system. They are in the
12 military system after this bill is passed. They're
13 going to have their own lawyer.

14 Imagine the difference that makes to a
15 victim, that from day one as she has reported this
16 crime, and, by the way, you all know because many
17 of you are experienced in military justice, how
18 many different places a victim can report outside
19 the chain. It's only one of five or six or seven
20 different options. Imagine the difference that
21 makes if that day or the day after all of a sudden
22 she's got somebody who's looking after her who can

1 explain the difference between the civil
2 jurisdiction and the military jurisdiction, who can
3 talk about how those decisions are made, and
4 restricted versus unrestricted reporting.

5 So anybody who thinks what we have done in
6 this bill is not going to make a major difference
7 protecting victims has not spent enough time really
8 looking at it. And I know that Kirsten agrees with
9 me on that.

10 I do think there is more work to do, and I
11 am -- I've been at this for a while, and I am
12 grateful to my colleague for the added emphasis
13 that both of us together on this subject have made,
14 and my other women colleagues. I think we have
15 made a difference, and I'm proud of that. But the
16 narrative that's being painted that this is victims
17 versus commanders does the subject matter a
18 disservice, because many victims don't agree that
19 removing the commander is somehow going to be the
20 insulation they need to provide the protection.
21 And we all -- I'm sure you all have talked about
22 the 26,000 number. I have chastised the military

1 for the way they've gone about getting that number.
2 It's sloppy. It's not accurate. It can't -- we
3 can't compare apples to apples and oranges to
4 oranges because all it asks for is unwanted sexual
5 contact. There's a big difference between a
6 forcible sodomy and unwanted sexual contact,
7 particularly when the person asking the question
8 isn't sure what the question means.

9 So I think we've got to get at the right
10 numbers. We've got to get victims protection.
11 We've got remove the commander from being able to
12 fool around after a jury has made its decision.
13 And we've got to realize that a JAG is a JAG is a
14 JAG, and, yes, JAGs are not judged on their
15 conviction rate, but neither were my prosecutors.
16 But guess what? I had to chastise some of them who
17 were turning down cases because they knew they were
18 going to be too hard to make, because they had had
19 a stellar record, and they were the kind of
20 prosecutors that were on a rocket ship to getting
21 promoted, and they knew that the more convictions
22 they had, or at least they thought that was going

1 to make a difference. And I had to chastise the
2 people who worked for me that we don't do that in
3 our office. This is about finding truth.

4 But if you think you can remove from a
5 prosecutor the consideration as to whether or not
6 they're going to win or not, you've not been in the
7 courtroom with one of these cases, because that's
8 impossible to completely remove from a prosecutor's
9 mind.

10 Now, a JAG that works for a commander is
11 going to make the same recommendation, I believe,
12 that a JAG that's going to work in Belvoir or
13 wherever they're going to put this unit. And we do
14 know this: over the last two years, there have
15 been almost 100 cases where prosecutors have turned
16 down the cases and commanders have gone forward.
17 So there's almost 100 women who would not have had
18 their day in court if a prosecutor was the last
19 place that the decision was going to be made. And
20 under the reform that Senator Gillibrand is, in
21 fact, embracing, that's the first and last place
22 that anything occurs.

1 So I am -- and I think it's, you know,
2 kind of the elephant in the room that this is for
3 me hard because the notion that I would ever be
4 advocating for anything that wouldn't be helpful
5 for victims in these cases is very hard for me.
6 It's hard for me politically. It's hard for me
7 personally. But I believe that we have an
8 obligation to hold these commanders' feet to the
9 fire, hold them accountable for the culture. And I
10 believe if we let them off the hook from any
11 decision making in this, we are not going to move
12 towards that goal as quickly as we would otherwise.

13 And I'd be happy to answer other questions
14 you have. Judge?

15 CHAIRWOMAN JONES: Yes, go ahead, Admiral.
16 Thank you very much, Senator.

17 VICE ADMIRAL (RET.) HOUCK: Senator, thank
18 you very much. And I was -- find particularly
19 compelling what you said at the very end about it
20 being hard for you because I think it's hard in the
21 same way. It's hard for the overwhelming number of
22 people in uniform to deal with the very same issue

1 and the suggestion that people in uniform do not
2 care about victims. So in that regard, people who
3 are wearing the uniform and someone like you who
4 has devoted your life to public service and
5 prosecuting these cases have the very same
6 perspective on these issues.

