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RESPONSE SYSTEMS TO ADULT SEXUAL
ASSUALT CRIMES PANEL

PUBLIC SESSION

Wednesday,
September 25, 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
3 HONORABLE BARBARA JONES
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 MIA FERNANDEZ
12 MARIA FRIED, Designated Federal Official to the
13 Response Systems Panel
14 COLONEL PATRICIA HAM, USA, Staff Director
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P R O C E E D I N G S

(9:10 a.m.)

1
2
3 CHAIRWOMAN JONES: Go ahead, Colonel.

4 Thank you.

5 COLONEL HAM: Good morning. Welcome to
6 the second day of this public meeting of the
7 Response Systems for Adult Sexual Assault Crimes
8 Panel. I'm Patricia Ham, a colonel in the United
9 States Army. I'm the staff director.

10 Just a couple of brief administrative
11 matters before turning things over to Judge Jones,
12 the Panel chair. We have one request for public
13 comment, and public comments will be this afternoon
14 at 4:45. The public comments have already been
15 provided to the members.

16 Photographs are permitted, but please
17 don't take them while the presentations are going
18 on. Please make sure all electronic devices are
19 off or silenced. And maybe most importantly, the
20 restrooms are at either end of the hallway.

21 We're going to begin with five-minute
22 opening statements, and I'll turn it over to you,

1 ma'am.

2 CHAIRWOMAN JONES: All right, thank you.
3 As I mentioned yesterday morning, our topic this
4 morning are really -- involves the combination of
5 the commander and the staff judge advocate in our
6 current military justice system, and so we have
7 assembled this panel to hear just that. And I'd
8 like to begin with General Linnington and Colonel
9 Bradley, if I can find you. There you are.

10 LIEUTENANT GENERAL LINNINGTON: Thanks,
11 Your Honor, and good morning, everyone. My name is
12 Lieutenant General Michael Linnington. I'm
13 currently assigned as the Military Deputy to the
14 Undersecretary of Defense for Personnel and
15 Readiness. But for the purposes of this Panel, I'm
16 here as a recent commander who was just a general
17 court martial convening authority when I served
18 just a few months ago as the commander of the U.S.
19 Army's Military District of Washington.

20 I'm also pleased to be joined this morning
21 by Colonel Corey Bradley, United States Army. He
22 was the Military District of Washington's staff

1 judge advocate during my time in command and was my
2 advisor on all UCMJ issues.

3 On a personal note, I've been in the Army
4 for 33 years. I'm West Point graduated, married
5 with two children. My son, Michael, is an Army
6 captain currently in Izmir, Turkey, and my daughter
7 works locally for Navy Federal Credit Union. My
8 wife is also an Army veteran, West Point graduate
9 from the class of 1981, the second year that had
10 women at the Academy.

11 Today I'd like to provide my observations
12 and perspectives on the Army's application of the
13 UCMJ, specifically the role and effectiveness of
14 Army commanders in preventing and responding to
15 sexual assault, as well as the unique role and
16 relationship between the senior commander and his
17 judge advocate. Finally, if time allows, I'd like
18 to provide my thoughts on the adequacy of systems
19 and procedures to support victims of these horrible
20 crimes.

21 As I begin, I must admit, however, that
22 I'm personally and professionally embarrassed by

1 the problem our Army -- our military and, I
2 believe, frankly, our entire culture -- our entire
3 civilian society has with regard to sexual
4 harassment and sexual assault, as I believe it is
5 an anathema to the values we hold dear and to the
6 sacred responsibilities we have as commanders in
7 providing for the health and welfare of our
8 soldiers that serve in uniform.

9 Sexual harassment and sexual assault
10 breaks down all bonds of trust in units. I believe
11 it significantly degrades unit effectiveness, and
12 it erodes the very confidence our soldiers have in
13 each other, and especially their leaders, if it's
14 not dealt with quickly, fairly, and effectively.

15 As the recent commander of the U.S. Army's
16 Military District of Washington, my command
17 responsibilities stretched geographically from Fort
18 Hamilton, New York, to Fort AP Hill in Virginia,
19 and for UCMJ purposes, included more than 400
20 separate Army units, including many with widely-
21 dispersed footprints. To assist in my UCMJ
22 authorities, Colonel Corey Bradley was assigned as

1 our staff judge advocate. Corey is a gifted
2 officer, incredibly smart, articulate, and
3 experienced. He was my right-hand man for sure,
4 and his knowledge of the UCMJ, in my opinion,
5 rivals anyone in uniform. I was fortunate to have
6 him as the SJA for the Military District of
7 Washington, and Corey led a fairly robust team of
8 professionals hand selected for the wide range of
9 responsibilities for our unique command.

10 As an Army officer, I've commanded at
11 every level, from company level as a captain in
12 Berlin, West Germany, where I was responsible for
13 180 soldiers, to battalion command as a lieutenant
14 colonel in the Republic of Korea, with 750
15 soldiers, and as a brigade commander at Fort
16 Campbell, responsible for a brigade combat team of
17 3,500 which doubled in size during my deployments
18 to both Iraq and Afghanistan.

19 Recently, as a two-star commander of the
20 Military District of Washington, I was responsible
21 for thousands of soldiers, over a multi-state
22 footprint, which also expanded significantly like

1 brigade command whenever the Joint Task Force was
2 formed for national special security events, like
3 state of the Union or an inauguration. And in
4 those cases, our task force expanded to more than
5 5,000, and included service members from all of the
6 services assigned here in D.C. and beyond.

7 All but nine of my 84 months of command at
8 the 0-6 level and below, brigade command team level
9 and below, were conducted overseas in Berlin,
10 Korea, Iraq, Afghanistan, and most of them -- many
11 of them deployed. And accordingly, I see
12 tremendous value in having a commander-centric,
13 fully deployable military justice system. Despite
14 my assignments away from the United States, I was
15 never away from the system of justice that enabled
16 me to do my job in command and do it in a way that
17 took into account the unique circumstances facing
18 my soldiers and the missions we were assigned.

19 Operationally, I have witnessed firsthand,
20 from June '09 to March '11 when I was assigned
21 recently in Afghanistan, and certainly when I was a
22 brigade commander in both Iraq and Afghanistan, the

1 advantages U.S. commanders had in making use of the
2 military justice system that affords investigation,
3 prosecution, and adjudication cases from a deployed
4 footprint, while affording the military justice
5 system access to witnesses, trial attorneys
6 representing both sides, and an impartial judge,
7 and, if necessary, a military jury.

8 Some of our allies that relied on
9 independent civilian adjudication of high profile
10 or sensitive cases had to return their service
11 members and witnesses, in many cases, back to their
12 home countries, making for what, I believe, was an
13 inefficient, costly, and less effective system for
14 dealing with these unique cases. More importantly,
15 in my opinion, it made for tentative actions on the
16 battlefield or on decision making in general, which
17 I'd be happy to address in question and answer.

18 As a commander at all levels, my top
19 priorities were mission accomplishment, readiness
20 of our soldiers, and the welfare of them and their
21 families. To this end, commanders must establish
22 and enforce standards of behavior and standards of

1 performance for the unit members to adhere to.
2 Commanders lead by example in living these
3 standards, and must hold accountable those who
4 choose to violate or fall short of those standards.
5 This system of accountability led by the commander
6 is essential to mission accomplishment, unit
7 readiness, and the health and welfare of the entire
8 military family.

9 One of the key accountability tools is, in
10 fact, I believe, the military justice system. As
11 the commander of the Military District of
12 Washington, I fully supported the Chief of Staff of
13 the Army's number one priority and our Army's five-
14 pronged approach to eliminating sexual assault from
15 our Army, which I'm sure you're all familiar: one,
16 preventing offenders from committing sexual crimes,
17 and when crimes are committed and providing care
18 and protection for the rights of the survivors,
19 especially their right to privacy; two, ensuring
20 that every allegation of sexual assault and sexual
21 harassment is thoroughly and professionally
22 investigated, and that appropriate action is taken;

1 three, manage responsibilities for a positive
2 command climate, free from intimidation,
3 harassment, innuendo, and where the very best can
4 be brought out in all those we lead; fourth,
5 holding individuals, units, and organizations
6 accountable for the behaviors, an important aspect
7 of eliminating sexual assault, and we should begin,
8 I believe, to consider even doing more in that
9 accountability process; and lastly, it's critical,
10 I believe, that we do keep commanders involved and
11 at the center of solutions to combatting sexual
12 assault and harassment. Increasing commander
13 involvement and accountability is key to solving
14 this problem.

15 And now, I'd like to spend just a minute
16 to talk about the role of the commander and his
17 staff judge advocate. I was blessed as a
18 battalion, brigade, and two-star commander with
19 excellent, well-trained, well-educated, and
20 experienced staff judge advocates, like Corey
21 Bradley. Although Corey and I didn't always view
22 cases with the same perspective, I could always

1 count on Corey to provide the very best legal
2 advice, unvarnished and free from influence, except
3 by the laws of our military. For example, Corey's
4 legal opinion may have been that a certain case
5 warranted alternative disposition, like
6 administrative separation in lieu of court martial,
7 but from my perspective, it may have been more
8 important that the case proceed all the way through
9 to court martial.

10 Colonel Bradley advised on specific cases,
11 but also continually updated me on changes in the
12 law, refreshed my memory on instruction I received
13 at the Pre-Command Course and at the Senior Officer
14 Leadership Course, Senior Officer Legal Orientation
15 down in Charlottesville. And I can say honestly we
16 never left our weekly or sometimes twice a week or
17 even three times a week meetings without both of us
18 having our say. And Corey is persistent in that
19 regard. And I never left without explaining the
20 rationale for my decisions I made with regard to
21 the course of action the command would pursue on
22 the cases that Corey brought in for disposition.

1 There were times when Colonel Bradley
2 advised and I pursued criminal cases on cases we
3 either knew would not be pursued by criminal --
4 civilian counterparts, or where we knew there might
5 be a difficult time getting a conviction by a
6 military court. One case in particular that
7 happened recently while I was still in command
8 obviously was a soldier had pled guilty to child
9 sex assault in a civilian criminal court and was
10 given a suspended three-year sentence and returned
11 to the Army. And while pending discharge from the
12 Army, the soldier sexually assaulted another child.
13 And the civilian prosecutors wouldn't take the case
14 up, so we ended up prosecuting him accordingly.
15 Our charges led to his conviction for sexual
16 assault, and he was confined for 22 years from the
17 military judge.

18 Commanders are central to our multi-
19 disciplinary approach in establishing a climate of
20 dignity and respect, which enables enforcement of
21 standards across our formations. Commanders are
22 also responsible for establishing standards of

1 behavior, enforcing those standards, and holding
2 people accountable in meeting them. Commanders are
3 also responsible and in the best position, I
4 believe, to care for soldier victims. While
5 disciplining offenders is one responsibility, a
6 commander is also responsible for the health and
7 welfare of victims, and I take that responsibility
8 very seriously. All of our leaders at every level
9 in our profession must be held accountable for
10 preventing and responding to sexual assault in
11 their ranks and under their commands. And that's
12 what I believe separates us as professionals.

13 Strengthening the commander's role and
14 holding our commanders accountable is the best way
15 to solve sexual harassment and assault in our
16 ranks. If commanders are no longer accountable,
17 then they are less effective, I believe, in making
18 the cultural change that will sustain a fix to this
19 problem. They must also be informed on all
20 prevention and response efforts, and they must
21 exemplify the highest standards of behavior we
22 expect in order for our actions to result in real

1 change.

2 In closing, the problem of sexual assault
3 in the military is complex, and, indeed, I believe
4 there's no easy solution or no easy answers in
5 solving these complex issues. That is why I
6 believe the Department's multi-pronged approach is
7 necessary, focusing on a combination of prevention,
8 education, and accountability, not just for
9 offenders, but for commanders who fail to establish
10 a healthy command climate of dignity and respect.

11 Your Honor, thank you for your time, and I
12 look forward to your questions and that of the
13 Panel.

14 CHAIRWOMAN JONES: Thank you, General.
15 I'll hear from you, Colonel Bradley.

16 COLONEL BRADLEY: Yes, ma'am. Good
17 morning, ladies and gentlemen. I'm Colonel Corey
18 Bradley, and as General Linnington said, I was the
19 staff judge advocate for the Military District of
20 Washington in my last job. I believe you have my
21 bio. I don't have any prepared statements, but I
22 would share with you that I've been a judge

1 advocate for 24 years, advising commanders at every
2 level. I've been a prosecutor in combat. I've
3 been a supervisor of defense counsel, of
4 prosecutors for the government, in two different
5 positions, both in Germany and also here in
6 Washington, D.C. I've taught at the Army's JAG
7 School, and my wife is also a judge advocate and
8 has served for about 20 years. And so, I look
9 forward to your questions, and I appreciate the
10 opportunity to answer them today. Thanks.

11 CHAIRWOMAN JONES: Thank you, Colonel.
12 For preliminary statements then, I'd like to move
13 next to Admiral Smith, Captain Harrison, and
14 Commander Hutchison.

15 REAR ADMIRAL SMITH: Thank you, Your
16 Honor. Well, good morning. I'm Rear Admiral Dixon
17 Smith, Commander of Navy Region Mid-Atlantic, and
18 I'm joined today by Captain Dave Harrison,
19 Commanding Officer, Navy Region Southwest, Regional
20 Legal Service Office, and also Commander Frank
21 Hutchison, who previously served as the staff judge
22 advocate in Navy Region Mid-Atlantic. And thank

1 you all for this opportunity to discuss with you
2 the role of the commander in military justice and,
3 in particular, the commander's close working
4 relationship with experienced judge advocates who
5 serve in varying roles from the prosecutor to the
6 staff judge advocate.

7 As commander of the Navy Region Mid-
8 Atlantic based out of Norfolk, Virginia, I provide
9 coordination of base operating support functions
10 for operating forces throughout a region that spans
11 from Maine to North Carolina. My previous commands
12 include commanding officer of USS Solomons, a
13 guided missile destroyer, Commander, Naval Base San
14 Diego; Commander, Navy Region Hawaii; Commander,
15 Navy Surface Group Middle Pacific; and Commander,
16 Navy Region Southwest. Prior to each of these
17 command positions, as well as during my prospective
18 executive officer and flag officer training, I
19 attended courses on leadership and the law. In
20 addition, annual commanders conferences and ongoing
21 local training provide regular and up-to-date
22 courses that include legal briefs and education.

1 In my career, I have been a special court
2 martial convening authority, and I am now in my
3 third tour as a regional general court martial
4 convening authority. Currently, I exercise general
5 court martial convening authority over soldiers in
6 the Mid-Atlantic Region. As a convening authority,
7 it is my responsible to determine the level of
8 disposition for a case, and as a general court
9 martial convening authority, it is to determine
10 disposition for felony-level offenses, including
11 those of sexual assault that are forwarded to me
12 with recommendations from my staff judge advocate
13 for trial by general court martial.

14 I am also assigned qualified -- I also
15 assign qualified members to a court martial and
16 determine what, if any, pre-trial agreement is
17 acceptable when an accused elects to plead guilty.
18 These decisions are always made with the advice of
19 legal counsel, both from the prosecutor and my
20 staff judge advocate, and with careful
21 consideration of the effect of every decision on
22 good order and discipline and in the interest of

1 justice. I also consider input from the victims on
2 various offenses if they choose to provide it.

3 During my career, I have worked with a
4 number of staff judge advocates, and I value their
5 advice that combines with my experience and
6 expertise and oversight to resolve each and every
7 offense with a mind to justice, due process, and
8 the victim's best interest. I believe a
9 commander's role is more than that of a convening
10 authority. Through training and experience, a
11 commander is charged with maintaining the war
12 fighting capabilities of those who serve under him
13 or her, and whose efforts -- and his efforts
14 support that requires good order and discipline and
15 the maintenance of a command climate that
16 encourages the very best of every man and woman in
17 the commander's charge.

18 Having the responsibility to ensure
19 accountability of those under my command is but one
20 role that I have as a commander. Commanders are
21 the ultimate -- are ultimately responsible for the
22 development, readiness, and performance of the men

1 and women in their units. Commanders must be
2 afforded every tool and every opportunity to mold
3 and shape that unit into the very best the service
4 has to offer. The tools for completing that task
5 are honed in the commander and demonstrated not
6 only in ensuring good order and discipline, but in
7 a commander's response to a violation of the rules
8 and laws that govern a unit both in peace and at
9 war.

10 While some offenders will commit crimes
11 regardless of the command and climate, the failure
12 to maintain good order and discipline and establish
13 a positive command climate is a direct reflection
14 of the commander and is detrimental to the mission.
15 Commanders' ability to hold offenders accountable
16 for their behavior and their crimes is key to
17 maintaining good order and discipline and also the
18 interests of justice.

19 To remove a commander from that role with
20 respect to sexual assault or any other criminal
21 offenses would have a detrimental impact on the
22 role of the commander to fulfill the mission. I am

1 responsible and accountable for my people, and I
2 need to have the tools to execute that -- be
3 accountable and execute that responsibility.

4 Thank you very much, and I look forward to
5 your questions, ma'am.

6 CHAIRWOMAN JONES: Thank you. Captain
7 Harrison?

8 CAPTAIN HARRISON: Good morning, and thank
9 you for the opportunity to be here today where I
10 hope to assist this Panel in its fact-finding
11 mission on this important topic of combatting
12 sexual assault in the military services, and the
13 roles of the commanders and their staff judge
14 advocates in that regard. I am Captain David
15 Harrison, Judge Advocate General's Corps, United
16 States Navy. By way of background, I accepted my
17 commission as an ensign in 1990, was admitted to
18 the Maryland Bar in 1991, and have been a
19 practicing judge advocate since 1992. I was board
20 selected as a military justice litigation expert in
21 2007.

22 Over my years of service, I spent years at

1 the trial level working hundreds of cases as both a
2 trial counsel and a defense counsel. I have served
3 at the appellate levels as a litigant representing
4 the United States on criminal appeals, and I have
5 served four tours as a staff judge advocate
6 advising flag officer, general courts martial
7 convening authorities.

8 My most recent position, I was the
9 director of the Navy Judge Advocate General's
10 Criminal Law Division charged with developing
11 criminal law policy and assisting the judge
12 advocate general in carrying out statutory duties
13 under the Uniform Code of Military Justice. In
14 that position, I also had the opportunity to chair
15 the Joint Services Committee on Military Justice,
16 which drafted the current sex offense statute,
17 Article 120, the Military Rule of Evidence creating
18 a victim advocate privilege, and other changes to
19 the Code. Currently, I serve as the commanding
20 officer of Region Legal Service Office Southwest,
21 supervising the prosecution of all Navy courts
22 martial in the six-state Navy Region Southwest.

1 This position also serves as the senior uniform
2 judge advocate advising the region commander.

3 I hope my background and experience in the
4 military justice arena will be helpful to this
5 Panel, and I look forward to your questions. Thank
6 you.

7 CHAIRWOMAN JONES: Thank you. Commander
8 Hutchison?

9 COMMANDER HUTCHISON: Good morning, and
10 thank you, Your Honor. I'm Commander Frank
11 Hutchison, and I'm currently assigned in the
12 Military Personnel Division within the Office of
13 the Judge Advocate General.

14 By way of background, I was originally
15 commissioned in 1994 as a surface warfare officer
16 after graduating from the U.S. Naval Academy, and I
17 subsequently joined the JAG Corps in 2000. Prior
18 to my current assignment, I served as the staff
19 judge advocate for the previous eight years, most
20 recently as the principal legal advisor to the
21 Commander Navy Region Mid-Atlantic. The Commander
22 Navy Region Mid-Atlantic, as Admiral Smith said, is

1 responsible for installations from North Carolina
2 to Maine, and is one of the largest, if not the
3 largest, general court martial convening authority
4 in the Navy.

5 During my tenure in Navy Region Mid-
6 Atlantic, I had the opportunity to advise the
7 commander on numerous sexual assault cases, and I
8 can say unequivocally that my commander valued and
9 trusted the advice I gave him. The same is true at
10 each of the other commands where I have served from
11 special court martial convening authority CO of an
12 aircraft carrier, to the four-star fleet commander
13 on whose staff I served.

14 I'm happy to take the Panel's questions,
15 and I thank you again for the opportunity to be
16 here today.

17 CHAIRWOMAN JONES: All right, thank you.
18 Next we'll hear from General Rice and Colonel
19 Kenny. General?

20 GENERAL RICE: Good morning, Judge, and
21 distinguished members of the Panel. Thank you for
22 the opportunity to appear today before the Response

1 Systems to Adult Sexual Assault Crimes Panel. When
2 I first became aware that the Secretary of Defense,
3 as required by law, established this Panel, I was
4 personally very supportive of this effort because I
5 believe your work can help illuminate in a very
6 fact-based way the many complex issues that
7 surround the problem of sexual assault in the
8 military.

9 I have been on command orders seven times
10 in my career, to include approximately 10 of the
11 last 13 years. This experience certainly
12 influences my views on the role of the commander in
13 preventing and responding to sexual assaults in the
14 military, and I appreciate the opportunity to share
15 some of these views with you over the next few
16 minutes.

17 I want to begin by reaching back to a
18 lesson I learned over 35 years ago when I was a
19 senior at the Air Force Academy about to take my
20 commission as a second lieutenant, and a very
21 senior general officer offered me advice as senior
22 general officers like to do to junior officers as

1 they're beginning their careers. And this
2 particular piece of advice I found very helpful.
3 He essentially said that there would be many times
4 during my career that people would try to give me
5 responsibility without the associated authority
6 required to fulfill that responsibility, and that I
7 should resist this disconnect whenever it happened
8 because responsibility without authority is a
9 recipe for failure.

10 While this is almost true -- is true in
11 almost any circumstance that I can think of, I
12 believe it is especially true in the area of
13 maintaining good order and discipline in the
14 military unit. As a commander, I feel strongly
15 that I have a pact with the airmen under the
16 commands that I have had during my career, and that
17 pact essentially goes like this. You're in the
18 military now, and I am your commander. In order
19 for us to be an effective fighting force, we must
20 maintain an environment of good order and
21 discipline. To this end, there are certain
22 standards of conduct that you must follow, and I am

1 responsible for setting, maintaining, and enforcing
2 those standards.

3 Our Nation has given me significant
4 authority in this area in recognition of the
5 distinctive characteristics of military life and
6 the foundational role that good order and
7 discipline ultimately plays in the security of our
8 Nation. It is my job to understand the complex
9 relationship between misconduct and accountability
10 as it applies to the unique circumstances of this
11 unit. This system of standards and accountability
12 and responsibility and authority is based on trust.
13 You must trust that I will be fair, impartial, and
14 timely in the execution of my responsibilities and
15 authorities. Without this trust, confidence in the
16 system weakens, which in turns weakens the
17 environment of good order and discipline, which
18 ultimately weakens military effectiveness.

19 Trust is not a thing that can be taken.
20 It is a thing that must be earned. I will earn
21 your trust by being fair, impartial, and timely in
22 setting, maintaining, and enforcing the standards

1 of conduct that will result in an environment of
2 good order and discipline that will make us an
3 effective fighting force.

4 Because of this pact with our airmen is
5 based on trust, it is very difficult for me to
6 endorse a course of action that would weaken this
7 essential element. In fact, my instinct would be
8 the opposite, to look for ways to strengthen the
9 trust that must exist in any military unit in order
10 for it to be fully effective. While I believe we
11 all should be circumspect about assertions that
12 point to a lack of confidence in the chain of
13 command, I nonetheless believe we are making good
14 progress in further strengthening the bonds of
15 trust between our airmen and our commanders that
16 lie at the very heart of military effectiveness.

17 For example, in my command where every
18 airman comes into the Air Force because we do basic
19 military training both for officers and enlisted,
20 so we touch literally every airman, in my command,
21 the numbers of reports of sexual assault that
22 occurred prior to their entrance into military

1 service has increased from 18 percent in 2009, to
2 28 percent in 2010, to 30 percent in 2011, a slight
3 dip to 27 percent in 2012, and then a significant
4 increase, a surge, if you will, to 38 percent this
5 year in 2013. Thirty-eight percent of the people
6 who come in and report a sexual assault to us are
7 reporting activity that happened prior to their
8 entrance into military service.

9 I draw two conclusions from these
10 statistics: first, that a large and increasing
11 number of airmen entering the Air Force find an
12 environment that is more conducive to reporting
13 sexual assault crimes than the environment that
14 they left in the civilian world, and, second, that
15 our efforts to create this very environment,
16 largely based on the work of our commanders, is
17 working.

18 In my view, it is time to double down, if
19 you will, on the role of the commander in
20 effectively addressing the issue of sexual assault
21 as opposed to decreasing their authorities and
22 responsibilities in this area. As I said earlier,

1 authority and responsibility go hand-in-hand, and
2 we should not somehow think that we can reduce one
3 without reducing the other.

4 I would like to conclude by expressing my
5 hope that as part of your research, you will have
6 an opportunity to review as many actual cases of
7 sexual assaults in the military as possible. Only
8 in this way will you be able to fully understand
9 the set of facts presented to a commander that led
10 to his or her decision on how to proceed. Every
11 case is unique and almost always presents
12 challenges in establishing absolute truth. Having
13 reviewed a great many of these cases over the years
14 myself, I would be surprised if your review found
15 that a significant number of commanders made
16 inappropriate decisions based on the evidence that
17 they had, or that you concluded that an official
18 outside of the chain of command would've been more
19 effective in pursuing these cases. I know there is
20 a widespread belief that commanders are not living
21 up to their responsibilities in this area, and I
22 believe one of the most important outcomes of your

1 work will be to either confirm or refute this
2 belief.

3 Again, thank you for the opportunity to
4 participate, and I look forward to your questions.

5 CHAIRWOMAN JONES: Thank you, General.
6 Colonel Kenny?

7 COLONEL KENNY: Thank you. I am Colonel
8 Polly Kenny. I am General Rice's staff judge
9 advocate at Air Education and Training Command.
10 Prior to this position, I have been a four-time
11 staff judge advocate. I've advised two other
12 general court martial convening authorities and
13 nine special court martial convening authorities
14 during those tours. In my 24 years in the Air
15 Force, I have prosecuted and defended hundreds of
16 cases, including dozens of sexual assault cases, as
17 well as I've been the Chief Defense Counsel for the
18 United States Air Force.

19 Again, like my other JAG Corps colleagues,
20 I look forward to any questions you might have, and
21 hopefully my experience will help enlighten the
22 Panel with any questions you may have. Thank you.

1 CHAIRWOMAN JONES: Thank you, Colonel.
2 I'd like to turn now to General Busby and also
3 Colonel Harris from the Marine Corps.

4 MAJOR GENERAL BUSBY: Judge Jones, members
5 of the Panel, I'm Major General Steve Busby,
6 commanding general of Third Marine Corps Aircraft
7 Wing and Headquarters in Marine Corps Air Station,
8 Miramar. I have the honor and privilege of leading
9 18,000 marines and sailors in four locations in
10 California and Arizona. On behalf of the
11 Commandant, General Jim Amos, Lieutenant Colonel
12 Harris and I thank you for the opportunity to
13 present you the actions that your Marine Corps has
14 and is taking as we attack the crime of sexual
15 assault.

16 We will offer representative actions that
17 we as a subordinate command in the Marine Corps,
18 Third Marine Aircraft Wing, have pursued and
19 demonstrated how serious we take the issue. We
20 also want to express what we believe to be the
21 critical element in this effort, getting to the
22 left of an assault through behavioral change to

1 specifically ensure that our marines understand
2 that sexual assault is not consistent with who they
3 are as marines. And we'll offer our thoughts on
4 the individual who is the center of gravity for us
5 in this effort, and that's our commanders.

6 Over the last year, the Commandant has
7 taken very significant steps attacking this issue.
8 I'm going to list just a few to give the Panel
9 members an idea of what we're doing in the
10 commander focus of these efforts. He executed the
11 Commandant Heritage Brief Tour, where he visited
12 bases and stations across the Marine Corps,
13 reinforcing to all officers and senior staff, NCOs,
14 the need to establish a command climate in which
15 marines are held to the highest traditions and
16 standards of the Corps. For me, that was the
17 stepping off point as the commanding general of
18 Third Marine Aircraft Wing of what we call
19 committed and engaged leadership, which I'll talk
20 about in a minute.

21 He implemented a 2012 sexual assault
22 prevention and response campaign with the following

1 purpose: to reduce, with a goal to eliminate,
2 incidents of sexual assault through prevention and
3 engaged leadership; when a sexual assault does
4 occur, to provide appropriate and timely victim
5 care, investigations, and accountability that
6 reflect our core values and promote good order and
7 discipline in the units. He executed a general
8 officer sexual assault prevention and response
9 symposium where he pulled back all 80 of his
10 general officers to Quantico for two days where he
11 and the Sergeant Major of the Marine Corps
12 personally led two days of training and education
13 and discussion on this critical issue. That was
14 followed by the Commandant and the Sergeant Major
15 of the Marine Corps then doing the same thing with
16 the Sergeants Major across the Marine Corps at a
17 symposium at Quantico as well.

18 He required that we conduct a command team
19 for all our commanding officers and sergeant
20 majors, which I'll discuss in a minute as well. He
21 implemented a Take-a-Stand Bystander Intervention
22 training curriculum for our non-commissioned

1 officers, and mandated that all-hands sexual
2 assault and prevention response training for all
3 marines be conducted by commanders at every unit
4 across the Corps. He established additional sexual
5 assault prevention response training for our
6 delayed entry programs to get to the young men and
7 women who were joining the Corps before they enter
8 recruit depots. The same thing at recruit depots,
9 at our entry level schools, our professional
10 military education courses from corporal all the
11 way through Command and Staff College for field
12 grade officers.

13 We established inside our pre-deployment
14 environment opportunities to discuss committed,
15 engaged leadership on sexual assault before a unit
16 deploys around the world. He mandated this July a
17 leadership summit run by the lieutenant generals in
18 the Marine Corps where all commanding generals,
19 commanding officers, and their sergeants major
20 address for two days the far-reaching effects of
21 command climate and the central role of the
22 commander in preventing and responding to sexual

1 assault.

2 He further inserted specific training in
3 our commander's course that we run twice a year for
4 our lieutenant colonel and colonel commanders on
5 this critical issue. And we've begun development
6 of a bystander intervention training similar to
7 Take-a-Stand training for NCOs that is going to be
8 pushed down to the lowest ranks in the Marine Corps
9 based on the critically significant effectiveness
10 that we've seen by addressing the issue with our
11 NCOs.

12 He established a requirement for sexual
13 assault prevention and response eight-day brief.
14 If a sexual assault occurs in one of their units,
15 and we'll take my command as example, that squadron
16 commander has a sexual assault in his unit, he's
17 required within eight days to give me the report,
18 the details, what happened to the level of
19 knowledge that he has, any actions that we're
20 taking to take care of the victim. That is owed to
21 me within eight days. I get that and personally
22 talk to every unit commander and his leadership

1 team within eight days.

2 He established a sexual assault response
3 team, a SARC, at every Marine Corps installation
4 comprised of the first responders across the entire
5 spectrum between those who provide service, and
6 those who lead, and the Naval Criminal
7 Investigative Service to ensure everyone
8 understands the entirety of the issue.

9 He increases staffing of our SAPRO
10 personnel based on the NDAA, hired 22 full-time
11 sexual assault response coordinators across the
12 Marine Corps. As an example, I now have a civilian
13 SARC who comes to me with years and years of
14 experience in the community dealing with this
15 particular issue, and she has already earned every
16 penny that we intend to pay her. And we are
17 meeting the requirement of credentialing all our
18 SAPRO personnel, which is particularly critical
19 when we start talking about the young women and men
20 inside of our organizations who we handpick to be
21 uniform victim advocates.

22 With respect to some of the actions on

1 investigations, the establishment by NCIS of the
2 Adult Sexual Assault Program in compliance with the
3 NDAA has made a significant impact by training
4 agents in detail on this particular issue. NCIS
5 staff had been increased by the Secretary of Navy
6 with hiring 54 more agents, and NCIS established a
7 text and tip line. I offer this to you that in my
8 interaction with NCIS, I've been nothing but
9 satisfied with their understanding of the critical
10 role that they play in this, that at every turn
11 they're responsive, and they fully investigate with
12 vigor every single assault that comes their way.

13 Allow us to turn this over to Lieutenant
14 Colonel Harris just for a second. He'll talk about
15 some of the military justice actions that the Corps
16 has taken over the last year.

17 LIEUTENANT COLONEL HARRIS: Good morning,
18 Judge Jones, members of the Panel. Thank you for
19 the opportunity. Just in conjunction with what
20 General Busby is speaking about, I'll just hit a
21 few items, lay out some of the recent changes that
22 have occurred in the Marine Corps' legal community.

1 And I would just preface it by stating what's made
2 that possible is that the commanders have made
3 these things possible.

4 First, the introduction of the Sexual
5 Assault Initiative Disposition Authority Withhold
6 Policy that elevated that decision making process
7 for sexual assaults first as mandated by the
8 Secretary of Defense, as the Panel well
9 understands, and then later expanded by the
10 Commandant of the Marine Corps. So what that means
11 is for any sexual assault, any contact assault, as
12 was expanded by the Commandant of the Marine Corps,
13 those referral decisions are now being made by O-6
14 commanders, by a special court martial convening
15 authority. So, for instance, in the 3rd Marine
16 Aircraft Wing, that means rather than having 49
17 squadron commanders who might make those referral
18 decisions on some of these cases, you now have five
19 O-6 senior commanders who make those decisions.

20 Likewise, within a two-month period in the
21 summer of 2012, the entire legal organization
22 within the Marine Corps was reorganized as part of

1 the Commandant of the Marine Corps' sexual assault
2 prevention and response campaign plan. What that
3 means is in the last two decades since I've been a
4 judge advocate in the Marine Corps, there has been
5 discussions amongst judge advocates on how to best
6 reorganize, that we can have the right prosecutors
7 on the right cases in a structured manner that
8 allows the detailing of the right counsel.

9 Once the Commandant of the Marine Corps
10 made that a priority, that occurred within 60 days,
11 the complete reorganization of the legal community
12 within the Marine Corps. That reorganization now
13 has in it the ability where each of the regional
14 offices, the four offices, have a regional
15 prosecutor, a regional trial counsel, a senior
16 lieutenant colonel-level prosecutor with extensive
17 experience prosecuting complex cases such as this,
18 as well as a complex trial team. That complex
19 trial team has imbedded in it not just the regional
20 trial counsel, but also two hand-selected senior
21 prosecutors, investigators, administrative support
22 personnel, and a highly-qualified expert, a

1 civilian who's been contracted. On the West Coast,
2 as an example, for instance, there is a prosecutor
3 from San Diego County that's been employed with two
4 decades worth of civilian prosecution, mostly
5 focused on sexual assaults now as part of that
6 complex trial team, that special victim's
7 prosecution capability for the Marine Corps has as
8 a result of that reorganization.

9 There have been other steps taken, and
10 each of those steps I would just highlight to the
11 Panel members, have been able to be taken because
12 it has become an issue for the commanders to ensure
13 that the legal organization within the Marine Corps
14 is able to support what it is that they want to do
15 in this area. And I'll turn it back over to
16 General Busby to continue on.

17 MAJOR GENERAL BUSBY: I'd just like to
18 take a couple more minutes and talk to you about my
19 perspective as the Commanding General Third Marine
20 Aircraft Wing and some of the tactical actions, if
21 you will, that we've taken over the last year to
22 help our marines understand this issue.

1 First, we tell everybody inside the wing
2 that we take this seriously, and we take it
3 personally, that this is not who we are as marines.
4 It's inconsistent with what it means to be a
5 marine. Last year after the sexual assault
6 prevention and response general officer symposium I
7 mentioned earlier, myself and my Sergeant Major
8 trained all of my O-6 commanders and their sergeant
9 majors. We sat down with them and personally
10 talked to them and told them exactly what we
11 expected of them in this area so there could be no
12 misunderstanding of what they as leaders are
13 responsible for.

14 We then sat down with all of our squadron
15 commanders, lieutenant colonel commanders and their
16 sergeant majors, and did the very same thing, and
17 defined for them the scope and scale of the problem
18 and what my expectations were of them as committed
19 and engaged leaders. After that occurred, the
20 Sergeant Major and I engaged on a daily basis with
21 our marines and sailors on this issue. We continue
22 to do so. And a core topic every time we engage

1 with our marines, no matter where it happens in
2 Third MAW, is the issue of sexual assault being
3 inconsistent with who we are as marines.

4 Monthly we have what we call our top-tier
5 conference where I grab my five group commanders
6 and their sergeants major together and we talk
7 about issues of concern across Third MAW. The
8 leading issue is always this one. It's on the
9 agenda. Every single month we talk about where we
10 are, what are we doing, what more can we do.

11 The Sergeant Major and myself then
12 personally beginning in January engaged after the
13 New Year in an annual safety stand down with every
14 single one of our marines on the topic of
15 misconduct. For an hour and a half we talked to
16 them. Sexual assault was the centerpiece of that
17 discussion. Those discussions actually laid the
18 foundation for what we called our Commit and Engage
19 Leadership Program, which I'll talk about here in a
20 second. We've also conducted a female forum, not
21 to segregate our females, but to understand from
22 their position as experts on this issue what more

1 we could do. We had 43 marines and six sailors for
2 an entire day. They queried me for an hour when I
3 opened up the session, and they offered us some
4 tremendous insights, and I'll mention one of those
5 insights here in a second, as a result of that
6 action that we're going to take.

7 We've also instituted a program so we can
8 try to understand what's on our marines' minds,
9 luncheon in my quarters one to three times a week
10 with eight to 10 marines, I think I told you
11 previously, where we feed them pizza, and then we
12 talk to them. We get inside their minds and say,
13 what are you thinking, why do you think it, and we
14 have an opportunity in that session, that ranges
15 from two to three hours, to talk to them about
16 sexual assaults and what it means to be a marine,
17 and that this is inconsistent with who they are.

18 We've also leveraged every training
19 provided to us. As an example, the Department of
20 the Navy provided us a No Zebras presentation by
21 Steve Thompson of Central Michigan University --
22 very powerful -- and a presentation by two improv

1 actors called "Sex Signals," a peer-to-peer event
2 where they came by and talked to a number of our
3 sergeants and below, a powerful tool where they
4 engaged with each other as peers. Based on that
5 engagement, we've taken that as a model, and we
6 have our own marines developing what is going to
7 end up being a three- or four-hour presentation
8 where they talk to each other about a sexual
9 assault, what led to it, how it happened, the re-
10 victimization of the victim, and how it's
11 adjudicated throughout the entire process. And
12 we're going to start that event. It's taken a
13 couple of months, but we're going to start that
14 event soon, and I think it's going to be hugely
15 powerful as we learn with peer-to-peer engagement.

