UNITED STATES DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICE
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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL
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COMPARING SYSTEMS FOR INVESTIGATION,
PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT CASES
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THURSDAY
DECEMBER 12, 2013
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The panel convened in the
Multipurpose Room in San Jacinto Residence
Hall at the University of Texas at Austin, 309
East 21st Street, Austin, Texas, at 8:00 a.m.,
The Honorable Barbara Jones, Panel Chair,
presiding.

PANEL MEMBERS PRESENT:
THE HONORABLE BARBARA JONES, Chair
THE HONORABLE ELIZABETH HOLTZMAN
VICE ADMIRAL (RETIRED) JAMES HOUCK*
BRIGADIER GENERAL (RETIRED) COLLEEN McGUIRE
BRIGADIER GENERAL (RETIRED) MALINDA DUNN
COLONEL (RETIRED) HOLLY COOK
PROFESSOR ELIZABETH HILLMAN
HARVEY BRYANT

STAFF PRESENT:
WILLIAM SPRANCE, Designated Federal Officer
COLONEL PATRICIA HAM, Staff Director
DILLON FISHMAN
*Participating via teleconference
SPEAKERS:
MARTHA BASHFORD, Chief, Sex Crimes Unit, New York County District Attorney's Office
LANE BORG, Executive Director, Metropolitan Public Defenders, Portland, Oregon
CAPTAIN JASON BROWN, Military Justice Officer, Military Justice Branch (JAM), Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps
COLONEL DON CHRISTENSEN, Chief, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency, U.S. Air Force
LIEUTENANT COLONEL ERIK COYNE, Special Counsel to The Judge Advocate General
CAPTAIN ROBERT CROW, Director, Criminal Law Division (Code 20), U.S. Navy
KELLY HIGASHI, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia
LAURIE ROSE KEPROS, Director of Sexual Litigation, Colorado Office of the State Public Defender
COMMANDER DON KING, Director, Defense Counsel Assistance Program, U.S. Navy
LIEUTENANT COLONEL MIKE LEWIS, Chief, Military Justice Division, U.S. Air Force
JANET MANSFIELD, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
CAPTAIN STEPHEN MCCLEARY, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
BILL MONTGOMERY, Maricopa County Attorney, Maricopa County, Arizona
LIEUTENANT COLONEL JAY MORSE, Chief, U.S. Army Trial Counsel Assistance Program, U.S. Army
COLONEL MICHAEL MULLIGAN, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
ANNE MUNCH, Owner, Anne Munch Consulting, Inc.
AMY MUTH, Attorney-at-Law, The Law Office of Amy Muth
WENDY PATRICK, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office
LIEUTENANT COLONEL JULIE PITVOREC, Chief Senior Defense Counsel, U.S. Air Force
BARRY G. PORTER, Attorney & Statewide Trainer, New Mexico Public Defender Department
COMMANDER AARON RUGH, Director, U.S. Navy Trial Counsel Assistance Program, U.S. Navy
MAJOR MARK SAMEIT, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
CAPTAIN SCOTT (RUSS) SHINN, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
DR. CASSIA SPOHN, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
JAMES WHITEHEAD, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
LIEUTENANT COLONEL DEVIN WINKLOSKY, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School, U.S. Marine Corps
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P-R-O-C-E-E-D-I-N-G-S

(8:32 a.m.)

COLONEL HAM: Good morning and welcome to the continuation of this Public Meeting of the Response Systems Panel, Judge Jones.

CHAIR JONES: Thank you. We have a full day today and I'm very pleased to announce that our very first presenter will be Ms. Anne Munch, who's written a wonderful article named "The Unnamed Conspirator," and without any additional commentary on my part, Ms. Munch, we'd love to hear from you.

MS. MUNCH: Good morning.

(Multiple good mornings)

MS. MUNCH: Thank you very much for the invitation to come and talk with you and present a little bit of information to you this morning.

I am just -- it's really an honor to get to educate at any level, and I wanted to express appreciation for that. Also to let
you let know that this a presentation that I provide for civilian audiences, military audiences, I work a lot of with the Department of Defense and with all of the branches of the military.

I'm a consultant and I am paid for that work, just in full disclosure, as well as by colleges, universities, and civilian folks. So this is just, I get to just kind of present to you as I would to any other group and I appreciate that opportunity to do that.

So I'll get started with that and what I'd like to do is talk a little bit about the issue of sexual assault from my perspective.

So I was a career prosecutor in Colorado for about 13 years and went to law school, understood and digested the concepts around what justice kind of looks like, how justice is administered in the civilian world, and I thought that I understood all of that.

And what I noticed when I stepped
into prosecuting cases and especially cases of sexual assault after about a year in County Court where you can't do too much damage, you know, they move you up into District Court to do the felonies, and I had a steady diet in the Domestic Violence and Sexual Assault Unit in Denver, in the Denver D.A.'s Office, of these kinds of cases.

And what I realized was that while I had made an assumption in my practice and in my legal education that basically when you had a sexual assault you had two parties to that sexual assault, you have the victim and you have the offender.

And that justice was determined based on what happened between those two parties. I took that assumption with me up into that specialized unit and I realized that I was wrong.

As I started doing cases of sexual assault, and specifically sexual assault that involved adult victims, I realized that this
assumption that I had made and what I had seen
in other kinds of cases where this seemed to
be true, in robbery cases, and other kinds of
cases, it wasn't true in sexual assault cases.

    As I started looking and examining
I understood that there was indeed another
influence, there was another party that was
involved in these cases.

    Now this party was not listed in
the police reports, not listed in the charging
document, didn't come into court, raise a hand
and testify, and didn't go back and to
actually deliberate in the jury room, but as
I saw this third party, the involvement of
this third party in these cases, I started to
kind of scratch my head as it was providing me
with what I thought were some interesting, if
not challenging, results.

    And so I decided, you know, I need
to understand this a little bit more because
the third party was influencing the outcome of
the cases, more than either of those two
entities on the board, more than the evidence itself.

It was having the lion's share of outcome, or of influence over the outcome of these cases and I decided it was important to really try to get to know and understand that influence.

And so what do you do when you're trying to understand something, we either learn its name or if it doesn't have a name you give it a name. I gave it a name, and this is something that I call the Unnamed Conspirator.

And so this is going to be kind of a tour, a birds-eye view through concepts that I think are really important that undermine how we approach these cases and what we bring to the cases and the influence of the Unnamed Conspirator in these cases, day in, day out, in every jurisdiction that I've ever, ever come to know.

So that's what I'm going to do.
I'll take you on a tour with this Unnamed Conspirator concept. The truth is to see or understand the influence of the Unnamed Conspirator you actually don't have to look too far.

You will see examples, and I will give you examples from a day in the life of myself or from court cases and that kind of thing to help try to demonstrate this.

And my first example just comes from a morning in my world, in Denver, Colorado, when I was trying to relax, a Saturday morning, had a stressful week, you know, they tell you it's a good idea to get away from your work so I was creating a day like that for myself, coffee brewing, you know, Labrador Retriever runs out to go get the newspaper for me, I'm pretending I don't have a job.

And she brings the paper in and all was well in my world in terms of trying to create a day of, you know, relaxation for
myself until I opened up the newspaper and on
the front page of the Denver Post was this
picture with an accompanying story.

Now what this is, this is a
breakout banner that was painted by the
Chatfield High School Cheerleading Team in
order to basically cheer on their team to
victory in this football game that they had
and, General Dunn, that was kind of what my
eyes did, too.

I looked at this and I read this,
what it says is "Mighty Chatfield High School
Men Rape the Raptors," all right. Now I don't
know where the adults were when the
cheerleaders in high school decided this was
a great idea, apparently they weren't present
when the banner was painted.

But this is what they came up
with, right, and so it surprised everybody,
including the football players who were
running to this banner thinking boy, I was
here to play football today and somebody has
a different kind of idea, I'm sure it was confusing for them.