7 I also think that the interplay of the JAG
8 and the commander is critical for the very reason
9 that you said, because JAGs aren't perfect. And to
10 take your number at face value, 100 cases that went
11 forward because a commander pressed and moved
12 forward with the decision that a prosecutor on
13 their own may not have made. I don't take issue
14 with that at all. I mean, I think that's a very
15 credible illustration of the dynamic that goes on
16 when a JAG -- a forceful JAG interacts with a
17 commander and there's a give and take and there's a
18 back and forth, and out of that interplay comes the
19 best decision. And I've been wrong when I've
20 interacted with commanders and they've enlightened
21 me on perspectives. And I didn't back away because
22 I was intimidated. I backed away because after

1 listening to them, because they were right. And
2 that's -- I think that's the kind of thing that
3 you're talking about. So from my standpoint, we'd
4 lose all that if it's all given to a prosecutor who
5 do this -- who does this on their own.

6 The one -- after those comments, one
7 question that I want to ask, and I think I know the
8 answer, but I would ask anyway. Are you aware of
9 any empirical data that shows that reporting will
10 go up if commanders are taken out of the system?

11 SENATOR MCCASKILL: No. And furthermore,
12 I'm not aware of any data where JAGs have said to
13 go forward on cases and commanders have refused,
14 you know. And that's the essence of this argument.

15 I thought it was interesting when I was
16 listening to Senator Gillibrand, she first said,
17 well, they're going to say whatever the commander
18 wanted, and then when you pushed back and said,
19 well, no, they're not, she said, no, they're not,
20 but, you know. So if they're not, then I know for
21 a fact then the commanders are, in fact, following
22 the recommendations, so this is not a problem.

1 We can't find cases where JAGs have said
2 go forward and commanders have refused. We can't
3 find them. And I think during all of this, those
4 cases would've come forward by now because we've
5 got anecdotal information about a lot of other
6 cases, but we don't have a body of data that would
7 indicate that commanders are refusing the
8 recommendations of their JAGs because they're
9 trying to protect someone that is in their command.

10 VICE ADMIRAL (RET.) HOUCK: Thank you.

11 MS. FERNANDEZ: Madam Chair, over here.
12 Madam Chair?

13 CHAIRWOMAN JONES: Okay. Where are you?

14 MS. FERNANDEZ: Over here.

15 CHAIRWOMAN JONES: Sorry, Mai.

16 MS. FERNANDEZ: That's okay.

17 CHAIRWOMAN JONES: Go ahead.

18 MS. FERNANDEZ: Thank you, Senator. I
19 have a question about the example that you gave
20 when you started your testimony. You said that if
21 you had a victim that was with a commander and the
22 decision was being made half a continent away, that

1 that commander wouldn't have anything left at his
2 or her disposition to really help that victim.

3 Earlier today we talked a lot about the
4 commanders still retain discipline over their
5 troops. Isn't it true, though, that they could
6 move the victim, move the perpetrator, that there
7 could be administrative sanctions that could be
8 taken by that commander short of prosecution in the
9 interim so that that victim did not feel
10 disempowered, their safety would be in peril, all
11 of that. That there's one thing about --
12 prosecution is almost -- it's an extreme in some
13 ways, and there's a whole bunch of other things
14 that could also -- that are still within the power
15 of the commander, and that's not being removed.

16 SENATOR MCCASKILL: No, absolutely. In
17 fact, the reforms that we put in the bill not only
18 -- because I believe very much -- in fact, I
19 brought these reforms to Lindsey Graham, and he
20 said, you know, I agree with you, let's put that
21 in, and we did. From now on, the victim will have
22 the choice as to whether she is removed and goes to

1 a different unit or that the perpetrator be
2 removed. And we put that choice with the victim.
3 That is a reform that's in the underlying bill.

4 And I don't mean to imply that by removing
5 the commander you remove any tools he has to
6 protect that victim. But ultimately, it is not as
7 much his problem anymore or her problem anymore,
8 because this is a decision in terms of what's
9 really going to happen to the perpetrator and what
10 justice is going to happen. This is a decision
11 that's far removed from his unit now.