16 Those are just some of the actions that
17 we're taking. And I would just like to finish with
18 one more, and that's the most expansive and really
19 is the most important. And I think as I previously
20 talked to you about, it's about behavior change.
21 It's about what we call committed, engaged
22 leadership. Committed, engaged leadership for me

1 is the mechanism we're using to attack this issue
2 and many others.

3 In the execution of this effort, the
4 Sergeant Major and myself in the spring talked to
5 all 14,000 of our marines not deployed for over
6 three hours with sexual assault being the
7 centerpiece and the foundation of why we were
8 talking to them for three hours. I told them for
9 us, committed and engaged leadership starts with
10 something I was taught by a captain when I was a
11 lance corporal over 30 years ago. There's nothing
12 a marine cannot or will not do if he or she is
13 treated with respect and dignity.

14 We expressed that thought to our marines.
15 We must treat ourselves, each other, and those we
16 serve with respect and dignity. Nothing else is
17 acceptable. And again, this idea of committed,
18 engaged leadership -- committed, engaged leadership
19 at levels starting with the commanders, is the
20 mechanism of execution for us. The thing we used
21 to address commitment to the Marine Corps -- that's
22 the portion that's committed -- is being a marine

1 is who you are and not what you do. There's a
2 difference. Being a marine is who you are.

3 This directly attacks what we're after,
4 the behavior change we're striving for a means --
5 we're striving for as a means to prevent sexual
6 assaults from occurring by ensuring marines
7 understand that their service is not about them.
8 It's always about others, to the marine to the left
9 and right. It's about ensuring they understand and
10 live the fact they are their brother or sister's
11 keepers. They're responsible for others first,
12 foremost, and always, and that sexual assault
13 violates every bit of being a marine as who we are.

14 The theme we used to address engagement
15 with the other is the idea of Pay it Forward that
16 we got from a young lance corporal. I wish I had
17 the time to tell you that story from the mind of a
18 young man is shaping how we're attacking sexual
19 assaults inside 18,000 marines in Third MAW.

20 I want to tell you that we're seeing an
21 impact based on what I've told you on some of the
22 actions that the Commandant is taken to commit

1 engaged leadership, as our measures of misconduct,
2 some leading measures of misconduct are starting to
3 decrease. This tells me that engagement within our
4 marines, in particular, our NCOs, who we call our
5 VIPs, is starting to make a difference. And all of
6 these actions are directly aimed at what the
7 solution is, getting to the left of the act. Any
8 individual that we or I in this case in Third MAW
9 hold directly responsible and accountable to make
10 the difference are my commanders. They're the ones
11 who I hold responsible and accountable.

12 And for the commanders to do this, he or
13 she must be provided with all possible tools to
14 educate and train and care for our victims. And we
15 in the Marine Corps are doing just that. And just
16 as important it is to ensure that they have all the
17 tools to train and care for the victims is they
18 have the tools to hold those accountable who commit
19 this crime. And they have the tools to ensure that
20 our standards are maintained, that they're able to
21 maintain good order and discipline in their
22 commands.

1 They must have the ability to visibly lead
2 this effort in both prevention and in adjudication.
3 Responsibility must be accompanied by authority to
4 hold violators accountable. Without the ability to
5 hold accountable, we're tying the hands of those we
6 know can make a difference, those we've already
7 seen can make a difference, will limit their
8 ability to engage and make a behavior change in
9 order to instill values we know that are missing in
10 some of our marines to prevent this time far, far
11 more difficult. Our commanders are the center of
12 gravity in this effort, and we must ensure that we
13 provide them all the tools needed in prevention and
14 adjudication.

15 Finally, as a result of the Corps'
16 campaign plan, all the actions that the Commandant
17 has taken and just the representative list that
18 I've offered from my perspective as a commander, I
19 just offer this to you that we're starting to make
20 a difference and focused on the commanders has
21 resulted in some of this. Reports of sexual
22 assault have increased by over 75 percent -- 70

1 percent, excuse me -- in Fiscal Year '13. This
2 tells me that our marines have confidence -- have
3 confidence that we're there for them. So the
4 reports have increased significantly. Prosecutions
5 have doubled. Convictions have increased by over
6 100 percent. Punitive discharges have increased by
7 over 100 percent. Confinements over five years
8 have almost tripled. And since 2010, we've
9 prosecuted 28 sexual assault, sexual misconduct
10 cases declined by civilian jurisdictions with a 50
11 percent conviction rate.

12 We're seeing a four to five times increase
13 in restricted reports being turned into
14 unrestricted reports telling me as a commander that
15 my marines have confidence that we're there for
16 them once they get inside the victim care system
17 and know we're there for them. And marines are
18 just simply taking action is what I would like to
19 leave as the final thought.

20 And, ladies and gentlemen, thank you for
21 the opportunity to talk with you today, and we look
22 forward to your questions.

1 CHAIRWOMAN JONES: Thank you. Admiral
2 Ostebo, is that how you pronounce your name?

3 REAR ADMIRAL OSTEBO: Ostebo, ma'am.

4 CHAIRWOMAN JONES: Ostebo? And Commander
5 Dwyer from the Coast Guard.

6 REAR ADMIRAL OSTEBO: Judge, distinguished
7 members of the Panel, good morning, and thank you
8 for the opportunity to speak with you today
9 regarding the operational commander's perspective
10 on the military justice system and to tell you
11 about my command and what we're doing to address
12 sexual assault.

13 My name is Rear Admiral Thomas Ostebo, and
14 have 36 years in uniform, and I currently serve as
15 the commander of the 17th Coast Guard District
16 headquartered in Juneau, Alaska. And I'm
17 accompanied by my senior SJA, Commander Bill Dwyer.

18 Ladies and gentlemen, the issue of sexual
19 assault in our military has my utmost professional
20 attention. And the damage and horrific effects of
21 sexual assault and misconduct are also very
22 personal to me, for not only am I the admiral

1 entrusted with the well-being of America's sons and
2 daughters, but I'm also the proud father of two
3 daughters who currently serve this Nation in the
4 U.S. Army. So as both a military leader and a
5 parent, I am all in in finding a solution to this
6 problem, and I also trust our military justice
7 system to do that.

8 District 17 has almost 3,000 active duty
9 reserve and civilian Coast Guard men and women
10 serving throughout Alaska. District 17 is the
11 Coast Guard's largest district with an area of
12 responsibility consisting of the state of Alaska
13 from the maritime land boundaries with Canada,
14 westward to the Russian maritime boundary line, and
15 includes all the Arctic.

16 America's Coast Guardsmen and women in
17 Alaska conduct a myriad of operations, including
18 maritime law enforcement, defense support
19 operations with our DoD partners, and some of the
20 most challenging search and rescue missions in the
21 world. I have approximately 50 subordinate
22 commands throughout the state from bases in

1 Ketchikan and Kodiak, Kodiak being our largest base
2 in the service, to fixed and rotary wing aircraft
3 stations in places like Sitka and Kodiak, cutters
4 home ported in small communities in Petersburg,
5 Cordova, and Homer, just to name a few.

6 The district's mission is to serve and
7 safeguard the public, protect the environment and
8 its resources, and defend the Nation's interest in
9 the Alaska maritime region. My commander's intent
10 that I have delivered to every member of District
11 17 requires operational excellence always, respect
12 for each other, and professionalism 24/7. Working
13 closely with my senior enlisted advisor, we are
14 currently engaged at all levels of command
15 throughout the district to ensure that we are
16 accomplishing the mission safely while properly
17 developing our people and preventing misconduct of
18 any form by living up to our core values of honor,
19 respect, and devotion to duty.

20 In addition, I have four judge advocates,
21 six Coast Guard Investigative Service agents posted
22 throughout the district to address military justice

1 issues that range from providing command advice to
2 those in the field to prosecutions at court
3 martial. Through frequent communications with my
4 staff judge advocate, I am kept apprised of every
5 case involving or affecting our members.

6 As stated by the Commandant, Admiral Papp,
7 I, too, believe that all Coast Guard men and women
8 must be bound by trust and mutual respect for their
9 shipmates in order to execute the missions of our
10 service. We know that sexual assault traumatizes
11 victims, undermines morale, degrades readiness, and
12 damages mission performance. There are no
13 bystanders in the Coast Guard, and we must have the
14 courage to take immediate action to prevent or stop
15 acts of misconduct from occurring both on and off
16 duty.

17 The Coast Guard and, specifically, my
18 command, has seen progress in our ability to
19 prevent and respond to sexual assault. In District
20 17, I have initiated policy changes, including
21 requiring that all initial disposition of 120 cases
22 or sexual assault cases are done at the flag level.

1 That means they're done with me. Moreover, I have
2 initiated prevention and response training and
3 improved access to victim support services, such as
4 victims counsel. Each of these measures provides
5 us with important tools to achieve our goal of
6 eliminating sexual assault from the service.

7 Of note, in my district, we have had -- we
8 have also hosted a district-wide women's leadership
9 symposium in the spring of this year to facilitate
10 communication and transparency on women's issues
11 and specifically on sexual assault. Despite tight
12 fiscal times, I felt it was a priority to bring
13 together service members from across the state to
14 one location for the symposium. The event was well
15 attended and so well received that we intend to do
16 it again next month.

17 Additionally, we conducted a district-wide
18 safety stand-down in advance of the 2012-2013
19 holiday season to discuss specifically sexual
20 assault prevention and responsible alcohol use.
21 The program was facilitated by Coast Guard work,
22 life, and legal staff, and was held in strategic

1 locations so that nearly all of the 3,000 members
2 had an opportunity to attend in person. It was
3 also videotaped so that those -- so it could be
4 provided to those unable to attend. I hold this up
5 as an example of responsible prevention and
6 intervention as we put a spotlight on these
7 critical issues.

8 During my numerous commands, I have found
9 the role of the commanding officer to be a critical
10 part of the military justice process. As the
11 leader, the commander is ultimately responsible for
12 the health and safety of each person within his or
13 her charge and, thus, must set the tone for the
14 unit and be able to speak frankly and openly on all
15 aspects of conduct. I also understand that the
16 commander must remain neutral and detached from
17 individual cases so that when called upon, he or
18 she is able to act in a way that supports a fair,
19 impartial military justice system while at the same
20 time ensuring good order and discipline.

21 This ultimate responsibility with
22 neutrality is working, and allows the military

1 commander to achieve operational readiness and
2 mission success while maintaining good order and
3 discipline with due consideration for the rights of
4 the accused and the rights of the victims and their
5 families where applicable. As I stated earlier, I
6 take this issue very seriously.

7 Thank you again for the opportunity to be
8 here, and I look forward to answering any questions
9 you may have.

10 CHAIRWOMAN JONES: Thank you.

11 COMMANDER DWYER: Good morning, Madam
12 Chair and Panel. Thank you for your hard work and
13 the dedication you're showing to your important
14 mandate.

15 My name is Commander Bill Dwyer. I serve
16 as Admiral Ostebo's staff judge advocate in the
17 17th Coast Guard District. I previously served as
18 a deputy staff judge advocate, as well as on the
19 U.S. AFRICOM operational law staff prior to my
20 assignment with Admiral Ostebo.

21 As Coast Guard judge advocates, we also
22 serve as line officers, meaning that we serve in

1 operational units. So in my case, I served four
2 years at sea as well as a ship salvage diving
3 officer, so it gives us a unique perspective for
4 the Coast Guard men and women who are out there
5 doing the mission and operation because we, too,
6 have conducted those same missions.

7 I have three judge advocates and one
8 civilian attorney that I work closely with, as well
9 as great back reach through the Coast Guard JAG
10 operational chain. We advise not only on military
11 justice issues, but across the myriad of other
12 operational issues. So oftentimes, that makes it a
13 challenge when you're advising commanders because
14 we are working on operational issues, environmental
15 law, and other issues, as well as prosecuting
16 military justice cases.

17 In my role, I advise not only Admiral
18 Ostebo, but the dozens of commanding officers that
19 serve him as well. So our legal staff, unlike some
20 of the other services, we'll advise directly to
21 those special court martial convening authorities,
22 which in the Coast Guard can range from the O-2

1 level where you can have command as lieutenant JG
2 of O-6 level.

3 I've had the opportunity conduct our SAPRO
4 training, our sexual assault prevention and
5 response training, as well as our victim advocate
6 training. I just wanted to say one word on our
7 SAPRO training. In the Coast Guard, we do it in a
8 way that's very personal to the members where we
9 sit down and we have an open and frank conversation
10 with the members, and we use terms and words that
11 they would use. And we use real cases and real
12 situations to talk about the fact that there are no
13 bystanders in the Coast Guard. And we push our
14 Commandant's Shipmates 19 message that really
15 pushes that message out.

16 And we do so in a way that the feedback
17 from our men and women has been very positive where
18 they look at this SAPRO training and say, well,
19 that was a bit of a watershed moment where we kind
20 of had a frank conversation about this very
21 important issue. And I realize that the same folks
22 that I'm out there every day serving with on a

1 rescue mission or some other operation, I need to
2 ensure that when we're out in a bar in a foreign
3 port, I need to have their back at that point as
4 well and to assist them.

5 I feel the role of the judge advocate and
6 specifically the the SJA has to be one where you
7 have an open and frank conversation with the
8 commander and you have to be able to do that at all
9 levels unlike any other staff officer when you're
10 having these conversations because I think the SJA
11 plays a critical role in the current military
12 justice process.

13 I look forward to your questions. Thank
14 you.

15 CHAIRWOMAN JONES: I have an initial
16 question I would like to ask about logistics.
17 Leave aside for the moment the question of the
18 wisdom of removing the commander as convening
19 authority, and assume that you have a system which
20 is being proposed in the legislation where you have
21 a separate prosecutor. What practical and
22 logistical problems, if any, are there were that to

1 occur? And I expect it will be different by
2 service and different by whether you're deployed or
3 at home. But I think General Linnington alluded to
4 some logistical problems, and I'm interested in,
5 Admiral Smith's, your take on this because I'm
6 interested in how the Navy is organized. Captain
7 Harrison is a regional prosecutor, who has a staff,
8 and presumably under this legislation, and I don't
9 pretend to understand it completely, Captain
10 Harrison would become the decision maker. You
11 would no longer be the decision maker. But the
12 question to all of you is, what logistical
13 problems, if any, would that cause? I don't know
14 who wants to start?

15 REAR ADMIRAL SMITH: So we owe you a more
16 detailed answer on that --

17 CHAIRWOMAN JONES: Okay.

18 REAR ADMIRAL SMITH: -- than we can give
19 you now. And I have not put thought into that. As
20 you were asking the question, we had a little side
21 bar here to think through what the logistical
22 issues and challenges are. And I'm going to ask

1 you, because I think, you know, as you said, if
2 he's the senior lawyer in the southwest in that
3 case or in the Mid-Atlantic equivalent there and
4 has that authority, what that would mean. How do
5 you think on that, Dave?

6 CAPTAIN HARRISON: I think for those cases
7 that go to trial, the logistics probably would not
8 be too terribly complicated that we could not
9 overcome them. But the challenges, as you know,
10 about service wide, 10 percent of the allegations
11 would actually go to trial.

12 So then the question would be for those
13 other 90 percent of those cases, what would we be
14 able to do because I as a prosecutor do not have
15 authority in many areas, both administratively or
16 under the Code, to take action against those
17 individuals. The commander does. So I think from
18 the logistics of those cases that do go to court, I
19 don't know that we have insurmountable logistics.
20 But in the overwhelming number of cases that do not
21 go to court, there are a lot of procedural aspects
22 and responsibilities and authorities that, again,

1 we'd have to get back to you with a more detailed
2 answer. But I do know for a fact that I as a
3 prosecutor do not have authority to take various
4 actions to service members that do not report to my
5 command, and, therefore, we would lose that -- the
6 ability to effectuate some level of accountability
7 in that 90 percent or so of cases.

8 CHAIRWOMAN JONES: All right. So only the
9 commander can do certain things right now in
10 response to criminal conduct. And you would not
11 have the authority to do that, at least as things
12 stand.

13 CAPTAIN HARRISON: Correct. For example,
14 under Article 15, nonjudicial punishment, I would
15 not have nonjudicial authority, for example, if
16 there were some lesser offenses that we wanted to
17 take into Article 15 punishment for. Various other
18 administrative separation, I would not be empowered
19 to forward a case through administrative processing
20 to separate the individual from the service member,
21 or to put other documents in the member service
22 record to document the activity, for example, if we

1 could not prove it beyond a reasonable doubt in a
2 court of law. As not being his commander, I would
3 not have the power to do that.

4 CHAIRWOMAN JONES: Maybe I'm also not
5 understanding how the investigative process works.
6 Who's investigating this, and who are they
7 reporting to when there's an allegation? Why don't
8 we start there?

9 CAPTAIN HARRISON: In the Navy, all cases
10 must be referred immediately to the Naval Criminal
11 Investigative Service. So for sexual assault
12 cases, the Naval Criminal Investigative Service
13 takes the lead. Now, they're an independent
14 civilian law enforcement organization in the
15 Department of the Navy.

16 In my office in the southwest, I created a
17 sex crimes division a little less than a year that
18 specializes only in sex crime prosecutions. So
19 they work with the adult sex crimes unit that Naval
20 Criminal Investigative Service has directly,
21 basically daily. We do meet biweekly to go over
22 cases that we have, but they work together to

1 investigate that crime and determine what the
2 recommendation should be. In all of the services,
3 you know the initial disposition, what is the
4 initial thing we're going to do with this case, has
5 been elevated to the O-6 level, the Navy captain
6 level, within all the services.

7 So in all of these cases, my office and I
8 actually signed many of the letters personally, we
9 make a recommendation to my fellow commanding
10 officers in the Southwest Region as to what to do
11 with that case.

12 CHAIRWOMAN JONES: Right. And in the
13 envisioned system, you would be making the
14 decision, right, as opposed to just a
15 recommendation?

16 CAPTAIN HARRISON: Whatever organization
17 is created, whoever that official would be. I
18 don't know what the organization would be.

19 CHAIRWOMAN JONES: Right, I don't either.
20 But logistically, that doesn't sound like it would
21 be an issue, the actual bifurcation of the decision
22 from the general to you.

1 CAPTAIN HARRISON: Logistically, no,
2 ma'am. As I said, we're simply -- at this point we
3 make the recommendation. We tried to bring all of
4 the evidence to bear to the commander to give him
5 the learned expertise to advise. That's the
6 criminal investigative agent, the prosecutors, and
7 myself as the senior prosecutor. So we're trying
8 to bring to bear all the resources to make what we
9 believe ultimately will be the right decision in
10 each and every one of these cases.

11 So if that official were to change, I
12 don't envision that we would discontinue bringing
13 all the resources that we have to try and make the
14 best recommendation, whoever the official -- the
15 deciding official would be.

16 CHAIRWOMAN JONES: Right. No, I wouldn't
17 think it would change either. Okay.

18 MS. FERNANDEZ: Judge, can I follow up?

19 CHAIRWOMAN JONES: Yeah.

20 MS. FERNANDEZ: Thank you. I guess my
21 question is, so you've got a report that's made.
22 It gets investigated. And your investigators come

1 to you and say, you know what, and you look at the
2 evidence and you say, we don't have enough to take
3 this to trial. You're still in a position of
4 making the decision. You decide not to take this
5 to trial. Is there anything prohibiting you then
6 from sending it back to the commander and for the
7 commander to take on some other kind of
8 disciplinary action, some other administrative
9 disciplinary action?

10 You would still -- you'd still be making
11 the call on taking something to trial or not taking
12 something to trial, but when you made the call and
13 you said we don't have enough evidence to go go
14 forward, then the authority then would go back to
15 the commander. Would there be anything -- would
16 that create any huge problem?

17 CAPTAIN HARRISON: No, ma'am, it would
18 not. The only caveat would be that many of the
19 commanding officers of the float units in the Navy
20 are 0-5 commanders. I'm an 0-6. So we would
21 certainly have to avoid what we call unlawful
22 command influence, a senior officer telling a

1 junior officer what to do with the case.

2 So the manner in which we do it, we would
3 have to do it in such a way to avoid those unlawful
4 command influence issues, but certainly that
5 recommendation is that it is not a prosecutable
6 case, and we return the case for you to dispose of
7 as you see fit is possible.

8 CHAIRWOMAN JONES: General Linnington?

9 LIEUTENANT GENERAL LINNINGTON:

10 Logistically, ma'am, what I would say is commanders
11 own all the resources. They own the budget. They
12 own access to the witnesses, the medical health
13 facilities, and all of it. So bifurcating the
14 cases not only creates some complexity for
15 adjudicating them, it also -- the judge advocates
16 don't control the resources that the commanders do.
17 So commanders looking at these things holistically
18 I think are important.

19 Practically I think when you get into
20 bifurcating cases and pulling out, you know, let's
21 say the sexual assault cases go a separate route,
22 most of the cases that we've had in the Military

1 District of Washington carry a range of charges in
2 them. It's not just a simple, you know, 120
3 offense. If you pull the 120 out, that's dealt
4 with separately, and the commander is looking at a
5 host of other offenses, you get into that, you
6 know, separate adjudications of the offenses. And
7 it just makes it much more difficult.

8 But I do think logistically, it's probably
9 more challenging for the Army, but I owe you and
10 the Panel probably more on that after today.

11 CHAIRWOMAN JONES: And I'll be happy to
12 hear from you in a minute. I realize this question
13 was kind of off topic, but it's a question it would
14 be great to hear from each of you on. Admiral?

15 REAR ADMIRAL OSTEBO: Ma'am, if I could,
16 the suggestion that you would take the convening
17 authority away from the commander is a solution to
18 what problem that we've identified how so far and
19 measured how? In other words, it would imply that
20 somehow the commanders in the field are not pushing
21 120 cases or egregious cases of any sort to court
22 martial or far enough down the military justice

1 system, which from my experience is not the case.

2 I think my record is such that I take a
3 lot of cases that either the criminal civilian
4 courts will not take, and I'm like, nope, we're
5 going to push that forward for a whole lot of
6 reasons. I have cases that come to me with
7 numerous offenses. As mentioned earlier, you know,
8 you have a 120 case and you have a 135. You have a
9 whole bunch of other lesser included offenses in
10 there, and the 120 may be weak, but the other ones
11 are important to push forward for the demonstration
12 to my troops in a remote location deployed that
13 good order and discipline will be observed, and
14 that the criminal justice system within the
15 military is transparent. And when you have an
16 egregious or smaller acts that are deleterious to
17 good order and discipline, that you will be held
18 accountable.

19 By taking the commander's authority away,
20 you lose all of that. And I would submit that
21 logistically that's going to be very difficult to
22 do, especially when you look at the military

1 justice system that's deployable and scalable, that
2 just whose objective is not putting somebody in
3 jail, but it's about discipline and accountability.
4 And it's a deterrence system. None of those other
5 things outside the military are necessarily there.

6 So I would submit all of that is
7 problematic. And then if you take a case away, how
8 do you -- I do think it's a very real logistic
9 problem of how do you give it back to somebody
10 without undue command influence and with the
11 transparency that our troops and sailors expect in
12 the military justice system when it comes back and
13 someone says, there was no case there, so now you
14 do something with it on your level. Ma'am, that
15 would be extremely problematic.

16 Finally, the number of cases that I think
17 that would be initially pushed up would go to who
18 if it's not the convening authority that's
19 overseeing this. Who's the actual group of people
20 that are dealing with this case? Who's putting
21 together the panel, for example, that's going to
22 sit before this general court martial and judge?

1 Who's doing that work?

2 You know, one of my thoughts on this whole
3 thing is, first, let's do no harm to what we
4 currently have as a system. Let's keep it
5 transparent, and let's avoid the Nth order effects
6 of throwing a solution out there to a problem we
7 don't even understand at this point. And I don't
8 mean to speak for everybody here, but I think we
9 have the tools. I do think there are improvements
10 that can be made in the current process,
11 particularly around the 32 process that would help
12 keep victims in this longer. But I do think you're
13 throwing a solution out there without fully
14 understanding, and that's not a criticism. It's
15 just an observation. Thank you, Your Honor.

16 CHAIRWOMAN JONES: I appreciate all of
17 those comments. And as I said, I'm just interested
18 in what would be the effect if we have legislation
19 that, you know, as it stands, removes the convening
20 authority rights from the commander and puts them
21 into a separate prosecution system. So if you can
22 send me some response to that in writing, I'd be

1 very appreciative.

2 MAJOR GENERAL BUSBY: Could I offer one
3 thought?

4 CHAIRWOMAN JONES: Oh, yes.

5 MAJOR GENERAL BUSBY: Just one thought on
6 the practical side of this.

7 CHAIRWOMAN JONES: Well, that's what I'm
8 talking about.

9 MAJOR GENERAL BUSBY: That we would remove
10 the ability of the individual that we hold
11 responsible to make the difference that we're
12 after, and that is preventing the sexual assault in
13 the first place. So when we remove him from that
14 ability to hold people accountable by putting the
15 -- that authority in some nameless or faceless --
16 nothing against lawyers -- nameless or face lawyer
17 someplace, and I'll talk as a marine, that the
18 marines won't see or know or understand. We
19 removed from the ability of the individual who we
20 are tasking to make a difference, the ability to do
21 just that, by removing that critical tool to hold
22 people to the standard.

1 I think that's a very practical issue, and
2 the result would be we would tie the hands of
3 commanders, particularly, in my case, lieutenant
4 colonel commanders working for a colonel commander,
5 ability to get inside the minds of his marines and
6 convince them this is not who they are. I think
7 that's a very practical implication of what this
8 could come to.

9 CHAIRWOMAN JONES: Thank you, General.

10 COLONEL KENNY: I would like to give a
11 fairly practical example as well of the unification
12 of effort that would be required if you had a
13 separate, faceless entity that made the
14 prosecutorial decision versus the commander making
15 that prosecutorial decision in conjunction with all
16 the other decisions that affect good order and
17 discipline, for example, basic military training
18 and the -- and what we been through in the United
19 States Air Force for the last year and a half or
20 so.

21 The prosecution of those offenders was
22 just one part of achieving mission success, of

1 achieving good order and discipline. The other
2 parts were equally as important, and those parts
3 were -- had to be done by commanders with the
4 authority and responsibility to close gaps that
5 were identified by perpetrators, to close areas
6 that we didn't realize were there, to close
7 leadership problems that we did not realize were
8 there. But we found out they there as a result of
9 the perpetrators.

10 In order to be able to effect that change
11 and to be able to provide a safe, secure training
12 environment, the commanders had to be lockstep with
13 the prosecution process.

14 CHAIRWOMAN JONES: Thank you.

15 GENERAL RICE: The only comment I would
16 make, ma'am, is that --

17 CHAIRWOMAN JONES: Yes, General?

18 GENERAL RICE: -- I would reinforce the
19 idea that many of these cases are complex in terms
20 of the numbers of offenses that are involved, and
21 they paint a holistic picture of what actually
22 happens when they're connected. If you disconnect

1 a piece of that, it's not clear to me how we would
2 do that, you know, with only --

3 CHAIRWOMAN JONES: Right. So as a
4 practical matter.

5 GENERAL RICE: -- from considering those
6 other matters that involved the sexual assault and
7 only the matters that might've involved something
8 else that happened. And do we get to a better
9 outcome if that's the case? And it seems to me
10 having looked at a lot of these over time, that
11 there is a picture here that gets painted on all of
12 the circumstances, and you have to have that to get
13 to the right outcome at the end of the day.

14 So it's not clear to me. I think we'd
15 have to walk down the trail here to understand
16 logistically, to your point, how this would take
17 place in a way that would not prevent decision
18 making authorities from having all of the
19 information that they needed to decide on that part
20 of the case for which they were responsible,
21 because you could easily have two people making
22 judgments about a --

1 CHAIRWOMAN JONES: Almost two
2 jurisdictions.

3 GENERAL RICE: -- particular point in
4 time.

5 LIEUTENANT GENERAL LINNINGTON: One thing
6 I would say, Your Honor, and I know everybody has
7 kind of said the same thing. But commanders would
8 lose credibility, I believe, with their
9 subordinates when you take these cases away from
10 them. When these cases occur, it's really an
11 opportunity for a commander to make a statement
12 about his character -- his or her character and his
13 commitment to the values that all the Services hold
14 dear.

15 So when you remove that, I think on a
16 personal level, commanders don't have then the
17 ability to demonstrate that commitment to the
18 values we espouse. So not only practically, I
19 think just from a straight leadership opportunity,
20 I think it breaks down the commander's credibility,
21 which could have a further erosion of what we've
22 all talked about in terms of combat readiness of

1 the formation.

2 CHAIRWOMAN JONES: Thank you.

3 LIEUTENANT COLONEL HARRIS: Your Honor, if
4 I may add as well.

5 CHAIRWOMAN JONES: Yes, I'm sorry, Colonel
6 Harris. I saw you.

7 LIEUTENANT COLONEL HARRIS: As the Panel
8 well understands I'm sure, courts martial are not
9 standing. They're created for limited purposes and
10 limitation durations. And so all of the resources
11 that are required to constitute that, or most of
12 the resources, right now are owned by the
13 commander. Judge advocates, lawyers don't own any
14 of those resources, as was mentioned previously.

15 Now, certainly those -- the logistics of
16 that could be reapportioned so that there was a
17 judge advocate command in some respects that owned
18 those resources later. But what I would highlight
19 to the Panel is what we see in the day-to-day
20 actions of courts martial is the potential for
21 conflicts in terms of prioritization. For
22 instance, witnesses. Right now, it's not an

1 uncommon occurrence where a witness is required to
2 report to a court martial to give testimony. The
3 issue that occurs now in this system or the lack of
4 the issue is when that witness is ordered to
5 testify, it's a commander who's telling him to come
6 -- to report and to provide that testimony. If
7 that decision were being made by somebody other
8 than the commander, quite frankly there are
9 operational considerations that go into that. And
10 there are times where a commander will make a
11 decision that the operational requirements of that
12 witness -- the members of that panel who are going
13 to hear that court martial -- are greater than the
14 need to stand the court martial up at that point in
15 time.

16 And when you have the decision making
17 process bifurcated, you create the inherent
18 possibility of a conflict in prioritization,
19 because, again, while we're focused on sexual
20 assaults, and they're very serious offenses, not
21 every sexual assault is the same. And there may be
22 times where a referral decision authority may view

1 the importance of when and where that court martial
2 stands differently than a commander. And by
3 bifurcating that, you create the possibility of
4 conflict in that decision making process. And,
5 again, we see that in court martial practice day-
6 to-day, whether that's a member who has a duty that
7 conflicts with his ability to show up to the court
8 martial as a juror or whether it's a witness who's
9 required to come and offer testimony. Thank you,
10 Your Honor.

11 CHAIRWOMAN JONES: Thank you. Other
12 questions from the Panel?

13 BRIGADIER GENERAL MCGUIRE: I had a
14 question. Gentlemen, Colonel, thank you very much
15 for your service and obviously for your continued
16 leadership and informing this Panel on the, what I
17 believe is a very critical and valuable role of our
18 commander.

19 We expect so much of our commanders right
20 now, particularly in the aftermath of over a decade
21 of conflict. Because not all of you know me, a
22 couple of you I'm very familiar with, thank you.

1 And my role is the commander -- my role as the
2 former commander of CID and the Provost Marshal
3 General of the Army, I was knowledgeable of the
4 types and rate of misconduct in every unit in the
5 United States Army. I could see trends, numbers,
6 and I knew that that, because I, too, was a
7 commander and have been a commander, of leadership.
8 It does reflect leadership.

9 But what I did not see is that we don't
10 have or, please, and this is where I'm going to ask
11 the question, a consistent and equitable
12 accountability of commanders that was reflected
13 either in their evaluations or their assignments.
14 Having sat on multiple centralized command boards
15 and having knowledge of the particular commanders
16 in the units where there was misconduct, I did not
17 see that reflected.

18 So how would you propose if we remain or
19 if commanders retain this authority and
20 responsibility, how do you propose that we do hold
21 commanders accountable for conduct in their units?

22 MAJOR GENERAL BUSBY: I'll go ahead and

1 offer just a few comments and start with what the
2 Commandant has done here recently, established a
3 command climate survey to get at that exact point.
4 Every new commander who takes over command is
5 responsible within 30 days to conduct a command
6 climate survey, and then we're going to do it, I
7 believe, annually every year.

8 The purpose of the survey is to identify
9 the trends in the unit, and a second purpose of the
10 survey and specifically laid out in the message
11 received from the Commandant is to identify toxic
12 leadership, toxic leadership that results in a
13 command climate that doesn't allow the marines or
14 sailors in that unit to succeed and survive in
15 combat, that doesn't treat them with respect and
16 dignity.

17 So I think we've already taken the first
18 step down this road of identifying the trends and
19 identifying toxic leaders coming from command
20 climate surveys filled out by the members of the
21 organization. And the survey goes to the next
22 higher commander in the chain of command. So for

1 me, it would be the squadron commanders, it goes to
2 the group commanders, and then group commanders
3 would provide me an overview of what was said
4 inside of that. That is a very straightforward
5 mechanism that comes from the marines in the unit
6 as to how they view the climate and the leadership
7 in that unit, and a first step in holding leaders
8 accountable for the climate that exists or doesn't
9 exist inside the unit.

10 CONGRESSWOMAN HOLTZMAN: Excuse me. Could
11 I just follow that up with a question? What would
12 constitute a toxic command? Would it include, for
13 example an increase in the number of restricted
14 reports, unrestricted reports? Would sexual
15 assault in any way, shape, or form help to shape
16 the question of what is a toxic command?

17 MAJOR GENERAL BUSBY: I would offer my --

18 CONGRESSWOMAN HOLTZMAN: And if so, how
19 does it?

20 MAJOR GENERAL BUSBY: I would offer that
21 the number of reports right now may not be the best
22 indicator of a toxic climate because we've been so

1 aggressive about establishing the trust and
2 confidence, because we get a lot of reports that
3 come through the units of assaults that happen
4 prior to joining the service, or from units two or
5 three years prior to their current unit. Someday
6 that might be a very good measure of the climate in
7 that unit when we have now got our arms around even
8 more than we do now on the numbers of assaults.

9 But I think there's going to be other
10 measures of the climate of a toxic leader, and I'll
11 just go back to respect and dignity. Are they
12 actually -- are the marines treated correctly? Are
13 they listened to? Do people engage them? Do they
14 help them? When they have a problem, is a leader
15 there? Is the squadron commander there? Does the
16 squadron commander care more about the airplanes
17 than them? And that's a conversation I've had with
18 my commanders. Your daily flight schedule is not
19 the driving document. The driving document inside
20 the wing is committed and engaged leadership and
21 how you take care of your marines.

22 So I think there's a number of different

1 measures that we'll find that deal with toxic
2 leadership.

3 CONGRESSWOMAN HOLTZMAN: But I guess what
4 I'm --

5
6 LIEUTENANT COLONEL HARRIS: So one of the
7 most effective measures is the simple question
8 that's asked them in those command climate surveys
9 of would you be comfortable reporting a sexual
10 assault. A simple question such as that allows
11 us --

12 CONGRESSWOMAN HOLTZMAN: And who does that
13 go to? Who's asked that question?

14 LIEUTENANT COLONEL HARRIS: Every member
15 that takes the survey, ma'am.

16 MAJOR GENERAL BUSBY: Every member of the
17 organization.

18 CONGRESSWOMAN HOLTZMAN: You mean every
19 soldier, every marine in that unit?

20 LIEUTENANT COLONEL HARRIS: If you asked
21 the question --

22 CONGRESSWOMAN HOLTZMAN: I'm sorry, I

1 don't know the terminology, so I'll --

2 LIEUTENANT COLONEL HARRIS: Yes, ma'am.

3 In your unit, would you be comfortable reporting a
4 sexual assault in your current unit?

5 CONGRESSWOMAN HOLTZMAN: And is that an
6 anonymous and confidential survey?

7 LIEUTENANT COLONEL HARRIS: Yes, ma'am.

8 CONGRESSWOMAN HOLTZMAN: And someone
9 tabulates the results of that?

10 LIEUTENANT COLONEL HARRIS: Yes, ma'am.

11 CONGRESSWOMAN HOLTZMAN: Have they --

12 LIEUTENANT COLONEL HARRIS: What will you
13 do once you have that information? Once you have
14 that information, that's where the accountability
15 comes in.

16 REAR ADMIRAL SMITH: So if I may. So kind
17 of both questions starting with yours. There are
18 various things that we have done, and there's more
19 that we're doing now. So in our performance
20 evaluations, our fitness reports, equal
21 opportunity. We used to never really comment on
22 equal opportunity. We are now directed and are

1 required to comment in every one of our fitness
2 reports on our subordinates, how they're doing with
3 respect to equal opportunity. We did not used to
4 do that. The 360 degree --

5 MS. FERNANDEZ: What exactly does that
6 mean?

7 REAR ADMIRAL SMITH: I'm sorry? Where did
8 it go? Here you are. How they are handling the
9 command climate of their command, and so there's
10 other things that I'll talk about that will help
11 define how they're doing in equal opportunity and
12 how I would evaluate and mark my direct reports and
13 subordinates on equal opportunity.

14 So the command climate survey that we were
15 talking about, that's required to be done within
16 the first 90 days of when a commander takes
17 command, and then annually thereafter. Before, and
18 it's open to the whole command, civilian, military.
19 It's a voluntary survey. We obviously encourage
20 folks to take that. We do not mandate it. And it
21 runs the gamut -- sexual assault, working
22 environment, racism, religious persecution, all

1 those kind of questions. That used to be only for
2 the commander to evaluate his command, see what the
3 issues and challenges are. So there's questions
4 you fill out and there's also open comments. And
5 he had to just basic knowledge to the chain of
6 command that it was conducted.

7 That has changed now, and you are now
8 required to report that -- the outcome of that to
9 your commander. So for my 15 direct reports, they
10 all now report out. I also now get to see their
11 command climate survey. My equal opportunity
12 advisor goes in and scrubs that, pulls out the
13 things I need to see, and then now that commander
14 comes in face-to-face unless the distance, we do a
15 VTC, video teleconference, to sit down and talk
16 through his command climate survey.

17 So now you take that piece, and then I can
18 take -- the accountability, I can take the sexual
19 assault piece, is there DUIs, or suicide, those
20 kind of things to determine whether you have the
21 caustic environment or not. And then, that's my
22 commander's decision. So if there's no legal

1 crimes committed, I still have responsibility as a
2 commander to have good order and discipline in my
3 unit, and I have the accountability and
4 responsibility to make sure my subordinate
5 commanders have the same thing.