And so the cheerleaders made apologies to everyone concerned, to the other cheerleaders, to the football players, they got them some education, some folks stepped in and said, you know, that's really a kind of startling thing that you came up with so let's get you some education.

That's all fine and I appreciated that, other people kind of let the issue go, but I did not because this was compelling to me as I looked at this and I understood, you know, this is the influence of the Unnamed Conspirator.

As I was beginning to develop or understand this concept this is what I saw here and the reason is because I found myself staring at this picture that morning in my living room going, what is it that inspires high school aged girls to think that wishing rape on anyone is okay?
What is it that helps them understand or what do they get from their world that says if you really want to win, if you really want to dominate, if you really want to make a showing to the other side, what do you do to other side, you rape the other side, right?

And I thought, I mean that just was startling for everyone, but to me it was more than startling it was concerning because I started thinking about high school aged girls, right.

I started thinking about girls or young women in that age group and I just ask you as a Panel, you know, if any of you have a high school aged daughter or anyone in the audience has a high school aged daughter, she comes home to you, she says, you have been teaching me all my life to be independent and so here's the acceptance letter to the college or the university that I have chosen.

And I've done all the work and
I've got the scholarships lined up and she hands you this, and you do your homework as a good parent and you find out that if she chooses that particular college or university she has a one in four, maybe a one in five change of being the victim of a violent robbery because she chose that school.

And the question that I ask you or would ask myself is are we going to let, we're going to send our daughters to a school like that? No. We're going to be asking questions.

What's going on at this college or university? Why is this happening and who's doing something about it? How is that this is happening to such a large population of these students and why don't we know about it, right? We'd be asking questions.

And yet what I find is that if we just switch our focus, and that's what this lecture will mostly be about, is switching our focus to look at kind of things in other
realms, we see perhaps some startling
information.

And that is, you know, so in a
large study of colleges and universities, 32
of them, where 6000 students were surveyed,
they were given a survey like so many of us
have taken that asked them, you know, about
their lives, about their study habits, their
work habits, et cetera.

And in that survey was a question
that what basically, you know these surveys
contain behavior-based questions, so I want to
give you an idea of what the question was so
that we can understand a little bit about our
concepts and how the Unnamed Conspirator
influences how we see this problem.

So the question would be posed,
for example, has anybody ever forced you to
have sexual intercourse when you didn't want
to by holding you down or twisting your arm,
et cetera, right?

A behavior-based question that is
written in a way to see whether or not
somebody's behavior or something they've
experienced has matched up with a violation of
the law.

And so if anybody answers yes to
that question that clearly meets the legal
definition of sexual assault, rape, that kind
of genre, pretty much anywhere around the
Country or under the UCMJ.

When you ask that behavior-based
question you find out that, in this survey,
one in four had been the victim during their
college years of a rape or an attempted rape.

And yet when you look at the next
portion of this slide only 27 percent of them
considered themselves to actually have been
victims of rape even though what they
described happened to them clearly met the
legal definition.

So there's a big discrepancy,
right. They are saying yes, somebody held me
down, forced me, penetrated me, and I didn't
want it to happen. Clearly meets the legal
definition of rape, and yet you ask them to
self reflect on what that was and only 27
percent of them identify themselves as having
been sexually assaulted or raped.

So then the question is why?
There's a disconnect there, right? I'm pretty
sure that most folks that are the victims of
bank robberies or of other kinds of violent
crime get that and they understand.

We don't have the majority of them
not identifying themselves as victims. So
then that begs the question, why? Why is
that? And, of course, part of it is that
they've been coached up and schooled up in our
culture, what we see in the media, what is
popular, to understand "what a real rapist
looks like," you know.

And so we all kind of rely on or
we go back to that image often that we've seen
in the media, which is, of course, the
stranger who jumps out of the bushes and has
the knife and wears a mask and everybody knows
that person, he probably smells bad, too.

And he is the one that we kind of
maybe understand is a rapist. It's easier for
us as a culture to see that person as a
rapist, and it is for these college-aged women
as well.

And so part of the thinking, I
surmise, is well, I knew him, 84 percent of
these victims knew their attacker. That's not
rape, right? Not only that, but 57 percent of
these assaults happen on a date.

And so then you have this young
college-aged woman who is in a position of
well, let's see, you know, my parents taught
me, hopefully, about trusting, about having
good boundaries, all those kinds of things,
and just like you and I make decisions around
whether it's okay to be alone in a situation
with a person, whoever it is, whether it's a
cab driver, or whether it's a friend, or
whether it's somebody that we work with, or
whether it's a coach, you name it.

We make decisions based on what we believe we see and understand on whether it's okay to be alone with someone. They make that same decision. They meet someone, they trust them, to the outside appearance they are kind, they're well spoken, maybe they're a good athlete or a good debate, you know, team member, whatever it is.

They make a decision that they trust that person, just like you and I do, right? Any of us who have sweat peas or any significant others in our lives, we made decisions to be alone with these people at some point.

They make that same decision and then, very sadly, because the hard part of this is that we really can't tell who the rapist is and that's the disturbing news of this because it makes it a difficult problem to treat.

But because you can't tell any
better than I can nor than they could most of the time, they make a decision to be alone and then that person takes that opportunity, forces a rape on that person and then here they are, right, in their college experience.

Perhaps part of the study that bothered me the most around this was that 42 percent of them didn't tell anybody and only 5 percent of that particular study reported to the police, right, so again this is one study.

But I think it's important because we learn so much from it and it underscores so much of what I have come to learn and understand about victim dynamics.

So that is I think important and significant for us to see, wow, you know, there's plenty of them who are experiencing this, very few of them are identifying what happened to them as rape and then they're really not talking about it, and only 5 percent of them are saying ah, this is criminal and I need to call the police.
In a college setting, again, different study, but, you know, we get a little bit more information. We understand in the later study 20 percent of college-aged women experienced this, 6 percent of college-aged men were experiencing this kind of conduct.

About half of the women were incapacitated by drugs or alcohol and the majority of these assaults happened in the first four semesters, which tells us a lot of information in my opinion.

And that is because, you know, when you think about a person, a student, a college-aged student in their first four semesters, of course they're not as practiced, knowledgeable, aware, et cetera, as the people in their last four semesters.

And it is not a coincidence nor is it just a, you know, a mistake that the majority of these rapes happened and are directed toward that more vulnerable
population.

In the Air Force, again, just to kind of round this out a little bit to provide some information around, from the Gallup study that was done, they learned an awful lot of very direct information in this survey that they did.

And what we learned, you know, are, unfortunately, very similar kinds of problems, if you will, that there are high numbers of women and men that are experiencing this and that the reporting is very, very low.

That most of these are happening or being committed, I should say, against the victims in their first two to three years of service, same thing, right?

So what this tells us is this is a cultural problem, that this happens across communities, whether they're military or civilian in very similar ways and that part of the reason for these numbers I'm submitting to you is the influence of the Unnamed
Conspirator, who we'll get back to now.

Okay. So as we develop this concept of the Unnamed Conspirator what I'd like to do is take a pause here and there's really, the easiest way for me to help you understand what I'm trying to describe is to let you hear the influence of the Unnamed Conspirator in the actual voice of a victim. And so what I'd like to do, and I'd like to just give a heads up to people, I'm going to play a part of a 911 tape, all right, and in this 911 tape this victim describes a sexual assault.

And I say that partly because there are often survivors in the room. I want to be, I'm always sensitive to that, and if I'm going to play something that can be a little bit difficult to listen to or something like that I like to give a heads up before I do that.

What I'd like you to do when you listen to this is to listen specifically, you
know, listen to what she reports or what she says, but please listen specifically for the influence of this character that I'm trying to create for you called the Unnamed Conspirator and then we'll talk about the tape.

(Audio playback)

OPERATOR: Police.

CALLER: Yes, I need to speak with somebody.

OPERATOR: Okay, How can I help you ma'am?

CALLER: I was raped earlier --

OPERATOR: Yes.

CALLER: -- or at least I felt like I was.

OPERATOR: Okay. Where are you right now?

CALLER: I'm at home.