12 MS. FERNANDEZ: Well, isn't it actually
13 the opposite? I mean, you've got a question about
14 prosecution, and that lies here and that's a legal
15 decision. But as you yourself stated, that person
16 is still living with the perpetrator or living with
17 the victim, and the commander is going to have
18 figure out that situation.

19 So in some ways, all you're removing is
20 the prosecution, but the rest of it lies there with
21 the commander.

22 SENATOR MCCASKILL: I agree with what

1 you're saying, and further we've made retaliation a
2 crime, which also helps. We've done that in the
3 underlying bill. But I would say that if the
4 commander knows that they have no stake in whether
5 or not the case goes forward, that it's not their
6 call anymore, I think it changes the way they view
7 the problem. I think over time it could. You
8 know, yes, they could move the perpetrator. Yes,
9 they could move the victim. Yes, they would be
10 responsible that it was reported if there were
11 crimes of retaliation. But I do think it's
12 different if you completely remove. And it's not
13 just for this crime, it's for all felonies.

14 MS. FERNANDEZ: Thank you.

15 PROFESSOR HILLMAN: Senator McCaskill?
16 Far left. The way you framed this is very helpful
17 in that we're certainly moving towards the same
18 objectives. My question for you is how you think
19 we can do better at what you said is the key,
20 holding commanders accountable? Do we hold them
21 accountable for the rate of conviction? Do we hold
22 them accountable for the rate of prosecution

1 however we might discern that? Do we hold them for
2 the accountable for the incident based on more
3 rigorous surveys that we do that would follow up
4 and get us better data? Do we prosecute them? Do
5 we remove them command?

6 I don't think this has been something, as
7 Admiral Houck has pointed out many times here, that
8 commanders have not cared about in the past. But
9 what we've done has not made them accountable, and
10 I don't see how -- I don't see what the proposals
11 are going forward that would hold them more
12 accountable than in the past.

13 SENATOR MCCASKILL: Well, we're working on
14 that, and we're also working on 32. You know, 32
15 is a weird amalgamation for those of us who have
16 spent time in a court room on the civil side. It's
17 a weird -- you know, it's a combination trial run,
18 trial, discovery, deposition, preliminary hearing,
19 grand jury with a different set of rules for
20 civilian victims and military victims, which
21 certainly I think your committee should take a look
22 at as to what -- why in the world does that make

1 any sense.

2 And we're looking at all of that. And I
3 just had another series of meetings with one of --
4 a very, very experienced defender and JAG just last
5 week going through the whole 32 and looking at
6 that, and talking about how we make commanders
7 accountable.

8 I think we have some ideas that might
9 work, and we're hopeful that we can bring them to
10 the floor when have the debate on this bill. But
11 we do have to be careful that we don't artificially
12 get commanders in a position they don't want
13 reports to come forward, or that they're rushing to
14 prosecute cases where there isn't sufficient
15 evidence, but at the same time, hold them
16 accountable for these victims feeling that they are
17 going to be protected when they do come forward.

18 I will just tell you that in my experience
19 victims don't come forward for a lot of different
20 reasons. And anybody who thinks anything that we
21 do is going to be like turning a light switch on
22 victims coming forward, I mean, this is the most

1 traumatically painful and personal moment these men
2 or women will ever have in their lives. And coming
3 forward and going through what you have to go
4 through to air it all in public is an incredibly
5 difficult thing.

6 And we can say it's because of the
7 commanders, they don't trust the commanders. We
8 can say because the investigators aren't good. We
9 can say if we change the system, maybe because it
10 takes too long, because this obviously in terms of
11 the way our system works in the military, you know,
12 our allies aren't trying cases in Afghanistan. We
13 try more sexual assault cases at Fort Hood every
14 year than is tried in the entire Israeli Army, you
15 know.

16 So, you know, it is -- it would take a lot
17 longer because you're going to have people far
18 away, and unless you put the units on every single
19 base and in every single contingency operation and
20 in every single place in the globe that we men and
21 women who are making the ultimate sacrifice for us.