6 So case in point, in my last job, I
7 relieved a commander actually the day before my
8 change of command not because he had committed any
9 crimes, but he had a caustic command climate that
10 didn't rise to a criminal offense, but it was an
11 ineffective command. And so, I took him out of
12 leadership, and that was based upon -- in that
13 case, it wasn't -- the command climate survey was
14 being conducted, and I hadn't seen the final one,
15 but I knew there were some bad stuff in there. But
16 it was from me going in and directing an
17 investigation.

18 COLONEL (RET.) COOK: Sir, on that point,
19 just to clarify, all the services do it
20 differently. But if you're relieving a commander
21 based on misconduct, or based on a command climate,
22 or just lack of trust in that commander, a relief,

1 you've essentially fired them from that position.
2 I know in the Army, that's accompanied by a
3 mandatory report, which means an evaluation of some
4 sort, that there's a document that's going to go
5 into their record, and I think that's true of the
6 other services. And since I see a lot of nodding,
7 I'm assuming that's done.

8 And whether it's called a fitness report
9 in the Navy, an officer evaluation in the Army, or
10 different for each of the services, on an annual
11 basis your commanders are all given an evaluation
12 of saying how they're doing. And when you said you
13 would document their EO piece or their command
14 climate piece, it would be in that annual record,
15 which is later collected in the service record and
16 considered by future promotion boards, command
17 assignments, or whatever kind of schooling
18 assignments they get or good news stories that are
19 taken as part of the process. Is that true across
20 the services?

21 LIEUTENANT GENERAL LINNINGTON: It's
22 certainly true in the Army. As Colonel Cook said,

1 the command climate surveys that commanders at all
2 levels have to do has recently changed in the Army
3 where it used to only be command -- company
4 command, small unit, 140 to 180 soldier units did
5 them. The Chief of Staff of the Army has now
6 increased that to include all the battalion size
7 units, brigade staffs, et cetera, across the Army.

8 The results used to just go to the
9 commander, so he would get a snapshot of how his
10 unit is doing, now goes to his boss. So maybe the
11 initial one that's due at 90 days comes back and
12 says there's a toxic climate in the unit or there's
13 a climate that doesn't take care of sexual
14 harassment issues. That commander then has to fix
15 those issues, and if the second one comes back,
16 which is mandated at the one-year mark that shows
17 that that climate is still pervasive, then I think
18 the higher level commander has the responsibility
19 to remove that commander from his position, which
20 is the accountability piece we're looking for.

21 Two other things I'd talk about with
22 accountability. One is the 360 evaluations that

1 are required on officer efficiency reports in the
2 Army now. The results of those 360 evaluations, I
3 think, should be studied to see where they go.
4 Right now, the results of the 360 goes to the
5 individual. It says what your subordinates and
6 your peers -- primarily what your peers and
7 superiors think about you.

8 I think we should look at expanding
9 perhaps the results of the 360 evaluation so that
10 the bosses of the leaders that perhaps have
11 nurtured a toxic environment can know what's going
12 on and then take appropriate action.

13 MR. BRYANT: May I? Go ahead.

14 CONGRESSWOMAN HOLTZMAN: Just a follow-
15 up --

16 LIEUTENANT GENERAL LINNINGTON: If I could
17 say one other thing because I heard somebody talk
18 about stats, and I know it was discussed down here.
19 The numbers of reported sexual assaults in the Army
20 are going up. As commanders -- senior commanders,
21 we sit in on the monthly sexual assault response
22 board meetings. I think we just have to be real

1 careful that we don't penalize units that have more
2 sexual assaults reported in the near term.

3 Now, a year from now if that's still
4 happening, then I think we got a problem. But as I
5 sat through the last several months of command, the
6 numbers of reports in the -- of sexual assaults in
7 the sexual assault review boards were going up.
8 And rather than -- I mean, we talked about it one
9 time at Fort Belvoir. I remember I said, okay,
10 what do you think about unit X that just had four
11 brand new reports of sexual assault? What do you
12 all think? And, of course, silence in the room. I
13 said, hey, let's applaud that unit because what
14 that tells you is now the climate is such that the
15 victims feel confident enough to report.

16 So as the numbers go up in the reports and
17 the climate improves, I think eventually you'll see
18 a point where those two graphs meet, and then
19 hopefully drops off very quickly. So I want to be
20 careful that we don't judge commanders in the near
21 term on the number of sexual assaults in their
22 units because that may be a good news story based

1 on a climate that they've established that supports
2 victims more.

3 MR. BRYANT: My question for you, and
4 first of all, let me thank you for being here
5 today. And I personally have no doubt that each of
6 our services is engaged in Herculean efforts to
7 address this problem and raise the sensitivity, if
8 that's an acceptable word to military people, of
9 your troops in regard to this problem.

10 My first question is, in terms of the
11 fitness reports, OERs, and the emphasis that you
12 put on is there sexual harassment, is there too
13 many reports of survey, if that's still a term
14 that's used at least from my day, and all these
15 other issues. Wouldn't and don't those criteria
16 exist regardless of the commander's authority to
17 initiate a courts martial? Wouldn't you still be
18 requiring and holding accountable your subordinate
19 commanders for their addressing those issues, even
20 if you didn't have convening authority?

21 (A chorus of yeses.)

22 MR. BRYANT: All right. And then

1 secondly, and it's sort of a follow up to that.
2 You all have engaged in your efforts in training,
3 the emphasis of the command attention, prevention,
4 and intervention, as you have addressed, in your
5 units. And wouldn't you have exercised and
6 initiated those efforts, even if you didn't have
7 court martial convening authority?

8 LIEUTENANT GENERAL LINNINGTON: Yes.

9 MR. BRYANT: I assume the answer is yes.

10 LIEUTENANT GENERAL LINNINGTON: But the
11 question is how effective would you be. As you
12 said earlier, commanders can be judged on a bunch
13 of different things, but statistics can be
14 interpreted in any number of ways. There are
15 reports or surveys now called flip-alls. If a
16 commander has a lot of them, that can be viewed as
17 negative or it can be viewed that he is a pretty
18 good property accountability process. The same can
19 be said for sexual assault.

20 MR. BRYANT: All right. For Ms. Fernandez
21 perhaps and some others, reports of surveys are
22 missing or lost or stolen property.

1 CHAIRWOMAN JONES: Admiral Houck?

2 VICE ADMIRAL (RET.) HOUCK: So to follow
3 up on Mr. Bryant's line of questioning, I think to
4 kind of get to the nub of some of this and go back
5 to the question that Admiral Ostebo sort of asked
6 at the outset, well, what's really the issue here.
7 Let me channel for a minute some of the testimony
8 that we heard yesterday, because, I mean, I think
9 we'd be remiss if you aren't compelled to or given
10 the opportunity to respond to some of the concerns
11 that are out there.

12 First of all, and I think this is echoing
13 a little bit of what Mr. Bryant was getting at,
14 there was testimony yesterday from allied armed
15 forces and then reinforced by other witnesses that
16 they've removed all of this from the commanders,
17 and their armed forces aren't falling apart, that
18 they haven't lost good order and discipline and in
19 their armed forces.

20 I mean, I would note as a matter of
21 perspective that the Army -- that the Marine Corps
22 and Coast Guard are larger than together the entire

1 armed forces of the United Kingdom, which were the
2 largest of the armed forces that were here
3 yesterday. But setting that aside, number one,
4 that good order and discipline hasn't broken down
5 in the allied armed forces.

6 Secondly, you guys won't tell the truth
7 that when military leaders come here, when senior
8 officers come here, they will come here and say
9 what the Secretary of Defense wants them to say.
10 It was raised in the context of Article 60
11 yesterday that everybody was opposed to changes in
12 Article 60 until the Secretary of Defense he
13 wasn't, and then the next day everybody was in
14 favor of changes to Article 60.

15 So you all need to be aware that that's
16 out there, and it won't do us any good if you won't
17 level with us. And as senior flag and general
18 officers, you answer a question from the Senate
19 when you're confirmed that will you give your
20 personal opinion and your honest opinion when
21 you're asked questions. And this Panel needs that
22 from you.

1 But there is a notion that you won't tell
2 the truth, and that, in fact, the junior commanders
3 at the -- there was testimony yesterday that
4 commanders at the 0-5 and perhaps 0-6 level would
5 prefer to divest this responsibility, to get rid of
6 it, to not have to deal with it. So contrary to
7 the kinds of things that you're saying today that
8 they would like to be rid of it.

9 I think the challenge is that the notion
10 has been raised, number one, that there are a lot
11 commanders out there who are, frankly, ignorant,
12 that do not get it when it comes to sexual assault.
13 Number two, that to the extent they have legal
14 advice, that they may intimidate or overrun or
15 ignore that legal advice, and that the lawyers will
16 not be forceful enough to make the points with the
17 commanders, and they will be intimidated by the
18 commanders. And number three, and probably most
19 fundamentally, and it goes to General Rice's point
20 about trust. The testimony yesterday about General
21 Amos' previous comments that troops don't trust us.
22 And so, you raised the point about trust.

1 General Amos' quote about lack of trust was raised
2 yesterday, and that the lack of trust means that
3 troops won't come forward. The sexual assault
4 victims do not trust the commanders in that
5 decision making loop to make good decisions. And
6 then it will lead to -- excuse me -- retaliation.
7 Lack of trust equals potential for retaliation.

8 So I'd just like to ask all of you, to any
9 of you or all of you to comment on any of that. I
10 realize it's a long stream of consciousness, but I
11 think it's a fair summary of what the -- in
12 response to your question, what's the issue.

13 GENERAL RICE: Just a couple of comments,
14 and then I'll pass it to my colleagues here. My
15 view is we have an opportunity now to actually do
16 something positive. And so the question is, what
17 constitutes something positive? So the fact that
18 other militaries may have instituted this -- a
19 similar legal provision that is being proposed that
20 takes commanders out of the loop and they don't
21 have any evidence that their militaries are falling
22 apart to me is not the right question. The

1 question is, do they have any evidence that this
2 has actually been effective in solving the problem?
3 If not, then to me it's not the best place for us
4 to expend our energy.

5 I think we've got to really understand the
6 nature of it, and when we're just now starting to
7 really understand the nature of how this problem
8 manifests itself in the military. And to the point
9 of that, that I think is relevant to this point in
10 this question is, ultimately if we're trying to get
11 more victims to report and they don't feel
12 comfortable reporting to their current chain of
13 command, and we think that they will feel more
14 comfortable reporting to another person, then
15 that's something I think that we ought to think
16 about, because at the end of the day, if we don't
17 get more reporting, in my judgment we won't solve
18 this problem.

19 And I've given this issue a lot of
20 thought, and I didn't sort of just react in a way
21 that said I think I have to as a commander have
22 these authorities. I've quite frankly been back

1 and forth on it because I have to figure out a way
2 to get more people to report if we're going to be
3 able to connect the dots to be able to find the
4 perpetrators to be be able to hold them accountable
5 ultimately. And most of them are hiding in plain
6 sight.

7 To this issue that we talked about before
8 in terms of how do you hold commanders accountable,
9 in my view, it's not an issue of command climate.
10 That's part of the issue, but a small part of the
11 issue, but not the main issue. We've learned a lot
12 in basic military training in the very look that
13 we've had at this over the last couple of years,
14 and I've changed a lot of my preconceived notions
15 about the nature of this problem.

16 We've had dozens and dozens and dozens of
17 victims of sexual misconduct and sexual assault. I
18 can't think of one that came forward to talk to us.
19 We don't have good feedback. We don't have good
20 enough feedback. We look at our perpetrators and
21 almost half of them are multiple perpetrators, so
22 these are people who are doing this again and again

1 and again. And the only way we were able to hold
2 them accountable is because we were able to connect
3 the dots with getting more than one person to come
4 forward to tell us what happened.

5 We've got to figure out a way to do that
6 better because I believe there are lots of dots
7 that are remaining unconnected out there because
8 we've got perpetrators who are walking around and
9 victims aren't coming forward. So this issue of
10 how do we get people to come forward is really
11 important.

12 I just don't see that there's any
13 evidence, and if anybody has some I'd be happy to
14 see it, that by having somebody else that victims
15 can believe will make the decision about whether to
16 prosecute this or not will substantially increase
17 the number of people who actually come forward to
18 report. I don't think that's the case. When you ask
19 victims why they don't report, it isn't that. It's
20 a lot of other things, but it's not that. That's
21 very low on the list of reasons why they don't
22 report.

1 So before we go down that road, I think we
2 ought to really be very circumspect about taking
3 more authority. And to the point -- the last point
4 I'll make, to the point of trust, more trust away
5 from commanders.

6 COLONEL (RET.) COOK: Sir, just to add to
7 what you're saying. Here's the analogy that was
8 actually put to us yesterday that'll give all of
9 you a good context as you answer this. One person
10 had said that if a report was made to them, that it
11 was like within a unit you have he said/she said.
12 It's brother and sister who get into a fight, and
13 now you're having dad resolve it, trying to take
14 care of everybody, and then nothing really -- the
15 case either doesn't go forward or a decision is
16 made that doesn't quite achieve justice.

17 So taking it out of that person's hands so
18 they can do everything else they need to do and
19 putting the independent discretion to do the courts
20 into somebody else's hands is what was put to us.

21 GENERAL RICE: But that's not the reality
22 of it. The reality of it is the evidence is the

1 evidence. The investigation is going to be done by
2 the same group of people whether it's OSI or NCIS.
3 It's a very thorough investigation. The evidence
4 is the evidence, which I said I think it's
5 absolutely important for you all to look at real
6 cases. If you look at the evidence, I don't think
7 you would think that anybody else -- it doesn't
8 matter whether it's, you know, a commander, an
9 independent prosecutor, or the President -- they're
10 going to look at the same evidence, and in 99
11 percent of the cases, they're going to come out
12 with the same outcome. That's not the issue here.

13 I mean, we're focusing on, in my judgment,
14 a lot of things that aren't the real issues that
15 are going to help us solve this.

16 LIEUTENANT GENERAL LINNINGTON: From my
17 perspective, I would say that I think we have to
18 hold the commanders accountable. And I think
19 strengthening the accountability for the commanders
20 that's been taken on by all the services and will
21 continue, and I know the Panel is looking at that.
22 I know that has to improve, number one.

1 I think if commanders are responsible for
2 preventing the incidents from happening in the
3 first place in their unit for all the different
4 things they do to prevent those incidents from
5 occurring, then the commander has to be the one
6 that adjudicates what happens when those events
7 occur.

8 The brother/sister analogy I appreciate,
9 and I would say that then how -- I mean, keep it
10 from happening in the first place so the parent
11 that's responsible for adjudicating the fight
12 between the kids should be the parent that keeps
13 the kids from fighting in the first place. So in a
14 very simple manner, hold the commanders accountable
15 for these incidents when they occur and charge the
16 commanders to create the climate that prevent them
17 from happening in the first place.

18 And at the end of the day for the young
19 officers that say, you know, they want to abdicate
20 that responsibility, then we need to look at in
21 real ways whether we feel they have the character
22 and commitment to command. And frankly, it's a

1 privilege, it's not a right.

2 BRIGADIER GENERAL (RET.) DUNN: General
3 Linnington and Colonel Bradley, on that specific
4 point, I am a private, sergeant, or captain in the
5 United States Army. Well, let's say a private,
6 sergeant, or a lieutenant in the United States
7 Army. How many commanders do I have?

8 LIEUTENANT GENERAL LINNINGTON: You have
9 one.

10 BRIGADIER GENERAL (RET.) DUNN: But as you
11 go up the chain?

12 COLONEL BRADLEY: One.

13 BRIGADIER GENERAL (RET.) DUNN: How many
14 -- I have -- what level commanders am I -- under
15 me?

16 LIEUTENANT GENERAL LINNINGTON: Well, yes,
17 ma'am, there's probably 10 levels of command from
18 bottom to top, and every soldier knows who his
19 commander is.

20 BRIGADIER GENERAL (RET.) DUNN: Who his
21 direct commander is. Right, but if I am Sergeant
22 Smith in Headquarters Company --

1 LIEUTENANT GENERAL LINNINGTON: He has --
2 you have a company commander.

3 BRIGADIER GENERAL (RET.) DUNN: -- so 325.

4 LIEUTENANT GENERAL LINNINGTON: Yes,
5 ma'am.

6 BRIGADIER GENERAL (RET.) DUNN: And I
7 commit a sexual assault, and -- well, first, 325,
8 there's not going to be a woman there, but, you
9 know, over in the COSCOM. I commit a -- I'm
10 involved in a sexual assault. I'm either the
11 complainant or the, you know, alleged perpetrator
12 of a sexual assault.

13 My first level commander is a captain 0-3
14 in the United States Army. Now, where is the first
15 level that that sexual assault is going to be --

16 LIEUTENANT GENERAL LINNINGTON: Well,
17 now --

18 BRIGADIER GENERAL (RET.) DUNN: -- looked
19 at in terms of disposition?

20 LIEUTENANT GENERAL LINNINGTON: Now it
21 goes straight to the brigade commander. It goes to
22 the 0-6 level commander. It goes to the company,

1 battalion --

2 BRIGADIER GENERAL (RET.) DUNN: Right,
3 which is how many levels up?

4 LIEUTENANT GENERAL LINNINGTON: It goes
5 three levels up.

6 BRIGADIER GENERAL (RET.) DUNN: Right. So
7 if the company commander is my daddy and I'm, you
8 know, having a fight with my brother here, that is
9 not the person who is making that decision. The
10 first level that it gets looked at is two levels
11 up.

12 LIEUTENANT GENERAL LINNINGTON: That's
13 correct.

14 BRIGADIER GENERAL (RET.) DUNN: And in
15 terms of numbers of people involved and in terms of
16 personal relationships, pretty distinctly removed,
17 correct?

18 LIEUTENANT GENERAL LINNINGTON: That's
19 correct.

20 BRIGADIER GENERAL (RET.) DUNN: I mean,
21 the brigade commander is not likely to know me and
22 my brother all that well --

1 LIEUTENANT GENERAL LINNINGTON: Well,
2 but --

3 BRIGADIER GENERAL (RET.) DUNN: -- you
4 know, unless I worked on his staff or something.

5 LIEUTENANT GENERAL LINNINGTON: As you
6 know, commander command two levels down --

7 BRIGADIER GENERAL (RET.) DUNN: Right.

8 LIEUTENANT GENERAL LINNINGTON: -- I mean,
9 professional development, we always go two levels
10 down. So brigade commanders decide which company
11 commanders command.

12 BRIGADIER GENERAL (RET.) DUNN: Right.

13 LIEUTENANT GENERAL LINNINGTON: That's the
14 accountability piece that goes into our system.

15 BRIGADIER GENERAL (RET.) DUNN: Right, but
16 my point is that the commander who I see every day
17 and who manages me every day is not the commander
18 that --

19 LIEUTENANT GENERAL LINNINGTON: Yes,
20 ma'am.

21 BRIGADIER GENERAL (RET.) DUNN: -- not
22 going to get involved in that from the first point

1 to make these decisions.

2 LIEUTENANT GENERAL LINNINGTON: No, not
3 anymore. No. They don't have the ability now to
4 -- I mean, at the company level, any incident of
5 sexual assault in the Army, in the military now
6 goes to the first O-6 level command, and has
7 immediate review under some recent changes by the
8 first flag officer in that chain of command.

9 GENERAL RICE: But the problem isn't who
10 looks at it. The problem is it's he said/she said.
11 And it doesn't matter who looks at it, it's still
12 he said/she said. And that's the real issue that
13 you have -- we have to figure out a way around.

14 BRIGADIER GENERAL (RET.) DUNN: Right.
15 And that goes to the investigative piece, the
16 prevention piece, the training piece. I mean, that
17 goes to many other things. What I was really
18 getting at here is the --

19 COLONEL BRADLEY: The analogy.

20 BRIGADIER GENERAL (RET.) DUNN: Pardon me?

21 COLONEL BRADLEY: Is the fallacy in the
22 analogy --

1 BRIGADIER GENERAL (RET.) DUNN: Yeah, the
2 analogy that, you know, you're --

3 COLONEL BRADLEY: Well, and, ma'am, I
4 would add --

5 BRIGADIER GENERAL (RET.) DUNN: -- loves
6 you and your brother and, therefore, you know,
7 can't make rational decisions. That is not, in
8 fact, the way it occurs because it's withheld now
9 to the 0-6 level, and that is a considerable piece
10 of the chain with a commander that has a broader
11 perspective. And, you know, absolutely these
12 cases, as everyone acknowledges, are extremely
13 difficult, and they all very, very fact specific.
14 And, you know, they need to be analyzed by both
15 commanders and lawyer to, you know, to make a
16 determination on whether we're proceeding straight
17 to, you know, Article 32 general court martial or
18 whether it's a case that's going to be handled at a
19 lower level or with some alternative.

20 COLONEL BRADLEY: Ma'am, I just want to
21 add one other aspect to that analogy that gets to
22 your point. And each level commander also has a

1 lawyer advising him. So the company commander has
2 a trial counsel advising him at the higher levels.
3 Then that trial counsel also has supervisory
4 review, so it's not done in a vacuum, the company
5 commander and a, you know, a lawyer held in the
6 family. It gets outside the family. It goes to
7 supervisory lawyers who review it, and then
8 ultimately, you know, as it goes up the chain, it
9 gets greater and greater legal scrutiny as well.

10 BRIGADIER GENERAL (RET.) DUNN: Yes, which
11 brings me to another point, and, you know, Colonel
12 Bradley, since I know you, I'm directing these at
13 you. But really across the board for the lawyers.
14 There was a little bit of commentary in here
15 yesterday about, well, the lawyers work for the
16 commanders and so the lawyer do what the commanders
17 do, what the commanders say, and, you know, no
18 lawyer is going to have --

19 So I think it might be helpful for the
20 whole panel to have some perspective on if you are
21 a military defense counsel or if you are a military
22 legal assistant's attorney, then your client is

1 that individual soldier, sailor, airman,
2 coastguardsman. But otherwise, Colonel Bradley, if
3 you and General Linnington are engaged in a, you
4 know, rather vibrant discussion on a particular
5 legal issue, who is your client?

6 COLONEL BRADLEY: Well, ma'am, you know, I
7 work for him and I'm his advisor, but my loyalties
8 and my duty do not run directly to him and only to
9 him, you know. Initially I am sworn to uphold the
10 Constitution and all that that means as an officer.
11 But also then as an officer of the court, I have
12 duties to ensure that I am abiding by my
13 professional legal obligations as well. So if the
14 commander is seeking to do something that I believe
15 to be illegal, immoral, then we'll have that
16 conversation and try to ensure that that process
17 gets back to what is appropriate in that particular
18 situation. And I don't have any --

19 BRIGADIER GENERAL (RET.) DUNN: But is
20 General Linnington your client or is the United
21 States Army your client?

22 COLONEL BRADLEY: The United States Army

1 is my client.

2 BRIGADIER GENERAL (RET.) DUNN: And if
3 General Linnington during the course of this --
4 and, excuse me, sir. But if he during the course
5 of this, you know, says, I had a little problem
6 last night, Colonel Bradley. When I was coming
7 back in the gate at Fort McNair, you know, the MPs
8 pulled me over to have a little bit of discussion.
9 What would your response to that be?

10 COLONEL BRADLEY: Well, my response would
11 be that he needs to seek a private defense counsel,
12 or a military defense counsel or civilian counsel
13 because, quite frankly, I'm not his lawyer for
14 matters that relate to him. I'm there to advise
15 related to matters for the command and the good of
16 the command.

17 CHAIRWOMAN JONES: For everyone's -- one
18 more question. I thought we should take a break, a
19 10-minute break.

20 COLONEL BRADLEY: Yes, ma'am.

21 CHAIRWOMAN JONES: There'll be plenty more
22 questions, but I think we could use a break, okay?

1 BRIGADIER GENERAL (RET.) DUNN: Yes.

2 CHAIRWOMAN JONES: Well, thank you,
3 General Dunn. We'll see everybody back in 10
4 minutes. Thank you.

5 (Whereupon, a recess was taken.)

6 CHAIRWOMAN JONES: All right. We're going
7 to resume. General Dunn had a couple of follow-up
8 questions, and then Professor Hillman. And after
9 that, we'll return to Admiral Houck. General Dunn?

10 BRIGADIER GENERAL (RET.) DUNN: Thank you,
11 Judge Jones. One other issue that I wanted to
12 address just in terms of lawyers' relationships
13 with commanders is for military lawyers, could you
14 please describe for the Panel where your ethics,
15 not necessarily instruction, but, you know, where
16 your ethics and practice are written, contained.
17 You know, what you're responsible from an ethics
18 and professionalism perspective, to whom you are
19 responsible from an ethics and professionalism
20 perspective.

21 CAPTAIN HARRISON: I'll go ahead and start
22 from the Navy's perspective. We're all obviously

1 members of a state bar, and we're bound by our
2 state rules. To the extent that our Navy rules
3 differ, then we're bound by the Navy rules of the
4 Federal rules that we follow. And those are by
5 instructions signed by the Judge Advocate General
6 of the Navy.

7 So we have an ethics instruction that
8 looks very, very similar to most state ethics rules
9 that we are bound to follow. If there are any
10 issues, we have -- there's an advisory committee,
11 an investigative panel, and a rules committee that
12 would look into sort of ethical impropriety of any
13 of our counsel in the Navy. So again, it's by
14 written instruction as opposed to statutory, but
15 it's very, very similar to what you would find in
16 most states.

17 BRIGADIER GENERAL (RET.) DUNN: And
18 Colonel Bradley?

19 COLONEL BRADLEY: In the Army, it would be
20 governed by, you know, my -- the Army's ethical
21 rules or Army Regulation 2726. And so, those
22 govern my professional ethics. And I guess the

1 point that I think I -- we would mirror the Navy in
2 how we handle ethical issues, but I would say that
3 it doesn't change by duty location. So my ethics
4 and ethical responsibilities don't change based on
5 -- they may change on whether I'm representing an
6 individual soldier or whether I'm representing, you
7 know, the Army or advising the commander. But my
8 ethical rules don't change by assignment.

9 BRIGADIER GENERAL (RET.) DUNN: And you
10 also are bound by your state bar.

11 COLONEL BRADLEY: We're also licensed by
12 our individual state bars, yes, ma'am. And I think
13 one last piece on that would be, and so if there is
14 a conflict, we go with most restrictive typically
15 and try to use that.

16 BRIGADIER GENERAL (RET.) DUNN: Colonel
17 Kenny?

18 COLONEL KENNY: It's the same for the Air
19 Force as the Navy and Army. We obviously all abide
20 by our state bar rules. We have Air Force rules.
21 We have Air Force procedures when there is an
22 issue.

1 I would add, too, though that all of us
2 are bound under Article 6 of the Uniform Code of
3 Military Justice. We have a unique role with the
4 judge advocate general of our unique services for
5 the professional provision of legal advice, in
6 particular, in the military justice realm.

7 So if for some reason I didn't feel
8 comfortable telling General Rice I felt that
9 whatever he was doing was wrong, which, by the way,
10 I do feel comfortable doing, and have done with
11 many of my commanders in my career. But
12 especially if something illegal or unethical or
13 immoral is going to happen, I have an obligation
14 under Article 6 to report that to the JAG of the
15 Air Force. So not only do I have those ethical
16 obligations, I also have Article 6 of the UCMJ.

17 BRIGADIER GENERAL (RET.) DUNN: And just
18 to clarify, the Uniform Code of Military Justice
19 applies to all services within the United States.
20 Colonel Harris?

21 LIEUTENANT COLONEL HARRIS: Ma'am, for the
22 Marine Corps, we also fall under the same JAG

1 instruction that the Navy judge advocate was
2 speaking about earlier, our state bar. And then,
3 also the only difference really between the Navy
4 and the Marine Corps is there's a few amplifying
5 instructions relating to how exactly ethical
6 complaints are handled under the Marine Corps
7 advice, the Navy, and the Department of the Navy.
8 And that JAG instruction, to go to your question
9 earlier, ma'am, makes clear that covered attorneys
10 under the JAG instruction, their client is the
11 Department of the Navy, not the commander with
12 which they serve or with whom they serve.

13 BRIGADIER GENERAL (RET.) DUNN: Okay.
14 Commander, I'm sorry, I can't see you.

15 COMMANDER DWYER: Commander Dwyer. Yes,
16 ma'am. We're going to be similar to our sister
17 services with the exception that we fall under DHS.
18 So there's going to be some differences there in
19 terms of the instruction, underlying instruction.
20 But again, answerable to your state bar.

21 But then as Admiral Kenney will speak to
22 this afternoon, really push to our whole judge

1 advocacy and CG JAG group is folks have to be able
2 to stand up and discuss issues with their
3 commander. And it's going to be uncomfortable, and
4 I know from my experience it has been at times, and
5 it will be. But you have to be able to do that.

6 But we have great bench strength in that
7 we can go back and discuss these issues up the
8 technical legal chain that we have back through
9 Pacific Area in Alameda and back through
10 headquarters to discuss issues to ensure some
11 consistency, but ensuring that we're comfortable
12 with saying some very uncomfortable things to the
13 commander at times.

14 BRIGADIER GENERAL (RET.) DUNN: Colonel
15 Harris, General Busby is an aviator, and strikes me
16 as a person who definitely has a mind of his own.
17 So could you describe for me how you handle
18 disagreements that you have with him over the
19 disposition of the case, over --

20 LIEUTENANT COLONEL HARRIS: Yes, ma'am,
21 first, to start with, I ought to explain that
22 military justice is one part of the portfolio of a

1 staff judge advocate, but it's not the only part.
2 There's a number of issues that a staff judge
3 advocate works with his commander on, everything
4 from ethics, fiscal law issues, environmental law
5 issues, and, of course, military justice. But when
6 there is a disagreement, first, it's important for
7 a staff judge advocate to realize, whether it's
8 just simply a disagreement or whether there's a
9 proposed course of action that involves something
10 unethical or something illegal.

11 In those circumstances, it's very easy.
12 There's a technical chain that a staff judge
13 advocate has, which ultimately, interestingly
14 enough, reaches back into the senior commander, to
15 the commander with which you're providing legal
16 advice. And that's most often one of those matters
17 in which you can resolve a conflict is to go up
18 your technical chain, if you will, to the next
19 senior staff judge advocate. And if they concur
20 with your legal advice, they have that access to
21 your boss' boss, if you will, to explain. And
22 that's what, in the past, quite frankly, in reality

1 that's an effective method which a staff judge
2 advocate can use in order to get to the right
3 decision for the organization because, again,
4 that's what it's all about is the organization and
5 making that right decision.

6 BRIGADIER GENERAL (RET.) DUNN: And,
7 Captain Harrison, is something that the Navy spends
8 a lot of time training its judge advocates on, that
9 concept of when to use a technical command, how to
10 deal with commanders when you're giving them advice
11 that they may or may not be receptive to?

12 CAPTAIN HARRISON: Yes. In fact, we have
13 a senior staff judge advocate course that we're all
14 required to attend at the Naval Justice School
15 before we fill the role as an advisor to the flag
16 officer. And part of that discussion, we spend
17 about a day on ethics, and it's the same issue. If
18 I disagree with the admiral as to the ultimate
19 decision, if it's a lawful decision, that's simply
20 disagreement. But if it's an unethical decision or
21 one that would be contrary to law, I'm required to
22 go up the chain of command to the supervisory staff

1 judge advocate at the next higher level of the
2 command over the admiral to bring those issues to
3 his or her attention. That's required and, yes, we
4 are trained to that.

5 COMMANDER HUTCHISON: Ma'am, if I could
6 just follow up with what Captain Harrison said, not
7 only is that true -- I echo everything he said, but
8 our commanders understand that as well. And our
9 commanders receive legal training as they go to
10 command. And furthermore, they and every commander
11 I've worked for has encouraged their staff judge
12 advocate to disagree with them, to bring up issues
13 with them.

14 So as brave as we might feel we are to be
15 able to stand up to the senior commander, it is
16 welcomed. It is encouraged. The role of the staff
17 judge advocate to the commander is mutual, and
18 there's an understanding from the commander, at
19 least the ones I've worked for, that there will be
20 times when we push an issue, we disagree with him.

21 And I've been in an environment, every
22 command I've been at, where that's been encouraged.

1 So it's a two-way street.

2 BRIGADIER GENERAL (RET.) DUNN: General
3 Linnington, you addressed at the beginning the
4 levels at which you have commanded. I'm presuming
5 that you had judge advocates who were your legal
6 advisor, at least from the battalion level up.
7 What do you look for and respect in a judge
8 advocate? What are your expectations of your judge
9 advocate in terms of their, not their day-to-day
10 activities, but in terms of assisting you in your
11 decision making process within the UCMJ?

12 LIEUTENANT GENERAL LINNINGTON: Yes,
13 ma'am. It's a mix of competence and character. I
14 mean, the competence to know the law and make good
15 recommendations, and then the character to stand on
16 the recommendations and not to be afraid of
17 disagreeing.

18 Corey and I disagree on -- not all the
19 time, but we definitely disagree on occasion, and
20 those disagreements were talked about. Ultimately
21 I knew the decision was mine, and I knew that Corey
22 held me accountable as well. So competence and

1 character.

2 GENERAL RICE: Could I just make one quick
3 comment on that point?

4 BRIGADIER GENERAL (RET.) DUNN: Please,
5 sir.

6 GENERAL RICE: And that is, this cuts both
7 ways, as you know. So, for example, just within
8 the last year, I've had to release several
9 commanders who received advice from their legal
10 representatives that was not good advice. And so,
11 the commander ultimately was responsible for the
12 decisions they made based on that advice, so this
13 relationship really has to be one where commanders
14 not only are willing to hear what their attorneys
15 have to tell them -- excuse me -- what their
16 attorneys have to tell them, but that they are
17 willing to put their own judgment against that
18 ultimately because they're accountable for the
19 decision.

20 REAR ADMIRAL OSTEBO: And if I could also
21 add, there's nothing unique here. I mean, a
22 commander who is not willing to listen to the JAG

1 or is not approachable by the JAG officer may not
2 be approachable by their senior enlisted advisor.
3 They may not be approachable or probably not
4 approachable by their ops boss on issues regarding
5 safety and operations stuff.

6 So there's nothing special going on here.
7 The legal advice is always perfect and always and
8 will always take into account all the commander's
9 interest and the best interest of that unit, and,
10 therefore -- or the relationship between myself and
11 Commander Dwyer is no different than my
12 relationship between my ops boss, my maintenance
13 chief, or anybody else in my chain of command or
14 direct report to me.

15 So I think let's set that aside. Before
16 break, a lot of assertions were made that, quite
17 frankly, that I don't agree with that some other of
18 my colleagues said, oh, yeah, that's true. So I'd
19 like to throw a couple of things at the Panel, if I
20 could.

21 First, I think it's -- we ought to be
22 careful about comparing ourselves to a lot of other

1 nations and the changes that they've made. I don't
2 know -- I wasn't here yesterday, but I do engage a
3 lot with my foreign counterparts and military
4 colleagues on the other side. And just because
5 they've taken this away in some countries doesn't
6 mean it's improved anything overall.

7 In some cases, it's just a matter of
8 efficiency because size and scale does, in fact,
9 matter. I think we, you know, time will tell
10 whether or not that's any better than the system we
11 currently have. So before we throw the baby out
12 with the bath water and decide we're going to try
13 to be like New Zealand or something, we ought to
14 really take a careful look at what our armed forces
15 do, what's unique and special to us in the way we
16 deploy and the way we operate, and the value added
17 by the current Uniform Code of Military Justice and
18 justice system overall before we do that.

19 This idea that junior officers would like
20 to get rid of some other administrative or other --
21 my JOs would love to have nothing to do other than
22 operations and everything else somebody else can

1 deal with. I think that's just a natural -- and
2 the more junior you get, the more you see that
3 because they may not have the bench strength of a
4 JAG working for them. But on the 120 cases, they
5 roll up to us anyway, so if they're giving away
6 something they don't currently have, at least not
7 within my chain of command.

8 So I don't -- I'd be careful again about
9 asking a junior person necessarily who may not have
10 the experience or fully understand the value of 200
11 years or so of experience that you have sitting at
12 this table and why something they have and may not
13 use may be of value to them.

14 Victims don't come forward was an
15 allegation made out here before, and I think that's
16 true. But I don't think we know the reason why
17 that is. I would profess that part of the reason
18 why that is, and supported somewhat empirically by
19 what I've seen, is that the process that you have
20 to go through a court martial for the victim, the
21 32 process ,the public re-victimization in an open
22 forum, and some other things are pretty onerous.

1 And a lot of victims just don't want to go through
2 that.

3 And I think when we looked at it and
4 Commander Dwyer and I were talking about it,
5 between the two of us, of all the cases we've ever,
6 we can only think of one person, I think, that's
7 ever remained in the service, win or lose a court
8 martial, when they've been a victim of sexual
9 assault. And why is that? I think we ought to
10 explore some of those other things and look at ways
11 of taking the system we have and modifying it,
12 adapting it, or adjusting it in ways that are
13 reversible if it didn't work and in ways that are
14 measurable so that we can understand the changes
15 that we've made before we start making wholesale,
16 you know, major muscle movements here.

17 In addition, we've made a lot of changes.
18 There's a lot of changes that have come down to me
19 from higher headquarters about how to address this
20 issue. We've put training in place. We've put
21 SARCs in place. We've put victim advocate legal
22 counsel in place, which the dust hasn't even

1 settled on, and what's that relationship to defense
2 counsel, to prosecution? How does that all come
3 together? Let's allow a little bit of time here to
4 settle out, measure the changes that were made, put
5 some -- like General Rice was saying, put some
6 measures behind this and understand what we're
7 doing before we start making other wholesale
8 changes. However, I do think it would be good to
9 ask what changes would be helpful to this system.
10 How could we make things better to address
11 specifically sexual assault going forward?

12 Finally, taking general court martial or
13 convening authority away from me in any way would,
14 in fact, be prejudicial to my ability to do my full
15 spectrum job, to get back to the question that you
16 asked, sir. For me to stand up in front of my
17 folks on this issue or any other issue and tell
18 them they are going to be held accountable by me
19 for their conduct on and off duty, and, oh, by the
20 way, you may be held accountable by somebody else
21 if they decide to take it up on these issues
22 outside of this chain of command, would be crazy.

1 I believe that I want to have the full
2 spectrum from administrative all the way up to
3 court martial and imprisonment if necessary for the
4 actions of the people below me. If I'm not doing
5 that job, fire me, okay?

6 On the command survey issue that came up
7 before and getting to the questions you asked about
8 how we hold people accountable, relieve for cause,
9 period. I've done it far too many times in my
10 command, and it's not just sexual assault. It's
11 things like hazing, right, which wouldn't
12 necessarily come under this. It's things like too
13 many alcohol-related incidents. It's things like
14 rites of passage that are stupid.