OPERATOR: When did the incident occur?

CALLER: At home.

OPERATOR: At home?
CALLER: Yes.

OPERATOR: By who, ma'am? Who did this to you? Ma'am?

CALLER: A guy.

OPERATOR: Is he your boyfriend?

CALLER: No.

OPERATOR: Is he a friend of yours?

CALLER: No.

OPERATOR: Who is he?

CALLER: This guy that I met at a bar.

OPERATOR: Did you give him consent, ma'am?

CALLER: No.

OPERATOR: No. How long ago did this happen? About 20 minutes, half an hour?

CALLER: About three hours.

OPERATOR: Three hours ago. Is he still there, ma'am?

CALLER: No.

OPERATOR: No. He left?
CALLER: No. Yes, he left.

OPERATOR: He left, okay.

CALLER: I'm sorry. I wasn't going to call this in.

OPERATOR: No, it's better that you do.

CALLER: But my doctor referred me to a hospital who also referred me and said, you know, you have to make a police report before we'll do anything.

OPERATOR: Okay, but you didn't go to the hospital yet?

CALLER: No, they won't let me go until I make a police report that's I why I called you back.

OPERATOR: Okay. Did he hit you?

CALLER: Yes.

OPERATOR: He did hit you?

CALLER: Yes.

OPERATOR: Okay.

CALLER: My head hurts.

OPERATOR: He hit you with what,
ma'am?

CALLER: I don't know.

OPERATOR: Hit you with his hand or --

CALLER: With his fist.

OPERATOR: With his fist?

CALLER: Yes.

OPERATOR: Okay. And you just met him at the bar?

CALLER: Yes. It's my fault.

OPERATOR: No, it's not.

CALLER: Well kind of it was. I was drinking.

OPERATOR: No, but that doesn't give him the right to violate you, ma'am.

CALLER: I said no.

OPERATOR: Okay. What's his name, do you know?

CALLER: No.

OPERATOR: Okay. Was he black, white, Hispanic?

CALLER: White.
OPERATOR: White male. Do you know about how old he was?

CALLER: Twenty-eight.

OPERATOR: Twenty-eight, about how tall? About how tall, ma'am?

CALLER: 6' 1".

OPERATOR: Six foot, six feet, or 6' 1"? Okay. How much do you think he weighed? Was he pretty --

CALLER: 180.

OPERATOR: 180, okay. And did he have a beard or a mustache?

CALLER: No.

OPERATOR: No.

CALLER: No facial hair.

OPERATOR: Clean shaven, okay.

What kind of clothing was he wearing?

CALLER: A white t-shirt and blue jeans with a vest, a jean vest. Why am I doing this?

OPERATOR: Are you there by yourself?
CALLER: No. My friend is here.

OPERATOR: Okay. It's better that you report it, like I said, he doesn't have the right to violate you.

CALLER: I think it's my fault.

OPERATOR: It doesn't matter, ma'am --

CALLER: I was drinking.

OPERATOR: No. That doesn't matter.

CALLER: I told him to come over, but then I said no leave me --

OPERATOR: Okay. So it's not your fault. You told him no, so it's not your fault, okay?

CALLER: He wasn't --

OPERATOR: He left in a car or on foot?

CALLER: I don't know.

OPERATOR: You have no idea? How did he --

CALLER: He left in a car.
OPERATOR: Okay. So he followed you from the bar?

CALLER: No. He came with me in my car.

OPERATOR: Oh, he came with you in your car?

CALLER: Yes. It's my fault, see.

OPERATOR: No, it's not.

CALLER: I brought him over to my house. It's totally my fault.

OPERATOR: Okay.

MS. MUNCH: Okay. So I'd like to talk a little bit about what you just heard in this tape before we move on. One thing I'll just point out, obviously she got some bad medical advice, right?

Somebody told her you can't even come to see us to get medical care unless you report this to the police and that was, somebody missed the boat somewhere because that's, of course, not how it works.

But otherwise would she have
called? She tells us no. She would not have called otherwise. She was calling to try to get medical attention.

I have a tendency to think of some of these things that I use by their theme, right? I name the tapes in my own mind or on my computer by the theme. Do you have an idea what I might call this tape?

FEMALE PARTICIPANT: It's my fault.

MS. MUNCH: It's my fault, right. This is the "it's my fault" tape, right. And you can hear very clearly that she has ingested the blame for this and she is even trying to convince the dispatcher that this is her fault.

So let's talk a little bit about that because I think this is really key and important and this is one of the places where sexual assault cases fall out very differently than some other cases.

So what are some of the reasons?
Give me just a few reasons that she might be blaming herself? Why is she doing that? If you can, would you, sir?

MEMBER BRYANT: Because society has taught females, and it is a stereotypical approach that if you got drunk and you invited a stranger to your house that you in fact got what you deserved or you asked for it.

MS. MUNCH: Right.

MEMBER BRYANT: And that's where that whole it's my fault guilt trip, there's more aspects to it, but that's one of the reasons.

MS. MUNCH: Sure. Sure, she meets him at bar, right? She didn't meet him at church. I mean she meets him at a bar, they drink together, and then she brings him home, right.

And so in her mind you can very clearly hear, if you picture your internal grandmother for a second, if you will, I mean, you know, or someone who is wagging a finger,
you can almost hear that, exactly what you
just articulated.

And you can hear that she has
ingested that. Now what's interesting to me,
especially about this particular case is that,
all right, so she's got herself, you know,
she's understood the rule book, the rule book
that is provided to potential victims of crime
which says don't do stupid things and if you
do, you know, this is pretty much your fault.

And that is, I will tell you, in
my experience, a lot of what keeps victims
from ever coming forward either for help or a
formal report is because they have ingested
that message just like she did.

But what else do we know about the
issue of consent or non consent in this
particular case? What did we hear verbally?
What was said? What did she tell him?

MEMBER BRYANT: Well he hit her.

So there was a force involved.

MS. MUNCH: Right.
MEMBER BRYANT: I thought it was interesting, at the very, very beginning when she first starts to speak she says "I was raped, or at least I think I was."

MS. MUNCH: Right. Very good.

MEMBER BRYANT: Yes.

MS. MUNCH: Yes. And so, yes, so he, and she --

MEMBER BRYANT: And with that same intonation, "at least I think I was" --

MS. MUNCH: "At least I think I was" --

MEMBER BRYANT: Yes.

MS. MUNCH: That's right. Now she also tells him a word that we're pretty familiar with. What was that word?

FEMALE PARTICIPANT: No.

MS. MUNCH: No, right. She tells him no. She also asks him to do something, which was what? Did you hear that? Leave. And he refuses to leave.

So in terms of verbally, because
when you're looking at consent we know that
that is either words or actions, or a
combination of those kinds of things.

She tells him no. She asked him
to leave and he refuses to leave. Then, and
I'll just say, you know, just to pose a
question, because again this is more based in
common sense than anything, but the last time
anyone in this room decided that, you know,
they were interested in a sexual act with
their spouse or partner or whoever, and their
spouse or partner didn't want to and uttered
that word, you know, my question to my
teaching audiences is, is typically how much
sex follows that word, right, in any of our
lives, is none.

You know, we understand what that
means and the rules are not different just
because this person is in this particular
category, meaning, you know, she tells him no,
she asked him to leave, he refuses, and then
he hits her in the face as you noted.
I cut the tape off a little early,
but it sounds like he may have broken her
nose. The doctor is concerned that her nose
might be broken and he is trying to get her in
for medical attention.

So even under circumstances like
that, where you have that kind of physical
force and you have no and please leave and a
refusal for a person to leave your home, she
is convinced that this is her fault.

That is the influence that we're
dealing with that I think needs to be named
before really any of us in any kind of the
circles that we work on on this issue can
really understand what progress looks like.

All right, let's switch the field
for a second. We've talked about those
college-aged women, military-aged women, and
some men. You know, when we look at the guys
and we kind of give them those similar kinds
of surveys, whether it's in the civilian
population or whether it's in the military
population, it's a similar stage, right.