22 CHAIRWOMAN JONES: Liz?

1 CONGRESSWOMAN HOLTZMAN: Senator
2 McCaskill, I just want to say thank you very much
3 for your leadership. Without your work, we
4 wouldn't be in this place. I don't mean just this
5 Panel, but where the country is now, which is
6 really focused on a problem that should've been
7 paid attention to. You were dealing with this
8 problem years and years ago, and so was I.

9 SENATOR MCCASKILL: I remember the days
10 before rape shield statutes.

11 CONGRESSWOMAN HOLTZMAN: Right. Well, I
12 wrote the Federal ones.

13 SENATOR MCCASKILL: I know you were very
14 involved.

15 CONGRESSWOMAN HOLTZMAN: So we've come a
16 long way, and your work has been extremely
17 important here. And I think I'm really grappling
18 with what to do about this. I don't think I agree
19 with the last comment you made fully that -- I'm
20 not sure there's a single silver bullet here.

21 But along those lines, I just wanted to
22 ask this. Granted that that's the case, that we

1 don't know whether, you know, changing the
2 commander will make a difference, or changing
3 Article 60, or, you know, having lawyers for every
4 victim, and all the things suggesting that
5 commanders be held accountable for the climate and
6 so forth.

7 But if -- part of, I think, what you're
8 trying to do in the Senate is to send a signal to
9 everybody in the military -- our troops, the
10 families, the American people -- that we're really
11 trying to change a system that has not served our
12 troops our public and sense of justice. If you
13 make a change of this magnitude, wouldn't that help
14 or what's your answer to the view that making a
15 change of this magnitude might help to strengthen
16 that signal, that business as usual is not going to
17 happen anymore?

18 I mean, it may be that we're just jumping
19 from the frying pan into the fire. I'm not going
20 to disagree. But that's my question to you. Does
21 this help send a transformative signal to our
22 troops, to the American public that business as

1 usual isn't going to go on? And is that enough, or
2 should we be sending signals? Should we be doing
3 more than sending signals? I'd just throw that out
4 to you for you to comment.

5 SENATOR MCCASKILL: Well, I am blessed to
6 have a front row seat to watch the reforms that are
7 going to be enacted this year put into place, and
8 I'm sure many of the recommendations that you will
9 make be put into place.

10 I am like a dog with a bone on this issue.
11 I'm not going anywhere. And there are going to be
12 some major changes in how these cases are handled
13 in terms of the way victims are treated, the
14 services they get, and the investigations that
15 occur. I believe that we will see an increase in
16 reporting and that will be -- as always, the curse
17 of doing well in this area is it appears there's
18 more of it because reporting goes up, but I believe
19 we will see an increase in reporting, which, in
20 this instance, will be a very good sign.

21 I don't know that changing the law for
22 purposes of sending signals is important as

1 changing law to make a real substantive difference
2 in the essence of the problem without doing harm
3 with unintended consequences. I believe the
4 changes we're making are going to make a
5 substantive difference in terms of how these cases
6 are handled. I believe -- honest disagreement --
7 that the change being advocated by Senator
8 Gillibrand could have harmful, unintended
9 consequences with fewer prosecutions and more
10 retaliation for the victim, and no greater
11 reporting.

12 CONGRESSWOMAN HOLTZMAN: Just one other
13 question. I don't know whether you addressed this
14 in the Senate bill, but I know that Article 60 is
15 -- that's been changed. What about the commander's
16 right to pick the, in essence, the jury? What's
17 happened to that, and what do you think about that?

18 SENATOR MCCASKILL: Well, in talking to a
19 lot of the prosecutors, you know, there is a voir
20 dire of sorts, and I think that the rate of
21 conviction would indicate that if the commanders
22 are trying to stack the juries to let these guys

1 off the hook, which seems to be the theme that
2 we're pushing back against, that the commanders
3 don't care about this, the commanders don't want to
4 get to the bottom of it, the commanders don't care
5 if rapists go free, the commanders don't want to
6 take these cases seriously, I think we would see it
7 in the conviction rate. The conviction rate in the
8 military is actually much higher than it is in
9 civilian courts.

10 So I don't see that the way that they are
11 picking juries has resulted in -- now, there might
12 be a defender JAG that would come up here and say
13 that it's not the right to do it because the
14 conviction rate is so high. And I've never been on
15 that side of the table. I respect people who have,
16 but my passion is for putting people who commit
17 rape and sodomy in prison. So I'm not as worried
18 about the way the juries are being selected, but I
19 think it's something we've got to continue to
20 monitor and look at. By the way, in the reforms,
21 you got to look and see who's picking the juries.