15 So we're going to trust our commanders
16 with the full authority, and we hold them
17 accountable to that. And when they screw it up,
18 they get relieved. And times are changing even
19 today. Somebody who gets relieved might as well
20 start shopping their resume somewhere else because
21 they're out of our service. It is very well
22 documented on command climate surveys today. And,

1 in fact, we even have commanders calling strikes in
2 on themselves. I just had a command ask for a
3 command climate survey so they could fully
4 understand the spectrum of events going on at their
5 command if they're relatively new to that command,
6 but what to understand and ask for a third party
7 review through a command climate survey.

8 To me, that's a very healthy position to
9 be in. It's the correct direction to go in. And
10 it allows us -- it shows our folks that we are
11 taking this serious and it's transparent to
12 everybody throughout the chain of command. So just
13 to try and clean up a number of things that were
14 brought up.

15 BRIGADIER GENERAL (RET.) DUNN: I think --

16 MAJOR GENERAL BUSBY: If I could just
17 respond to the question about the relationship
18 between the two of us. I guess I am a moderately
19 aggressive individual. The advice I give, actually
20 the direction I give everyone who serves with me is
21 pretty simple. Speak your piece, speak your mind.
22 I'm not the font of all good ideas. You have to

1 speak up. And that's Lieutenant Colonel Harris. I
2 demand of him to be a second and third order
3 thinker, to be able to make sense of a set of
4 facts, legal facts or otherwise, as he's trained to
5 do that and very good at it.

6 And the last thing I tell him is that he
7 has to have the best interests of the institution,
8 always have to be first. In fact, I won't give you
9 the sequence of events and the facts, but we had a
10 situation this weekend where an event occurred. I
11 had a set of facts, called him on the phone. I
12 know this, and this, and this, and here's what I
13 want to do, and his response was pretty clear: I
14 wouldn't do that if I were you. So I think that
15 relationship between all of us and our SJAs is the
16 same, we demand of them to be thinkers to tell us
17 what's on their mind, and have the best interests
18 of the institution at heart.

19 BRIGADIER GENERAL (RET.) DUNN: And
20 General Busby, do you rate or senior rate Colonel
21 Harris?

22 MAJOR GENERAL BUSBY: My Chief of Staff

1 rates him, and then I -- my Chief of Staff is the
2 reporting senior for Lieutenant Colonel Harris, and
3 I'm the reviewing officer for his fitness report.

4 BRIGADIER GENERAL (RET.) DUNN: And this
5 is another issue that was raised yesterday, and,
6 you know, kind of thrown out there as, you know,
7 how can the staff judge advocate possibly, you
8 know, stand up to the commander when their
9 efficiency report is written, signed, reviewed, et
10 cetera, by that commander. I would just be
11 interested in some comments across the board on
12 that.

13 MAJOR GENERAL BUSBY: Well, I would offer
14 just from a marine perspective that they're
15 professional military officers. I just did it with
16 my boss yesterday on a particular issue where the
17 word "no" came out. We just can't do that, and
18 here's why. And I think we all demand, and they're
19 all professional military officers, and that's who
20 they are.

21 COLONEL KENNY: I think the key, and one
22 of the things you can look at is the defense

1 counsel program. One of the things that I recently
2 did was supervise all of the young captain defense
3 counsel throughout the United States Air Force all
4 over the world. And those young officers are
5 professional officers and professional attorneys,
6 dual professions. And if a captain can take on the
7 entirety of the United States Air Force, the United
8 States Army, the United States Marine Corps and
9 defend some young person who's in trouble, and
10 they've got the moral fortitude to do that, then
11 they certainly when they grow up to become a staff
12 judge advocate to a general court martial convening
13 authority, can stand up to a four-star when
14 appropriate and tell them what needs to be said.

15 CHAIRWOMAN JONES: Thank you, General
16 Dunn. I think we should move on now. I am going
17 to call on Professor Hillman, but, Admiral Houck,
18 did you want to follow up on your questions or see
19 if there were more responses? You had a lot of
20 questions.

21 VICE ADMIRAL (RET.) HOUCK: Thank you. I
22 do have a couple by way of follow up, and I

1 apologize for the sort of stream of consciousness
2 nature of the original set of questions. But I do
3 think they're important, and I know that Admiral
4 Smith was trying to get in on that last round
5 before the break. Did you have anything?

6 REAR ADMIRAL SMITH: Yes, sir, Admiral. I
7 wanted to follow up on a couple of your comments
8 and, you know, the ignorant one kind of got me.
9 And, you know, Congress should make a decision on
10 taking away accountability or not. And if it
11 happens, it's going to be harder. It's going to
12 cause complications, but we're going to figure it
13 out because that's what's we do.

14 But what the real issue in my mind is, you
15 know, when you talk about prevention, advocacy,
16 and, you know, accountability, we're working the
17 advocacy, we're working the accountability piece
18 hard. But it's also easy to gravitate to that
19 because it's tangible, you can work it, there's
20 things.

21 Where we need to be focusing is on the
22 prevention. And I've been working this solid, hard

1 for a year now. I spend anywhere from 15 minutes
2 to three or four hours a day on sexual assault, and
3 I keep on coming back to the prevention piece. You
4 know, 40 percent plus of the sexual assaults that
5 happen in my area of responsibility happen out in
6 town, and I'm not the dad there, and I'm not
7 standing over them when they're drinking or doing
8 stupid things, making bad decisions that lead to
9 sexual assault and other things.

10 And so, in my mind, that's where we need
11 to spend our effort. That's where we need to spend
12 the time. That's where I spend my time. Mr.
13 Bryant, I haven't come to see you yet down in
14 Norfolk because I'm reasonably new, but, you know,
15 I've seen my district attorney when I was in San
16 Diego, did the same thing in Hawaii, established
17 relationships. I've been out with the colleges.
18 They've got the same demographic where the
19 preponderance of these occur. I come to find out
20 we're doing a lot more than a lot of other folks,
21 whether it be cities, schools, stuff like that.
22 But they've got good ideas that we're taking on

1 board and we're sharing ideas.

2 You know, one of the things -- you know, a
3 year and a half ago, I never thought that I would
4 be out talking to the leadership of the LGBT
5 community in San Diego. I'm now doing that because
6 it's one of the things that -- it isn't just male
7 on female. It's female on female, male on male,
8 male on female, and we've got a group out there
9 that we're not taking care of because for fear and
10 things like that don't want to come forward. So
11 we're working with the LGBT community now to help
12 those things.

13 And where I really think that we as a
14 country, Congress, the military, have got to focus
15 on the prevention piece because, you know, I've
16 been taking care of my sailors, and I've been
17 accountable for my sailors since I was an ensign,
18 since I got commissioned. I've done it well. I've
19 done it bad. I've made mistakes. I've learned
20 from it, you know. And it's been a growth for me.
21 If I look back to when I was a commander of a
22 destroyer back as a commander, I had a sexual

1 assault on that ship, and I took care of it, and I
2 addressed it. I also had multiple DUIs. I had
3 multiple domestic violence, things like that. So
4 it was one of a myriad of personnel issues.

5 So I knew it was important, but I didn't
6 have an understanding or appreciation of how
7 important it was, how pervasive it was throughout
8 our society and how significant. And I have grown
9 to that. So the ignorance piece, it's taken me a
10 while, but I think, you know, and a lot of it is
11 because of the pressure and things like that, but I
12 think we're all much smarter now than we were two
13 years ago and understand it.

14 And I don't think there's a -- and there
15 are still probably some people out there and bad
16 apples. There always are. I mean, I referred
17 earlier to the individual I had to relieve of
18 command in my last job because he didn't get it.
19 Most of us get it, and most of us, the majority --
20 the large majority want to make this right. And
21 the way we're going to make this right is in the
22 prevention piece, not on the backside with the

1 advocacy and accountability. We're working that,
2 and it's important, and I focus on that, too. But
3 it's a prevention piece. And so, I don't think
4 it's about ignorance. I think it's about us
5 understanding and focusing on how we can change
6 culture.

7 You know, we kind of talked about -- one
8 of the things that I've learned over the past year
9 is I had no idea. I mean, I talk to my kids, but
10 some of the language and the things that are
11 accepted for -- accepted in society right now I was
12 appalled at. I had no idea.

13 VICE ADMIRAL (RET.) HOUCK: Understanding
14 that there's a piece of that in this, let me ask
15 you kind of a hypothetical question in a sense. So
16 suppose that you have a predator, a serial
17 predator --

18 REAR ADMIRAL SMITH: Yes, sir.

19 VICE ADMIRAL (RET.) HOUCK: -- in the
20 command who not uncharacteristically perhaps is an
21 outstanding performer. And the serial predator who
22 is an outstanding performer is immune, in some

1 sense, to lot of the preventive steps that we try
2 to take in terms of alcohol reduction and
3 everything else. Why are you a better person to be
4 the decision maker in terms of whether or not an
5 accusation would go to trial, for example, than
6 Captain Harrison, for example, who would be
7 probably would no doubt fall under the category of
8 an experienced military prosecutor? Can you
9 reflect on that a little bit?

10 REAR ADMIRAL SMITH: The first thing I
11 would give you is I'm accountable for my command,
12 and I have the responsibility to you, all of you,
13 all of us as taxpayers and citizens of this country
14 to deliver a unit that can perform. And I've got
15 an individual that is not doing their job, I have a
16 responsibility to hold them accountable, not him.

17 LIEUTENANT GENERAL LINNINGTON: I would
18 also say, sir, that, I mean, for it's a cop-out to
19 divest that decision making, but that's a teachable
20 moment. That's a moment a commander can impose
21 justice and do it in a public kind of manner that
22 sets the tone for that unit and can improve that

1 unit tremendously.

2 VICE ADMIRAL (RET.) HOUCK: It is fair --

3 LIEUTENANT GENERAL LINNINGTON: If it's
4 not your responsibility, then you just kind of say,
5 you know, it's not my problem.

6 VICE ADMIRAL (RET.) HOUCK: And I take it
7 that all of you, and if anybody wants to differ
8 from it, feel free to do it. But I take it that
9 all of you would ascribe to the sentiment that
10 Admiral Ostebo mentioned a few minutes ago, that it
11 may well be that if you go out and survey some
12 junior officers and perhaps some junior commanders,
13 that you will find some who say, yeah, I'd rather
14 not have anything to do with it.

15 But that from a senior leadership
16 standpoint, and not because you feel compelled to
17 say it, but do all of you sign up to what he said
18 about wanting responsibility to take these things
19 on?

20 (A chorus of yeses.)

21 VICE ADMIRAL (RET.) HOUCK: The second
22 question -- I have two more questions, and then

1 I'll defer to my colleagues. There's been a lot of
2 attention given, and rightly so, I think, I think
3 to the relationship of the lawyer and the lawyer's
4 ability to speak freely in the commander-lawyer
5 relationship. I want to twist a little bit and ask
6 the lawyers, do you feel that there is value in the
7 conversations that take place with the commanders?

8 In other words, we've been very focused on
9 lawyers not being repressed, right, in this
10 conversation, that the commanders are not
11 overriding the lawyers. But I want to turn that
12 and ask you guys if you get value out of it such
13 that if the commanders were removed from the
14 conversation, do we lose anything.

15 And then I think the follow-on question
16 that somebody will ask to that is, well, you could
17 have that conversation anyway. Even if the
18 prosecutors were independent, they could still
19 always ask for input from commanders. Do you feel
20 that the conversation would have the same quality,
21 that it would take on the same dynamics as it would
22 now? So that's what I'm interested in

1 understanding from the lawyer's perspective, what's
2 the nature of this conversation that takes place
3 and what's the value in it, if any?

4 LIEUTENANT COLONEL HARRIS: Admiral, if I
5 may, first, really a two-part answer to that
6 question. The first part is that I think it's
7 important to bring out that the decision we're
8 talking about is usually a referral decision, a
9 decision on how to dispose of an allegation. And
10 quite frankly, legal training is important, but as
11 General Rice alluded to, what makes all the
12 difference is usually facts. And you don't need to
13 be -- it's not a degree of legal training. It's
14 important because that bears to the answer
15 ultimately.

16 But, quite frankly, the majority of the
17 decision making process revolves around those
18 facts. And making a decision based on facts
19 presented to them is something commanders do time
20 and time again. And as the Admiral alluded to
21 earlier, whether it's a referral decision, an
22 operational decision, a decision on allocation of

1 resources and logistics and the exercise question,
2 regardless, commanders make those types of
3 decisions all the time. They don't need great
4 legal expertise to make the decisions we're talking
5 about.

6 They have a lawyer on their staff, their
7 staff judge advocate, who can provide input with
8 regard to whether there's a legal aspect to those
9 questions. But usually that's the minority of the
10 problem. The majority of the problem is really a
11 fact-based issue.

12 And second, going back to your question,
13 Admiral, from the lawyer's perspective, I would
14 just simply really in response also to your earlier
15 comments, from the lawyer's perspective, I don't
16 want that decision, not because I shirked the
17 responsibility or I'm concerned about making that
18 decision. What I'm concerned about as a judge
19 advocate is what I know from my experience of
20 what's going to happen after that decision. Do I
21 want to be part of a court martial process that's
22 viewed as a distraction, as our Canadian brethren

1 referenced it yesterday, something where the
2 commander is not involved in it? Having
3 unfortunately sat in almost every chair in a court
4 martial room, being a judge, a prosecutor, a
5 defense counsel, a witness, I've been a member.
6 Luckily I've never been an accused and I've never
7 been a court reporter.

8 (Laughter.)

9 LIEUTENANT COLONEL HARRIS: But having sat
10 in all those chairs, I would offer for the Panel
11 from my perspective, the ability of a court martial
12 to effectively adjudicate an allegation fairly for
13 everybody involved is strengthened when that court
14 martial is convened and is a result of the order of
15 a commander versus a lawyer.

16 COMMANDER DWYER: I would just echo that,
17 and even say in -- you know, after the fact, I've
18 stood there when Admiral Ostebo was commander on
19 the, you know, on the hangar deck and talked to a
20 command about some decision that's been made. I
21 wouldn't have that same effect on those folks that
22 he does, you know, as a two-star, as their

1 commander, and then understanding that underlying
2 good order and discipline piece and being able to
3 explain that to folks, because oftentimes when I'm
4 having that conversation, sir, it's always, okay,
5 if you took this decision, how are you going to
6 explain it to -- what will be viewed by by the rest
7 of your folks, and are you willing to stand up and
8 talk about it when you can to them? The commander
9 has that ability inherent in his authority or her
10 authority, whereas the staff judge advocate, I
11 don't. I can help them prepare those remarks and
12 that statement, but it's not going to sound the
13 same coming from me.

14 VICE ADMIRAL (RET.) HOUCK: Okay. One
15 more?

16 CAPTAIN HARRISON: You know, Admiral
17 Houck, I've served with many senior officers and
18 had a lot of discussions on a lot of cases. And I
19 got to tell you, in each and every one I think the
20 discussions that you have with your senior officers
21 enlighten you as much you enlighten them, because
22 they came from a different world. They grew up in

1 a fighting force. We grew up in the Navy, a staff
2 corps primarily focused on the law. They bring a
3 lot of things that we perhaps had not previously
4 considered to the table that we then have to
5 discuss in that environment, and then make a
6 recommendation or just, you know, vet those issues,
7 issues that we had not been exposed to because
8 we're not -- we had not come from the same
9 background as them.

10 But, you know, the thing that I've noticed
11 today is that a lot of the discussion here is
12 focused only one small, very, very small aspect of
13 this is who's going to convene these courts. But
14 when I have a discussion with my convening
15 authorities, let me tell you that the nature of the
16 discussion flows the full gambit of the
17 responsibility that the commander has under the
18 Uniform Code. Our Code is written that from an
19 incident of -- when an incident occurs, the
20 commander has to start the investigation. The
21 commander is a quasi-judicial official. He or she
22 would determine whether the suspect is going to go

1 into pre-trial confinement. He or she will
2 determine whether or not to issue a search or
3 seizure authorization. When we go to the Article
4 32, he or she will decide whether or not to approve
5 witnesses and experts and things like that.

6 So the nature of our discussion is not
7 solely focused on this one detail of whether or not
8 to convene, but the whole process of the Uniform
9 Code of Military Justice. And I think that's what
10 a lot of us struggle with here today is that this
11 proposition that we're either going to, one,
12 streamline some constitutionally-protected class of
13 offense or we're simply going to laterally lop off
14 just one small piece; that would be the convening
15 of the courts.

16 What does that then do to the rest of the
17 responsibilities that these commanders have? And I
18 think that's the challenge is that each and every
19 one of these need that full spectrum of authority
20 and responsibility under the Code, not just the
21 convening piece and not just in one specific
22 offense.

1 You know, talking to the junior
2 commanders, I've spoken with a lot of 0-5
3 commanding officers of afloat units in the San
4 Diego area. They want these cases. They don't
5 want to abdicate responsibility. They own these
6 problems, and they want to deal with these
7 problems. And they are somewhat offended that the
8 institution does not believe that they have been
9 promoted to the rank and command, that they're not
10 capable of making those decisions. They can make a
11 decision to refer a capital trial, but they cannot
12 make a decision on a sexual assault case.

13 So the experience that I have seen out in
14 the fleet, at least in the San Diego metropolitan
15 area, is that the junior officers want these cases.
16 And I'll go one step further and say, as a
17 commissioned officer, if the flag officer that I'm
18 briefing disagrees with me, I think it's expected
19 of me by my Nation, my integrity, and my oath of
20 office that I'll stand up and do the right thing
21 and say the right thing, and advocate the position
22 which the Department that I represent, the United

1 States Navy, is what they expect of me.

2 VICE ADMIRAL (RET.) HOUCK: So, no, that's
3 helpful, and it segues into the last question that
4 I want to ask, and then I'll back off. I think
5 there are some who feel that the nature of this
6 conversation, that the lawyer brings a purity to
7 it, and an objectivity -- and a purity and an
8 objectivity to it. And then when the conversation
9 takes place with a commander, something else is
10 injected into the conversation, something that is
11 arguably impure and illegitimate and corrupts the
12 decision making process. And I think that's what
13 -- and some degree, that's what motivates the view
14 that the commander should be taken out of this
15 decision making process.

16 Linked very carefully to that is this
17 notion that the commander will interject a
18 protectiveness of the people that work there, a
19 covering for them, and as adjunct to that,
20 retaliate against the person who has brought the
21 complaint in the first place such that if the
22 lawyer is making the decision on their own, the

1 lawyer would make a legally informed, pure
2 decision, and the commanders are corrupting that
3 process either in the decision making process or by
4 injecting the notion of retaliation into it that
5 then infuses the command, and that the person who
6 brings the complaint is going to be retaliated
7 against.

8 That's a long-winded way of getting to the
9 question, the question being, do -- there are
10 multiple ways in which people can report sexual
11 offenses today. If we take commanders out of the
12 decision making process for referring courts, will
13 it lessen the instances of retaliation, to put it
14 directly? If we take commanders out, will
15 retaliation go down?

16 COMMANDER DWYER: I don't see -- sir, I
17 don't see how it can. I mean, if a case is brought
18 to my attention and Commander Dwyer's attention,
19 and he's the person that makes the decision on
20 whether he's going to convene a court martial and
21 take it forward, that person is assigned under me,
22 so my ability or some perverse person within my

1 command can still retaliate if retaliation are
2 things like shunning that person, ignoring that
3 person, writing a fitness -- he won't be writing
4 the fitness report, I will be or some subordinate
5 command.

6 So I think the retaliation piece is not
7 shielded in any way by taking it over to, you know,
8 some other person that actually convenes the court
9 martial because you'll be retaliating against the
10 allegations, not against the adjudication, quite
11 frankly. And what I've seen is the tension begins
12 the second an allegation is made at a command. So
13 on that side of it, I don't think -- I can't see
14 logically why that would go away, sir.

15 There are some other things that I think
16 up front when an allegation is made that might
17 structurally be better and worth exploring in my
18 command, and that is that when an allegation is
19 made, because sometimes we had in the past where
20 the victim and the accused literally lived next
21 door to each other in the barracks. And so, maybe
22 it is appropriate to remove those folks, put them

1 in separate commands on all of these cases, and
2 give them that opportunity to start anew or to be
3 insulated from interaction with each other given
4 the emotional issues around all of this.

5 So there are things I think we can do for
6 both the accused and the victim up front that might
7 make it better off. But if you leave the things
8 the way they are now and just simply make the
9 convening authority another person in the chain of
10 command, it's still the allegation that people
11 would be retaliated against.

12 GENERAL RICE: My quick comment on that
13 would be in my experience, the reason one of the
14 top reasons people don't report is because they
15 perceive that the environment into which they are
16 going to report is either, at worst, hostile or, at
17 best, not welcoming. And my experience is in many
18 cases that's true, but it's not at the level of the
19 commander, it's the level below the commander and
20 the individual offices and the unit.

21 I believe the way forward is not to take
22 the commander further out of that responsibility to

1 make sure that that environment is the one that we
2 want to increase reporting, but to hold them
3 further accountable for it, and that's really the
4 direction that we're heading within both my command
5 and in the Air Force.

6 LIEUTENANT GENERAL LINNINGTON: Sir, I
7 would say commanders are in the best position to
8 care for the victims who report these crimes, and,
9 therefore, their investment in the decision making
10 process would be what defeats the retaliation or
11 prevents retaliation. I think if you take the
12 commander out of the picture, I think the
13 retaliatory nature of these reports has to go up,
14 my opinion.

15 LIEUTENANT COLONEL HARRIS: Sir, I would
16 just simply add that there were -- I think
17 retaliation, the most common form of retaliation
18 that is referenced by victims that we interact with
19 is, as we stated before, at, quite frankly, a very
20 low level. It's not at the level of the commander.
21 If we had retaliation at the level of a commander,
22 there'd be multiple ways to handle that.

1 But when we're talking about the
2 retaliation at a lower level, the one who's in the
3 best position with the most tools available to them
4 to resolve that issue is the commander. If we turn
5 that over to a lawyer, the lawyer has got one tool
6 available to him, and that's to prosecute. We're
7 not going to prosecute our way out of that problem
8 set. The commander has so many other tools
9 available to impact and to reduce the possibility
10 of retaliation however we define that term.

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

12 CHAIRWOMAN JONES: Professor Hillman?

13 PROFESSOR HILLMAN: Thank you, Judge
14 Jones. I wanted to thank each of you for spending
15 this time with us today, these hours, and also the
16 time that you spend on it every day as Admiral
17 Smith referred to, and that you spent preparing for
18 us today.

19 I do want want to ask you for a little
20 more help, and I apologize for the additional work
21 that that would entail. And that just goes to the
22 data. As you get information and you know more

1 about -- General Busby, you referred to more
2 reports, you know, reporting rates going up.
3 General Linnington mentioned that reports will go
4 up and we need to not take that as a sign of
5 failure, but a sign of success.

6 It would be very helpful for us to know
7 that as data comes in at what you consider
8 reasonable points so that we can look at it,
9 because these next months are the period of time
10 when we're trying to bring all this information
11 together.

12 Another question about data. One of the
13 things we're struggling with is not only what we
14 know, but how do we know it, and when we will know
15 it has changed. It's sort of an epistemological
16 question from an evidentiary perspective.

17 We need your help in identifying what the
18 measures of success are. And you've set much of
19 this out already in the plans that you've worked
20 on. But we will continue to need that because it's
21 actually not a very good response to say that we
22 simply have more reports and we -- there have to be

1 other ways in which we're measuring this, whether
2 it's climate surveys. And the accountability piece,
3 I agree it's an easy piece to press on because it
4 gives us metrics rather than the softer measures of
5 success in other parts of this equation. But we
6 will need that, too.

7 So I want to ask you a few questions about
8 that. What about putting -- one of the things, and
9 this goes to Admiral Ostebo's question about why
10 are we looking at taking the commander out of the
11 process when that's actually not the thing that you
12 think is actually the problem at all. And, in
13 fact, General Rice, you think we should have the
14 commander yet more elevated. We're doing it
15 because victims -- because survivors, and they're
16 the people who are really faceless here. You
17 mentioned that transferring the convening authority
18 power to a professional prosecutor would make that
19 person faceless, where really we have six judge
20 advocates here before with commanding officers. We
21 don't have the survivors here before us. It's the
22 victims who are telling members of Congress and who

1 are telling us that they lack trust in the
2 legitimacy of the process by which those charging
3 decisions get made.

4 One of the things they also tell us is the
5 perpetrators, the accused, get promoted. If we
6 could actually find a way to put in the process the
7 promotion and evaluation process a measure of --
8 you know, the command climate surveys. That's a
9 piece of it. It's great to have that information,
10 and it's important to relieve persons of command.
11 But relieving persons of command isn't -- that's
12 not getting to the level at which the problem is
13 actually percolating up through the ranks. And I
14 think we need to do more to include in evaluation
15 processes questions about how these issues are
16 being managed to address what victims are coming to
17 tell us about.

18 Now, General Rice, a question for you
19 specifically about the numbers. You mentioned that
20 the percentage of individuals who are in the
21 sessions the Air Force has -- the number of sexual
22 assaults they've reported has gone up in recent

1 years. I think you said it had come up to 39
2 percent in the numbers you were reporting. I'd
3 love to see that data. And I also want to know,
4 how is that -- I don't quite understand how that's
5 a measure of our success, of the Air Force's
6 success in encouraging reporting. If I'm
7 understanding correctly, it's individuals coming
8 into the Air Force reporting they had experienced a
9 sexual assault in the past. Can you just tell me a
10 little more about that?

11 GENERAL RICE: Yeah. So that's a measure
12 so when people come in, we take surveys that we are
13 collecting across the Air Force of how many sexual
14 assaults we have. We divide that in many ways.
15 One of the ways we divide it is when did the
16 assault occur. Was it after you came onto active
17 duty or was it before you came onto active duty?
18 And what I was indicating is that today 38 percent
19 of the people when we asked them have you ever been
20 sexually assaulted, and they say yes, say that the
21 assault actually occurred before they came into us
22 in the Air Force. And so, that number is going up.

1 And so my point was that they are now
2 feeling more confident to tell what happened in an
3 environment that is now more conducive to either
4 responding to them with help or that they think
5 will do something to address their concerns than
6 the environment that they came from. So to me,
7 that is good. That's positive.

8 PROFESSOR HILLMAN: Understood. Thank you
9 for clarifying. One of the challenges that we face
10 with respect to the survey data is also one that
11 I'm sure you reckon with as you look at the data
12 you're getting. And that is the lack of follow-up
13 for surveys about incidence of trauma leads to
14 difficult -- leads to uncertain results. In other
15 words, I think we need to invest more resources in
16 following up some of the surveys that we do to make
17 sure we're getting accurate data. And that would
18 include the follow-ups there, and I know you're all
19 looking into that. So -- yes, sir?

20 LIEUTENANT GENERAL LINNINGTON: Real
21 quick, professor. In the last probably two months
22 or so, all the services under the direction of the

1 Chairman of the Joint Chiefs of Staff have spent a
2 lot of time on metrics and surveys. They actually
3 came up with about 40 metrics that the Services are
4 looking at. They've met actually in the JCS tank
5 and whittled it down to about eight or 10, I think.
6 And they've actually populated, I think, six or
7 eight of them. So it's probably worth you and the
8 Panel's time to have somebody from the DoD Sexual
9 Assault Response Program to come over and just fill
10 you in on where we are on the data and surveys,
11 metrics and surveys, so you're informed of what the
12 recent reporting has shown.

13 PROFESSOR HILLMAN: Thank you. That's
14 definitely important to us, and we realize, too,
15 you all -- many things are happening out there that
16 we're racing to keep up and we have a great staff.
17 But it is tough for us to keep track. It is a big
18 force, and there are a lot of efforts in this
19 regard.

20 Let me just stress, though, we have faced
21 this problem in the past. It's not really a new
22 problem. We have -- your predecessors have

1 demonstrated commitment in the past before Congress
2 and before other bodies reckoning with the
3 question. It's three decades, more than three
4 decades, since women first graduated from our
5 national service academies. It's more than two
6 decades since the Tailhook scandal. It's more than
7 one decade since I was at the Air Force and the
8 aftermath of the scandals there, the Lackland
9 situation that happened over the past few years. I
10 have the sense -- the strong sense that that's
11 affected your assessment, that the Air Force has
12 learned a lot from that.

13 That is what we face here, too, and that
14 is a part of the lack of confidence not only in
15 command authority in the prosecutorial process, but
16 in the ability of the military to solve this
17 problem itself. So one of the questions for you
18 that I have after hearing what is very persuasive
19 testimony about the negative impact of some of
20 these potential changes, is the problem different
21 in the armed forces than it is in civil society? I
22 feel like this is a problem we've not been able to

1 solve in the armed forces, despite the fact that
2 you have a lot more tools at your disposal than
3 what, say, the civilian president of a college does
4 whose facing a similar demographic and comparable
5 issues.

6 If it's not distinctive from -- if it's
7 not a distinctive problem in the military, it's
8 tougher to decide that command authority and
9 responsibility is the right way to resolve this.
10 If the problem really runs to subjective factors
11 related to the confidence of individuals, the
12 fortitude they need to have in order to report
13 those assaults. So if it's not actually a
14 different problem, why is the answer inside command
15 and not in some comparable civilian process?

16 COLONEL BRADLEY: I think the answer to
17 that is that it gets back to what I think you hear
18 from the Panel often is that it's not so much that
19 the problem is different in society or in the
20 military. I think it's the same, and the
21 prosecution is the same, and so those are similar.
22 And I guess the point would be that you're not

1 going to prosecute your way out of that not in the
2 military and not in society.

3 But what I think we would say or I think
4 the command would say is that it's the
5 effectiveness of the unit that is at risk, that if
6 you change the dynamics of it, how it is currently
7 -- even though we're approaching it with a lot of
8 energy and true, you know, focus, when you remove
9 the commander from the process, you're going to --
10 you may get change, but you don't know. But it's
11 very clear that you will undermine the commander's
12 authority, and, thus, put the unit, the mission at
13 risk, I think.

14 And so, one of the balances is not just
15 solving the problem, but making sure when we solve
16 the problem we don't destroy the other components
17 of why we do what the military does best.

18 PROFESSOR HILLMAN: To follow on my
19 colleague, Admiral Houck's, articulation of what we
20 heard yesterday, here's an example of a response to
21 that. It's time that we privilege the victim and
22 not the unit in our calculus here. So what you say

1 does respond to the military effectiveness
2 argument. But what if our priority here needs to
3 be the vulnerable, the victim, the powerless, not
4 the judge advocate's authority as a legal advisor,
5 and not the command authority, but the powerless in
6 this case? In that case, the command doesn't seem
7 like the right place to make that decision.

8 COLONEL BRADLEY: Well, I'm not sure that
9 -- is it any different in regular society or in
10 civilian society, so I don't understand how -- have
11 we addressed that in the civilian society and found
12 that it is a tremendously successful program that
13 has --

14 PROFESSOR HILLMAN: The metrics are at
15 issue, but the structure is distinct where it's not
16 the president of the college or the CEO of the
17 corporation who makes that decision, but instead
18 it's an independent prosecutor who doesn't have the
19 best interests of the Army, who is your client, who
20 doesn't have a concern about optics in the
21 community, who doesn't consider as Rule for Courts
22 Martial 30-6, the discussion does suggest that you

1 should consider the military service and the
2 character of the accused in making a decision about
3 whether to prosecute, that's something an
4 independent prosecutor wouldn't weigh in the same
5 regard.

6 GENERAL RICE: Yeah. I guess my comments
7 on that quickly would be it's not clear to me that
8 anybody has really sort of indicated -- you said
9 that victims have indicated that they would feel
10 more comfortable in reporting. Is that really
11 factual? I know there are some that have said
12 clearly, but is that sort of the preponderance of
13 the information that we're getting from victims,
14 because I think there's other information that sort
15 of cuts the other way in terms of why victims do or
16 don't report. So I think -- again, I think it's
17 just important to make fact-based decisions on
18 these things versus, you know, things that I might
19 say or anybody might say that we heard or that
20 we've had an experience with.

21 I think my other quick comment would be to
22 your point about does this problem manifest itself

1 differently in the military than in civilian
2 society. I think it is. You know, we have a
3 different culture within the military. The problem
4 exists everywhere, but it manifests itself
5 differently in different places. Again, I'm not
6 aware, and if anybody knows of an institution
7 that's of any considerable size that has figured
8 this out anywhere, I mean, I've love to know that.
9 And I'd copy whatever they're doing in a heartbeat,
10 you know, if I could.

11 And so, to the sort of the third point
12 that you asked about, yes, we have been here
13 before, and what I have taken from my experience
14 with this is it is difficult to overestimate the
15 amount of effort, energy, focus, resource that you
16 have to put against this problem in order to get it
17 under control. If you do that, you have an
18 opportunity to, in fact, significantly decrease the
19 incidents. But you have to be willing to commit
20 that level of effort, and you have to be persistent
21 over time.

22 Our challenge as an institution in the

1 United States military is we like to solve a
2 problem then move on. So the reason the cycle
3 repeats itself is because we solve a problem and
4 then we move on. We've got to figure out a way not
5 to solve it and move on, but to solve it and
6 continue to solve it because you've got to be after
7 it every day or the nature of it is it will come
8 back. It's not -- you don't win this war. You win
9 a battle every day.

10 So I think that's the long-term play for
11 us here. You know, we'll do some things here
12 that'll be effective, but the question will be are
13 we still after it five years from now, six years
14 from now, next year.

15 PROFESSOR HILLMAN: General Rice, it feels
16 like structural changes will ensure the continued
17 focus after this particular set of incidents
18 resolves or subsides and we move on. And, General
19 Linnington, you mentioned that in a year you'd like
20 to start seeing a decrease in a year. You're very
21 optimistic, and --

22 LIEUTENANT GENERAL LINNINGTON: We're not

1 even close. In fact, they have a really good chart
2 that shows -- and it goes to the metrics that I was
3 talking about, that it shows right now a dramatic
4 increase in reporting, and it also looks at the
5 DEOMI climate surveys, how the climate is
6 improving. But until you get those two avenues to
7 come together and then come down, I mean, I think
8 it is something, as General Rice said, that you got
9 to keep your eye on the ball ad infinitum, and this
10 can't be a one-year campaign or a five-year
11 campaign.

12 But the metrics, at least the initial
13 metrics, that the Defense Department has collected
14 from the services is, I think, showing dramatic
15 increase in reporting, which, of course, that's a
16 double-edged sword. You can say there's more
17 incidents. I don't personally think so given the
18 effort and the energy and the focus that the
19 services have put against it. I think it just goes
20 to victim confidence and their willingness to come
21 forward and report.

22 PROFESSOR HILLMAN: Let me just make one

1 more brief comment, and then we'll hear from
2 Colonel Bradley. I want to yield to my colleagues
3 who I'm sure still have questions for you. But I
4 do want to suggest that the work that you're doing
5 matters tremendously not only for our armed forces,
6 but actually outside, because this is -- the other
7 militaries from whom we heard, they haven't solved
8 this problem, of course. And, in fact, they're
9 relying on the models that you're developing out
10 there right now to change things, as I think civil
11 jurisdictions. And one of our hopes is that we can
12 actually establish a database that shows what
13 you're doing, create metrics by which other
14 jurisdictions could measure their success here, and
15 also perhaps set some expectations that won't
16 involve a solution in a year, but will involve --
17 understanding the trends that we need to look for
18 and then account for going forward.

19 But I will say I don't think that we can
20 rely on heroic efforts of individuals whether
21 they're legal advisors who have the wherewithal to
22 stand up or commanding officers who care enough to

1 spend time every day on this. I think we need some
2 structural changes to ensure that that sort of
3 attention continues going forward. Colonel
4 Bradley?

5 COLONEL BRADLEY: Ma'am, and that got to
6 the point of, you know, the structural changes that
7 you're focusing on. I mean, I wasn't here
8 yesterday to hear about it, but my understanding is
9 that the structural changes, the independent
10 prosecutor, say, from other services, from other
11 countries, have not solved their sexual assault
12 problems. They haven't seen a dramatic reduction
13 or change. And I could -- I may not have the data
14 to back that up, but that's my understanding.

15 And so, that makes me think that the
16 structural change that I've heard discussed today
17 may not be the one. I don't think anybody would
18 oppose changing the system. I guess I would
19 caution as we go about changing the system, though,
20 that we do it incrementally so that we can measure
21 the change and know which it affects, maybe make it
22 even reversible so that in the event we make a big

1 change, we don't end up destroying the institution
2 and also not having any real effect on the problem.
3 So I guess that would be one of the cautions as we
4 go forward with deciding what those changes should
5 be.

6 BRIGADIER GENERAL (RET.) DUNN: I would
7 just --

8 CHAIRWOMAN JONES: I'm sorry, General
9 Dunn. Ms. Holtzman had asked to go next.

10 CONGRESSWOMAN HOLTZMAN: Thank you. I
11 want to echo my colleagues' thanks to you, all of
12 you here -- some of you appeared before us in the
13 preparatory session -- for the willingness to help
14 us think through these very difficult problems.
15 And I personally really appreciate your assistance
16 and your time. I haven't come to any conclusion.
17 I'm still trying to understand. But let me just
18 raise some issues with you.

19 Obviously institutions don't like to
20 change, and the status quo is a lot more
21 comfortable. In that light, I certainly understand
22 the reluctance to change the commander's authority

1 with regard to referrals to a general court
2 martial. But picking up on what you said, Colonel
3 Bradley, and I don't want to make you responsible
4 for this in any way, shape, or form. Suppose,
5 because I don't think we have the answer looking at
6 the European system or looking at what we do, as to
7 whether changing the commander's role here will
8 have any impact. I don't know that we have any
9 evidence that we could clearly point to. Maybe my
10 colleagues differ with me, but I don't know that
11 the evidence is there.

12 But if we were to do something on a trial
13 basis, on a pilot basis, to test that theory on the
14 grounds that some have raised it, other systems
15 have adopted it, what would your reaction to that
16 be? Anyone?

17 MR. BRYANT: I think what -- we asked the
18 question yesterday, if you don't mind -- excuse me,
19 Ms. Holtzman -- suppose we picked, and this is just
20 hypothetical, as we brainstormed this together, we
21 picked two Army divisions or two Army bases or
22 something like this as a pilot program. You

1 mentioned, Captain -- I mean, I'm sorry, Colonel,
2 doing it incrementally and perhaps reversible. Is
3 that where you're headed, Ms. Holtzman, I think?