So Dr. David Lisak, who did the, you know, groundbreaking research on the undetected rapist, he has surveyed about 2000 college-aged men, gives them a survey, asks them about all kinds of things. One of the things specifically that he asks about, of course, are their sex habits, because he's trying to get information about what are they up to.

In those surveys is a typical question that reads as follows, "have you ever forced anyone to have sexual intercourse when they didn't want to, by holding them down or twisting their arm," et cetera. Right, again, a behavior-based question.

To that behavior-based question 6 percent of his population said yes, I have done that. In a similar set of studies that they have done, McWhorter, and other folks at the Naval Recruiting Center in Great Lakes, Michigan, they learn similar information, but
the number is about, in the latest study, the
number is about 13 percent of the Naval
recruits who had been there one year or were
just coming in had done that, all right.

So if we ask the question instead
"have you ever raped anybody" in that survey,
what do you think the answer would be? No,
right? Because, again, the Unnamed
Conspirator's influence here is that, you
know, while they admit to doing the conduct
they are adamant, when you ask them to self
reflect about this, they are adamant that what
they did was not rape.

Yes, maybe I did that, but I'm not
a rapist. Okay, sure, I held her down or I
did this, but I'm not a rapist. Why is that?
Part of that is because, who do they think is
the real rapist. They are thinking about the
same person that the college-aged women are
thinking about. It is the stinky, smelly guy
who jumps out of the bush, you know, and
commits a stranger assault.
And please hear me, those are very real rapes and I am not undermining the importance or the significance of a rape by a stranger, but it has a tendency to kind of be the default, where as you see even in the research when you look at Cassia Spohn's research, or any other research around, how juries decide cases and how prosecutors decide whether to even bring charges.

They have a tendency to give a lot of weight to cases where a person is raped under circumstances where they report right away, and perhaps are assaulted by a stranger. Okay, so that has all informed, both our victim population and our offender population and it's something that we really need to be aware of. Probably the most frightening thing for me is that from Dr. Lisak's research, of the 6 percent of the men who admitted to doing this once, 63 percent of them were serial rapists averaging four rapes per rapist.

And in the military survey, 71
percent of them were serial rapists, averaging
seven rapes per rapists, by the time they take
this survey.

So what we know about these cases
is typically it is not he said-she said or he
said-he said, it is almost always he said-they
said, and that is part of the problem, is that
in opinion we don't see the problem, because
the Unnamed Conspirator along with a lot of
other influence is very much at work and that
is part of the challenge that we have in any
community.

MEMBER BRYANT: May I ask a
question at this point?

MS. MUNCH: Please.

MEMBER BRYANT: That the 88
percent who don't consider that that was rape,
do you think that that has to do with the low
reporting rates at all, in other words, it
must not have been rape because she didn't
call the police?

MS. MUNCH: I would say, well I
don't have a specific answer to that, I would say, of course, factors such as that one would play into a mind set, that and many other kinds of things that could justify "why I'm different."

And clearly when we have this repetitively going on and no reports coming from that kind of conduct, and you have a serial rapist who will tell you well, sure, I did this on this occasion and this on that occasion and almost the identical thing on another occasion, and none of those victims will come forward.

That has influence on their, you know, self-perception. Okay, so we brought up the subject of alcohol, I'm going to take you a little bit further into this concept. And, again, these are just ways to get you to think differently. So we've talked about and you heard in the 911 tape, alcohol is a factor, right. Probably 70 percent of our cases, alcohol is a factor on one or both sides, so
let's look at that because this is one of the
great tools that the Unnamed Conspirator uses.

And so to do this, this is just a
little exercise where I would ask the audience
to, you know, picture yourself at the end of
a stressful week. I'm assuming that you're
responsible drinkers, if you drink at all.
And let's just say at the end of this week you
decide to get together with friends, family,
whoever is here with you and, you know, you're
going to relax a little bit.

You're going to have, share a
beer, you know, if you have hair, you're going
to let your hair down, you know, kind of an
evening. I mean you just need to chill out
for a little bit. And so you get together
with your friends and while in that setting
and you have a designated driver, the whole
thing, you know, you drink a couple of beers,
all right. You drink a couple of beers.

Now most people that I ask about
this say oh, yes, and I want you to, this is
a visualization for you, so just picture yourself in that situation, end of the week, you've had a couple beers. How does that feel? If you drink responsibly, you've had a couple beers at the end of a stressful week, let's be honest, what is the feeling around that? Collective, anybody, tell me, ah, or something, you know.

I mean if that's a responsible thing that you can do most people it's like okay, that's nice. And had you gone home at about that period of time, probably would've been a great decision, but let's say it was a really stressful week and so you actually follow those two beers up with three margaritas, all right.

And so you have now, at this setting, had a couple of beers and three margaritas. This is your visualization not mine, but I'm assuming that people are feeling kind of drunk and that nobody's driving a car, et cetera. And when you picture this it can
become a little uncomfortable as you think
about the queasiness in your stomach or the
spinning room or whatever it is. You probably
should've gone home, but you didn't, you stuck
around and you followed that up with four
jello shots, okay.

So in this one night this is what
you've consumed with your friends, all right.
And, your visualization not mine, but
typically, when I ask the audience they will
say, I have a toilet in my visualization, I am
passed out in my visualization, I'm sick as a
dog, whatever it is, that's a lot of alcohol,
is that fair to say?

That's a lot of alcohol. All
right, so let's juxtapose that with, you know,
how we would think that your friends and your
peers and your family would treat you, under
a circumstance like that. I mean I have 16
nieces and nephews and they all call me when
there's a problem in their lives. I just have
that whatever it is, I'm the one that gets
those phone calls.

And one of my nephews called me
his freshman of college and reported to me
basically, you know, I took my first midterm,
we went out with a bunch of friends, I got
really drunk. He got like this drunk that
we're talking about. And he said and my
friends got really worried about me, because
I was throwing up and kind of passed out, so
they took me across campus to the infirmary
and, you know, a police officer showed up on
their way while they were trying to stumble my
nephew across the campus to get to the
infirmary and said hey, what's going on?

And they said well, you know, he's
really sick, we're trying to get him over to
get some help, and the officer said that's a
really good idea. You're taking good care of
him. And they said well would you put him in
your car and drive him because he's heavy, and
the officer said no, I really don't want you
throwing up in my car, but I will call you an
ambulance.

And so he called an ambulance for my nephew, who went by ambulance across campus to the infirmary where he stopped getting sick, they gave him liquids, they brought his blood alcohol content down, right, he spent the night.

The next morning he went directly from there to take his second midterm, he tells me on the phone, and then he called me. And as we talked about this, other than his being terribly hungover, you know, I was listening and paying attention to how, what his, kind of his friends did for him. He was, you know, calling me because he didn't know how to explain the $734.00 charge for the ambulance that was coming on his tuition bill two weeks later when he was coming home for Thanksgiving, and I did a little intervention so his mother didn't kill him.

But, nonetheless, you know, he called me, and he reached out that way. But
the point was, look at how he was treated, all right, look at how he was treated.

And I want you to juxtapose that to, let's enter the Unnamed Conspirator into this realm, where alcohol really lives and exists and shapes our thinking to another day in my life when I was on the 16th Street Mall in Denver, killing some time before we all went to a play, went into a tourist shop, looked around the tourist shop, looked up at the t-shirts on the walls and found this one which reads, "two beers $7.00, three margaritas $15.00, four jello shots $20.00, taking home the girl who drank all of the above, priceless," all right.

So I see a very different packaging of the same amount of information that you just visualized yourself, having consumed that much alcohol. We look at this, and I'm bothered by these kinds of t-shirts that are marching around all over the place. I see them on college campuses, people, you
know, think that this is a good idea somehow.

This is really just an advertisement to how to
commit a rape, really. That's what this is
and how to kind of successfully do that.

And it is bothersome to me and it
bothered me that day, so I had someone go back
and get the t-shirt so that I can just talk
about it in that context, because the truth
is, for you or me or anybody who decides and
makes the decision to drink that much alcohol,
you're vulnerable, right?