22 CONGRESSWOMAN HOLTZMAN: Okay. Thank you.

1 BRIGADIER GENERAL MCGUIRE: Senator
2 McCaskill, I, too, had a question, and thank you
3 very much for everything that you're doing as well
4 on behalf of our victims, but also in ensuring some
5 sort of balance as well in the response to that.

6 I just wanted to share with you, I was on
7 the ground floor in establishing the Army Suicide
8 Prevention Task Force. And in 2008, when it came
9 to our attention that suicides were on the rise,
10 there was a great deal of public interest and
11 concern about the care that we had for our soldiers
12 and what we were doing in order to -- you know,
13 what was the cause of all these suicides.

14 Now, several years later, we still have
15 suicides and they're on the rise. But what's
16 interesting is the civilian community has now come
17 to admit they, too, have a problem with suicides.
18 And I sense that given the concern of sexual
19 assault in the military, that over time, because
20 I'm not sensing the same hue and cry within the
21 civilian community. There's also a problem in the
22 civilian community regarding sexual assaults, and

1 that any changes that we make now in response to
2 what we clearly have identified for years and are
3 just now acting on is going to make some sort of an
4 effect or will it really change anything in the
5 long term as we continue to understand and get to
6 know this issue.

7 I just wanted to share that, but also get
8 an idea from you what you're sensing from the
9 civilian community as well in terms of being
10 responsive to victims.

11 SENATOR MCCASKILL: Well, I think we have
12 issues, and I know the military has consulted with
13 college campuses, and I think we're going to
14 continue to look at that issue. I've already begun
15 work on that issue. In fact, in my State this
16 morning, the newspaper in our major college town
17 reported absolutely unacceptable statistics about
18 sexual assault of young women in college. And so,
19 yes, this is a problem just like suicide. It's a
20 societal problem. It's not just a military
21 problem.

22 I think that the problem that the military

1 had, because it was male dominated and remains male
2 dominant -- it was once exclusively male; it's
3 still male dominated -- that the first response to
4 this issue was, well, we need to get these guys to
5 quit drinking together and have a buddy system, and
6 we need to make sure that women are not walking
7 alone when they've come back from partying. And it
8 was almost a protective thing when this is not a
9 crime of lust. This is a crime of violence, and
10 these are predators. And the military has an
11 special challenge because you move around in the
12 military.

13 So if we don't keep these records, if we
14 don't track these predators, if we don't get these
15 unrestricted reports filed, at least to the extent
16 that the victim allows us to put it in a record for
17 the purposes of the military police being able to
18 see it, it's just a special set of challenges that
19 need to be addressed.

20 And I will be honest with you. When I
21 read that letters by that commander after he
22 overturned the *Aviano* case, I was stunned that he

1 thought it was relevant that she hadn't taken a
2 ride home, that he thought it was relevant that
3 they appeared happily married. Clearly there's an
4 issue there. And, you know, I agree that the vast
5 majority of JAGs, and, frankly, the vast majority
6 of the commanders are trying hard to get at this.

7 But there's still some ignorant commanders
8 out there that somehow think this is about a woman
9 coming onto a guy or a guy coming onto a woman,
10 and, you know, got a little frisky, and got a
11 little out of hand. That's not what this is. And
12 I do think this episode -- I told the victim from
13 *Aviano* what a service she had done by coming
14 forward in a very difficult factual case. I mean,
15 no question about it. I'm not sure how many
16 conflict of interest prosecutors or civilian
17 commanders would've allowed that case to go
18 forward, commanders being the person in charge of
19 the prosecutor's office.

20 But it exposed some ignorance at the
21 commander's level that we've got to keep after
22 because it was infuriating that he felt -- and,

1 frankly, it was because of that whole 60 process
2 where you've got all that clemency stuff where all
3 the stuff that was excluded under rape shield all
4 came to his desk the minute the trial was over.
5 Yikes, that's not good. So that's all getting
6 changed.