4 CONGRESSWOMAN HOLTZMAN: Yes. I was just
5 wondering what your reaction to this would be. I
6 mean, I don't know that a division is the correct
7 unit. This is totally hypothetical. But would it
8 be worthwhile doing this? What would your reaction
9 be? I mean, on the plus side, one could say, you
10 know, we're not so stuck in the past that we're not
11 willing to see whether this could make a
12 difference, and we would test that very clearly.
13 On the other hand, we wouldn't be doing it in on
14 such a broad scale as to really undermine our whole
15 military, assuming that that was going to be the
16 consequence of it. So I just wanted your reaction
17 to something like that. Anybody who wants to
18 speak, either commanders or the JAGs or whatever.

19 COMMANDER DWYER: I would just say that
20 there have been some changes made that a few of the
21 Panel members have discussed, whether it be, you
22 know, changes to 120, where we haven't really

1 really talked about that, but that may be one of
2 the reason we have more reportable cases because
3 more cases fall under 120 now that previously
4 didn't. They'd be handled in a different way. And
5 we've educated across the forces as to what that
6 is, and they understand that.

7 Also with all due respect, Professor, I
8 think there has been a lot of changes since those
9 battle days, if you want to call them, where there
10 is a -- as I've seen. Again, I don't have the
11 perspective from that time period, but there is a
12 strong commitment to victim's advocate programs and
13 victim's counsel. And the conversations that are
14 going on, I don't think those were going on 20
15 years ago. I don't even think they were going on
16 10 years ago. So there are some steps being taken
17 in that direction.

18 And so, I think we want to realize that
19 steps have been taken and changes have been
20 implemented, and whether the next step is to say,
21 okay, let's try a test period. Okay, but I would
22 want to know that what those metrics would be, what

1 we were looking for in terms of to know do we turn
2 back the clock the way it was, or does that go full
3 implementation, you know? What would be the
4 triggers to go one way or another based on even a
5 pilot program?

6 CONGRESSWOMAN HOLTZMAN: Okay. So your
7 point is if that we do that, we have to think it
8 through very carefully. Okay. Yes, General?

9 GENERAL RICE: I would return to something
10 I said earlier. So my reaction is, would be I
11 don't think it's a good idea in terms of the long-
12 term strategy to approach the problem. If the
13 issue is lack of trust in the system, we have
14 people who don't trust the current system that we
15 have, and they think that a different system would
16 be more trustworthy, then what we have to think
17 about is the long-term solution, one that takes us
18 down a road where we reinforce that we as a Nation
19 don't trust our commanders, we don't trust the
20 current system, and so we're going to set up a
21 different system that in some way is more
22 trustworthy, or do we think the long-term plan is

1 to figure out a way to reinforce the trust that is
2 so basic to the system working and doing it in a
3 way that sort of builds the system up versus
4 weakens it over time. And so, my reaction to that
5 would be we need to go the other direction versus a
6 direction that, you know, reinforces this lack of
7 trust in the system.

8 CONGRESSWOMAN HOLTZMAN: Okay. Any other
9 comment? Yes, sir.

10 LIEUTENANT COLONEL HARRIS: The point that
11 I'd bring up, ma'am, is just simply that initially
12 my reaction would be that there are some -- it
13 would be a good thing perhaps on a trial basis,
14 because the concern I have as a practitioner is an
15 enormous amount of second and third order effects
16 for making one small change to a very complex
17 system that is the UCMJ. And the concern I would
18 -- what makes me that think that maybe it wouldn't
19 be such a bad idea is that then perhaps we could
20 see what some of these unintended consequences are.

21 But ultimately I come back to each one of
22 these cases, as you well know better anybody,

1 ma'am, is when you pull that string at the end of
2 the line, you've got a victim, you've got an
3 accused. So while it's easy from a holistic
4 perspective to think a trial basis may help us vet
5 out some of the issues that we don't see, if you're
6 that individual who is involved in that process, do
7 you want your case to be this pilot program, and is
8 that the message we want to send our service
9 members?

10 MAJOR GENERAL BUSBY: I would just
11 disagree with my SJA on the first point just a
12 little bit, and I agree with General Rice. I would
13 not see the utility in that because for a couple of
14 reasons. One because, the second point that I
15 agree with, that we would potentially be
16 disadvantaging a small population, who were subject
17 to the experiment. We'd also, I'll go back to the
18 other point that General Rice made is that this,
19 again, this is about prevention. And by then this
20 small population, you're going to be taking a tool
21 away from those commanders who leveraged the
22 prevention side.

1 CONGRESSWOMAN HOLTZMAN: Okay. Now, let
2 me just ask another question along these lines.
3 Yesterday, and I don't remember which system it
4 was, the commander is still given the
5 responsibility of deciding whether or not to refer
6 the case for a court martial. But if the -- and
7 the case is investigated by whatever the police
8 institution is. But if the police institution --
9 let's say the commander turns down the referral,
10 says, no, I don't think this case should be
11 referred, the police investigating institution can
12 still bring charges. Any reaction to that?

13 So in other words, the commander still
14 would have the authority to say, yes, I want to
15 refer it, but if it's a no, there's a kind of
16 second bite at the apple from the investigative
17 agency. Any reaction?

18 COLONEL KENNY: We already have somewhat
19 of a second bite at the apple through that --
20 through the chain of command process. So, for
21 example, if a subordinate general court martial
22 convening authority to General Rice decides that he

1 doesn't want to take a case to trial though the JAG
2 community, because there's always going to be a
3 legal advisor, if that gets to me, I can take it to
4 General Rice and say, General So and So is not
5 going to take this legitimate case to trial, I
6 think you should do so, sir. So we already
7 actually have --

8 CONGRESSWOMAN HOLTZMAN: Right, but that's
9 not formalized. I'm not -- right. It's an
10 informal system. I'm not saying it's not
11 effective. I'm not making any comment about that.
12 But should it be formalized? Should it be
13 strengthened? Should it -- so that the the signal
14 that's being given is in the event -- that we're so
15 concerned that this decision be made properly that
16 we want to have a second look, and that there be a
17 thought through or -- I don't mean thought through,
18 that your process is thought through, but an
19 articulated -- fully articulated --

20 COMMANDER DWYER: So are you saying, ma'am
21 -- so to put this in kind of an example, you're
22 saying if it's at the two-star level, for example,

1 now you say I want also a three-star to look at it.
2 Is that what you're kind of saying? Is that what
3 the formalization --

4 CONGRESSWOMAN HOLTZMAN: Well, that might
5 be. I mean, there might be --

6 COMMANDER DWYER: You'd want another level
7 in the chain of command to look at any initial
8 disposition?

9 CONGRESSWOMAN HOLTZMAN: I'm not saying
10 necessarily the chain of command. I don't know
11 what the alternative would be for -- when there's a
12 turndown, but that there'd be a second bite at the
13 apple if there's a turndown by the commander.

14 COMMANDER DWYER: Yeah.

15 CONGRESSWOMAN HOLTZMAN: I mean, so I
16 don't -- I mean, that would be something that we
17 would have to think through. But I'm asking you
18 whether you think that that would be a bad idea.

19 GENERAL RICE: I personally don't think
20 that that would be a bad idea, but I also think,
21 and actually I know -- I think based on my personal
22 experience over a long number of time -- the number

1 of times when that would happen is miniscule. So
2 the number of times where it's actually not taken
3 to court is very, very small.

4 CONGRESSWOMAN HOLTZMAN: Right, but the
5 reason to do it might be to send a very strong
6 signal that we're so concerned about these cases
7 that we're going to create a mechanism to ensure
8 that there's a second look that's all.

9 GENERAL RICE: No, I understand that.

10 CAPTAIN HARRISON: There is a provision in
11 the code, though, today that any senior commander,
12 if they can reach down and grab that case. So if
13 they don't like the decision that was made below,
14 they can take the case, elevate it to their level,
15 and then take it to court. So there is a provision
16 in the Code existing today, but it's not a
17 mandatory. It's a discretionary.

18 CONGRESSWOMAN HOLTZMAN: Right. Well, I
19 think that sort of answers the point.

20 REAR ADMIRAL SMITH: I have done that
21 because to your point, ma'am, to send a message
22 because they were not -- they were going to

1 adjudicate it at a lesser level, and I disagreed
2 with that, and I pulled the case up to my level.

3 CONGRESSWOMAN HOLTZMAN: Right.

4 MAJOR GENERAL BUSBY: And I do think we
5 already do have to some degree some tools in place
6 to do that, such as the case management groups
7 where every one of our assaults that's reported
8 walks through a case management group who provides
9 the services and those who are responsible for the
10 individuals. And at that point, I as the general
11 court martial convening authority have my SARC and
12 my Chief of Staff sit on that so if there's a
13 subordinate unit, because they have -- the case
14 management group talks about adjudication on how
15 we're doing it. If the subordinate unit decides
16 not to prosecute, I already have somebody sitting
17 on there responsible to me being my Chief of Staff
18 and my SARC and the SJA to come back and say, we
19 need to think this one through. So we already do
20 have a second bite at the apple built into the
21 process for us, I believe.

22 CONGRESSWOMAN HOLTZMAN: Thank you. I

1 have still one or two more questions. One is the
2 surveys that you've mentioned that you use to
3 assess command climate, these are voluntary. Is
4 there a reason that they're not mandatory?

5 LIEUTENANT GENERAL LINNINGTON: They are
6 mandatory, ma'am. You got to take it within the
7 first, I think, 90 days of changing command, and
8 then every year thereafter. And the recent -- at
9 least that's in the Army. And then, the recent
10 change has been that the results of those surveys,
11 it used to just be viewed by the company commander,
12 the young O-3 captain or lieutenant are now being
13 viewed by the higher level commanders.

14 CONGRESSWOMAN HOLTZMAN: Okay. Maybe I
15 didn't make myself clear. I was talking about the
16 surveys where people are asked do they have
17 confidence about reporting their sexual assault --
18 any sexual assault.

19 LIEUTENANT GENERAL LINNINGTON: That's
20 part of the command climate survey.

21 CONGRESSWOMAN HOLTZMAN: That's mandatory?

22 LIEUTENANT GENERAL LINNINGTON: Yes,

1 ma'am. There's nine -- I think there's nine. It
2 might be six. I think it's six expanding to nine
3 questions in the surveys that are conducted at
4 every year definitely, and then with changes of
5 command the results of those surveys go to the next
6 higher level.

7 CHAIRWOMAN JONES: But it's mandatory --

8 LIEUTENANT GENERAL LINNINGTON: It's
9 mandatory.

10 CHAIRWOMAN JONES: -- each soldier has --

11 COLONEL (RET.) COOK: Does every service
12 member have to fill it out is the question. Does
13 the service member -- it's not does it have to be
14 given. It is given. Is the content the same,
15 that's the same. The question is, for those
16 service members receiving it, does every service
17 member who gets it and says, hey, we want your
18 input on a command survey, do they have to take it,
19 and what if they don't?

20 COLONEL BRADLEY: It's an anonymous
21 survey, so there is the possibility that a service
22 member doesn't take it, and so it makes it

1 difficult to go back and say, hey, Bradley, you
2 didn't take your survey because we know --

3 REAR ADMIRAL OSTEBO: You wouldn't know
4 who didn't take it.

5 COLONEL (RET.) COOK: So you measure what
6 percentage of the unit did take it, so you know
7 that whether only 10 percent decided to even fill
8 it out?

9 REAR ADMIRAL OSTEBO: We don't know that.

10 COLONEL (RET.) COOK: What happens if you
11 get a percentage that, you know, maybe below the --
12 I don't know what the number would be, but say it's
13 below 80 percent of a particular unit. Does a
14 higher level commander then look at it and say,
15 hey, why aren't these service members responding?

16 REAR ADMIRAL OSTEBO: Yes. So we don't
17 know -- if somebody doesn't -- it's anonymous. So
18 we don't know who didn't take it, so we don't go
19 back and try to hunt down the person who didn't
20 take it and prosecute him for not taking it and
21 following a direct order. What we do is we put it
22 out there. We encourage the commands to put it

1 forward. With us, we put a safety stand down in
2 place so there's no operational reason why you
3 wouldn't have taken it. And we do force people
4 through -- not force, but we want people to be as
5 candid as possible in those surveys. Inevitably,
6 we come back with less than 100 percent.

7 If a command comes back on a climate
8 survey or any other one at 20 percent or the only
9 survey and it's only 20 percent, that commanding
10 officer will get a call from me or my Chief of
11 Staff and say what the heck. And we'll go back and
12 re-push on that. We also push it through our
13 senior enlisted folks so that our command enlisted
14 advisor at the lower level, gold or silver badges,
15 are pressing the enlisted folks to step up and take
16 that exam as well, ma'am. So I think we're doing
17 pretty good on that part of it.

18 CONGRESSWOMAN HOLTZMAN: I just have one
19 more question, which is the various aspects of the
20 referral by the command to a court martial. Now,
21 we have the decision to refer, but we also have --
22 which all of you feel is essential to retain in the

1 commander's hands. But what about picking the
2 panel of jurors? How essential is that for the
3 commander to retain as a power? And if so -- and
4 if you think it's essential, could you explain why?

5 COLONEL KENNY: Part of it is balancing
6 priorities. I think some of the other panel
7 members have discussed this previously. When a
8 commander says I want these people based upon the
9 Article 25 criteria, which is set out in the
10 Uniform Code of Military Justice, age, experience,
11 et cetera, et cetera. I've evaluated all these
12 people. They have been nominated up to me. When
13 he says that those people are going to be available
14 to do this duty, then that is their duty. That
15 commander then can't turn around and say, oh, wait
16 a minute, it's more important for that person to go
17 fly this mission.

18 So and that's part of the problem. If the
19 JAG is the one picking those court members, they
20 don't know the mission. They don't know the
21 availability. They don't know that balance of
22 prioritization of that key resource, the people.

1 And so, the only way to achieve that appropriate
2 balance is through the commander picking the
3 members.

4 COMMANDER DWYER: I look at what other
5 options -- I mean, are we talking -- another option
6 would be the way the civilian system does it where
7 it's anonymous and maybe you didn't get out of jury
8 duty, so you had to show up that day, or a process
9 like we have where there's actually a criteria in
10 place. And I look at it like who better than the
11 commander because the commander is blind often to
12 the case because when we'll pick our panel the
13 beginning of the year, they won't know for what
14 case it's for, but they'll go through that criteria
15 and pick that panel based on those specific
16 criteria.

17 And in our case, I think the district
18 commander is in a good position of knowing the
19 people that are in that command who can best sit
20 there. And then from there, there's some delegated
21 authority to the staff judge advocate for
22 operational substitutions or whatever needs to

1 happen with that initial pick. I'd have to see
2 what other alternatives anyone was thinking of
3 putting out there. Would it be, again, the SJA
4 would pick that panel, or who else would do it
5 before I knew that --

6 I think this is the best option that we
7 have right now. I haven't seen alternatives that I
8 think work better, and I really don't think the
9 civilian system would be better for the military.

10 GENERAL RICE: I also think it's -- the
11 commander doesn't actually pick the panel. The
12 commander picks the candidates for the panels.
13 Then the lawyers go through and actually pick who's
14 going to be on the panel. So it's not unusual for
15 me to have to pick more than one set of candidates
16 because by the time the trial happens, the original
17 set doesn't happen. So I think just a small nuance
18 there.

19 That, if we were going to go down this
20 road of the actions that we could take, would not
21 be at the top on my list of things that I would be
22 concerned about.

1 CONGRESSWOMAN HOLTZMAN: In other words,
2 you don't think that this is going to be major one
3 way or another, assuming we could have a system
4 that is acceptable to you, Commander Dwyer. It
5 wouldn't undermine your sense of authority as
6 commander you don't think.

7 GENERAL RICE: Oh, that's not what I said,
8 but I said if we were going to do something, I
9 think this would not be at the top of my list. But
10 I do think this is another issue that sends a
11 signal to the rank and file that we don't trust the
12 commanders to do the right thing. So in general I
13 think this is not the right approach.

14 CONGRESSWOMAN HOLTZMAN: Right. But the
15 Secretary of Defense has already determined, and
16 it's going to probably be in the legislation, to
17 remove the Article 60 --

18 GENERAL RICE: Article 60. That's at the
19 end of the court martial.

20 CONGRESSWOMAN HOLTZMAN: Power, right. So
21 some of those powers are already being taken away.

22 GENERAL RICE: I agree with that.

1 CONGRESSWOMAN HOLTZMAN: Okay.

2 GENERAL RICE: I understand.

3 COLONEL BRADLEY: Ma'am, and another
4 important characteristic of our system is its
5 portability, its deployability. And so, whatever
6 scheme that you're thinking, it needs to, you know,
7 continue with that aspect that allows, and that's
8 one of the important aspects of our system is that
9 the commander can go forward and have that trial
10 forward and pick the panel, the jury, that can hear
11 those types of cases.

12 CONGRESSWOMAN HOLTZMAN: Thank you.

13 CHAIRWOMAN JONES: All right. One final
14 question, Colonel Cook?

15 COLONEL (RET.) COOK: Thank you, ma'am,
16 and thank you all for being here, and I know you
17 have schedules and you're supposed to be out of
18 here right now. This is important, so I'm going to
19 ask you to be brief on the answer. But we've heard
20 a lot -- Corey, you mentioned the comment of, you
21 know, the changes in the international community
22 have not necessarily changed the sexual assault

1 program -- problem in the other services. That's
2 probably true. One of the biggest realities that
3 we're faced with is there is a perception with some
4 of the victims that they're not able to come
5 forward and report in a safe environment. It may
6 not be true of all, but there is a problem there,
7 and that needs to be addressed.

8 But going back to the comment that was
9 made earlier in the interest of do no harm, as you
10 all are talking to your commands, and you're
11 increasing your investigators, increasing your
12 prosecutors, increasing the victim services and the
13 special victims counsel, can you confirm that each
14 of your services is also doing something to
15 actually preserve a justice system where there's
16 also resources being given to the defense community
17 to help them ensure that one of your service
18 members, once they are accused, they still get that
19 presumption of innocence, and they don't -- and we
20 don't end up with the second and third order effect
21 of a system where once you're accused, you
22 basically are going to be railroaded into something

1 else; that there's still that presumption of
2 innocence until convicted, but those resources go
3 across the board and you're protecting those
4 interests on all sides.

5 LIEUTENANT GENERAL LINNINGTON: Yes,
6 definitely, and one of the -- I was talking about
7 the metrics earlier with Professor Hillman. One of
8 the things the services are looking at specifically
9 the second or third order effect or unintended
10 consequences of capturing metrics that don't
11 provide due process to the alleged, so --

12 COLONEL (RET.) COOK: Or the perception,
13 sir. I mean, to the defense community, the
14 perception of you're an -- they feel like when they
15 walk into the justice system, they're going to get
16 a fair shake.

17 LIEUTENANT GENERAL LINNINGTON: That's
18 exactly right. Yes, ma'am.

19 COLONEL (RET.) COOK: That would be a
20 different perception for a panel to address later
21 on, and I hope that never happens.

22 CONGRESSWOMAN HOLTZMAN: Within the Navy,

1 we for the last couple of years as we've been
2 moving out all these different programs, we've
3 taken a very concerted effort to make sure that
4 there was a balanced approach both in the training
5 that we're affording prosecutors as making equal
6 funds and opportunities available for the defense.
7 We stood up Trial Counsel Assistance Program. We
8 stood up one Defense Counsel Assistance Program.
9 We hired HQE, highly qualified experts, for the
10 prosecution side and for the defense side. So
11 we've endeavored to ensure that there's a balance.

12 But that sort of really identifies one of
13 the biggest problems I think that you have
14 comparing our system to any other. You can compare
15 it to a state, but the state doesn't always have a
16 vested interest in both the accused and the victim.
17 They're interested in the victim rights and
18 prosecuting that crime. That's one of the unique
19 responsibilities of a military commander. They
20 have a vested interest in the accused and
21 protecting that accused's constitutional rights,
22 but also a vested interest in the victim,

1 protecting the victim's rights and ensuring that
2 she or he has the care and the response mechanisms
3 over the long term.

4 So it's one of the challenges, so that's a
5 little bit more than just the prosecution-defense.
6 But it identifies the issue that we always have is
7 balance throughout our system, both at the trial
8 level for the litigants, but as well as at the
9 commander's level looking out for both the victim's
10 and the accused's rights.

11 CHAIRWOMAN JONES: I want to thank you
12 very much for coming, some of you for a second
13 time. And let me just reemphasize something
14 Professor Hillman mentioned, and that is the data.
15 We could use that data. We would like that data.
16 We need that data. So to the extent that it exists
17 and that it can be helpful to us, we would
18 appreciate your doing whatever you can to get it to
19 us. Thank you very much.

20 (Whereupon, a luncheon recess was taken.)

21 COLONEL HAM: Proceed?

22 CHAIRWOMAN JONES: Yes. All right. Thank

1 you very much for coming. Good afternoon. I'm
2 sorry we were a little late. We ran a little late
3 with our previous panel.

4 We'd like to begin by asking each of you
5 to make a brief opening statement, and then we'll
6 open it up for questions. I wonder if we could
7 start with General Gross?

8 BRIGADIER GENERAL GROSS: Yes, ma'am.

9 CHAIRWOMAN JONES: There you are.

10 BRIGADIER GENERAL GROSS: Thank you,
11 ma'am. Good afternoon. I'm Brigadier Rich Gross.
12 I'm the legal counsel to the Chairman of the Joint
13 Chiefs of Staff, and I'd like to thank you for this
14 opportunity to discuss our commitment to
15 eliminating sexual assault from the Armed Forces of
16 the United States. The Chairman and the entire
17 Joint Staff are firmly committed to removing the
18 stain of sexual assault from our ranks. This
19 pernicious foe has no place in our military.

20 On the Joint Staff, our job is twofold.
21 First, we are often asked to help coordinate among
22 the services and serve as the liaison between them

1 and the civilian leadership of the Pentagon.
2 Second, we are responsible ourselves for developing
3 potential military-wide solutions to identify
4 problems and helping facilitate their dissemination
5 within the services. In both of those capacities,
6 I can faithfully report that we are doing our
7 utmost to combat sexual assault within the United
8 States military.

9 On 14 August 2013, the Secretary of
10 Defense, with the recommendation and support of the
11 Joint Chiefs of Staff, approved seven executive
12 actions to complement the preexisting 2013 Sexual
13 Assault Prevention and Response Action Plan and the
14 eight other executive actions he had previously
15 announced in a 6 May 2013 memo. As these 15 major
16 initiatives and a solid campaign are rolled out
17 throughout the services, we also need time to
18 assess their impact. While changes to the military
19 justice system are considered, as they should be,
20 we should be aware that in many ways we are
21 shooting at a moving target. The military is
22 improving on this matter every day.

1 As more attention and interest is focused
2 on the issue of sexual assault within the military,
3 we have been presented with many, many good ideas
4 and have embraced much change as we strive to
5 address this problem. I am very optimistic about
6 the promise that these executive actions hold, and
7 believe they will be a great complement to some of
8 the most promising and productive pieces of
9 legislation pending in Congress.

10 The remainder of my remarks will focus on
11 three central themes: first, the need for careful
12 and deliberate study before changing the military
13 justice system in order to avoid unintended
14 consequences; second, the role of the commander;
15 and third, what I've learned personally talking to
16 my allied counterparts about their justice systems
17 and the role of the commander in those systems.

18 As you well know, the military justice
19 system is complex and major changes require
20 careful, deliberate study. The current military
21 justice system created in 1950 was carefully
22 crafted by Congress over the course of two years

1 after numerous hearings, testimony from lawyers and
2 non-lawyers, and painstaking drafting. Since that
3 time, Congress has made major changes to the Code
4 on only one occasion: when it enacted the Military
5 Justice Act of 1968, after months of hearing and
6 testimony.

7 Many provisions are interconnected, and
8 changes to one may have second and third order
9 effects and unintended consequences. Previous
10 rapid changes, such as those made in 2007 to
11 Article 120, resulted in provisions being held
12 unconstitutional, increasing the potential for
13 overturned convictions. Dramatic changes to the
14 UCMJ, such as removing commanders from disposition
15 decisions, without careful study and consideration
16 of impact, increase the likelihood of unintended
17 consequences. Some of these unintended
18 consequences may harm the very victims that
19 legislation proposed to remove commanders is trying
20 to protect. The considerable deliberation that
21 went into the Military Justice Act of 1983, the
22 last bill to provide comprehensive UCMJ reform,

1 proves the potential for successful reform through
2 a measured approach.

3 I support the mission of this Panel, and I
4 hope that the process undertaken by the Panel
5 continues to be deliberate as it has been. While
6 some changes likely can be made to the military
7 justice system that specifically address sexual
8 assault, other changes may have more far-reaching
9 consequences and may be better considered by a body
10 charged with UCMJ reform in general. For this
11 reason, the Chairman and the Joint Chiefs have
12 recommended to the Secretary of Defense that he
13 direct the DoD General Counsel to conduct a
14 comprehensive, holistic review of the UCMJ and the
15 military justice system.

16 As we further -- or as we consider further
17 reforms, the role of the commander should remain
18 central. Our goal should be to hold commanders
19 more accountable, not render them less able to help
20 us correct this crisis. The commander's
21 responsibility to preserve good order and
22 discipline is essential to effecting change. They

1 punish criminals and protect victims when and where
2 no other jurisdiction is capable or lawfully able
3 to do so.

4 Commanders are accountable for all that
5 goes on in a unit. Ultimately, they are
6 responsible for mission success. However, there
7 are proposed changes to the military justice
8 system, such as the removal of the commander from
9 that system, that have the potential to truly harm
10 our units, our ability to obtain accountability,
11 and to respond to the concerns of victims about the
12 process.

13 The military is a unique environment. We
14 ask service members to have the ultimate faith that
15 their commanding officers will only risk their
16 lives under the most necessary of circumstances.
17 And when operational requirements necessitate risk
18 to their troops, the commanders have structured,
19 trained, and equipped their units in such a way as
20 to minimize the risk to the greatest extent
21 possible. To our military, the question of
22 military discipline is fundamentally intertwined

1 with the greater question of the commander's
2 responsibility for operational readiness.

3 In addition to its broader impact on
4 military readiness, removing the commander from the
5 military justice system will not only help us
6 address -- will not help us address the concerns
7 that victims have voiced in the process. In every
8 service, we have heard that victims are concerned
9 about the length, the ability to question and
10 ability to voice preferences within the process,
11 and the capacity of the system.

12 Taking military justice decision making
13 authority away from commanders will exacerbate all
14 of those problems. Instead, my hope is that the
15 Panel will consider possible reforms that promise
16 to make real change for the better with the
17 interest of victims in mind.

18 During his reconfirmation hearing before
19 the Senate Armed Services Committee and its
20 subsequent correspondence, the Vice Chairman of the
21 Joint Chiefs of Staff provided senators with
22 information regarding roughly 100 cases over the

1 past few years in which after civilian prosecutors
2 declined to go forward on a sexual assault
3 prosecution, the military took action. Commanders
4 have consistently shown willingness to go forward
5 in cases where attorneys have been more risk
6 adverse. Commanders zealously seek accountability
7 when they hear there's a possibility that
8 misconduct has occurred within their units, both
9 for the victim and in the interest of military
10 discipline, and we need to maintain the ability to
11 do so.

12 The number of prosecutions in these types
13 of cases may very well decline if the very
14 commanders who have a vested interest in
15 accountability are stripped of their power to deal
16 with the allegations regarding personnel in their
17 unit in favor of independent military prosecutors.

18 I now turn to our allies' military justice
19 system. I recently met with legal advisors from
20 the United Kingdom, Canada, Australia, New Zealand,
21 the Netherlands, and Germany, and conducted a
22 survey of their military justice systems. From

1 these conversations and additional research, we've
2 learned quite a few things, which General Dempsey
3 mentioned himself at his reconfirmation hearing.

4 First, no allied country changed its
5 system in response to sexual assault crimes
6 specifically or the rights of victims generally.
7 In most cases, commanders were removed as convening
8 authorities to better protect the rights of the
9 accused, often in response to decisions by their
10 domestic and/or the European Court of Human Rights.
11 In contrast, the United States Supreme Court has
12 repeatedly upheld the UCMJ and the U.S. military
13 justice system as consistent with the Constitution
14 and Federal law.

15 Second, none of the allies I surveyed
16 could draw a correlation between their new system
17 and any increased or decreased reporting by victims
18 of sexual assault. There was no statistical or
19 anecdotal evidence that removing commanders from
20 the charging decision had any effect on victims'
21 willingness to report crimes. Similarly, we found
22 no studies by our allies that examine the impact of

1 the changes on prosecution rates, conviction rates,
2 or processing times, although generally they told
3 us their cases now take longer.

4 It is also important to keep in mind that
5 the scope and scale of our allies' caseloads are
6 vastly different than ours. None of our allies
7 handle the volume of cases that the U.S. military
8 does. This is likely due to the greater size of
9 our military forces in comparison.

10 Finally, the move by our allies to more
11 civilianized systems mirrors a general global trend
12 towards demilitarization, especially among
13 countries that no longer require or maintain truly
14 expeditionary militaries. The role of the United
15 States military is different, and it will continue
16 to be different. While many countries can afford
17 for the center of the military justice systems to
18 be located in their national capitals, far from the
19 arenas of international armed conflict, we require
20 a more flexible capability that can travel with the
21 unit as it operates in any part of the world.

22 While there is no doubt that studying

1 comparative law can provide useful insights into
2 our own system and perhaps provide inspiration for
3 potential changes, solutions that work for other
4 countries for unrelated reasons may not be
5 appropriate for us to help us combat sexual assault
6 in the military.

7 I've been very impressed and encouraged by
8 the diligence that this Panel has shown in
9 obtaining a thorough understanding of both the
10 problem of sexual assault within the military and
11 potential solutions. The depth with which you are
12 studying this problem makes me optimistic that you
13 will come up with solutions that have the potential
14 to truly help us fight this terrible crime. I
15 promise you my full support in whatever I can in
16 the future and today during this Panel.

17 Thank you for this opportunity to address
18 you, and I look forward to your questions.

19 CHAIRWOMAN JONES: Thank you, General
20 Gross. General Darpino, could we hear from you?

21 LIEUTENANT GENERAL DARPINO: Judge Jones,
22 distinguished members of the Panel, I appreciate

1 the opportunity to be here today and discuss this
2 important matter with you as you take on this very,
3 very important task. We have not coordinated our
4 opening statements, and I think that you'll find a
5 general consistency, not because we have planned,
6 but because of our vast experience in this area.

7 I myself for 26 years have had the
8 privilege of serving alongside and advising
9 commanders at every level of command in times of
10 peace, peacekeeping and stability operations,
11 humanitarian operations, and for the past 12 years,
12 sustained combat operations. I have served as a
13 staff judge advocate at the two-star, the three-
14 star, and the four-star level two times in combat
15 where we did military justice.

16 There is no -- there is one constant over
17 all these decades of my service, and that is that
18 soldier discipline is the foundation of a trained,
19 focused force capable of accomplishing any mission.
20 Soldier discipline is built and reinforced over a
21 soldier's career by commanders with authority, the
22 authority to address all behavior quickly, visibly,

1 and locally. From my unique perspective, I am
2 convinced that command authority, particularly in
3 the context of military justice, is the most
4 crucial element to ensure the integrity and
5 readiness of our force.

6 The crime of sexual assault in our ranks
7 is a threat to the Army's ability to maintain
8 readiness. This is not only because sexual assault
9 is a crime that degrades esprit de corps,
10 undermines morale, and destroys unit cohesion, but
11 because questions and concerns regarding the
12 ability and willingness of our commanders at this
13 time have begun to erode the confidence in our
14 institution, and we recognize that. We must be
15 able to hold leaders accountable for their failures
16 both in handling these crimes and, at the same
17 time, require that they work to have a command
18 climate that encourages victims to report and
19 discourages these crimes within our ranks.

20 We must ensure that we have a
21 comprehensive system of checks and balances on all
22 our actors in the system, set requirements that can

1 be objectively evaluated and verified. Commanders
2 must have responsibilities that cannot be delegated
3 to staffs and subordinates. They must be
4 responsible. The responsibility must be placed on
5 the commander at the center of our system, so that
6 it can be measured and judged.

7 Discipline is Army business. It is not
8 lawyer business because commanders lead. Lawyers
9 enable. I say it is not lawyers' business because
10 I really think that if we simply focus on the
11 investigation and the prosecution of these crimes,
12 we will not end with a solution. While proposed
13 changes to the military justice system are the
14 easiest and most available targets for change,
15 those changes will not get at the root of our
16 problem. It is education, prevention, training,
17 and commitment to a culture change that will make
18 the difference. All of these areas are led by
19 commanders, not lawyers. It is commanders' focus,
20 involvement, and emphasis that will bring the
21 change in the culture that we seek.

22 Part of our challenge lies in instilling

1 our values -- in my case, the Army values -- in the
2 65,000 recruits that we bring into our force each
3 year. As with our civilian counterparts, the vast
4 majority of our victims and our offenders -- in our
5 case, two-thirds of our cases -- involve junior
6 soldiers between the ages of 18 and 24 years old.
7 What makes us different than our civilian
8 counterparts is that the military has a time-honed
9 structure to instill values, to make that culture
10 change. That method is the power of the command.
11 Commanders set priorities, commanders provide
12 vision, and commanders give orders to execute that
13 vision. And when those orders are not followed,
14 commanders are the ones who hold people
15 accountable.

16 Past progress and institutional change,
17 whether racial or gender integration, or, more
18 recently, Don't Ask, Don't Tell, have been
19 successful because of the focus and authority of
20 commanders, not because of lawyers. And so it
21 should be in addressing sexual assault. In my
22 opinion, command involvement and accountability are

1 the essential elements in solving this problem.

2 Having said that, I want you to understand
3 that I am not resistant to change. I firmly
4 believe that our military justice system should
5 continue to evolve. The military justice system
6 has never been static. I have been lucky enough to
7 be the chief of the Criminal Law Division in the
8 Army, and I have been a member of the Joint Service
9 Committee. Every year there is an executive order
10 that changes pieces and parts of the military
11 justice system, but it is done through a process
12 and a holistic view, not piecemeal.

13 We should examine our procedures pre-trial
14 to post-trial. The central role of the commander
15 is subject to the appropriate checks and balances
16 in our system to fully address victims while also
17 ensuring the due process rights of the accused. I
18 believe that a comprehensive commander and leader
19 focus has resulted in meaningful, substantial
20 developments in the way crimes are reported,
21 investigated, and prosecuted. And I'd like to take
22 a few moments to talk about those.

1 Most recently, the Secretary of Defense
2 directed a series of improvements to the military
3 justice system that will provide more support to
4 victims navigating our system. It should increase,
5 and we believe it will and has, victims' confidence
6 and encourages reporting. These initiatives
7 include the implementation of victims' counsel, the
8 use of judge advocates at pre-trial 32s for the
9 investigation of sexual assault allegations, and
10 amending the *Manual for Courts Martial* to provide a
11 formal opportunity to provide victims input during
12 the post-trial phase of our process.

13 What the Army has done in order to ensure
14 that the prosecution and investigations have
15 improved is that we have set apart a special
16 victims capacity that has also been directed in the
17 National Defense Authorization Act. Every
18 unrestricted report of a sexual assault from an
19 unwanted touching over the clothing to a forcible
20 rape is referred to a specially selected and
21 trained personnel for victim care and assistance,
22 investigation, and prosecution. Sexual assault

1 investigators from our Criminal Investigation
2 Command and special victims' prosecutors from the
3 Judge Advocate General's Corps work hand-in-hand
4 from the initial report through the post-trial
5 processing of this case.

6 There is a close coordination between the
7 special victims' prosecutors and sexual assault
8 investigators, and it has absolutely improved the
9 prosecution, investigation, and the victim care
10 aspects of our cases. This expertise has enabled
11 our commanders to make evidentiary-based decisions
12 in these very, very complex cases. Since we
13 instituted this program in 2009 with our sexual
14 assault investigators from the Criminal
15 Investigation Division, we have seen a 100 percent
16 increase in the prosecution of these cases, a 100
17 percent increase in convictions, and a 100 percent
18 increase in sentences that have included discharge.
19 And it's really over 100 percent, but I don't want
20 to brag too much.

21 In addition, we employ highly-qualified
22 experts, individuals who have vast experience in

1 prosecuting these cases and investigating these
2 cases. Both the Criminal Investigation Command the
3 Judge Advocate General's Corps have employed these
4 highly-qualified experts to help us with the
5 prosecution and investigation. And we are
6 expanding all these programs, most recently adding
7 paralegals to these teams to make sure that they're
8 as robust as we can make them.

9 So the question is, and I know many ask,
10 well, how do you measure progress? I can give you
11 those statistics, but how do we measure progress?
12 Commanders pursue challenging cases because
13 commanders believe that serves victims and our
14 community. Much of our pursuit has to do with the
15 commanders' responsibility to care for the welfare
16 of their soldiers, every one of their soldiers. A
17 commander cares for them by protecting the victim,
18 but also making sure that the rights of the accused
19 are respected. So aggressive prosecution is
20 actually consistent with command authority.

21 As a result, I would hold our prosecution
22 rates with our commanders as part of our process up

1 to any civilian jurisdiction. And when you look at
2 the most serious offenses, the penetrative
3 offenses, the Army prosecutes them at a higher rate
4 than our civilian counterparts. This is not only
5 my conclusion. The congressionally-directed Joint
6 Task Force on Sexual Assault in the Military
7 reached the conclusion that the military services
8 prosecute many types of sexual assault cases that
9 civilian prosecutors choose not to. I honestly
10 believe it is because commanders understand that
11 they are charged with protecting the welfare of all
12 their soldiers, all assigned to their care. I have
13 never advised a commander who did not take this
14 role seriously both in protecting the victim and in
15 protecting the rights of the accused.

16 But the military justice aspect that I
17 just discussed is only one part of the Army's
18 comprehensive program to combat sexual assault and
19 its precursor, sexual harassment. The Army has
20 invested unprecedented amount of resources. In the
21 last two years, even under budget crisis, we have
22 spent and invested \$50 million towards this effort.

1 The leadership takes it seriously, commanders take
2 it seriously, and all of our prosecutors take it
3 seriously. We emphasize it through a program
4 called I. A.M. Strong, because we are Army strong,
5 that emphasizes the Army values when teaching
6 bystander intervention techniques, and it saturates
7 all our training with all our soldiers.

8 We are putting checks and balances, should
9 you be concerned, throughout our process, ensuring
10 that commanders put proper emphasis when it comes
11 to these to include command climate surveys, okay,
12 anonymous by the ranks that are then reviewed by
13 the higher level command. We are making revisions
14 to our evaluation process which actually influences
15 our promotion and our meritocracy of the Army. And
16 we have commander focused training so soldiers
17 understand that the full weight of command
18 authority is behind this effort, all the while
19 still protecting the rights of the accused.