Maybe you make yourself, if you
will, vulnerable. But the point is, we have
a tendency to focus on the vulnerability and
sometimes not on other things. The
vulnerability itself has no meaning unless
someone decides to take advantage of it. And
that is a place I think sometimes where we get
stuck, you know, that the alcohol question,
you know, the truth is my nephew was fine,
because his friends saw his vulnerability and
they took care of him.
That's where sometimes, or that is where, I will say, the rapist sees an opportunity as opposed to a potential emergency. Anybody who has ever had a surgery understands that before, you know, because there are lawyers in the world, you know, we have to sign consent forms and that kind of thing before anybody cuts into us, but we sign those forms not at this point, we sign them earlier, right?

Nobody can consent to anything when they are basically passed out or under the influence of ethanol or any other kinds of those things, and yet I will tell you, we have a double standard in our culture that says oh, no, that's actually okay. It's okay to, you know, if this doctor decided to, you know, repair the ACL and then go operate on the brain or take out the appendix, without permission that would not be okay, right?

And yet it's important for us to force our thinking, to see, do we have a
double standard? And that's the point of this, because the logical consequences of drinking too much alcohol is a hangover. We tend to get mad at victims who drink. You know, we see this all over in the literature, and we certainly see this with panelists and jurors, they don't like it.

And, you know, the truth is, this is what any person who drinks too much alcohol deserves. We see the evidence of the Unnamed Conspirator as well on the general public, I just throw Jerry Springer up there because he reminds me of kind of getting opinions out of the general public.

There has been some, and this is a condensed version that I'm giving you, but, you know, we get some information by polls or by talking with folks. A time CNN did a poll a long time ago, but they don't do them very often, what we found, or what they found was that in asking about the subject matter, that a whole lot of people said that a raped woman
is partly to blame is she dresses provocatively, all right.

And that is an opinion, I can tell you, that is alive and well in our culture and in the military. I have this conversation all the time with airmen, sailors, marines, you know, Army and commanders. I want to challenge the thinking around this by telling you again a story, another true story, just out of the day of the life of Anne Munch where I went to a wedding reception, I was seated at a beautiful white linen tablecloth for a friend of mine's wedding, next to a guy that reminded me of the person on the screen.

It wasn't this person, I don't know who this is, really, but he reminded me of this, and what I mean by that is that he was very wealthy and he was really good looking and he was beautifully coiffed, nails nicer than mine, gorgeous, you know, Italian suit, the whole thing. I'm seated next to him, he was an elderly gentleman, and I
thought well, you know, this is nice, I'll just try not to spill on him though because he, you know, I can't afford the cleaning bill for this guy.

So he strikes up a conversation with me and he simply asked me a question, which is a very nice social question that most people ask, which is so, Anne, tell me what you do for a living, right? Now that should be a warning sign to me, honestly, and then sometimes I avoid that question because this is exactly what happens when I answer that question. I said well, I said at the time, I'm a prosecutor and an educator in the area of domestic violence and sexual assault, and it stopped the conversation.

And he said to me, sexual assault? And I said, yes. And he said rape. And I said yes, you know, and he got this kind of very serious, stern, kind of grandfatherish, look on his face and he said to me the following, and I quote, because I'll never
forget it, quote "You know, we wouldn't have that problem if those women would just stop wearing those floozy clothes."

And I though oh, man. I just wanted a piece of cake, but I've got to stop and educate a 65-year-old, you know, first, because I can't leave that one just sit out there. So I asked him, I said wow, I said, "So you feel that way?" He said, "I do." I said, "Well, can we talk about it, you know?" and so what I did was I pulled something from jury selection, actually, because prosecutors are good at trying to come up with different kinds of questions to try to get through the mire of some of these ideas that people hold.

And so I just pulled something out and I had a conversation that sounded much like the following. I said, "Okay, sir, I said let's say that you leave this wedding dressed exactly like you're dressed, and you drive off in your beautiful car, with your Rolex watch and you realize on your way away

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from the wedding reception that you are short on cash.

And so you see an ATM sign in the distance, and so you pull your car over and you hop out of your car looking just like you're, you know, like you do, and you flash your watch and you pull out your big, fat, thick wallet from your back pants pocket, and you walk up to the ATM terminal and you put that plastic card in there and you start getting cash, all is good."

"At the same time," I said, "there's another person, he goes up to the other ATM terminal. He's wearing blue jeans and a t-shirt and flip flops and he drives a rusted out Toyota Corolla, but he has that same plastic debit card.

So he puts his debit card into the other machine and he's getting money, too. It's like Vegas, you know, everybody is winning and the scene is happy until a robber comes from around the corner and he sizes up
the situation, I said, and he picks you and he
takes your money, takes your wallet, takes the
card, loves your watch, grabs your keys, takes
the cash, and off he goes driving away in your
car and he leaves you standing there with your
chin on the ground."

I said, "What just happened to
you?" He said well, "I was robbed." I said
"Yes, what are you going to do?" He said,
"I'm going to call the police." I said,
"Great idea." So you call the police and you
have the witness wait there and the police
come, and they get out of the car and they
look at your companion and they look at you
and they look you up and down.

And you say, "Help, help, I was
robbed." And they say, "I just have one
question for you. Is this what you were
wearing at the time that this happened? Like
you can't dress like that and come to an ATM
store, you're practically advertising that
you're available, you know, for this
particular kind of crime. I mean what were you thinking? You can't wear those clothes. I mean people will take from you if you do."

And he looked at me and I said, "But wait, there's more." I said, "So you call the police and the police decide to do an investigation, but," I said, "Guess what, they investigate you."

So they call you back, and they say, "Sir, we found out that you give money away all the time to your wife, to your kids, to your grandkids, to the United Way, every week, $200 out of your paycheck.

You're really a philanthropist and yet, you're expecting us to believe that you were robbed, when you're in this habit of giving money away. We don't think that, we think you have credibility issues, plus we saw what you were wearing, so please don't waste our time."

And he looked at me, and I silenced him, which was not, and it's not a
good thing to do at dinner party, but he
looked at me and his comment was, "You know
what, Anne," he said, "I never really thought
of it that way."

And I counted that as win and I
went and I got my cake and we moved on, right.
But part of the point was he was iterating a
rule out of the rule book around clothing.
And the truth, is I'm bothered by that because
if you stop and really examine your thinking
about what's beneath that kind of thinking,
that if she dresses really hot he can't help
himself, he can't control himself. That is
such an offense to men. For us to tell you,
well, we're sorry, but you just can't help
yourself. And so you're at fault if he gets
aroused.

I mean it's a concept, I'm not
sure where it came from, other than some
ancient time and yet we do drag this forward
and we do drag it, I mean women and men will
dress for sexual attention, clearly. And
people on beaches wear swimsuits, right, and they have very little covering them, and yet it is within this context that we begin to assign blame if a person takes advantage of another person under circumstances such as that.

So thanks for listening, that's a floozy. In case you want to know what he was, I wondered, and so if it's a rule, don't dress like a floozy then just get rid of this and hopefully we're all fine.

All right. The influence is also seen on children. When we look at or talk to children, we learned very interesting things from middle schoolers when we asked them about their attitudes in this area. Sixty-two percent of the boys and 58 percent of the girls said it's okay to force a woman to have sex, if the couple's been dating for more than six months, which is a little bit like the, you know, what's he supposed to do if you get him aroused rule, but it's a 6-month time
period.

And that's kind of scary. They also tell us, half and half tell us that girls, or a woman, who is walking alone is actually asking to be raped. That is disturbing, and brings up a case in a jurisdiction where I was a prosecutor, these are the mountains of Telluride, Colorado, which was a wonderful, a hard duty, really, to have to work there, but I did.

And, you know, Telluride's a really safe town. I mean I moved there from the Denver D.A.'s Office where it was, you know, the knife and gun club and very violent stuff. I move here to where it literally, I have everything from illegal possession of elk to homicide, you know, over a very large kind of rural jurisdiction and it was a nice breath of fresh air in many ways.