7 And, frankly, one of the things I regret
8 the most is in the honest disagreement on whether
9 commanders should be removed entirely, I'm afraid
10 the American people don't realize the major changes
11 and reforms we've made together, the honorable,
12 hard-working, passionate Senator Kirsten
13 Gillibrand, me, and a lot of other people in the
14 Senate, including some of our male colleagues. And
15 there's this disagreement, but the underlying body
16 of work we've done is going to make a real
17 difference for victims, and we all should be very
18 proud of that.

19 MR. BRYANT: I have a question for the
20 senator.

21 CHAIRWOMAN JONES: Mr. Bryant?

22 MR. BRYANT: Senator, thank you for

1 coming. Would it give us any more confidence in
2 these changes if -- I assume it would take enabling
3 legislation -- if pilot programs were instituted
4 and we took Army bases -- Fort Bragg, which is the
5 largest Army base that we have, and, say, Fort
6 Knox, and I'm using hypotheticals, Langley Air
7 Force Base and Eglin Air Force Base, and a couple
8 of the Navy bases, the Coast Guard, naval district,
9 anyway so we cover everybody -- and institute a
10 pilot program at major institutions with some of
11 these changes. Would that give us more confidence
12 in the changes or in the reforms as opposed to
13 saying, okay, all branches of the service are now
14 going to do this, boom?

15 SENATOR MCCASKILL: Well, let me say this.
16 The changes that have been embraced in the
17 underlying legislation, which was voted on by a
18 wide bipartisan margin in the Armed Services
19 Committee, I am not interested in them being part
20 of a pilot program.

21 MR. BRYANT: All right.

22 SENATOR MCCASKILL: I am only interested

1 in those changes getting enacted and signed by the
2 President into law and becoming effective as
3 quickly as possible.

4 MR. BRYANT: But do you think it would
5 give those who are questioning the efficacy of the
6 changes more confidence if we had pilot programs or
7 no?

8 SENATOR MCCASKILL: Well, we had a pilot
9 program on victim advocates for -- victim lawyers
10 for -- that was done in the Air Force, and it's one
11 of the reasons we're taking it across all the
12 branches because it's made a difference in the Air
13 Force. We're seeing an increase in reporting.
14 We're seeing victims with a much higher sense of
15 confidence that the system is going to be
16 responsive to their concerns and their needs.

17 MR. BRYANT: Yeah, the Navy has already
18 instituted their program in that regard, too.

19 SENATOR MCCASKILL: They have. And,
20 frankly, a lot of the things you all are
21 considering, you know, Secretary Hagel is pushing
22 the military very hard, and, frankly, the

1 commanders are, too. You know, I think General
2 Amos and General Welsh and, frankly, General Welsh
3 has asked me to come and speak to the three-stars
4 about this issue. And believe me, I won't -- that
5 won't be a session where I'll be coddling any of
6 the three-stars, just for the record.

7 So I'm not big on -- if there's wide
8 agreement that these are reforms that need to be
9 done, I'm not big in slowing them down with a pilot
10 program, you know. If I'm completely dead wrong,
11 and reporting doesn't go up, and we get better
12 victim satisfaction survey about how they are
13 accessing services and help and confidence in the
14 system and that they will be treated fairly and
15 respectfully, and there will be no retaliation, you
16 know. I'm not going to ever say never about a
17 pilot program for looking at having a prosecutor in
18 charge of all the decision making in the case. I
19 think we'd have to work on how we did it. It
20 couldn't just be the prosecutor. You'd have to
21 have it be a little more balanced in terms of the
22 way it was proposed.

1 MR. BRYANT: Thank you.

2 CHAIRWOMAN JONES: Anything further?

3 (No response.)

4 CHAIRWOMAN JONES: Senator, I can't thank
5 you enough for coming tonight, staying as late as
6 you have, and giving us all your time.

7 SENATOR MCCASKILL: Oh, thank you for your
8 patience in staying this late. And by the way,
9 thank you to all of you for doing this. I can tell
10 everyone is taking it very seriously and that that
11 there's a lot of knowledgeable people on the Panel.
12 And you're helping your country with a problem that
13 all of us want to eradicate. So thank you very
14 much.

15 MS. FRIED: Thank you. I'd like to close
16 the meeting for the evening.

17 (Whereupon, at 5:45 p.m., the public
18 hearing was concluded.)

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