20 Now, I ask that you bear with me for one
21 more moment as I talk about the other systems and
22 our allies' systems, because we have spent some

1 effort in trying to answer the questions that you
2 have regarding this. And I sat down today with the
3 Australian TJAG after he spoke to you yesterday to
4 make sure that what I would represent here today is
5 accurate.

6 I think General Gross, when he mentioned
7 previously that you have to remember and keep in
8 your minds that those systems were changed because
9 of concerns about the rights of the accused, and
10 there is nothing in those systems that has
11 demonstrated that it has any effect on sexual
12 assault, either when it comes to reporting or
13 prosecution. I also ask that you remember that our
14 closest ally, okay -- we are 10 times larger than
15 our closest ally, the UK, so that system also may
16 not translate based upon size. Our mission is also
17 very different than the armies you heard from
18 today. We deploy and have an expeditionary force.

19 The U.S. Army alone in the last 10 years
20 has tried 953 courts martial in a combat theater.
21 All of our allies combined together have only tried
22 around 15. We need a system that is portable where

1 discipline can be done locally and visibly, and
2 that requires the commander being part of that
3 system. Additionally, based on my personal and
4 professional interactions over the past decades
5 with judge advocates from other countries, I do not
6 personally believe that the modification of command
7 authority has been without cost. From a practical
8 standpoint, as General Gross mentioned, our allies
9 report that it does take longer. It takes longer.
10 Delays in justice never serve the victim, the
11 accused, nor good order and discipline.

12 Moreover, I have been personally told, as
13 have other judge advocates, that commanders and
14 other forces sometimes hesitate to engage the
15 opposing force in combat operations based on their
16 concerns that their actions will be viewed in
17 hindsight by individuals who do not understand
18 combat. There is actually a term of art used to
19 describe this hesitation. It is called "judicial
20 insecurity." My fellow judge advocates from other
21 countries use the term "judicial insecurity" to
22 describe the reluctance of commanders to engage in

1 aggressive operations, cognizant that their actions
2 will be reviewed, investigated, and prosecuted by
3 someone without an understanding of the military,
4 someone who applies common law concepts instead of
5 the lens of armed conflict.

6 Additionally, commanders express concern
7 that the degradation of their justice system leads
8 to undisciplined troops, and then those same
9 commanders are held accountable for the substandard
10 performance of their own soldiers, or, phrased
11 another way, the commander is accountable for a
12 problem that he cannot fix.

13 The American military is the best in the
14 world. We should tread very lightly before we
15 change a key component of what makes us great --
16 command authority. I mentioned previously that it
17 does not appear to have any effect on reporting or
18 sexual assault, and I did confirm that today when I
19 sat down with a fellow TJAG.

20 What we would be doing if we modeled our
21 system on allies is we would be changing our system
22 in a way that will not even address the problem we

1 are attempting to solve. In essence, we are
2 prescribing the wrong medicine for an illness, and
3 we may end up killing the patient. And I mean
4 that.

5 All that said, the intense focus, both
6 external and internal, on the issue of sexual
7 assault in the military has driven rapid and
8 positive change across the services. We have made
9 incredible strides. We have courageous victims
10 stepping forward. We have a culture now where
11 bystanders are stepping in to expose criminals
12 within our rank. And we understand that headlines
13 will not stop as we continue to bring the full
14 weight of our efforts to eradicate any tolerance or
15 indifference in our culture as we eliminate the
16 offensive and unprofessional and criminal acts.

17 More will step forward. We will have more
18 reporting, which some will spin is that we have
19 more sexual assault, when really we are getting at
20 the problem. This is a senior leader priority, and
21 it causing a monumental institutional effort. And
22 commanders lead the way.

1 I look forward to your questions.

2 CHAIRWOMAN JONES: Thank you, General.
3 Admiral DeRenzi?

4 VICE ADMIRAL DERENZI: Thank you. Good
5 afternoon, Judge Jones and distinguished members of
6 the Panel, and thank you for the opportunity to
7 discuss the Navy's efforts to confront the
8 challenge of sexual assault in the military, and
9 specifically to shed light on why I believe
10 commanders must remain ultimately responsible and
11 accountable for preventing and responding to sexual
12 assault.

13 I want to assure you, as will all of us,
14 that the Navy is fully committed to eliminating the
15 crime of sexual assault in our ranks. It's
16 rightfully recognized as a leadership issue by
17 Secretary Mabus and the Chief of Naval Operations,
18 and they've made it a leadership priority.

19 My written testimony outlines the Navy's
20 comprehensive commander-driven approach to this
21 issue. It incorporates training and awareness for
22 Navy leaders, the fleet, and Navy civilian

1 employees that emphasizes active and engaged
2 leadership and bystander intervention, measures to
3 encourage reporting and improve the confidence of
4 victims, programs and processes that ensure timely
5 support and protection to victims, including
6 medical treatment, counseling, and legal support,
7 and actions to improve accountability for offenders
8 under the Uniform Code of Military Justice, and for
9 commanders as they execute their roles in command
10 and their roles in the military justice system.

11 Mechanisms are in place to facilitate
12 victim reporting, to provide the full spectrum of
13 critical victim services, and to shepherd sexual
14 assault cases through the military justice process
15 with close coordination between specially trained
16 investigators, prosecutors, and sexual assault
17 prevention and response personnel. These people
18 form the backbone of our special victims
19 capability.

20 I would note that the Navy is implementing
21 a Victims Legal Counsel Program to help protect
22 victims' rights during the investigative and

1 adjudicative stages of the military system.
2 Victims legal counsels' duties will include
3 explaining the investigative and military justice
4 system, the processes to the victim, advocating for
5 victims' rights and interests, and, when
6 appropriate, appearing in court on the victim's
7 behalf.

8 The JAG Corps is intensely focused on
9 upholding the special trust placed in us to provide
10 a fair, effective, and efficient military justice
11 system. We've implemented several key initiatives
12 in recent years to ensure that our clients, both
13 the government and the accused, receive the highest
14 levels of advocacy. Sexual assault and other
15 complex cases are litigated and adjudicated by
16 judge advocates who are designated as military
17 justice experts or specialists. They're
18 competitively selected for a military justice
19 litigation career track based on their litigation
20 experience and aptitude. And they're assigned
21 primarily to litigation intensive billets
22 throughout their career.

1 As set forth in my written statement, Navy
2 judge advocates have abundant training
3 opportunities. We engage in cross training with
4 NCIS agents, sexual assault response coordinators,
5 victim advocates, and we draw on a robust reach
6 back capability, which includes headquarters based,
7 highly-qualified experts.

8 Undoubtedly more can be done through
9 legislation or otherwise to improve the military
10 justice system. The current focus on sexual
11 assault is understandable and appropriate, and the
12 military justice system should evolve to ensure
13 that we meet our responsibility to victims of
14 sexual assault and other serious crimes. And as we
15 discuss what steps we can take, it's worth
16 emphasizing that the military justice system must
17 not only be fair to victims, but also to the
18 accused. Our duty to protect the rights of those
19 accused of criminal misconduct, a core value and
20 aspect of American jurisprudence, cannot be lost in
21 this debate.

22 It's also crucial that we don't lose sight

1 of the intended objective. Any change to our
2 system must be tailored to achieve the intended
3 result and avoid harmful second and third order
4 effects. Among other things, the Panel will assess
5 the strengths and weaknesses of various proposals
6 to modify the current role of the commander in the
7 administration of military justice.

8 As you've heard today and I'm sure you
9 will continue to hear today, commanders are
10 responsible and accountable for sustaining
11 readiness, for good order and discipline, and for
12 the safety and well-being of the sailors under
13 their charge. Commanders must have authority
14 commensurate with that responsibility. I believe
15 strongly that permanent, effective change must be
16 implemented through our commanders, and that
17 commanders, advised by experienced judge advocates,
18 must retain their central role in the military
19 justice system.

20 While I'm committed to preserving the
21 commander's authority, some proposed limits to
22 commanders' authority have merit and ought to be

1 adopted. For instance, I support the Department of
2 Defense's proposed amendment to Article 60, which
3 would limit the commander's authority to set aside
4 court martial findings, except for certain offenses
5 that are punishable by confinement for less than
6 two years. I also support requiring convening
7 authorities to explain any action that they've
8 taken to modify a court martial sentence.

9 Several other legislative proposals are
10 under consideration, and as those proposals are
11 assessed, we must ensure that changes to the
12 military justice system don't adversely impact the
13 interest of justice, the rights of crime victims,
14 or the due process rights of the accused.
15 Additionally, any legislation must preserve the
16 commander's disciplinary authority over his or her
17 sailors. Without this authority, a commander is
18 denied a vital tool to ensure a safe workplace, to
19 maintain a healthy command climate, and to field a
20 disciplined force ready to execute our global
21 mission ashore or afloat, in peace and in war,
22 unlike any other Navy in the world.

1 What I hope is clear from my comments and
2 my written testimony is that the Navy is actively
3 engaged in sexual assault awareness and training,
4 prevention, victim response, and accountability
5 initiatives. There's no silver bullet. We can't
6 prosecute our way out of the problem, we can't
7 train our way out of the problem, and we can't
8 legislate our way out of this problem. But we must
9 continue to train. We get 35 to 40,000 sailors
10 coming into the Navy every year, and they come in
11 every day. The training requirement will never
12 end, and we welcome that opportunity, and we
13 welcome that requirement to instill our core values
14 into America's young men and women.

15 We must investigate and adjudicate
16 criminal cases when they do occur, and we must do
17 that thoroughly and well. And we would welcome
18 legislation that helps prevent and respond to
19 sexual assault and that enhances and improves the
20 military justice system.

21 One final personal note on the military
22 commander. I've been a commanding officer. I lead

1 a community of 2,300 legal professionals. That
2 community includes roughly 850 active duty judge
3 advocates, a third of whom are women, 450 active
4 duty enlisted paralegals, two-thirds of whom are
5 women. Sexual assault isn't a woman's problem.
6 The raw numbers tell us that men are more victims
7 in raw numbers. But women are far more likely to
8 be victims of sexual assault.

9 Most of my people do not work in commands
10 under my control. Instead, most of the judge
11 advocates and the vast majority of my enlisted
12 paralegals are entrusted with confidence to the
13 Navy's commanders worldwide. I do that every day,
14 knowing that those commanders will be responsive to
15 the needs of my people because they're their
16 people. And if I thought for one minute that maybe
17 commanders were not responsive to those needs and
18 that they were part of the problem, I'd say so. I
19 owe that to the Navy, I owe that to my people, and
20 I owe my candid assessment to you.

21 Thank you, and I look forward to taking
22 your questions.

1 CHAIRWOMAN JONES: Thank you, Admiral.
2 General Harding?

3 LIEUTENANT GENERAL HARDING: Yes. Judge
4 Jones and members of the Panel, thank you for the
5 opportunity to speak to you today about sexual
6 assault prevention in the Air Force and response
7 within the Air Force. This topic is extremely
8 important to us. We are certainly fully committed
9 to supporting victims of sexual assault while we do
10 everything humanly possible to eradicate this crime
11 from our service. Our Acting Secretary, the
12 Honorable Eric Fanning, and our Chief of Staff,
13 General Mark Welsh, are fully committed to
14 eliminating sexual assault also from within our
15 ranks.

16 Our efforts will drive increased reporting
17 of sexual assaults, in turn will hold more
18 offenders accountable as they become known, and
19 finally, will drastically reduce the number of
20 sexual assaults in the Air Force. We believe that
21 our sexual assault challenge, like all other
22 challenges we faced in the past and those that we

1 will face in the future, is best overcome by
2 staying rooted to our core values -- integrity,
3 service, and excellence -- and in acting on those
4 values. Integrity, service, and excellence require
5 respect for others and honoring their right to be
6 free from sexual assault.

7 At the same time, those same core values
8 obligate us to protect airmen, our airmen, from
9 becoming victims of this crime. This is the
10 responsibility of not only the commander, the SARC,
11 and the staff judge advocate, but every airman.
12 One thing is certain. We cannot meet our
13 obligation to eliminate sexual assault from within
14 the ranks without full, unconstrained participation
15 by commanders.

16 Therefore, I want to discuss the
17 importance of commanders in our military justice
18 system. Commanders are responsible for executing
19 the Commander in Chief's intent in preparing to
20 defend the Nation, and, when called upon, to win
21 America's wars. Throughout our history, the United
22 States has fought and largely won its wars because

1 it brought four key components to each armed
2 conflict. Those four components are the best
3 people, the best training, the best equipment, and
4 tying the three elements together with the fourth,
5 discipline. Commanders must have a disciplined
6 force if they are to succeed in combat. As General
7 George Washington famously stated in 1757,
8 "Discipline is the soul of the Army. It makes
9 small numbers formidable, procures success to the
10 weak, and esteem to all."

11 That was the formula General Washington
12 used to win the war -- our War of Independence. He
13 assured his commanders had criminal disposition
14 authority over their subordinates and, thus, could
15 enforce military discipline. Every member of that
16 Army then and in our armed forces today knows that
17 he is accountable 24/7, on and off duty, to his
18 commander. That formula, that truth -- the best
19 people, training, equipment, and discipline --
20 still applies today, and it's our best approach to
21 national defense.

22 Now, the commander teamed with his or her

1 staff judge advocate is the most important part of
2 the military justice system, which is, of course,
3 an essential tool that we use to instill discipline
4 inside our military force. Outsourcing enforcement
5 of standards to far-away lawyers diminishes the
6 authority of commanders and cannot, despite its
7 very best efforts, achieve optimal military
8 discipline. Curiously, some have advocated
9 removing commanders as the criminal disposition
10 authorities under the UCMJ, sending a confusing
11 message to our rank and file that you can trust
12 your commander to send you into battle where his or
13 her decisions may cause you to pay the ultimate
14 price, the sacrifice of your life on the altar of
15 freedom, but you cannot trust your commander to
16 hold your fellow airmen accountable for his crime
17 against you.

18 This message is more than just confusing
19 and counterintuitive. It degrades airmen's trust
20 and confidence in their commanders and, in turn,
21 degrades military discipline. Furthermore, when it
22 comes to command climate, there is no substitute

1 for the commander's informed judgment on the
2 particular circumstances and stresses placed upon
3 the service member and on the commander's unit.
4 And importantly, there is no better person to hold
5 accountable for that climate than the commander.
6 As part of that assessment of accountability for a
7 unit's climate, commanders should be held
8 accountable for failing to appropriately hold their
9 subordinates accountable for the commission of
10 crimes, such as sexual assault.

11 Now, the drafters of the Uniform Code of
12 Military Justice understood this. With the
13 support, experience, and testimony of great
14 commanders, such as General Dwight D. Eisenhower,
15 Congress passed the UCMJ to serve two purposes:
16 first, to achieve justice with fairness, but
17 secondly, to foster good order and discipline.
18 Justice and discipline are neither mutually
19 exclusive nor conflicting concepts. Rather both
20 are complementary and mutually supportive. In an
21 all-volunteer force, you cannot achieve one without
22 the other.

1 To outsource criminal disposition
2 decisions is to succumb to an unsupported and,
3 frankly, in my opinion, irresponsible belief that
4 justice can be pursued by someone other than the
5 commander, while the commander with his
6 disciplinary tools thus constrained, can pursue his
7 or her responsibility to establish and maintain the
8 best disciplined forces in the defense of the
9 Nation.

10 To achieve both justice and discipline,
11 the authors of the Uniform Code of Military Justice
12 were nothing short of brilliant in teaming the
13 commander with the staff judge advocate. The
14 commander/SJA team adopts the very best of the
15 civilian district attorney model with the need of
16 the commander to be seen by his subordinates
17 holding offenders accountable for criminal
18 violations.

19 The SJA, like the civilian district
20 attorney counterpart, reviews reports of criminal
21 investigations, and using his legal education and
22 criminal trial experience, drafts well-suited

1 criminal charges for the commander to prefer.
2 There is no evidence to support the notion that
3 removing commanders from the Uniform Code of
4 Military Justice process and replacing them with
5 anyone outside the chain of command will improve
6 the system. In fact, the evidence shows that Air
7 Force commanders and their SJAs agreed on the
8 appropriate disposition in over 99 percent of the
9 cases where the SJA recommended trial by court
10 martial. Specifically, from 1 January 2010 through
11 23 April 2013, a little over three years, Air Force
12 commanders declined to prosecute charges which the
13 SJA had recommended for trial in only 22 of 2,511
14 criminal cases. That equals less than one percent
15 of the time.

16 Further, the SJA, who advises the
17 commander to prefer a court martial, has the
18 authority to go to a superior commander in the
19 chain of command seeking preferral if the immediate
20 commander refused to prefer the charge. Therefore
21 -- I'm sorry -- in 10 of the 22 cases that I just
22 cited, a superior commander determined it

1 appropriate to prefer those charges. Therefore,
2 removing commanders from the commander SJA
3 disposition team will make a difference in less
4 than one percent of sexual assaults. Members of the
5 Panel, we need to find a 99 percent solution rather
6 than a one percent solution to combat the crime of
7 sexual assault. The commander/SJA team is highly
8 successful in attaining the twin goals of justice
9 and discipline.

10 Now, I'd like to change gears and talk
11 about an idea that really does work in combating
12 sexual assault. To succeed in combating our sexual
13 assault challenge, the Air Force built -- needs to
14 build trust and confidence among airmen who are
15 sexually assaulted by other airmen. Victims of
16 sexual assault must believe that their
17 privacy can be protected, and they can regain a
18 sense of control in their lives. At the same time,
19 we cannot succeed in encouraging victims to
20 cooperate in prosecuting offenders if they believe
21 that they will be re-victimized by our court
22 martial process.

1 In January of this year, the Air Force
2 created and staffed the Nation's first large-scale
3 effort to provide attorney's to victims of sexual
4 assault. This new initiative, effective on the
5 28th of January of this year, is called the Special
6 Victims' Counsel Program. It is unique among
7 Federal agencies in providing large-scale legal
8 representation and advocacy to victims of sexual
9 assault. It has greatly improved the support we
10 provide to victims of sexual assault, and it's
11 enjoyed great success.

12 Our SVCs operate independently of the
13 prosecution and the commander. They establish
14 attorney-client relationships. They zealously
15 represent their clients, on their client's behalf,
16 thereby protecting the victim's privacy and helping
17 preclude victims from feeling re-victimized by
18 having to endure a long a complex, exhausting, and
19 often confusing criminal justice process.

20 SVCs join their client when their client
21 is interviewed by Air Force Office of Special
22 Investigation by prosecutors and by defense

1 counsel. They represent their client's interest
2 before convening authorities. SVCs advocate for
3 their client's privacy before judges in Military
4 Rule of Evidence 412, 513, and 514 hearings. And
5 significantly, a recent decision by the Court of
6 Appeals for the Armed Forces in *LRM v. Kastenberg*,
7 affirmed our SVCs have standing in a court martial
8 to represent their client's interest at times when
9 the Military Rules of Evidence allow a victim a
10 right to be heard.

11 Not surprisingly, the demand among victims
12 for sexual assault for SVC representation has been
13 high. As of 20 September, SVCs have represented
14 479 clients, and that's just in the first seven
15 months. Ninety-two percent of the victims surveyed
16 reported being extremely satisfied with their SVC's
17 representation. SVCs have attended 81 courts
18 martial, 77 Article 32 hearings, and over 500
19 interviews by trial counsel, defense counsel, and
20 investigators.

21 Furthermore, very impressing -- impressive
22 is the fact that 50 percent of our restricted

1 victims who retained an SVC converted their
2 restricted report to an unrestricted report,
3 indicating they were willing to cooperate with the
4 prosecution of the alleged offender. And you ought
5 to compare that rate, that 50 percent conversion
6 rate, to a 13 percent and a 15 percent conversion
7 rate in 2011 and 2012 that existed before the SVC
8 Program. The SVC Program has caused a greater than
9 three-fold increase in the conversion rate from
10 restricted to unrestricted. And that helps us hold
11 offenders accountable.

12 The SVC Program helps us to give the best
13 care to those who report being victimized by sexual
14 assault. It has proven to be the right thing to do
15 and will continue to have a positive and profound
16 effect on our ability to combat sexual assault.

17 In closing, the men and women who raise
18 their right hand with pride and volunteer to serve
19 this great Nation became more than just airmen.
20 They became part of the Air Force family. We have
21 a sacred obligation to provide a work environment
22 that welcomes and celebrates their diverse

1 backgrounds and contributions, and emphasizes the
2 Air Force core values of integrity, service, and
3 excellence, without which respect, trust, and
4 professionalism cannot thrive. While we have a
5 long way to go in eradicating this crime from our
6 ranks, we remain committed to a zero tolerance
7 approach. We have taken key steps in strengthening
8 accountability and victim care.

9 I look forward to answering your
10 questions. Thank you.

11 CHAIRWOMAN JONES: Thank you. We'll now
12 hear from General Ary.

13 MAJOR GENERAL ARY: Thank you, Judge
14 Jones. Distinguished Panel members, thank you for
15 inviting me to discuss the important issue of the
16 role of commander in sexual assault in the
17 military. Sexual assault is clearly a serious
18 problem faced by society, the Department of
19 Defense, and the Marine Corps. Recognizing this,
20 our Secretary, Secretary Mabus, and our Commandant,
21 General Amos, have made the fight against sexual
22 assault a top priority in the Department and in the

1 service.

2 In order to prevail in the fight to end
3 sexual assault within our ranks, commanders must
4 first create trust among victims to encourage
5 reporting. In the past, we have not always done
6 this as effectively as we should have. In early
7 2012, the Commandant realized the Marine Corps
8 could significantly improve our prevention of and
9 response to sexual assault, and began attacking the
10 issue in earnest. His resulting campaign plan is a
11 commander-led holistic approach to changing
12 behaviors, the behavior of the marines who might
13 commit sexual assault, of those who can intervene
14 to prevent sexual assault, and of the commanders,
15 leaders, and professionals who respond to sexual
16 assault. It involves engaged leadership by our
17 commanders to set expectations, to build a culture
18 of respect and mutual trust, and to hold marines
19 accountable when they fail to meet expectations.

20 The Commandant's campaign plan is working.
21 While it is always difficult to interpret
22 statistics relating to an issue as complex as

1 sexual assault, the Marine Corps has seen a 71
2 percent increase in sexual assault reporting,
3 restricted and unrestricted, over the previous
4 year. We believe that this increased reporting
5 reflects an increased trust in the Marine Corps and
6 its ability to care for victims.

7 Approximately 10 percent of those reports
8 relate to alleged crimes committed before the
9 marine entered active duty. An additional 15
10 percent of those reports relate to alleged crimes
11 committed over one year ago. These latent reports
12 demonstrate that the marines of today are more
13 willing to report allegations of sexual assault
14 than they were just one year ago. This reflects an
15 increased trust that a commander-led system of
16 military justice will treat them with dignity and
17 respect and hold offenders accountable.

18 Victims of sexual assault will not report
19 what happened to them if they do not trust the
20 person to whom they are reporting. We offer
21 victims nine different options for making a report.
22 Eight of them involve someone other than the

1 victim's actual commander. Aside from their
2 commander, victims can report to a sexual assault
3 response coordinator, a victim advocate, a
4 chaplain, a healthcare professional, a law
5 enforcement official, a judge advocate, a sexual
6 hotline -- assault hotline, or anyone in their
7 chain of command, and that could simply be their
8 squad leader or fire team leader. These options
9 make it less intimidating for a victim to report.
10 With these choices, reinforced by a commander's
11 efforts to encourage victims to come forward, we
12 have more opportunities to give victims the care
13 they need and to hold offenders accountable.

14 We've taken steps to ensure that every
15 report is thoroughly investigated. Further, every
16 unrestricted report is reviewed by the first
17 general officer in the victim's chain of command so
18 that each victim receives the support and care they
19 need.

20 In the military, commanding officers can
21 never delegate responsibility and accountability
22 for anything that their unit does or fails to do.

1 In particular, commanders are responsible for their
2 unit's good order and discipline, with taking care
3 of their marines, and for building a culture of
4 dignity, honor, and mutual trust. When their
5 commanders have court martial convening authority,
6 marines know that they can and will be held
7 accountable for failing to act like a responsible
8 and honorable marine. Removing such authority
9 undermines the ability of commanders to enforce the
10 standards they set.

11 The Marine Corps had made a number of
12 changes to how we execute our military justice
13 system to make it more effective. In 2012, the
14 Commandant directed a complete restructuring of our
15 legal community into a regionally-organized model
16 that allows the Marine Corps to place the right
17 prosecutor with the appropriate training,
18 expertise, supervision, and support staff on the
19 right case regardless of location. We hired
20 highly-qualified experts to provide expertise on
21 criminal justice litigation with a focus on the
22 prosecution of complex cases.

1 To support our prosecutors further, we
2 took steps to enhance training to better maintain
3 corporate knowledge and raise experience levels
4 among our prosecutors. We created a Trial Counsel
5 Assistance Program, which consolidates lessons
6 learned from throughout the Marine Corps and
7 provides training and advice to our prosecutors in
8 each region. At the same time, we balanced our
9 ability to prosecute sexual assaults with our
10 ability to defend marines accused of sexual assault
11 so that each marine accused receives a
12 constitutionally fair that will withstand the
13 scrutiny of appeal.

14 To that end, we made similar changes to
15 strengthen the independence and capabilities of our
16 Defense Services organization. We are also in the
17 process of standing up a victim legal counsel
18 organization to represent the interests of marine
19 victims. I expect that these changes will
20 ultimately enhance the confidence of commanders,
21 their marines, and the American public in the
22 military justice system, and assist commanders in

1 building the culture of trust and respect needed to
2 end sexual assault within our ranks.

3 I also believe that there can and should
4 be continual improvement to our system of military
5 justice. And while the UCMJ is not perfect, we
6 have a mechanism in place to continually improve
7 it. We conduct annual reviews of the UCMJ and its
8 accompanying procedural and evidentiary rules to
9 ensure they keep pace with legal developments and
10 the needs of the military. Each year, the Congress
11 and the President make changes to the military
12 justice system to make it more effective and fair.
13 These changes have always maintained its core
14 foundation as a commander-driven system of military
15 justice.

16 This continuous evolutionary change in
17 military justice is healthy and necessary.
18 Revolutionary change, on the other hand, should
19 only be made when the system is at a point of
20 failure. I do not believe that military justice is
21 anywhere near such a point. On the contrary, I
22 think many aspects of our military justice system

1 are working very well and are significantly
2 assisting us in our fight against sexual assault.

3 I've provided additional written testimony
4 for the Panel's consideration, and I look forward
5 to your questions. Thank you.

6 CHAIRWOMAN JONES: Thank you, General Ary.
7 Admiral Kenney?

8 REAR ADMIRAL KENNEY: Honorable Judge
9 Jones and distinguished members of the Panel, thank
10 you for providing this opportunity to testify today
11 before this Panel about the Coast Guard's efforts
12 and commitment to eliminate sexual assault from our
13 service.

14 The Coast Guard every day conducts
15 inherently hazardous missions, whether it be a
16 rescue swimmer diving into the waters off Alaska to
17 save fishermen in distress, or a Coast Guard
18 boarding, interdicting drug smugglers in the
19 Caribbean, or a port state control officer
20 inspecting explosive cargo on a ship bound for New
21 York Harbor. What Coast Guard men and women do all
22 day every day is dangerous and requires each one of

1 us to work as a team with strong bonds of mutual
2 trust and respect that is the critical to safe and
3 efficient mission execution.

4 Sexual assault is a cancer on those bonds
5 of mutual trust and respect. It degrades our
6 people. It inhibits our missions. Coast Guard men
7 and women accept risk every day, but we cannot and
8 we will not accept the risk of sexual assault. The
9 Coast Guard is committed not to just reducing the
10 crime of sexual assault, but to eliminating it from
11 our service all together. And that way we can
12 better protect our own people who serve America by
13 protecting those on the sea -- by protecting
14 America from threats delivered by the sea, and
15 protecting the sea itself.

16 Since 2003, the Coast Guard has initiated
17 programs making certain that victims receive
18 immediate, compassionate, and holistic support, as
19 well as implementing policies that ensure
20 professional investigations are conducted and
21 accountability is ensured for those who have
22 violated service policy. Those programs and

1 initiatives are more fully explained in my written
2 submission to this Panel. However, I want to
3 highlight the proactive steps the Coast Guard has
4 taken in the last two years to meet the
5 Commandant's goal of eradicating sexual assault
6 from our service.

7 In April 2011, the Vice Commandant of the
8 Coast Guard chartered a Sexual Assault Prevention
9 and Response Task Force comprised of subject matter
10 experts to examine the Coast Guard's posture and
11 programs addressing sexual assault. In January
12 2013, the Vice Commandant approved the 39
13 recommendations from this task force to improve our
14 policy, training, services, and response
15 capabilities regarding sexual assault. One of the
16 most significant recommendations was the
17 establishment of a flag level sexual assault
18 prevention counselor, the SAP-C. The SAP-C is a
19 standing body chaired by a vice admiral and
20 comprised of subject matter specialists designed to
21 oversee the implementation of task force
22 recommendations, consider and discuss SAPRO policy

1 generally, direct empirical study and trend
2 analysis, and order immediate and actionable course
3 corrections to Coast Guard SAPRO policy as needed.
4 The SAP-C, of which I am a member, meets biweekly.
5 This Form 3 working group is assigned the task of
6 implementing the recommendations on an aggressive
7 schedule.

8 The SAP-C was instrumental in developing
9 the Coast Guard's Sexual Assault Prevention and
10 Response Strategic Plan issued by the Commandant in
11 April 2013. Also as part of the SAP-C efforts, in
12 May 2013, the Deputy Commandant for mission support
13 established the Sexual Assault Prevention and
14 Response Military Campaign Office, which is
15 responsible for rapidly operationalizing the
16 strategic plan and task force recommendations.
17 Under the guidance of the SAP-C, the campaign
18 office oversees the implementation of near term
19 strategies that will create the processes, training
20 regimen, measurements, and support system integrity
21 that will best position the service to achieve the
22 ultimate goal of eliminating sexual assault.

1 The captain who has been assigned as the
2 full-time lead and the support staff has also been
3 assigned, including a commander as the Coast Guard
4 liaison to DoD's Sexual Assault Prevention and
5 Response Office. This liaison position will
6 optimize alignment between DoD and the Coast Guard
7 with strategic plan implementation.

8 The Vice Commandant of the Coast Guard
9 gives regular updates on the SAP-C and the MCO's
10 work to senior leaders at the Department of
11 Homeland Security and to the White House staff.
12 Also noteworthy was the creation and roll out of
13 the Coast Guard's Bystander Intervention Training
14 Program, known as the Sexual Assault Prevention
15 Workshop. This workshop is presented live by Coast
16 Guard Investigative Service special agents, judge
17 advocates, and Coast Guard work life specialists,
18 who in addition to providing the necessary
19 information about the SAPRO program in plenary
20 session, then engage in gender specific breakout
21 sessions to have a frank dialogue about sexual
22 assault and its prevention and response.

1 Since its inception, the workshop has
2 provided training to over 100 Coast Guard units and
3 thousands of Coast Guard personnel. This training
4 initiative received the Department of Homeland
5 Security's Award for Excellence in Training on
6 January 11th, 2013, and many coastguardsmen have
7 reported that this training is the most meaningful
8 and effective they have received.

9 More importantly, since the launch of the
10 workshop, the Coast Guard has received several
11 spontaneous reports of sexual assault from victims
12 who had previously been unwilling to report, an
13 indication that the Coast Guard's efforts are
14 creating an environment where victims have gained
15 confidence in our system of prevention and
16 response.

17 The Coast Guard has also sought changes to
18 improve the administration of military justice and
19 build victims advocacy capability. For example,
20 beginning in Fiscal Year '13, Coast Guard judge
21 advocates began attending, along with Coast Guard
22 Investigative Service agents, the nationally-

1 recognized U.S. Army Special Victim Investigator
2 Course. To date, 17 Coast Guard judge advocates
3 have completed the course, and 18 additional trial
4 counsel are scheduled to receive training by the
5 conclusion of Fiscal Year '14. In addition, two
6 Coast Guard judge advocates completed the
7 Prosecuting Alcohol Facilitated Sexual Assault
8 Cases Course at the Naval Justice School.

9 In July 2013, the Coast Guard established
10 the Office of Special Victims Counsel. It's the
11 second service to do so. Coast Guard active duty
12 and reserve personnel as well as family members who
13 report they are the victim of sexual assault and
14 some other sexual offenses are eligible to be
15 assigned a Coast Guard judge advocate serving as a
16 special victim's counsel. SVCs are active duty
17 judge advocates who have also been trained and
18 designated as victim advocates and provide legal
19 assistance to victims in a confidential victim
20 advocate relationship throughout the investigation
21 and any related proceedings.

22 SVCs support the victims of sexual assault

1 by assisting them in understanding and preparing
2 for the investigative and accountability processes
3 required to bring perpetrators to justice. The
4 Coast Guard is also in the process of certifying
5 its over 900 victim advocates to ensure that
6 victims receive the best support possible.

7 In closing, let me state this. Discipline
8 is the cornerstone of the well-trained and capable
9 force that rises to our service motto, Semper
10 Paratus, Always Ready. Discipline is inculcated by
11 our commanders who are charged with the safety,
12 morale, health, and welfare of their units, and who
13 are held ultimately responsible for mission
14 execution in times of war and peace.

15 In the Coast Guard where we have small
16 geographically dispersed units executing the
17 dangers I described earlier, the role of the
18 commander as the unitary source of authority is
19 critical to effective mission execution. The
20 Uniform Code of Military Justice is one of the many
21 options available to commanders to maintain good
22 order and discipline. This regime reflects the

1 notion that commanders are in charge of the units,
2 not lawyers.

3 When comparing other nations' systems of
4 military justice to ours, I should note that the
5 total number of courts martial conducted each year
6 in Australia, Canada, and Israel is similar to the
7 number of courts convened by the U.S. Coast Guard.
8 Now, I think I can say this, but I do not believe
9 that we would overhaul the system of military
10 justice in the United States based solely on data
11 from the United States Coast Guard. I think we
12 need more data than those from our allies before we
13 make such sweeping changes.

14 The Commandant has spent the last few
15 years leading a campaign focused on prevention,
16 investigation, advocacy, and accountability, all as
17 a part of an effort to change the culture of our
18 service. Like the Commandant, I am committed to
19 changing our organizational culture. However, I am
20 very concerned that dramatically changing our
21 system of justice at the same time that we are
22 trying to change our culture will impede that

1 cultural change. Any enduring change to our
2 service culture must include the commander and
3 their ability to instill and reinforce that change.

4 When it was enacted in 1950, the UCMJ was
5 the beginning of an effort to embody the true
6 tenants of justice within the military. Since
7 then, reform of the UCMJ has always strived to
8 apply the right balance between the authority of
9 command and the American principles of justice. Is
10 the UCMJ perfect? No. There is no perfect system
11 of justice. Can changes be made to improve the
12 UCMJ? Absolutely. But any changes to the military
13 justice system must be thoughtfully and carefully
14 considered, and should not needlessly undermine the
15 commander's authority and ability to maintain
16 discipline in the force to execute the mission.

17 I am convinced that maintaining the
18 unitary authority of command in parallel with our
19 commander's central role in our military justice
20 system is absolutely essential to maintaining the
21 effective and disciplined Coast Guard force that
22 has served this Nation so well since 1790.

1 Thank you again for the opportunity to
2 testify today. I look forward to working with this
3 Panel and supporting your work, and I look forward
4 to your questions.

5 CHAIRWOMAN JONES: Thank you very much.
6 Admiral Houck?

7 VICE ADMIRAL (RET.) HOUCK: Thank you,
8 Judge Jones, and thank all of you for being here
9 this afternoon and for your testimony.

10 What I'd like to do is lay out for you
11 very briefly as context and as a prelude to some
12 questions for all of you a counter narrative that's
13 been building over the course of our previous day
14 of testimony yesterday from witnesses that appear
15 before the Panel, and also the counter narrative, I
16 think, represents concerns of others who would be
17 in this room in attendance or members of the Panel.

18 I think it starts with the notion, and
19 this all comes directly from testimony or
20 questions. It begins with the notion that senior
21 military officers who come here to talk about this
22 are not going to be fully telling the truth. It

1 was suggested yesterday that senior military
2 officers were against changes to Article 60, and
3 then as soon as the Secretary of Defense supported
4 changes to Article 60, instantly senior military
5 leadership converted to being in favor of the
6 changes to Article 60.

7 Secondly, that there is an inherent
8 resistance to change, that no change will come as
9 the result of the initiative of military leadership
10 internally, that is going to need to be compelled,
11 and that the best evidence of that is the fact that
12 for 30 years, the military has been struggling with
13 the problem of sexual assault and sexual
14 harassment, and that we are nonetheless having the
15 issues that we've got here today. And that in lieu
16 of further efforts at internal reform by the
17 military, that we ought to defer instead to the
18 practices and initiatives of civilian society in
19 accomplishing that reform.

20 There has been much reference made already
21 to the practices of our allies, so I won't belabor
22 that. But it is a part of a piece that the system

1 that you are articulating defense for this
2 afternoon is anachronistic and alone in the world
3 at this point really in terms of the role of a
4 commander in making disciplinary and prosecutorial
5 decisions in an armed force.

6 Another analogy has been drawn to police
7 forces, police forces within the United States, the
8 members of which go into harm's way and the leaders
9 of police forces do not have the authority to make
10 the kind of decisions that the military would like
11 to make for commanders.

12 So I offer that by way of context. And
13 then the following two specific concerns that have
14 come up about the role of commanders in making
15 these decisions. And I think there are two -- I
16 hope I'm fairly condensing and extrapolating from
17 what I've heard what I think are two primary
18 concerns that have been raised. The first one is
19 bad decision making in the first place by
20 commanders, bad referral decisions, bad choices
21 about what decisions are made as to what cases --
22 what is done with cases in the disposition context,

1 bad decisions that operate to the detriment of
2 victims, or almost 180 out, bad decisions that
3 operate to the detriment of the accused in terms of
4 ignorance by the commanders who are not legally
5 trained and are making these decisions, and as well
6 as commanders who overpower or ignore legal advice
7 that they might get from lawyers.

8 That's the first concern, bad decisions.
9 The second concern is that the presence of
10 commanders in the decision making process leads to
11 retaliation. Various statistics were cited
12 yesterday, one of which approximated between 60 to
13 70 percent of survivors who have brought forth
14 concerns or brought forth allegations that they
15 have been sexually assaulted have been retaliated
16 against, and that the presence of commanders in
17 that -- in the decision making process, the
18 disposition process, helps promote that kind of
19 retaliation.