But it was a safe town. I will tell you the truth I didn't even, I wasn't always diligent even about locking my doors.
A young woman goes out at nine o'clock at night in this town to go get something to eat. There's not a lot open around 9:00. She goes to a bakery in Telluride which is called Baked in Telluride, to get a slice of pizza. Unfortunately for her on her way down to that bakery, she was abducted off the street by a stranger, stuck into a car, driven outside of Telluride up onto one of the high mountain mesas in the area, where she's dragged back out of the car through a barbed wire fence, she's raped in a field, this man drags her back through the fence, puts her back in the car and drives her back into basically the heart of town here and releases her and then he flees, okay.

First question, do you think she recognized what happened to her as rape?

Sure, right. This is the guy we all love to hate, you know, so she called the police. They did a great investigation. There are only two ways into and out of Telluride, you
got to really want to get there, it's in a boxed canyon, you know. So they set up blocks on each of the exits out of Telluride.

Down the road a ways they apprehended this person, they brought him back, she picked him out of a show up, they did a photo lineup, she picked him out of a lineup, they did a, you know, they collected the forensic evidence, she took them to the crime scene, they found her clothing fibers in the barbed wire fence.

Great case, put it together, you know, boxed and packaged, sent it to the prosecutor's office, the prosecutor's office accepted the case for charges, the defendant pled not guilty and the case went to trial.

Of course, in a civilian jurisdiction, on these kinds of felony matters, almost without exception you need a unanimous verdict of 12 jurors, for either guilt or innocence. And on the facts of the case that I just told you, this is a jury that
hung, all right. This is a jury that was a hung jury. They couldn't decide on a verdict.

Now as it turns out, because we are allowed to talk to jurors after the fact and that kind of thing, and find out about their deliberations and their thoughts, it turns out that there were three holdout jurors that didn't, you know, want to convict the defendant. So there were nine jurors that did and there were three that didn't. I can also tell you that that jury broke down along gender lines, and what I mean by that is that there were, the three holdout jurors were of the same gender.

My question is, do you think that they were men or do you think that they were women? They were women, all right. They were women. So what do you think that this women were "hung up on," if you will?

MEMBER COOK: The fact that he brought her back to town.

MS. MUNCH: Yes, that and what
else, do you think? You brought her back into
town, but they were also hung up on something
that she had done. She walked alone at night.
Part of their question was, what was this
young woman doing walking by herself at 9
o'clock at night, right?

And the point is, I think it's
interesting, because when you think about
sometimes, what we all carry into this realm
of trying to understand sexual assault, the
point of this is that, we all have baggage,
all right, we all have baggage, and sometimes
this baggage lines up along gender lines kind
of specifically.

And what I would say, and this is
my speculation, this is how I tried to
understand what their decision was, or what
they struggled with. You know, women are
raised from the time they're this big, to
understand that we can be, you know, we're
very vulnerable to this crime.

I mean, very well-meaning fathers,
brothers, boyfriends, mothers, tell us, honey, it's a bad world, do this, don't do that, right, they kind of tell us, don't walk alone, get a German Shepherd, you know, whatever it is, here's the things that you want to do to avoid this crime.

And I think what happened is these three jurors went in, they went into their safe town of Telluride, they sat down in the panel area for the jury, they found out what the charge was. And my guess is that it was like, oh my gosh that's terrifying. I don't ever want to think that that can happen to me, right?

And so sometimes the typical thinking, we know this, around when we study victim blaming, or we study, you know, a kind of attrition of responsibility, or attribution of responsibility, I think their thinking was, I want to know what she did, because I want something I can control. What did she do? Oh, she walked alone at night, well, that's
why it happened. And if I can do that then
I'm safe, because all I have to do is not walk
alone at night and I can go on into my life
and feel and believe that I am safe, okay?

And it's a very, very common thing
that we see in this area, and I think it's
what informed this case. But it scares me, as
well, that even the kids who are coming up
believe that somebody walking alone, perhaps,
is asking for this.

You'll learn more specifically
about this later, but what I will say is, just
in one slide, when you look at actual research
that has been done on actual jurors who decide
these cases, not mock jurors, but Kalvin and
Zeisel and Gary LaFree, who have talked to
deliberating jurors on actual simple rape
cases, meaning, no knife, no gun, you know,
one assailant, one victim, et cetera, they
have some very strong opinions around how they
make their decisions, including, in the later
research at the University of New Mexico by
LaFree, admitting to disregarding the evidence and making their decisions on a rape case, based on their perceptions of the victim's character and lifestyle.

That is concerning, right? That is concerning. Because, if we're making decisions based on a victim's character and lifestyle, we're really not concentrating on offender behavior.

To illustrate that, real quickly, this is the Chief of Police from Burlington, Vermont, past Chief of Police is a guy named Tom Tremblay, who I work with in the work that I do, great Police Chief, fantastic investigator, started a specialized unit in Burlington, Vermont, to deal with these kinds of cases.

He investigated a case that involved a medical student who had met and had a one-time casual, kind of, sexual relationship for one night with a college-aged freshman.
She left that encounter feeling used and like she didn't want to continue that liaison at all. About a month later, he found her, he went to her fraternity party, which also tells you something, right, what's a medical student doing at a fraternity party with freshmen?

But he went there, he found her again, wanted to have sex again, she said I'm not interested and I didn't like, you know, I didn't like being with you.

He's trying to convince her, talk to her, cajole her around this, tells her, she's trying to leave him, she goes outside and he follows her.

And he's trying to convince her that it's okay, they could just have sex in the shadows of the pine trees, you know, on the side of fraternity house and that nobody would know and it would be okay. She's telling him no.

He gets her isolated, and he uses
some force against her. He pushes her down, he begins to rape her, she resists, cries out for help.

There are three ear witnesses, who hear her crying and screaming, and also hear him hitting her, they hear the sound of a hand slapping flesh. They intervene.

He stops in the middle of the rape, pulls his pants up, runs away. She's hysterical, has a split lip and a black eye from what had just immediately happened to her. They take her for hospital care. The case is tried, you know, put together and goes to trial.

At the trial the defendant actually testified from his transcript, "I only slapped her after she became skittish about having sex. She raised her voice, I tried to calm her down and convince her it was all right, but she raised her voice again and I told her to be quiet and I slapped her face." So he admitted that conduct and was
acquitted.

And about one or two months later, the Police Chief was in a grocery store, or somewhere in Burlington, and was approached, physically approached by one of the female jurors, who came out of her way to tell him that he had arrested an innocent man, because they had had sex before, she was drunk, and just looking for sex again. All right?

So you see how reality is completely outside of the facts, sometimes, and that is because of what we bring with us. And when I say we, I mean, collectively, in this culture, sometimes individually in the life of a juror, or whatever, that can give us what I would call surprising results.

The bottom line is that if you think about sexual assault as a compass, if sexual assault is a compass, then north would be victim behavior.

It's where we orient some of our first questions. And this is what we're
trying to change, right, some of our first questions. Why did she, why didn't she, what was she, if it is a female victim, particularly.

And any victim, you know, they blame themselves and we blame them, and that is something that has us, in my opinion, in a bind.

Because the other side of that coin of victim blaming is that we, nobody wants to believe it, it's also really tough for our world view to think that there are offenders around us and we can't pick them out.

And so the sex offender in this picture, you know, kind of jumps out at us, but it's a hard thing for us to admit and to grapple with.

You and I are the unnamed conspirator, right? It's our culture, it's our attitude, it's what we've grown up with, it's the stew that we've kind of baked in, and
it's what we bring to this problem.

This is what I educate on,
because, you know, I've been doing this for
decades, with police officers and prosecutors
and military people and victim advocates, you
name it, fill in the blank.

And it is always the starting
place for us to first begin to look at
ourselves, because if we don't, in essence
we've created a Petri dish for this and we
have to claim our own baggage.