20 So what I'd like to do against that
21 backdrop is ask each of you one question, and at
22 the end of it if I didn't ask you the question you

1 really wanted to answer, if anybody wants to put
2 their hand up and say, I would like to go back and
3 comment on something that you didn't ask me, I hope
4 that we would have time for that.

5 I think an omnibus question first, but
6 it's important and you may think it's implicit, but
7 I don't think it is implicit given some of the
8 testimony that we've heard. Are we receiving your
9 candid views? Are we receiving your views and not
10 the views that you think somebody wants you to say
11 or something that you've been told to say? Are you
12 receiving -- are we getting the authentic opinions
13 of six senior military officers?

14 (No response.)

15 VICE ADMIRAL (RET.) HOUCK: Nobody said
16 otherwise.

17 (A chorus of yeses.)

18 VICE ADMIRAL (RET.) HOUCK: So we'll take
19 that as a yes. Admiral DeRenzi, I want to focus
20 on, if I could, do you believe that removing the
21 commander from the disposition decision making
22 process, the referral process, that taking the

1 commander out of that loop would decrease
2 retaliation against sexual assault survivors? So
3 to put it another way, if we take the commander
4 out, would retaliation go down?

5 VICE ADMIRAL DERENZI: No, I don't think
6 so. I don't think one thing has anything to do
7 with the other. As you delve deeper into the
8 retaliation concern, the retaliation that's
9 expressed isn't necessarily and, frankly, isn't in
10 the vast majority of instances, by the commanders
11 themselves. It's by other individuals, typically
12 the peer group of the victim.

13 If you take the commander's referral
14 authority away or preferential authority away, you
15 take away their ability to actually discipline the
16 people who may be retaliating against victims. I
17 personally don't see a connection between taking a
18 commander out of a sexual assault preferential
19 decision and reducing the retaliation aspect for a
20 victim who came forward. That also presumes that
21 both the victim and the accused are in the same
22 command, and that's not always the case. I do not

1 understand the logic and the connection there, I
2 just don't.

3 I'd also like to go on record to say
4 something to this Panel. When we testified in
5 March in front of the SASC Personnel Subcommittee, we
6 were asked about Article 60 and whether we thought
7 there should be changes. I indicated at the time
8 that I was open to change because of the evolution
9 of the military justice system and the increased
10 presence of lawyers in each aspect of that system.
11 And I remember that I said that because my answer
12 was met with some consternation by Senator Graham.

13 So I would say to you that we aren't
14 mouthpieces of leadership. I know all of these
15 people well, and I can assure you that I and each
16 one of us will give you our honest, candid
17 opinion.

18 VICE ADMIRAL (RET.) HOUCK: Thank you.
19 General Darpino, do you believe that taking the
20 commander out of the decision making disposition
21 loop would improve the decisions about what cases
22 should go to courts martial or should be done in

1 terms of disposition of these cases?

2 LIEUTENANT GENERAL DARPINO: You said, I'm
3 sorry, sir?

4 LIEUTENANT GENERAL DARPINO: If we take
5 the commander out of the loop, will it make the
6 decisions better?

7 LIEUTENANT GENERAL DARPINO: I think that
8 the premise of that belief is based upon a
9 misperception, which says that commanders while not
10 lawyers are also not aware of the judicial process
11 and come new to this at some point in their career
12 where they suddenly have these weighty decisions
13 upon their shoulders.

14 From the time you are commissioned as an
15 officer, you're given responsibility, and I'm going
16 to use the Army model because I'm an Army officer.
17 As a second lieutenant, you are given
18 responsibility for 20 people. You have had
19 training before you took the oath through your
20 commissioning source, be it West Point where we
21 have an entire department, the Department of Law,
22 that trains officers on the legal aspects of what

1 we do, or you learned it in your basic course --
2 your commissioning source through ROTC or
3 otherwise.

4 You then take control of these 30
5 individuals as a second lieutenant. From the
6 moment you are responsible for them, you enter into
7 a quasi-judicial role. If they do not show up for
8 formation, you make decisions regarding what type
9 of actions you're going to take, because unlike a
10 workplace where if you don't show up to work, you
11 don't get paid.

12 If you come late to a formation in the
13 Army or any of our services, we then can make you -
14 that lieutenant a quasi-judicial role can make you
15 come 10 minutes earlier the next day, and 10
16 minutes earlier the day after that. And if he
17 decides we are not making progress, he then refers
18 it to the first commander, that company commander.
19 And acting in his quasi-judicial role as he has
20 been trained from the time that he's been those
21 eight years now that he's a commander, he now has
22 the ability to take more action. And his action

1 can be that he's going to give you what we call in
2 the Army nonjudicial punishment, captain's mast, I
3 will say to my right here. He can take away your
4 rank, he can take away your pay, all actions at
5 that point because of the liberty interest. He has
6 the advice of an attorney typically. But those are
7 quasi-judicial actions.

8 You walk that up to a battalion commander,
9 who has 18 to 20 years, lieutenant colonel. He's
10 responsible for 4,000 or she's responsible for
11 about 4,000 individuals -- or, no, I'm sorry, that
12 would be about 600 individuals. That individual
13 now has the ability to start a summary court
14 martial where he can put you in jail for 30 days
15 taking away rank, another quasi-judicial role.

16 You go to the brigade commander. The
17 brigade commander, now he is able to actually refer
18 to a special courts martial with the advice of an
19 attorney. So by the time you get to someone who's
20 going to handle these cases at a general court
21 martial level, they have had 25 years of experience
22 in a quasi-judicial role, either reviewing

1 misconduct and referring it to the commander who
2 has the authority, or tried to take corrective
3 actions on his own with the powers that he or she
4 has.

5 VICE ADMIRAL (RET.) HOUCK: That's really
6 good, but suppose one of those people doesn't like
7 women in the armed forces, or suppose one of those
8 people does not like gays or lesbians in the armed
9 forces. What do we do about that?

10 LIEUTENANT GENERAL DARPINO: Well, that's
11 where the judge advocate and the collaborative role
12 that you have with your judge advocate. I, who
13 advise that commander throughout the process and
14 all of those that work for us as the judge advocate
15 generals within, we then have under Article 6 of
16 the UCMJ, the authority -- unvarnished authority,
17 unchecked authority -- to take that up the level
18 through the judge advocate chains, and make sure
19 that justice is done. It is an independent
20 authority that exists by statute that while we work
21 for the commander, we are also independent of the
22 commander when it comes to our legal advice,

1 because our client is the Army, not the commander.

2 And so, that is one check on the system.

3 We also have other checks on the system.

4 In the Army, we have now -- we have command climate
5 surveys. Those will now be done within 120 days of
6 arrival in a unit. They will then be done annually
7 thereafter. They will be sent to the higher level
8 commander. I have seen the results of this
9 already. There is a result -- there is a case on
10 my desk by a senior officer who was not treating
11 subordinates correctly in a sexual harassment
12 fashion, and we discovered that by these command
13 climate surveys.

14 We also have inspectors general that folks
15 can pick up the phone and call. We also have
16 whistleblowers DoD hotlines. So there are many
17 methods that these people will be met out through
18 the process. So it is not unchecked power. There
19 are checks and balances in our system, and they do
20 work.

21 VICE ADMIRAL (RET.) HOUCK: General Gross,
22 the military has had 30 years to fix this. Why

1 should anybody believe it's going to be different a
2 year from now, or two years from now, or five years
3 from now?

4 BRIGADIER GENERAL GROSS: Well, first of
5 all, sir, I think the progress you've seen over the
6 last two years has been fundamentally different
7 than the 28 prior to that. I can't speak to the
8 last 30 years. I can speak for the last two, and,
9 you know, I've seen the effort that's been put into
10 this. When you wake commanders up and you wake
11 senior leaders up to a problem, and they get it and
12 they own it, they're going to move it. They're
13 going to move it forward, and that's what we're
14 seeing right now amongst the senior leadership,
15 absolute commitment from the President of the
16 United States down.

17 So I think that in the past, I don't think
18 we moved it like we should have. Certainly there
19 were lots of individual great efforts by judge
20 advocates and commanders to do the right thing in
21 cases, in units, in commands. But I don't know
22 that we had the holistic push forward. I can't

1 imagine there's a single commander right now in any
2 of these services that would say, oh, I didn't
3 realize sexual assault was a problem, I didn't
4 realize the senior leadership considered this is an
5 important issue that we need to take care of. So I
6 see new signs that I've never seen in my career as
7 a judge advocate, and that's what gives me hope
8 that we are finally moving in the right direction.

9 I talk to the Chairman about sexual
10 assault prevention response at least weekly. I
11 can't imagine that happening 10 years ago. The
12 Chairman of the Joint Chiefs of Staff and I talk
13 about this issue at least weekly. He's got Syria,
14 Iran, Afghanistan, and the rest of the world to
15 worry about, and he and I talk about this issue all
16 the time. And that's a fundamental change, I'll
17 bet, compared to past Chairmen.

18 VICE ADMIRAL (RET.) HOUCK: I'd like to
19 ask one last question and leave it open to General
20 Harding and General Ary or Admiral Kenney to answer
21 this in whatever way you guys see fit. But focused
22 on -- I asked a different version of the question

1 to Admiral DeRenzi and General Darpino.
2 Specifically, if removing the commander from the
3 process would help solve the issue of retaliation
4 or would help make decisions better, and I
5 understood their answers to be, no, it would not
6 make a difference in their opinion.

7 I'd like to turn the question around and
8 just ask the three of you, if you could give your
9 own view on what distinctive good the commander
10 does in the decision making process. In other
11 words, if you imagine a system in which a lawyer or
12 a prosecutor makes the decision, is there value
13 added that comes from having the commander in that
14 process, and what is that value added to the
15 decision making process that would give survivors
16 and anybody in the armed forces confidence that
17 keeping the commander in that loop is the right
18 thing to do?

19 MAJOR GENERAL ARY: Admiral, I'd like to
20 answer that with a personal experience because I
21 think that there are those who argue whether the
22 decision has improved or changed or the factors

1 that go into this decision are different. As a
2 battalion commander of a recruit training
3 battalion, I know that my decision making process
4 was very different than it was as a prosecutor. To
5 give you an example, when you're leading an
6 organization with 150 drill instructors, as a
7 commanding officer you are responsible for setting
8 a command climate that will not allow that
9 retaliation, that sets that standard, that culture.

10 And I would stand up in front of the drill
11 instructors every day and say that I cannot and
12 will not tolerate recruit abuse in this
13 organization. When I had a drill instructor that
14 abused a recruit, I believed he had done it. He
15 refused nonjudicial punishment. I decided that I
16 would refer that case to a special court martial.
17 I had a prosecutor who walked in and told me that
18 we're not going to prove this case beyond a
19 reasonable doubt. As a lawyer, I probably would've
20 agreed with him if I was basing my decision on the
21 merits of the evidence. I was basing my decision
22 on setting a command climate that would not

1 tolerate recruit abuse in that organization. I
2 wanted to prevent retaliation. I wanted to set an
3 organization where everybody knew that what I said
4 was backed up my actions because actions always
5 speak louder than words.

6 So I sent that case to trial. He was
7 acquitted. Justice was probably served in that
8 case, and we got on with it. But every drill
9 instructor in 2nd Battalion knew that I did not and
10 would not tolerate recruit abuse.

11 So the decisions are different in the
12 commander's seat than they are in the lawyer's
13 seat. Where you sit probably would give you a
14 qualitative assessment of whether it's better or
15 it's different. The commanders add value, and they
16 are used to making these types of decisions. And
17 it's easy to advise; it's hard to decide. And
18 that's where commanders bring the value to this
19 organization. Thank you.

20 REAR ADMIRAL KENNEY: Thanks, Admiral.
21 Like General Ary, I have also been a field
22 commander. I have commanded a Coast Guard

1 operational unit. And having that perspective has
2 been tremendously important to my growth as a
3 lawyer because there have been many times in my
4 Coast Guard legal career where I have advised
5 commanders that maybe you shouldn't prosecute this
6 case, it may not be winnable. But they've said,
7 no, this needs to be done because I need to send a
8 message to my unit. And that, I think, is one of
9 the differences.

10 If I could go back to one of your earlier
11 comments, Admiral, when you said -- police officers
12 in the United States routinely go into harm's way,
13 but they're not subject to this system of
14 discipline that we have in the military. I think
15 the Coast Guard has an interesting perspective on
16 that because we are also a large law enforcement
17 enforcement agency. But having that military
18 character to execute the kinds of missions that our
19 military does each and every day is critically
20 important to the ultimate success of that mission,
21 I think the difference being with the police force,
22 if a cop decides they don't want to do that line of

1 work anymore, they can leave, but we can't have
2 that in our military in the situations that we are
3 routinely thrust into. And that discipline and the
4 commander's ability to back that up is the critical
5 component to making the system work.

6 I can't imagine as a commander where --
7 like General Ary, I've stood in front of my men and
8 women and said, this is the way we're going to do
9 things and I will hold you accountable if you
10 don't. I can't imagine standing in front of them
11 and saying, this is the way we're going to do
12 things, and after I check with my lawyer, I might
13 be able to hold you accountable. I think the
14 system would begin to fall apart, and that -- the
15 necessity for the unity of command would almost
16 immediately erode.

17 MAJOR GENERAL ARY: I'd add to that that
18 this time that we have --

19 CHAIRWOMAN JONES: I'm sorry. Could you
20 move that mic a little? Thank you, General.

21 MAJOR GENERAL ARY: I'd add to that that
22 this team that I spoke about in my remarks, the

1 commander/SJA team, is really stronger than the
2 individual parts. It does work well. And for 34
3 years I've been a member of that team six times.
4 I've been an SJA six times. I've worked for a lot
5 of different commanders. I have taken in cases
6 that I kind of felt needed to go to nonjudicial
7 punishment where the commander explained his
8 concern for the unit, and we went to court, and the
9 commander was right. I've gone in with proposals
10 to go to court where the commander said, hey, talk
11 to me about why, and we talked about it, and
12 eventually went to court.

13 My point here is that two heads are better
14 than one actually does work here, and we both bring
15 individual perspectives, the perspective of what
16 the law says and would allow in a charging decision
17 and the commander's perspective of what's good for
18 that unit. And to sever that team -- this is kind
19 of the DNA of how we operate in the armed forces to
20 split that double helix and somehow believe that
21 you're going to get a better result, is I think --
22 well, certainly not smart.

1 I worry about risk adverse attorneys,
2 frankly. I worry about attorneys believing that
3 their win record is supremely important. There are
4 cases that we go forward, as Admiral Kenney
5 indicated, that it's not as important whether or
6 not we win as it is important that we went forward.
7 And worry about a win-loss record is just not
8 appropriate. Now, that's not all attorneys, but
9 regardless of whether you're in uniform or not,
10 there is that instinct that says, I don't like to
11 lose, if you're a prosecutor. I worry about that.

12 Right now, the countervailing influence is
13 that commander who says it's okay to get an
14 acquittal. There are worse things than acquittal.
15 A case prosecuted poorly is a worse result, and a
16 case that should've been prosecuted that never was
17 prosecuted is a worse result.

18 VICE ADMIRAL (RET.) HOUCK: There are
19 commanders right now that are saying press forward
20 anyway because I'm afraid what it would look like
21 if we don't?

22 MAJOR GENERAL ARY: No, because we as a

1 matter of firm ground tell them this is not about a
2 hail mary pass. This is about looking at the
3 allegations and the evidence and determining
4 whether it meets the minimal threshold. That
5 threshold is not proof beyond a reasonable doubt.
6 That's what the panel uses. The threshold is, is
7 there adequate evidence for preferral, an honest,
8 subjective belief that the accused committed the
9 charges, the offense alleged in the charges, and
10 then the threshold for a referral, which is kind of
11 a proximate cause added test, which means is there
12 evidence of every element of the crime. So do I
13 honestly believe he committed it, is there evidence
14 of every element, and then we go forward.

15 That will ensure that that airman,
16 soldier, sailor, marine, is not mistreated by that
17 process. And it ensures the victims also have
18 their day in court. I think that is ultimately
19 what we get in our process. But if we find a
20 commander that believes that every charge needs to
21 go to court, then that's not a commander that's
22 performing his or her duty, and I would suggest

1 that that commander needs to be recalibrated or
2 removed.

3 VICE ADMIRAL (RET.) HOUCK: Thank you very
4 much.

5 CHAIRWOMAN JONES: Can I ask a quick --

6 MR. BRYANT: Following up -- I'm sorry.

7 CHAIRWOMAN JONES: Pardon me.

8 MR. BRYANT: Following up on all of your
9 comments from down here, honestly believing that
10 someone committed it is really not a standard at
11 all, is it? Don't you have to weigh whether or not
12 you have credible, admissible evidence, because as
13 a 40-year prosecutor, I have myself, my assistants,
14 and law enforcement who know in our gut and heart
15 somebody committed the case -- committed the crime.
16 But we don't take that to court just to send a
17 message if we don't have admissible, credible
18 evidence that will prove it, because otherwise, you
19 know, we've let the greyhound catch the rabbit when
20 we get an acquittal.

21 And frankly, I don't want to say I'm
22 shocked, but I'm disappointed that we would

1 prosecute -- that we had two examples of
2 prosecuting to "send a message." I agree 100
3 percent we're not taking only cases where we're
4 shooting goldfish in a bowl. We have to go out on
5 circumstantial cases many times. But to prosecute
6 simply to send a message, frankly, I think at least
7 for state prosecutors, is unethical.

8 MAJOR GENERAL ARY: No, I agree fully.
9 And I want to address that because I think it was
10 probably my remarks that brought that question, so
11 I want to address that directly.

12 In the case I was referring to, I had
13 medical evidence of the injury to the recruit, I
14 had statements from fellow recruits, I had
15 differing statements from drill instructors and
16 some of the other recruits. To me, that's a case
17 that goes to trial, but there was clearly probable
18 cause. So I wanted to address that, too, because I
19 feel strongly about those same principles that
20 you're talking about. So, but the difference
21 between beyond a reasonable doubt and the standard
22 to go to trial, sir, is we share the same concerns.

1 MR. BRYANT: Thank you.

2 REAR ADMIRAL KENNEY: And, sir, if I could
3 add to that, because I think I also made statements
4 in that regard, of course there has to be probable
5 cause. And I will freely recommend to a commander
6 that this can't be prosecuted because a prosecutor
7 does have an ethical duty before it goes to trial.
8 But by the same token, some of the testimony that
9 you've heard here today, and I didn't mention it in
10 my remarks. But all of us -- all our services
11 routinely take cases back from civilian
12 jurisdictions. And indeed, just Monday there was a
13 court martial for a sexual assault that concluded
14 in the Coast Guard where the Commonwealth's
15 attorney in Portsmouth, Virginia decided not to
16 accept the case and prosecute it because he did not
17 feel it was winnable. There was a conviction in
18 this case by a Coast Guard panel member and a 10-
19 year sentence award.

20 Was it an easy case? No, it was not. And
21 we routinely take cases that we know are going to
22 be challenging. But there is merit to the process,

1 and there is value to the process. But of course
2 all ethical standards of prosecution have to be met
3 before you go forward.

4 MR. BRYANT: There are many examples, such
5 as you gave, I'm sure, across the country that are
6 also fact driven by the case. And Commonwealth's
7 Attorney Earle Mobley is known across the state of
8 Virginia as one of the most aggressive prosecutors.
9 So there must have been some element of fact or law
10 that differentiated that case for him to decline it
11 in favor of Coast Guard prosecution. I just wanted
12 to --

13 REAR ADMIRAL KENNEY: Oh, there's no
14 question, and that's often the case. Sometimes
15 it's fact driven. Sometimes, quite frankly, it's
16 resource driven. Not all district attorney's
17 offices have the resources to prosecute very
18 complex cases. We see that in the Coast Guard
19 fairly often, especially in remote locations where
20 there are going to be logistical challenges to
21 prosecuting a case. And in some -- in many
22 instances, we are better equipped to prosecute than

1 a local DA's office, and we're willing to do it.

2 MR. BRYANT: Okay.

3 CHAIRWOMAN JONES: We're going to take a
4 10-minute break now. When we come back, we'll
5 continue until 14:30. I'm sure we'll want to
6 continue after 14:30, but we'll try to stick to the
7 schedule. Thank you.

8 (Whereupon, a recess was taken.)

9 CHAIRWOMAN JONES: All right. Professor
10 Hillman?

11 PROFESSOR HILLMAN: Thank you, Judge
12 Jones. Thanks to all of you for spending your time
13 with us this afternoon, and also for all the work
14 that you're doing on this. It does help us to hear
15 from you, and the written materials you've
16 submitted are also really important to us.

17 I'm going to ask you a sort of unusual
18 question, and that is, in protecting this
19 particular role of command in the prosecutorial
20 process, it feels like a relatively narrow thing
21 among the many, many things that commanders do have
22 the authority to do, including many other things

1 that are under question as to whether that should
2 continue, not only the clemency issues with Article
3 60 that Admiral DeRenzi talked about specifically,
4 but also the Article 32 process, the question of
5 the role of different elements -- the panel
6 selection. That is, different elements in the
7 decision making itself, the decision to prosecute,
8 as well as panel selection. All those are among
9 the reform measures that have been proposed.

10 But I wonder if this is -- this role of
11 the commander in criminal prosecution is actually a
12 vestige of a past way of discipline, and I just
13 want to put this out there for you to take aim at,
14 if you disagree, which I expect that you will.

15 So here's what I think. The Uniform Code
16 of Military Justice was drafted in the aftermath of
17 a war in which military participation was at a
18 tremendous high for the United States,
19 approximately 200 times what it is today. So many,
20 many more individuals in the United States had
21 experience in the military when the committee to
22 which several of you mentioned, chaired by a

1 Harvard Law School professor, involving veterans
2 and senior leaders in the United States, came up
3 with a plan to address discipline and justice,
4 which I think Lieutenant General Harding
5 specifically referred to as goals of the UCMJ, but
6 also to address problems in uneven punishments,
7 dramatic lack of standardization during World War
8 II, and the courts martial that took place, and
9 also lack of protections for the rights of accused
10 service members.

11 The process they came up with was
12 specifically responsive to that. And it was at the
13 beginning of an era that has seen a military very
14 different from that high participation rate
15 conscript armed force that we had until the end of
16 the Vietnam era. Now, we have an all-volunteer
17 military where coercion is no longer the way you
18 largely, and your commanders instill discipline in
19 your service members. We use positive
20 reinforcement. We use economic resources to
21 recruit and retain service members. We don't, as
22 we did in World War II, court martial service

1 members routinely and retain in them in the service
2 afterwards.

3 The court martial rate has plummeted
4 dramatically since that World War II era. You do
5 have a very disciplined armed force compared to
6 other militaries around the world, and your rate of
7 criminal prosecution is very low, notwithstanding
8 this problem that we're talking about right now.

9 So I wonder, given that what is really --
10 what you have all described in many different
11 compelling ways as a stain on the U.S. armed forces
12 today, this issue of sexual assault, preserving
13 this particular role of the commander in making
14 that criminal decision, that decision about
15 criminal prosecution, how can that be so central
16 when we've had such a change in the way the force
17 is constructed and the way discipline is pursued
18 and service members are recruited and retained
19 since that World War II era when this system came
20 into being?

21 LIEUTENANT GENERAL HARDING: Let me --
22 I'll open up with some thoughts. It's hard to

1 describe in this room the atmosphere that exists on
2 a military installation and in any military
3 command, whether they're in garrison or deployed.
4 It is hard to explain in this room, in this vacuum,
5 the power behind a commander's message. It is
6 difficult to explain in this vacuum that soldiers,
7 sailors, airmen, and marines all feel this innate
8 desire to fulfill the commander's wishes, that
9 sense of discipline starts with the commander
10 saying, here are my standards, which, in fact, may
11 be standards that are per my criminal code, like
12 the UCMJ. I expect that you will adhere to those
13 standards.

14 The popular press oftentimes makes fun of
15 the -- or kids about the term "zero tolerance."
16 But commanders use that. I have zero tolerance for
17 sexual harassment, zero tolerance for racial
18 discrimination, now zero tolerance for sexual
19 assault. Those are words. When the words are
20 backed up by the commander's action -- when a
21 commander takes action in a case, and that is known
22 in that unit like a hot knife through butter, it

1 sends a reinforcing message that says that the
2 commander's words were, in fact, his intent. And
3 that airman is going to be held accountable.

4 It reinforces through the other 99 percent
5 of the population the fact that the standards that
6 they adhere to themselves were the right standards,
7 and that the commander's words weren't empty,
8 weren't meaningless. And that perception of
9 accountability, that optic owned by the commander
10 is huge powerful medicine in formulating any force,
11 whether it's a force today in 2013, one after World
12 War II, or one that Washington had in 1775. And it
13 works. It works time and again.

14 And that's the piece that you're not going
15 to find a lot of huge science on, and you're not
16 going to be able to determine or see it in the
17 abstract, divorced from its environment. But it's
18 important to how we win and fight America's wars.
19 That didn't happen by accident. It was pure
20 military science, and that's part of the military
21 science.

22 Also I'd offer up as we talk about

1 separating the commander from this and whether
2 that's a good thing or a bad thing, the original
3 purpose for looking at that as a possible remedy in
4 our case or a possible improvement was the idea
5 that somehow it would allow us to improve on our
6 response to sexual assault. And I've got to tell
7 you, somebody is going to have to connect the dots
8 for me. I'm having a real hard time seeing that,
9 and I've been studying this for a long time. In
10 fact, the Air Force numbers and the reason that we
11 asked for those numbers over the course of three
12 years say that it will possibly produce a
13 difference in one-half of one percent of the cases
14 that SJAs recommended for trial.

15 So there doesn't seem to be a disconnect
16 between the lawyer advice and the commander's
17 action, at least on the Air Force side, today. So
18 I'm not sure what problem it seeks to fix, but it's
19 not the sexual assault problem. So that's why I'd
20 just offer that up as we continue to -- as you
21 continue to examine the propriety of removing the
22 commander as the disposition authority.

1 PROFESSOR HILLMAN: General Harding, I'd
2 like others to respond, but let me just say why I
3 think many people do believe it addresses the
4 problem, and that is the real problem isn't within
5 -- at least one of the real problems isn't within
6 the prosecution decision. It's in the willingness
7 of victims to report and that it is a possibility
8 that this sort of change would encourage more
9 victims to report because their confidence would
10 increase.

11 I don't think that -- that may be
12 something -- a factual issue that relates to mental
13 processes that are difficult to access through our
14 traditional metrics. But it is a reasonable
15 perspective on if there is a lack of faith that
16 commanders prosecute -- will prosecute if someone
17 comes forward, then changing the person who makes
18 that decision does seem like a reasonable --

19 LIEUTENANT GENERAL HARDING: Well, the
20 difficulty there, Professor Hillman, is this belief
21 that it would make a difference in the eyes of
22 victims. We have done a poor job in surveying

1 victims. And you heard from some of the remarks
2 here, the surveys we have are inexact. They tell
3 us that some fear retaliation, but they don't say
4 from whom. They lump into one pile of possible
5 people that might retaliate commanders,
6 supervisors, and co-workers. Boy, is there a world
7 of difference in those three categories.

8 We need to survey and determine who is --
9 where is this source of retaliation emanating from?
10 And when we elevated the disposition authority in
11 June of 2012 to the O-6 level, do we believe now
12 that there is a fear that that O-6, special court
13 martial, convening authority will retaliate?
14 Again, I've got no evidence to suggest that
15 anecdotally. In my 34 years, I haven't seen that
16 commander. And those that believe that there is
17 such a commander, I've asked for the name of that
18 commander, and I haven't gotten a name either.

19 So I hear you. I understand that
20 suspicion. I'm just looking for some, I guess,
21 facts that support it.

22 LIEUTENANT GENERAL DARPINO: And if I

1 could just maybe address both of those, and I will
2 attempt to be very brief, but also very frank. You
3 are correct that we have an all-volunteer Army
4 right now. It is more educated. We are definitely
5 more disciplined. But the constant that has
6 existed through this whole time is that we are
7 members of the profession of arms. We are in the
8 killing and dying business, and we know that when
9 we take the oath, and I'm not trying to be
10 melodramatic here. But that makes us very, very
11 different, but it's also been the constant. And
12 that's why we have a different system.

13 Soldiers, from the moment they enter the
14 military, we teach them discipline through command
15 authority, and we build upon that, and that shapes
16 them and makes them part of our force. It means
17 that soldiers will follow orders of their commander
18 at their own death. They will be in the killing
19 and dying business because we have disciplined them
20 to follow commander's orders.

21 So when they're at the bottom of a hill
22 and there's overwhelming fire above, when the

1 commander says, "take the hill," they do it because
2 they have been trained through our system to follow
3 the commander's orders. And they will take that
4 hill, and they will die, not because the lawyer is
5 standing at the bottom back in the bush waiting to
6 court martial them because they don't take the
7 hill. They take it because the commander has told
8 them to, and that exists now in our Army. It
9 existed in the Korean, Vietnam. You give me a
10 conflict, it is that discipline that makes the
11 difference.

12 We are concerned about this, and your
13 issue regarding retaliation is of great concern to
14 us because commanders are charged with the welfare
15 of their troops, the safety, the morale, and the
16 welfare. And they take that very seriously. And
17 so, the fact that there may be a perception that
18 they are the ones that retaliate is of great
19 concern, which is why we all have elevated it up to
20 a more senior commander.

21 When three-fourths of these crimes occur
22 between an an E-1 and an E-4, most of them aren't

1 absolutely sure who that old guy is with the birds
2 on his shoulder. I mean, they may never have seen
3 him. It's really their company-level commander.
4 So in the Army, we use a study that is used by
5 behavioral health specialists nationwide. It is a
6 gender study. And in that, we asked soldiers why
7 they don't report. Seventy percent -- the number
8 one reason, 70 percent was that they don't want
9 anyone to know. That is the same statistic that
10 you get in society. So it isn't retaliation. It's
11 that they don't want anyone to know. There is a
12 shame associated with this, particularly when
13 they're young in 70 percent of our cases involved
14 also, to be frank.

15 But we also -- this particular survey also
16 asked the question, would you report without fear
17 of reprisal to a large extent. That's your
18 retaliation question. Seventy percent say they
19 would report without fear of reprisal. So as
20 General Harding said, we are considering changing a
21 system that has built a great Army and armed force
22 across all the people sitting at this table when we

1 haven't defined the problem, or if we have, we
2 haven't really said that this is the solution. And
3 while, again, maybe a little melodramatic, it's why
4 I said the phrase. I thought of it when I was
5 running the other day. We could be prescribing the
6 wrong medicine, and we could end up killing the
7 patient as a result. And I just think that's a
8 great risk that we have to think about.

9 And I appreciate you giving me the
10 opportunity to address those two points.

11 VICE ADMIRAL DERENZI: And if I could echo
12 that, Professor Hillman, you said, and I've heard
13 others besides you say this, that if you take the
14 commander out of the decision, there's a
15 possibility of increased reporting. That may be
16 true for some individuals, but when you listen to
17 what you've heard today in terms of the importance
18 of discipline in our business, changing the system,
19 frankly, standing it on its head to get at the
20 possibility is something that we should think very,
21 very carefully about before we go forth and do it,
22 particularly when we've improved a lot of the

1 victim support processes, reporting processes. I
2 believe the Navy will also see a marked increase in
3 reporting over the course of the last Fiscal Year.

4 I don't disagree that we have to keep
5 looking at our military justice to make sure it
6 evolves in a responsible way to address the
7 disciplinary issues that we face. Some parts of it
8 may be a vestige of a past way of discipline. But
9 the need for discipline persists and will continue
10 to persist as long as we put America's sons and
11 daughters in harm's way. And when we pull away
12 from the pier, there's 5,000 people in an aircraft
13 carrier. They don't have anywhere to go, and they
14 have to pull together as a team, sometimes doing
15 things they don't want to do. And taking the
16 commander's ability to enforce discipline away, I
17 believe, would undermine the missions we ask them
18 to perform, particularly if it's just a possible
19 solution to a much bigger problem.

20 PROFESSOR HILLMAN: Thank you. I'm going
21 to just follow up with one quick comment, and I
22 apologize, I have to leave shortly and I won't be

1 able to hear the end of your comments here. I just
2 wanted to add that the hard part here is that the
3 power of command hasn't been significantly
4 diminished in recent decades, and yet this problem
5 has not been addressed. I mean, we are actually
6 operating from a position of failure in terms of
7 halting this problem in the armed forces, and
8 that's -- it's driven home to me every time I look
9 at this. I have research assistants working on
10 different studies. They were looking into the
11 Jordanian military and other Arab militaries to try
12 to understand the problem. What they can find in
13 Arab language sources on sexual assault is all
14 about the United States.

15 This is just -- it's not only here. It's
16 not only the media here in the United States that
17 focuses on this and continues to bring it up. It's
18 actually -- it has an impact elsewhere as well.
19 And that's why all of these measures, despite the
20 fact that we actually don't know what the
21 consequences of some these reform measures might
22 be, and, in fact, we have to reckon with all the

1 consequences you point to in this regard that might
2 happen as a result of changes. It does feel like
3 perhaps it's not a revolutionary change because of
4 the way military justice has been legalized,
5 bureaucratized, made non-deployable in some
6 estimations, despite -- I understand, ma'am, you
7 disagree with that. But that is an argument that's
8 out there, too. So there are multiple lenses
9 through which to view the possible changes. I
10 respect that your strong consensus is against this
11 sort of change.

12 CHAIRWOMAN JONES: Just to follow up a
13 little bit. In the Panel before you and now this
14 Panel, you've mentioned data from command climate
15 surveys, data with respect to increases in
16 reporting since various programs have come in. And
17 it's all very relevant to this Panel's
18 consideration, but we don't have it, so we need it.

19 Colonel Cook?

20 COLONEL (RET.) COOK: Thank you, and thank
21 you to all of you that are here today. We
22 appreciate your insights and the benefit of your

1 experience.

2 In addition to some of the proposals that
3 we're getting with, you know, some of the things
4 about taking the commander out of the military
5 justice system, and some of that you all know has
6 been proposed or suggested in comparison to some of
7 our allies. And one of the things they do think it
8 accomplishes, it may not do away with the sexual
9 assault problem, but it helps to cure the
10 perception that a victim who otherwise might enter
11 the system might get a better shake if it's
12 somebody truly independent that they're looking at.
13 So for some of you wondering where that comes from,
14 that's part of it.

15 But the other proposals that we're getting
16 where there are some that would advocate keeping
17 the commander in the system because command
18 authority and discipline are the essence of
19 command, they would also propose that there are
20 still some changes that could be made, and I'll
21 highlight one that was done by one group of people,
22 and then a couple of changes. I'd like your

1 comment on it.

2 One of them, General Harding, you
3 mentioned the concept of two heads are better than
4 one, this partnership between the judge advocate
5 and the commander. There are a couple that would
6 at least believe that that is such a strong
7 informal process that goes on right now that it may
8 benefit the perception problem of fairness if you
9 make it a statute -- make that legal and you
10 require a joint decision by the commander and the
11 JAG together. And if they can't reach agreement,
12 then you raise it up to the next higher level, and
13 those two as a team of the lawyer and the JAG, they
14 make it as well. What impact, if any, do you think
15 that would have would be the first question.

16 The second part in terms of reform where
17 people say, fine, discipline, the charging and
18 referral decisions are all the essence of command,
19 but some of the other things in the UCMJ process
20 aren't -- selection or the nomination of panel
21 members, even if it's the voir dire that selects
22 the actual panel at a court.

1 There's no clear guidance of command
2 responsibility maybe that should be to the UCMJ
3 because it's hard to hold people accountable. The
4 need -- the witness, you know, witness funding of a
5 court martial and then the Article 32 process.
6 Does the commander need to be as involved in those
7 pieces of the process as he does need to be in the
8 discipline authority? Does that impact their
9 ability?

10 So if you'd address those things, that
11 would be great.

12 LIEUTENANT GENERAL HARDING: I'll address
13 the team approach. We do have -- I mean you do
14 wind up getting -- becoming very close to your
15 commander when you're the staff judge advocate.
16 And you, over the course of time, build a very
17 professional and very positive and effective
18 working relationship.

19 We train JAGs that if they feel strongly
20 about a case and a commander just absolutely
21 refuses to prefer to go to court, which rarely
22 happens, that they certainly do have the option to

1 go up to the higher level, and they do. And those
2 statistics I gave you, there were cases where that
3 happened -- specifically happened.

4 I've got to tell you in the remaining
5 dozen cases where the commander did not follow the
6 JAG's advice, I've looked at those cases, and you
7 know what? I kind of agree with the commander. I
8 think he was right -- he or she was right. It
9 didn't warrant going to trial. There was other
10 lesser disciplinary action that could've been taken
11 in those cases.

12 So I do think the team is stronger than
13 its individual parts. I do think JAGs today have
14 the option of going forward. We train valor.
15 That's what we mean by valor, delivering unpopular
16 advice and occasionally having to go up a little
17 higher. Twice in my career I've done that, and it
18 is not incredibly dangerous to one's outcome in
19 their outcome to do it. And I use myself as an
20 example when I'm training the younger ones. So I
21 think we're kind of there today, I guess, is what
22 I'm saying.

1 As far as witness funding, that's a must
2 pay bill. And in the Air Force, money drops down
3 through the major commands through the
4 headquarters, and we always find the money to fund
5 witnesses -- expert witnesses, fact witnesses,
6 whatever the case might be. The question becomes
7 at what point do you think you need to stop funding
8 military justice, and if you ever reach that point,
9 it's kind of game over for the services because
10 it's that significant to combat capability
11 discipline. So the money is there. It is not as
12 tight as perhaps --

13 COLONEL (RET.) COOK: But should the
14 commander be making the decision as to whether -- I
15 mean, the fact that the money may be there --

16 LIEUTENANT GENERAL HARDING: Oh, whether
17 or not to fund the witness?

18 COLONEL (RET.) COOK: There may be a
19 decision where even defense counsel asks for a
20 witness as part of their team or an expert as part
21 of their team.

22 LIEUTENANT GENERAL HARDING: But you can

1 always bring up that decision certainly with the
2 military judge. And my experience has always been,
3 I mean, if necessity -- if you have a
4 constitutional right to have that expert witness to
5 help defend and make your case, you're going to,
6 you know, take it to the judge. But my experience
7 has been 34 years that I've not had a commander
8 that's made, you know, the kind of decision that
9 says, no, you can't have clearly an important
10 witness. I'm not saying that.