We are raised in a culture that
tends to blame victims, at least in part, for
this crime. We just are. And so what I tell
people, who are going to do the work, is
please be aware of that. Please be aware of
your baggage, examine it, through a process
such as this, and make sure you don't bring
that baggage into the room where you're
dealing with this particular crime, or with
these victims, because it's simply not fair.

And when we change our focus on
these cases, we find again that sometimes the thinking, the thinking -- that we have double standards.

And so I want to give you a couple of examples of that, and then I'll take any questions. But this is how I want to wrap this up, is by kind of showing maybe how the unnamed conspirator has perhaps influenced me or you.

And so part of the problem that we have with these cases often is that we find out that, you know, the victim had consented to at least part of what went on and then later reports a rape, right?

People, maybe witnesses, see her on the dance floor with him, or see her sitting on his lap and kissing him and all that kind of stuff, they seem to be fine there, and then there's a report the next day. People struggle with that, because she consented to part of it.

And so as a way to unpack this,
what I would do, and I'm actually going to
turn, if it's okay, I'm going to turn to one
of the subcommittees for a little bit of help
on this.

So assuming that you all know each
other, at least to one degree or another, let
me ask, what's your first name, sir?

MR. SPRANCE: It's Bill.

MS. MUNCH: Bill and Terri. Do
you know each other?

(Off microphone discussion)

MS. MUNCH: All right. Let's say,
Bill, that Terri comes to you on a break and
she asks you if she can borrow $10 because,
you know, she left her wallet on the white
van, or something like that, she needs to
borrow a little bit of money. Bill, do you
think that you would loan Terri $10?

MR. SPRANCE: Yes.

MS. MUNCH: Sure. And of course,
Terri, you would pay him back. So at the next
meeting where you are, the same kind of thing,
Terri, your kids cleaned you out and you thought you had money and you didn't, you find your friend, Bill, you're like Bill, I need to borrow $10, Bill, do you think that you would loan Terri $10, based on what you know about her?

MR. SPRANCE: I'd charge interest this time.

MS. MUNCH: With interest, loans you money, and of course, Terri, you would pay him back.

(Off microphone discussion)

MS. MUNCH: Six months from now you're somewhere else. Terri spent a little bit too much money. And, Bill, so did you, but she comes up to you and she's like, wow, Bill, I really need to borrow $20 this time.

Now, so she is asking you for twice as much as she asked you for last time, all right? Let's say, Bill, that you are like, you know what, Terri, you look at Terri and you say, you know what, Terri, here's $10,
that's what I'm comfortable giving you.

Now Terri would never do this, because she's a fine upstanding person, but in a moment of weakness, Terri, let's say that Bill shows you a $10 spot, but right behind it he has a $20 bill. And rather than taking the $10, because you want $20, you take $20. So Bill offers her $10, Terri takes $20, would that be a crime?

(Off microphone discussion)

MS. MUNCH: What's it called?

This is the test. Theft, right, larceny? And --

(Off microphone discussion)

MS. MUNCH: Larceny, right. And if Terri takes it with a little of this, what's it called?

(Off microphone discussion)

MS. MUNCH: Robbery, right? And if she takes it with this, what's it called?

Really bad robbery, right, don't do it robbery, but it is --
(Off microphone discussion)

MS. MUNCH: Yes, that's right, the gun comes out. But clearly, we would all recognize this as a crime. So if instead, of kind of going after Terri for doing this, what if I go after Bill a little bit, and I say, Bill, we need to talk.

You know, you're telling me that she robbed you, or you're telling me that she stole from you. But the truth is, I know you gave her money on two other occasions, you didn't complain about that.

And I also know, on this occasion, you offered her half of what she wanted. You offered her $10, what's the big deal that she took $20, what's the big deal that she took the other half?

If I treated you that way, as a crime victim, I would be in trouble and I should be. But how is that different perhaps than the 911 call that you heard?

How is that different than the person who
says, you know what, I like you, come home
with me, I'm attracted to you. I'll have some
limited sexual contact with you, but I don't
have sex on the first date, or I don't feel
like having sex tonight, and they draw a line.

How is it different, for that
victim, who then has that sex taken from them,
if you will? And I would say, it's between
our ears, all right, it is an example of the
Unnamed Conspirator at work in the way that we
see sex versus how we see other things.

Similar with drinking. You know,
we need to understand drinking as the tool for
the problem. If you have a robber in your
community and your robber is looking at this
screen and deciding who to rob, right? On the
left, you've got a person who's drunk as a
skunk, passed out from alcohol, but happens to
have money. And on your right you have some
sober guy sitting on a box, you know, in an
alley, who's the robber going to choose?

The robber's going to choose the
drunk person, why? Because they're vulnerable, because they can't fight back, because they might not remember, because they're less likely report, if they report they're less likely to be believed. This is not rocket science, or I would not do it. But for the very same reason that the robber is going to choose the drunk victim, so will the rapist choose the drunk victim.

And yes, finally, this is your definition, or part of your definition of consent, which is a fair definition. It's a good definition. It's one that we need to understand, and bring life to for all of the folks in the military culture and for similar definitions in the civilian culture, because there's no room for fear in consent. If fear is in the room, consent is not in the room.

It talks about freely agreeing. It talks about the things that we all know consent means, because we consent to things every day of our lives, and it's not different
just because it's sexual assault.
So, that's a quick run through of that
concept, by which I am privileged to educate
different people in different circles, and I'm
really appreciative of the opportunity to do
that with you. And I'm happy to answer
questions on that, or anything else that you
might have for me.

CHAIR JONES: Mr. Bryant?

MEMBER BRYANT: May I ask, just as
a background, because the most shocking thing
that I saw in your presentation, which I very
much appreciated, thank you, was that survey
of the Rhode Island school children, six
through what grade, eighth or ninth?

MS. MUNCH: Sixth through ninth
graders.

MEMBER BRYANT: Can you tell us
how old that survey was, and was it from a
particular part of town, was there any
demographics that maybe drove that opinion
from that aged child?
MS. MUNCH: Well, they did those, they did two, at least two of those surveys, they didn't do a third one, but they did them ten years apart, so they did a survey, I want to say, in 1998, and then they did one a decade apart from that.

And the opinions, if anything, were similar, if not a little bit worse, okay, the attitudes that were expressed by these middle-aged kids. It was at a school, this Rhode Island Middle School kind of decided to take this research project on. So it is somewhat dated, in terms of when they did that last survey.

I still think it's very relevant. And what I would suggest to you, this is just my opinion, but when I look at the influence on kids, as it differs and as it changes year to year, decade to decade, I think it's worse. Just my opinion. That is only anecdotal.

MEMBER BRYANT: Do you think that's because of the media, and the music
they listen to, that sort of thing?

    MS. MUNCH: Yes.

    MEMBER BRYANT: Because, that

survey is also scary about what's going on in

the homes in which they come from.

    MS. MUNCH: Sure.

    MEMBER BRYANT: Yes.

    MS. MUNCH: I mean, I think it's

all of the above. But it's clearly what they

get, you know, from the internet, from the

media, from the influences in their lives,

which are very similar to the things that we

are also exposed to. They are vulnerable and

they are shaped by their ideas and their

opinions. And I think that, of course, the

Unnamed Conspirator loves the media around

some of this. And there is a high influence,

that younger people are very challenged to

figure out how to make sense of, and what to

do and how to deal with that.

    MEMBER BRYANT: The other thing

that was offensive, obviously, was the t-shirt
that you saw, but it also made me think how ingrained this is, and I'm asking this as a question, because that's what we're supposed to do, do you think, how ingrained it is in our society? Because we all sort of giggle at the Ogden Nash little poem, candy is dandy but liquor is quicker.

MS. MUNCH: Right.

MEMBER BRYANT: And it's the same message as that t-shirt.

MS. MUNCH: It is the same message. It is because it is such a part of our historical, cultural belief system, if you will. I mean, it's where we don't even know it, we're so close to it. It's a little bit like water for the fish.