11 BRIGADIER GENERAL GROSS: Ma'am, I'll
12 just, I mean, answer based on my discussions with
13 the Chairman. I think we're very, at least he
14 would be very open, and I would as well in my
15 personal opinion, to changes where the commander
16 remains central, but we look at the entire system
17 and reform those parts that maybe don't make sense
18 in 2013 that made a lot of sense in 1950 or even
19 1983. You pointed out several.

20 Certainly the Article 32 hearing right now
21 is getting a lot of attention. That's changed in
22 practice a long way from where it was meant to be.

1 It was meant to be an independent hearing to give
2 information to a convening authority to decide
3 whether or not to go to trial. It's now become a
4 mini trial where the prosecution lawyers have full
5 discovery and the defense has a chance to probe
6 that discovery and sometimes find credibility
7 issues with the witness or even intimidate the
8 witnesses, as we've recently seen at the Naval
9 Academy. And that's my phrase, not anybody else's.
10 And so, that's worth looking at.

11 You know, the Article 60, when General
12 Dempsey's first question when the -- that case came
13 out of *Aviano*, his first question was, what's
14 Article 60? And so, I explained that. And as we
15 looked at it and I explained, he felt like that,
16 you know, a commander had a role in post-trial, but
17 a lot of that role had gone away. A lot of the
18 role was replaced by having military defense
19 counsel, having appellate courts, having
20 independent trial judges. So a lot of the need for
21 that Article 60 authority had really gone away and
22 had been replaced. And so you have a commander

1 still in the system, but other people are doing
2 other roles that make more sense.

3 And so, I think speaking only for myself
4 and for my client, I think we would be open to
5 changes. And I think that's what's important about
6 what this Panel is doing is finding those areas
7 where a commander's role perhaps isn't needed to
8 the degree that it has been in the past, and yet
9 retaining his or her role as the central part of
10 that important justice and good order and
11 discipline.

12 VICE ADMIRAL DERENZI: And as you look at
13 that, I think you have to do a couple of things. I
14 think you have to make sure that we don't react to
15 any one particular set of circumstances.

16 BRIGADIER GENERAL GROSS: True.

17 VICE ADMIRAL DERENZI: I think we have to
18 look and say if not the commander, then who, and
19 does the change enhance the system. Does it create
20 an inefficiency there? Does it increase
21 efficiency? Does it increase cost? Does it
22 increase time?

1 You know, I can't speak to the
2 expeditionary nature of military justice for the
3 Army and the Marine Corps. We do it a little bit
4 differently in the Navy. But I think it's
5 critically important that we are able to execute
6 the military justice mission wherever we go and
7 wherever our people are in a manner that doesn't
8 increase costs, increase inefficiency, for the sake
9 of removing the commander just for the sake of
10 removing the commander. So again, what problem are
11 we trying to solve? What solution is going up
12 against that problem? How does it improve what
13 we're doing now?

14 I think -- I can only speak for myself and
15 for my service chief. We are open to change, but
16 identify the problem we're trying to solve and then
17 look at how the solution furthers those ends.
18 Change just for the sake of change or removing the
19 commander just to remove some vestiges of authority
20 would not seem to be a preferred way of doing
21 business just for the sake of doing it. I know you
22 all understand that.

1 MAJOR GENERAL ARY: I might chime in and
2 echo those remarks. I think there's a perception
3 out there that we all represent services that are
4 bound by 238 years of tradition and unencumbered by
5 progress. That's not the case. We're in
6 organizations that are innovative. They adapt.
7 That's been to the detriment of our enemies on the
8 battlefield. And we can adapt to this change.

9 I think General Gross outlined the 15
10 executive actions that we've taken in the executive
11 branch, and I think that the record of Congress has
12 been very clear. They've been innovative. They've
13 been making a number of changes. We've had the
14 2007 change to 120. We had the most recent change.
15 We've been working this problem very aggressively.

16 But I think that issues that go to the
17 informed decision making of commanders is one
18 thing, and that's what a lot of this is focused on.
19 Trying to figure out, we would execute essentially
20 two different systems, a felony system run by
21 lawyers and a good order and discipline system run
22 by commanders, is another challenge. And I think

1 that we'll do what we're told. We're in the
2 military. We will execute it to the highest of
3 standards. I have some concerns about making sure
4 that how we adapt our organizations, because as you
5 all know, it's not just the system as it's written
6 in statute. It's how you execute that system that
7 makes good order and discipline and a very
8 effective military justice system.

9 And we've all instituted changes and
10 institutionalized those changes and made sure that
11 we are executing that system much better. But I
12 think as you look forward, I have no concerns about
13 some of the legislation that ensures that a
14 commander makes a better informed decision, but
15 some of the more revolutionary changes that would
16 create two different systems, and how we would
17 execute those effectively, fairly, balanced, those
18 are probably the concerns I'm most focused on.

19 REAR ADMIRAL KENNEY: Thanks. If I could
20 just echo the comments of General Ary. One of my
21 really significant concerns, and I mentioned this
22 briefly in my testimony, is that if we make a sea

1 change to the UCMJ, that will inevitably require
2 re-training, re-familiarization, not just by the
3 core of attorneys within our services, but by the
4 commanders themselves. And that is going to create
5 confusion and delay. And I really fear that some
6 cases that are valid, good cases will get lost in
7 that shuffle, and where is the justice for those
8 people that are in that ramp up period?

9 So if we're going to take the risk of not
10 doing justice as we radically change a system, the
11 end result needs to really be worth it. And I'm
12 not convinced that the end result will create a
13 system that is significantly better than the system
14 that we have. Certainly there are changes that can
15 be made, and my colleagues have touched on many of
16 them, the Article 32 process, for example. I agree
17 with Admiral DeRenzi that that seems to have
18 strayed from its original purpose, which was to
19 determine whether there are reasonable grounds to
20 believe that a crime was committed and the accused
21 committed it. It should not be an all-encompassing
22 discovery effort by the defense. That should

1 merely be an incidental byproduct of the primary
2 goal of the 32. Could that be formalized? I think
3 it should be.

4 With respect to issues, Colonel Cook, you
5 mentioned, for example, witness funding. That is
6 an issue that I always think can be addressed. In
7 the Coast Guard we have addressed it head on where
8 we have largely centralized funding for UCMJ
9 activities, not completely, but largely, to ensure
10 that financial resources should never be an
11 impediment to justice getting done. If that were
12 formalized, that would be fine.

13 Member selection. I think -- I don't
14 think there's a lot of evidence out there that
15 commanders are abrogating their responsibilities
16 under Article 25 and not abiding by the criteria
17 contained in that statute for selecting members.
18 And when you look at the composition of our panels,
19 highly educated, well-trained people, who
20 understand what their duty is when they go into
21 that court martial and, in my opinion, do justice.
22 Is there really any change that's needed there when

1 you compare it to the civilian system? I would
2 argue not.

3 COLONEL (RET.) COOK: In that question,
4 the only thing I would ask is, is there any
5 evidence, and I'm not aware that there is, but is
6 there any evidence that if the perception by some
7 of the victims is that they're not going to get a
8 fair shake if they go to their commanders, so they
9 should go to an independent authority, is there any
10 concern that, okay, if we leave it with the
11 commander, now the commander is the person who
12 initially does the nomination for a court, that
13 they really think, hey, I'm not -- I have to tell
14 my commander -- I'm sorry -- he or she gets to pick
15 whoever is on that panel. That's the question.
16 It's more -- is that a changed link? Is there any
17 indication that that's part of the problem?

18 The fact that somebody has come to us and
19 said, hey, here's a piece that could be changed,
20 it's not the essence of command. It doesn't mean
21 it necessarily should be changed. And that's what
22 my question is to you. Is there any linkage? Is

1 there any reason or basis for suggesting that
2 change?

3 REAR ADMIRAL KENNEY: I don't have any
4 data that would indicate there is a basis. Could a
5 victim have that perception? Absolutely. But I
6 think that's one of the issues that a special
7 victims counsel could address head on. And I think
8 it's one of the real advantages to implementing a
9 special victim's counsel program is that you -- it
10 allows the victims to become educated and more
11 aware of how the system actually works and what
12 their role and the commander's role in that.

13 LIEUTENANT GENERAL DARPINO: I think
14 there's another component of the panel selection
15 and why ours does look different than the civilian
16 sector. And modeling what we do after the civilian
17 sector in some ways misses the distinctions that we
18 have.

19 The Joint Service Committee looks at the
20 civilian sector when it comes to rules of evidence
21 and other things that are going on. And they then
22 try to import those and really only deviate when

1 there's a military purpose, and that's basically
2 their charter. You know, we were given 120. It's
3 one of the most modern and progressive statutes in
4 this area. We kind of led the way with that in
5 2007, and there were some bumps, right? Part of it
6 was found unconstitutional, but we worked our way
7 through that.

8 When it comes to panel selection as an
9 expeditionary force where we tried close to a
10 thousand cases in the last decade deployed, panel
11 selection is done by the commander, not because he
12 wants to fix the panel, because the Article 25
13 criteria ensures that he picks those folks that
14 have the qualities to serve. And that's statutory.
15 And there's a JAG in the room that ensures that --
16 you know, that is watching the process.

17 But it also an expeditionary force for him
18 to be able to say, well, that commander that I
19 might've selected under the Article 25 criteria is
20 in Fallujah in a really big fight. And so, I
21 really can't have him send a panel, so that's one
22 of the reasons why the commander is the individual

1 who for reasons, even though folks meet the
2 operational criteria, he selects them. It's also
3 to ensure that, you know, Rich Gross doesn't sit on
4 a panel with a subordinate, to make sure that that
5 isn't so there's no influence.

6 Another thing that I think is important to
7 also note is that as a matter of practice in the
8 Army, when I do a panel selection with my
9 commanding general, we pick a panel and they sit
10 for six months. And so, the presumption is that
11 I've picked a panel that -- for a case that I don't
12 even know exists in order to fix an outcome. But
13 let's say I as a commander was -- that happened,
14 all right? We had a case in the army where a
15 commander was unhappy with the result of a court
16 martial, and he tried to change his panel. And the
17 defense in our robust system with independent
18 defense counsel raised that issue. That commander
19 lost his ability to convene courts. It was taken
20 away from him because he abused that privilege.
21 And so, there are checks and balances in the
22 system.

1 So my point is not to say we shouldn't
2 change panel selection or to seem as if I am
3 resistant to change, because I agree with a lot of
4 what my compatriots just said, my brothers and
5 sisters in arms. What I'm saying is that we have
6 to look at the reason why certain things exist, and
7 we have to look how they're connected.

8 So, for example, with the 32, if we change
9 the 32 process, we have to ensure now that we have
10 proper discovery for our defense because the rights
11 of the accused are very important in this system.
12 The Constitution demands that they receive due
13 process under the law. So we have to make sure
14 when we make changes and good holistic changes that
15 we don't piecemeal it, that we look across.

16 And so, that is my only caution when it
17 comes to looking at some of these legislative
18 proposals, that we do, in fact, look at the entire
19 system, because we'll end up breaking it. And
20 actually the Australians had this issue where they
21 had a legislative change that everybody thought was
22 a great idea. And then it was found

1 unconstitutional, and all the courts that were
2 convened in that year to 18-month period, those
3 accused walked. And so, we just need to make sure
4 we take a measured approach.

5 MR. BRYANT: Isn't that an example of
6 something that happens not often, but it happens.
7 state legislatures pass statutes that are found
8 unconstitutional. Congress passes statutes that
9 the Supreme Court finds unconstitutional, whether
10 it's related to the military or otherwise, in areas
11 of search and seizure, electronic monitoring, all
12 these things. These are just thing that lawyers
13 have to live with when that happens. We can't hold
14 up this one statute and say, well, see, Congress
15 passed a statute that was found unconstitutional.
16 It happens all the time whether it's a military
17 statute or not, isn't that so?

18 LIEUTENANT GENERAL DARPINO: And that is
19 -- should not be done lightly.

20 MR. BRYANT: Right, I agree.

21 LIEUTENANT GENERAL DARPINO: We
22 actually --

1 MR. BRYANT: No, I'm not endorsing their
2 mistakes, but even while they're contemplating some
3 of this legislation, congressional lawyers and
4 advisors are saying that might be unconstitutional.

5 LIEUTENANT GENERAL DARPINO: Right,
6 absolutely. So I agree with you, and that's all my
7 point was that we have to make sure that we do, in
8 fact, look at that and not have change for change
9 sake.

10 MR. BRYANT: In terms of discovery, if an
11 Article 32 was turned into essentially a probable
12 cause hearing, such as exists in Federal law for
13 United States attorneys where full scale discovery
14 is not required before a preliminary hearing, but
15 certainly before trial, wouldn't that, in fact,
16 streamline that process if, in fact, the discovery
17 wasn't due to the defense until after charges were
18 preferred?

19 LIEUTENANT GENERAL DARPINO: Actually, the
20 Joint Service Committee is kind of looking at what
21 changes we could make to the Article 32. Our
22 system has more protections for the accused for a

1 reason. It has those protections because of a fear
2 of unlawful command influence that a commander
3 will, in fact, railroad the process. And so, our
4 discovery now is done at referral, but we have the
5 hearing to ensure where the accused is present in
6 order to be able to see the evidence that is
7 against them. So if we eliminated the 32 in its
8 current form and used the process as you were
9 saying, we would argue, most of us, and I'm not
10 speaking for my compatriots here, but folks that
11 I've spoken to in my shop, we would be concerned
12 that we would have to have some type of
13 commensurate discovery earlier in the process than
14 upon referral, because in our process upon
15 referral, you have three days to get to trial or
16 five days unless there's good reason. So that
17 would give somebody three days, an accused, in
18 order for them to be able --

19 And so, we would need to figure out,
20 again, it's all interconnected, not saying change
21 isn't good, but we have to make sure that we look
22 at all of the repercussions of that. So we would

1 have to look at discovery. When are we going to do
2 it?

3 MR. BRYANT: Yeah. Each system has its
4 own cut offs for discovery, state and Federal.
5 There are so many days, so many months, whatever it
6 is, and obviously if you go to a probable cause
7 hearing situation, which even in capital murder --
8 well, we don't do probable cause hearings in
9 capital murder cases in Virginia. But even in
10 serious cases -- rape, murder -- a preliminary
11 hearing that's more than 45 minutes long including
12 cross examination of the prosecution's witnesses,
13 is a long preliminary hearing, a long probable
14 cause hearing. And then after it's indicted,
15 that's when the full-scale discovery kicks in.
16 There are limited statutory requirements, which I
17 think the military could easily adapt to of what is
18 discoverable prior to the probable cause or
19 preliminary hearing.

20 BRIGADIER GENERAL GROSS: A better analogy
21 to the Article 32 hearing would be the grand jury.
22 The grand jury certainly is a jury. It has has no

1 defense counsel present. Proceedings are secret.
2 But it examines the full range of the evidence to
3 determine whether the charges can be indicted and
4 go to trial. So our Article 32 hearing is probably
5 more analogous to that than it is the preliminary
6 hearing, just as you're considering these issues.

7 MR. BRYANT: I understand. The main
8 difference being that depending on what, I guess,
9 in the Federal system you've got 16 to 21 grand
10 jurors. And in the Article 32, the defendant and
11 the defense counsel is present, but that's not true
12 in a grand jury.

13 LIEUTENANT GENERAL HARDING: And I think
14 it's important to reflect on why we're considering
15 this change. If the impetus for the change was the
16 case at the Navy Yard, the Annapolis case, that
17 case probably speaks more to the need to determine
18 how to protect victims' privacy better in a 32,
19 Article 32 process than allegedly occurred there,
20 and I know the Navy is taking a hard look at it,
21 and the JSC is as well.

22 So whether or not rape shield protection

1 can occur at an Article 32 hearing, protection for
2 mental health records in an Article 32 hearing,
3 protection for a victim-victim advocate
4 communication privilege, whether or not records can
5 be sealed that enjoy that privilege, all of those
6 things really, I think, are the things of immediate
7 concern when it comes to an Article 32.

8 The larger issue of do we need witnesses
9 subject to cross examination and counsel present, I
10 think, goes beyond that immediate need. It's not a
11 bad question to ask, but the immediate need, I
12 think, that arose from the Annapolis case was how
13 victims fare in the Article 32 process.

14 CHAIRWOMAN JONES: Well, just from my
15 perspective as a former Federal prosecutor, I
16 appreciate your remarks, General, about the need
17 for this is how you fulfill the discovery
18 requirement, and the fact that if you have to go to
19 trial in three days, you don't have the time to do
20 it the way it's done in the civilian criminal
21 justice system. There is no discovery until after
22 there's a charge in the civilian world. We're

1 supposed to be here also doing some comparisons of
2 civilian and military justice systems.

3 Certainly as a -- the preliminary hearing,
4 of course, in the civilian world is -- only occurs
5 if you can't get your case into a grand jury and
6 you don't need a preliminary hearing, although I
7 think California requires one no matter what. And,
8 of course, in a grand jury, there would be no
9 opportunity to cross examine any victim/witness,
10 not just a sexual assault victim. It would simply
11 be the prosecutor going in and presenting his case,
12 which wouldn't satisfy your goals of telling the
13 commander what the facts were at the end of the
14 day, although I guess there is some analogy there
15 that a prosecutor has marshaled his evidence. And
16 then the grand jury makes their decision of
17 probable cause.

18 But it's the -- what I find fascinating is
19 that at least in the Federal prosecutor system, and
20 I think, Harvey, state systems are probably more
21 liberal than the Federal in terms of giving
22 discovery. There's a Federal rule on discovery.

1 It's all there. You get what's in it, and
2 depending on the individual prosecutor, you may get
3 more, you may not. And it's pretty limited. So
4 you do have a system that is far more concerned
5 about the rights of the accused, if not concerned,
6 it certainly caters more to the rights of the
7 accused, provides the accused more than what they
8 would get in a normal Federal criminal system.

9 So the Article 32 -- Ms. Holtzman before
10 she left asked if I would ask you if you had any
11 suggestions. You've all raised it and talked about
12 the fact that you're willing to change or willing
13 to listen to things about change. And she was
14 wondering if you had any specific suggestions. I
15 wouldn't be surprised if right now you did not.
16 But it would be interesting if there was a way to
17 provide discovery without having what sounds like
18 to me like almost a complete trial setting for all
19 the witnesses. If discovery is the issue, that's I
20 guess where the focus would be for me. So I'd just
21 throw that out.

22 LIEUTENANT GENERAL DARPINO: No, and, and

1 Judge Jones, I absolutely agree. We are looking at
2 it. We do think that there is room for growth
3 there and change. And we are -- we will as part of
4 that calculus make sure that the rights of the
5 accused are protected in a system where you have to
6 be concerned about unlawful command influence. And
7 that is what makes us different. We want to ensure
8 that an accused, because he is in uniform and
9 subject to orders, is not, I don't want to say
10 railroaded because that's not the correct term, but
11 that he has all of his due process at each step.

12 So 32 can change. We just need to make
13 sure that we have an interlocking approach to make
14 sure that we protect the rights of the accused.
15 That's critical to us.

16 MS. FERNANDEZ: Can I just follow up on
17 that for a second? Aren't you making the case
18 right now for taking the commander out of the loop
19 then and having an independent prosecution? If
20 there's -- what you're trying to ward against with
21 an Article 32 is railroading the accused, then
22 there's -- then what you're saying is that there's

1 an implicit problem with having the commander.

2 LIEUTENANT GENERAL DARPINO: No. The
3 manual is written in order to protect against that,
4 and part of that has to do with the vestige of the
5 history. But again, if you're concerned about the
6 rights of the accused and we're not now talking
7 about sexual assault, my answer to the rights of
8 the accused is that the Supreme Court has upheld
9 our system repeatedly and found that it is
10 constitutional and it does protect the rights of
11 the accused.

12 That's not what happened in our allied
13 countries. And so, we have a very robust system,
14 and we are not concerned -- I am not concerned --
15 that the rights of the accused are trampled. But
16 when we make changes, we need to make sure that we
17 preserve --

18 MS. FERNANDEZ: I guess what I'm getting
19 at is a little bit different. If we're looking at
20 a situation where because of how the system is set
21 up there could be unlawful command influence,
22 either because a commander doesn't bring a case or

1 a commander does bring a case and you have to have
2 sort of a mini trial in order to make sure that
3 doesn't happen, isn't that sort of making the case
4 as to why you wouldn't want to have the commander
5 involved in bringing or not bringing the case?

6 VICE ADMIRAL DERENZI: Actually it's the
7 discovery aspect of the Article 32 that allows all
8 that evidence to come in, which is separate and
9 apart from assessing whether there's probable cause
10 to go forward. And I think that that's what we're
11 all saying is that we may want to take a very good,
12 hard look at adjusting the discovery aspect of the
13 Article 32 hearing, but ensuring that the accused
14 has the right to discovery fulfilled in some manner
15 if we change the scope of the Article 32 hearing.

16 LIEUTENANT GENERAL DARPINO: Right. And
17 there are preliminary hearings and grand jury
18 hearings to ensure that the state or the Federal
19 government has the evidence to go forward. And so,
20 the same concept exists in all of our processes.

21 MR. BRYANT: Madam Chairman?

22 CHAIRWOMAN JONES: Yes?

1 MR. BRYANT: If I may, I'd like to go to
2 another aspect of the investigation trial,
3 punishment, because I don't know that we'll ever
4 have all of you together at one time representing
5 all the services. If we could -- if I could get or
6 we could get your views of the suggestion of
7 sentencing guidelines in the military cases and/or
8 mandatory minimum sentences.

9 CHAIRWOMAN JONES: We like to surprise
10 people. Sorry.

11 MR. BRYANT: I just felt like since we've
12 got the heads of all --

13 CHAIRWOMAN JONES: Oh, no, Harvey. That
14 wasn't a criticism of you. I'm delighted you've
15 asked the question.

16 MR. BRYANT: I know that Major General Ary
17 had addressed mandatory minimums in his written
18 submission. Yes, mandatory minimums. I don't know
19 whether the rest of you have had time to assess
20 that -- those suggestions because those are
21 suggestions for changes.

22 BRIGADIER GENERAL GROSS: We've talked

1 about it as a group. We've talked about it -- the
2 Joint Chiefs have talked about it along with
3 Chairman Dempsey, and he and I have had a number of
4 conversations about that. There really -- people
5 tend to lump them together. You all don't. You're
6 an experienced prosecutor and you know the
7 difference but people tend to say it, you know,
8 mandatory minimum/sentencing guidelines, very
9 different concepts.

10 In the Uniform Code of Military Justice,
11 currently we have at least one or two offenses that
12 I'm aware of that have mandatory minimums. One is
13 spying in a time of war, which carries a mandatory
14 minimum of death, but it has to be in a time of
15 declared war or essentially an equivalent. That
16 hasn't come up in a long time. And then murder --
17 either pre-meditated murder or what you all would
18 call felony murder. We call it murder in the
19 course of a certain offense. That carries a
20 mandatory -- it's either life without parole or --
21 I think it's life without parole, but I'd have to
22 check.

1 So those are two offenses now where we
2 have a mandatory minimum sentence. And the
3 Chairman asked me to look at other jurisdictions.
4 And as I went across the Federal government and 50
5 states, I was amazed that as far as I could tell,
6 every state has mandatory minimums for a full range
7 of crimes, you know, and not just murder, but rape
8 and robbery and a host of offenses.

9 So he's open to the idea of studying that
10 to see what effects it would have if instituted in
11 the military justice system. And that would be my
12 -- I mean, I am as well. I was the one who kind of
13 recommended that to them is that that's worth
14 studying and looking at carefully and seeing what
15 effects in our system, which has a uniqueness, you
16 know, would there be jury nullification problems,
17 for example. When you have a two-thirds vote on a
18 court martial panel, would the fact that there's a
19 mandatory minimum when the panel knows that they
20 can't give a lower punishment, would they nullify
21 and vote otherwise? And so, things that this Panel
22 should think about on mandatory minimums.

1 On sentencing guidelines, there's a number
2 of things that don't match up very well between our
3 system and the civilian system, the U.S. -- the
4 parole office at least in the Federal system that
5 has the the two to three months to study the
6 accused and all these factors and put in a table
7 doesn't fit well. I'm going to defer to Admiral
8 DeRenzi. She, in particular, has done some study
9 on the sentencing guidelines and how some of the
10 issues are fitting in. So I'm going to throw this
11 one to you, ma'am, if you don't mind.

12 LIEUTENANT GENERAL DARPINO: You're our
13 expert.

14 VICE ADMIRAL DERENZI: That's me. No, I
15 don't know that in front of this Panel I'd want to
16 get into extraordinary detail. I would just say
17 the issue that General Gross raises is the issue
18 that we're most concerned about, which is the
19 sentencing guidelines, which are extraordinarily
20 detailed, and require what we would call a tail
21 because it adds time to when the punishment could
22 begin, would be -- you know, would impact the

1 efficiency aspect of the military justice system
2 where the punishment occurs and starts immediately.

3 So again, it goes back to a point that
4 each of us made in one way or another. As we look
5 at the various proposals that we're being faced
6 with, what problems are we trying to solve with
7 mandatory minimums and sentencing guidelines. Is
8 it that we think the sentences are too low? And we
9 have to remember, as General Gross just said, we
10 don't require unanimous verdicts. Is it because we
11 think they're inconsistent?

12 Well, you have members, one of whom, or
13 more depending on the size of the panel, may have
14 voted to acquit the individual. So there may be
15 inconsistency there. Is it that they're
16 inconsistent, you know, between offenses? You
17 could look at judge alone sentencing as an option.
18 There are various ways to address whatever problem
19 it is that mandatory minimums in Federal sentencing
20 guidelines might be intended to solve.

21 But it's the second and third order
22 effects, not just on sort of the interconnectedness

1 of the UCMJ, but also on the practice of military
2 justice as a whole that we would want to consider
3 very carefully.

4 CHAIRWOMAN JONES: Well, and as we all
5 know, the mandatory Federal guidelines are gone, so
6 that was an evolution there. And I think you've
7 pointed out a consequence of having a guideline
8 system when you talk about the fact that it would
9 take a -- it would add time.

10 The Federal guidelines were instituted in
11 1984 because there was a perception of disparate
12 sentencing. So it seems to me that, for instance,
13 if you really thought you had that problem, then it
14 might be something to consider. But I don't know
15 if you're aware of whether you have that problem or
16 think you do or have ever studied it. That would
17 be interesting to know if there is any information
18 on that.

19 REAR ADMIRAL KENNEY: Judge Jones?

20 CHAIRWOMAN JONES: Any other questions?
21 Yes, I'm sorry, Admiral.

22 REAR ADMIRAL KENNEY: If I could just

1 comment on your last statement. In the Coast
2 Guard, we don't have any studies that have been
3 done regarding whether sentences are disparate or
4 not. But I just wanted to reinforce a point that
5 Admiral DeRenzi made that if you had sentencing
6 guidelines with member sentencing, one of my
7 concerns is that it would add a complexity to the
8 sentencing process that I think would result in a
9 significant amount of appellate litigation because
10 you'd be having to train members how to implement
11 what in the Federal system are complicated
12 guidelines. It's not an easy process.

13 CHAIRWOMAN JONES: Having used them for
14 many years, they're incredibly complicated, and so
15 I agree that would be an additional complication.
16 And also the notion that you can have verdicts that
17 are less than unanimous would also totally -- and
18 sentences that were the result of that would
19 totally complicate it. We're not advocating it.
20 We're merely examining it. Anything else?

21 MR. BRYANT: What if --

22 CHAIRWOMAN JONES: I'm sorry, Harvey.

1 Were there any other comments on that issue? Mr.
2 Bryant?

3 MR. BRYANT: Thank you. In terms of the
4 panel and sentencing, if the guidelines have been
5 calculated prior to their finding of guilt and then
6 they were instructed that the sentencing guidelines
7 for this crime according to the UCMJ Article
8 whatever it would end up being are a minimum of
9 this, this is the median range and this is the
10 maximum range so that they would have a choice to
11 decide. I can't contemplate it and it doesn't
12 happen in any system that I'm aware of where the
13 jury or, in your case, the panel would have to
14 figure out what the sentencing guidelines are.
15 Somebody else would do that and they would be
16 instructed what they are. What issues or problems
17 would you see with that in terms with that in terms
18 of your sentencing?

19 And then I'd add as a corollary, it's
20 always interesting to me in the military system
21 that the defendant can go to trial with a known
22 sentence. I can't get worse than this. This is my

1 deal with the prosecutor. And go to trial and then
2 the panel comes back with a more substantial
3 sentence. I see questioning looks on your faces.
4 Is that not the case anymore? No, they don't do
5 that anymore?

6 LIEUTENANT GENERAL DARPINO: Pre-trial
7 agreements.

8 MR. BRYANT: Oh, yeah. So he goes to
9 trial with a deal from the prosecutor that he can
10 get no more than three years. The panel comes back
11 with eight. He goes, yes, I got the best of both
12 worlds. I got to eat my cake and have it, too.
13 How would sentencing guidelines affect that
14 process? Would the prosecutor -- when the
15 prosecutor is making a deal with the defendant and
16 a recommended sentence, he would have to then make
17 it part of my recommendation. And what you can
18 lock into is, say, the low end of the guidelines.

19 LIEUTENANT GENERAL DARPINO: Right. And,
20 I mean, you're absolutely correct. It would affect
21 the pre-trial agreement process that we use in our
22 system. We would have to consider that, and we

1 looked at this issue, can I think of a solution off
2 the top of my head? One could be that there is a
3 mandatory minimum, but that could be part of a pre-
4 trial agreement where you could go below that. I
5 mean, if you wanted to preserve -- if we thought it
6 was worth, and I'm saying we do, if we looked --
7 when we look at mandatory minimums, we would look
8 at that issue and we would see if we wanted to
9 preserve that right for a pre-trial agreement.

10 Why do we do that in the military? For
11 the same reason prosecutors do it everywhere when
12 they make a deal. It's to cut down on cost, you
13 know, the expenses, and for us bringing in
14 witnesses from an operation -- in an operational
15 theater or from another location and disrupting
16 military operations. And that's the benefit to us
17 of a pre-trial agreement. With a mandatory
18 minimum, we wouldn't have that sentencing phase,
19 and then maybe we wouldn't do that. So your point
20 is well taken.

21 MR. BRYANT: Excuse me. Thank you. And I
22 do understand the difficulty of bringing people in

1 from other places and ships at sea and so on. We
2 sometimes have to do that in our area with great
3 cooperation from the Navy and from NCIS in making
4 that happen.

5 But what I was talking about was not --
6 what doesn't exist in state and Federal
7 prosecutions is the ability to have your deal and
8 still go to trial. That doesn't save you any
9 money. That's not -- that doesn't create any
10 efficiencies. It just gives the -- it gives the
11 defendant a bottom line, as I view it. And I'm not
12 arguing that with you.

13 LIEUTENANT GENERAL DARPINO: No.

14 MR. BRYANT: My point is to discuss what
15 would happen if the military decided to adopt or if
16 Congress decided that you were going to adopt
17 sentencing guidelines.

18 LIEUTENANT GENERAL DARPINO: Right. With
19 the pre-trial agreement for the sentence, we do
20 still go to the sentencing portion. The findings
21 portion of the trial we do not, so it's a
22 bifurcated process. And you're exactly correct.

1 We would have to look at that, and that's why we
2 would -- you know, we believe that this is part of
3 that interconnecting that has to do with our
4 Uniform Code of Military Justice. You're
5 absolutely correct, we would have to look at that.
6 And I wish I could give you a solution at the table
7 right now, but it's the guys behind us that do all
8 the hard work that are on the Joint Service
9 Committee.

10 VICE ADMIRAL (RET.) HOUCK: I was just
11 going to ask what the status of that is. Is there
12 an active review by the Joint Service Committee to
13 look at mandatory minimums right now? Has this
14 just been an informal discussion about it, or is
15 there something more formal going on?

16 BRIGADIER GENERAL GROSS: Sir, in my, you
17 know, in my remarks I mentioned that the chairman
18 of the Joint Chiefs of Staff had formally
19 recommended that the SecDef undergo a holistic,
20 comprehensive review of the Uniform Code of
21 Military Justice. A second recommendation they
22 made formally to the SecDef was to look at, to

1 study with the idea of mandatory minimums and/or
2 sentencing guidelines, not recommending that those
3 were good ideas, but just asking that they be
4 studied because it had come up in multiple forums
5 and so forth.

6 VICE ADMIRAL (RET.) HOUCK: When would
7 that be finished?

8 BRIGADIER GENERAL GROSS: It depends on
9 when -- if the SecDef -- the Secretary of Defense
10 obviously can say no. If he agrees with that
11 recommendation, then he would direct it, I think,
12 through the General Counsel to DoD to the Joint
13 Service Committee. I'm not aware that that's how
14 far along that phase has gone.

15 CHAIRWOMAN JONES: Any other questions?
16 Amazing. I guess then I want to thank each of you
17 for coming. It's been very helpful. Please
18 remember our request for any data that you have,
19 reports of surveys, reports on improvements or not
20 in reporting. Thank you very much.

21 I should say that we're expecting --

22 COLONEL HAM: Yes, ma'am. We have one

1 request for public comment. Did you want to take a
2 break first and --

3 CHAIRWOMAN JONES: We'll take a break, and
4 then I didn't realize anyone was here for that.
5 Okay, great.

6 COLONEL HAM: Yes, ma'am.

7 CHAIRWOMAN JONES: We'll just take a 10-
8 minute break, and then we'll move to public
9 comments.

10 (Whereupon, a recess was taken.)

11 COLONEL HAM: Madam Chair, we had one
12 request for public comment. This is Ms. Miranda
13 Peterson, Protect our Defenders.

14 CHAIRWOMAN JONES: Good afternoon, Ms.
15 Peterson. You're very welcome. Thanks for coming.

16 MS. PETERSON: Thank you. Good afternoon.
17 I would just like to first start by thanking all
18 the members of the Panel for your service and for
19 your attention to this critical issue.

20 Protect our Defenders is an advocacy
21 organization that provides support and legal
22 services to survivors of military sexual assault

1 and works to reform the military culture and
2 justice system. We regularly receive pleas from
3 active duty service members who have been victims
4 of sexual assault whose attempts to report have
5 been thwarted, mishandled or made to disappear.
6 They are frequently threatened with collateral
7 misconduct or given errant medical diagnosis.

8 Sexual assault, as you know, has reached
9 an epidemic proportion in our military, and no one
10 here, I think, is denying that the military has
11 failed for decades to adequately address this
12 problem. So we would like to take this opportunity
13 to urge the Panel, which was created in response to
14 the most recent spate of sexual assault scandals,
15 to consider seriously the proposal to remove the
16 convening authority from the chain of command and
17 to seize this opportunity to recommend substantive
18 and fundamental reform.

19 This debate, we believe, is fundamentally
20 about American values of fairness and justice. We
21 must ensure that the men and women who have signed
22 up to serve this country and risk their lives for

1 our rights are given the same access to impartial
2 justice that every other citizen of this country is
3 entitled to. In order to make that a reality, the
4 military justice system must be reformed to ensure
5 that there is fairness, objectivity, and
6 impartiality. This cannot be achieved without
7 removing the prosecution and adjudication from
8 commanders.

9 Commanders can often be conflicted or
10 biased towards frequently higher ranking
11 perpetrators. Their careers can sometimes be
12 adversely affected if a rape is reported on their
13 watch. And at the heart of this issue, we believe
14 that having commanders in the chain as the
15 convening authority is antithetical to the American
16 values of justice.

17 Additional changes will also be required,
18 such as reforming the jury selection process and
19 modernizing the Article 32 process. But we believe
20 that removing the convening authority from the
21 chain of command is the first and fundamental step
22 towards professionalizing the military justice

1 system.

2 As an advocacy organization, we hear from
3 victims who have been re-traumatized both by the
4 perception and the experience of bias and
5 unfairness in the system. For example, one victim
6 who recently reached out to us said, "I am an
7 active duty member who was a victim of sexual
8 assault in April of 2011. The offender is still
9 active duty. It took time before I was willing to
10 seek help in fear that it would place my career in
11 jeopardy. My fear has been validated. I have
12 recently been found unfit for continued service due
13 to a bipolar diagnosis made by the medical
14 professionals who were supposed to help me."

15 And just two days ago, a victim's mother
16 reached out to us and told us, "My daughter was
17 raped one year ago. She was persuaded to just drop
18 the charges. There were two males who did this.
19 She was basically looked down upon and she was
20 pushed aside."

21 While we know that many commander may want
22 to do the right thing, others fail to put the

1 victim's interest before their own or that of the
2 perpetrator. Recent examples include the *Aviano*
3 case where Lieutenant General Craig Franklin
4 dismissed the aggravated sexual assault conviction
5 of Lieutenant Colonel Wilkerson in part because he
6 felt he was a doting father and husband. As well
7 as the ongoing Naval Academy case where the
8 convening authority encouraged the victim not to go
9 forward, and only initiated a full investigation
10 after the victim civilian counsel pressed the
11 issue.

12 Military leaders and supporters of the
13 status quo have failed to point to any material way
14 in which removing the authority from the chain of
15 command to handle these cases would bring about
16 their claims of disastrous consequences. Further
17 the oftentimes painful and arbitrary experience of
18 victims throws into serious doubt the idea that
19 justice has been enhanced by commanders'
20 involvement. Meanwhile, we have watched as our
21 allies have taken this step and continue to fight
22 effectively by our side across the world.

1 Lieutenant General Claudia Kennedy, the
2 first woman to achieve the rank of three-star
3 general and Protect our Defenders Advisory Board
4 member, recently said, "Having served in leadership
5 positions in the U.S. Army, I have concluded that
6 if military leadership hasn't fixed the problem in
7 my lifetime, it's not going to be fixed without a
8 change to the status quo." The imbalance of power
9 and authority held by commanders in dealing with
10 sexual assaults must be corrected. There has to be
11 independent oversight over what's happening in
12 these cases. Service members who are victims of
13 sexual assault are looking to you to help them
14 achieve justice.

15 Thank you.

16 CHAIRWOMAN JONES: Thank you. And I
17 should add for the record that Protect Our
18 Defenders also submitted a number of materials, and
19 they will all be on our website. And they are and
20 have been available for the panel members' review.
21 Thank you very much, Ms. Peterson.

22 MS. PETERSON: Thank you.

1 CHAIRWOMAN JONES: Colonel Ham, were there
2 any other requests for public comment?

3 COLONEL HAM: No. No, ma'am, there were
4 not. So if there's nothing further, the Designated
5 Federal Official will close the meeting.

6 CHAIRWOMAN JONES: Yes.

7 MS. FRIED: Thank you. This meeting is
8 closed.

9 CHAIRWOMAN JONES: All right. Thanks,
10 everyone.

11 (Whereupon, at 4:18 p.m., the public
12 hearing was concluded.)

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