But it is absolutely alive and well. And what I notice, of course, because kids are drinking younger and younger, using drugs younger and younger, having sex younger and younger, if you will, that just in that entire realm, I think we are seeing much more
of the influence of ideas and attitudes
attached to alcohol and what it means to
drink, if you're a man, or a woman, or a
student, or whatever, perhaps than we did when
I was younger.

MEMBER BRYANT: Thank you.

MS. MUNCH: You're welcome.

CHAIR JONES: Is there any
compared --

MEMBER HOUCK: This is Admiral
Houck, Judge Jones --

CHAIR JONES: Oh yes.

MEMBER HOUCK: -- may I ask a
question?

CHAIR JONES: Thank you, Admiral,
go ahead.

MEMBER HOUCK: Ms. Munch, thank
you for your presentation. And I'm in
Pennsylvania trying to do this, so this is
difficult. But I've heard you before and have
tremendous respect for your work in the
concept of the Unnamed Conspirator, which I
I think is exactly right.

I was heartened toward the end just by your example of the person who picks on a drunk, versus the person who picks on a sober person, and as well as the discussion with you and Mr. Bryant about the t-shirt. Because I'm very, and I'm nervous about what I'm going to say, because I fear that it can be misconstrued, and I hope that it isn't.

Understanding that the Unnamed Conspirator phenomenon is real, and understanding that no one deserves to be raped, much like the 911 operator was trying to reassure the woman in that very powerful example that you played for us. I worry, though, that there are still messages that are sent, and I worry that they're aiming, to use the word you used, ingested, in our military and in our prevention efforts by our unwillingness to confront alcohol as an Unnamed Conspirator.

And what I'm about to point out,
and I do with great respect, but that's because I want to explore your point of view on this, but when you were describing it, you talked about a young woman weeping to the voice of her maternal grandmother, and that she had ingested a belief system, and that the logical consequence of too much alcohol is a hangover.

And that describing your nephew's situation. I'll leave your nephew out of it. I'll insert my college-aged daughter in there. That the vulnerability, it comes from too much alcohol consumption has no meaning. I think those are, I want to understand how you see those. I wanted to give you an opportunity to talk about those statements, because I think I completely understand the context in which you're raising them, in terms of blaming the victim. And this is not about blaming the victim, but it is for me, a lot about our military and getting more serious about prevention on the front end. And I just want
to give you a chance to talk about that some.

MS. MUNCH:  Sure. Yes, thank you.

And I understand the, you know, the nuances
around these kinds of discussions, I
appreciate your question. What I would say,
there are a couple of things I think that need
to be considered when we talk about alcohol,
and its role, and prevention.

First of all, you know, the
vulnerability is meaningless unless someone
decides to take advantage of it. If you
would, for a second, you know, picture a
context where somebody is as drunk as perhaps,
my nephew, or your daughter, might be. And it
is being evaluated by bystanders for whether
or not this is an opportunity for
intervention, or whether this is something
that we don't even, you know, she kind of
deserves it, or he kind of deserves it, so
we're stepping out.

The vulnerability of a person who
drinks too much alcohol shouldn't be at play,
and it wouldn't be at play in the issue of
sexual assault, if we didn't have people that
were practiced at taking advantage of that
very person. And so because we know that is
the case, and because we are all interested in
keeping people safe, what I would suggest to
you is that there are several conversations
that are necessary.

And the first one that I'm going
to suggest, and it's the one that we don't
hear in prevention programs very often, I
would like to hear the question and have the,
you know, start initiating and fostering
discussions around, what do you think of a
person who drinks that much alcohol?

How do you see that person? Do
they cease to be a fellow soldier, or a buddy,
or a wingman, because of that? What do you
think of women who drink too much?
What do you think of, you know, of men who
drink too much? Because if we don't start
having the conversation and allowing the folks
that are the bystanders to the people that take advantage of the climate where alcohol is a part of it, if we don't allow them the conversation around what that means and, you know, how they will perhaps be witnesses to the objectification of a human being and, you know, somebody causing great harm to them in their presence, then we're really not preventing.

Or our prevention efforts have historically just been aimed at potential victims, and what we tell them is be aware of alcohol, you know, don't drink, or have a buddy, and all of those kinds of things that we give those messages. I got those messages and you probably did too. I'm not saying those messages aren't important, but they are not the answer in and of themselves. And so what I would suggest is that what we need to get at is the culture that endorses the t-shirt.

We need to get at the culture and
allow people who would walk by a t-shirt like that and chuckle, instead of really pondering it and going wow, what if that was my little sister, or what if that was me, or my brother, would that be okay? That's, I think, the piece of the prevention model that we don't focus enough on.

MEMBER HOUCK: I think you're exactly right. And I would hope, and I think it's only because I know how influential you are within the Department of Defense, and I was hoping, as we go forward that, that would be a future target of what we're doing. But also, we will focus, in addition, we'll ask, what do you think of men and women who don't drink? And that we not associate it with people who choose not to drink, or make a conscience choice to avoid it? That we don't associate them with grandmothers.

MS. MUNCH: Absolutely. Right.

MEMBER HOUCK: And making, and constantly working on finding a way to make it
more acceptable to avoid these situations in
the first place. But thank you for the work
that you do.

MS. MUNCH: Thank you, very much.

Yes, ma'am?

CHAIR JONES: Yes.

MEMBER HOLTZMAN: Well, I want to
put a good word in for grandmothers. We don't
buy it.

(Off microphone discussion)

MEMBER HOLTZMAN: I appreciated
very much your presentation. I have a
question about how this pertains to sexual
assault of men, and what information do we
have, with regard to the circumstances in
which those attacks take place? And does the
Unnamed Coconspirator, or Conspirator, play a
role there too? To what extent do they -- I
mean, because I can see one of the things that
is deeper, even than some of what you've
talked about, is the attitudes about women in
the society.
That at some point, women become property. And for different people, apparently, it comes at different times, and there's a signal. And women are accepting that signal just the way men are, it's not, that's what the high school, or the middle school approach showed.

But what do we see, with regard to sexual assault against men? Because even though the figures suggest the percentage isn't as high, the numbers are enormous, and how do we approach that problem?

MS. MUNCH: That is a great question and I'm glad that you asked it. I do think that the Unnamed Conspirator is alive and well in that side of the equation, as well. What we don't have yet, and what we're working on are more longitudinal studies and surveys to help us understand that realm, as much as we understand, you know, some of the sexual assaults that are committed against young women.
But here's what I believe, is part of the system that keeps the men from reporting and perhaps from even identifying themselves as having been victimized. And it has to do with our view, as a culture, of masculinity.

It has to do with how we see men, the expectations that we put on them. They are supposed to be, and fill in the blanks, strong, providers, always on.

You know, they are supposed to be able to, you know, they handle, you know, relationships really well. They're, you know, perhaps sexual, and have women, and all kinds of things that we kind of say that they are, they're strong, they're hard, you know, they're that kind of thing.

And I think that's part of why they don't perceive, like women do, that they are at risk. You know, we're trained from the time we're this big, right? Men are typically not getting that kind of education, because of
what it means to be strong and that this
doesn't happen to strong men.

And so some of the underlying
messages that I think we need to really look
at and deal with are, there's an assumption by
a lot of male victims that if somebody
assaults them, because most offenders are men,
you know, and the last DoD large survey, I
think 95 percent of the offenders were men,
four percent were both women and men and one
percent were women, if I recall that
correctly, so we're looking at typically male
on male assaults.

What that means to them, right, is
depending on how they've been raised, it is
perhaps an affront to their masculinity, their
questioning of themselves. And, of course,
for those that are straight, and they are
wondering, does this mean that I am gay? That
is not necessarily something that is popular
in our day and age, despite the progress that
the military and others have made around
homophobia and trying to understand that.

And so I think that those kinds of things, and in the military, you know, these are the strongest of the strong, right, these are men that are really dedicated, not just to physical strength, but to courage, and et cetera. If we don't make room for the fact that even under circumstances like that, vulnerability is at issue, it is at play, and you're being affected, we're going to continue to see half of the number of men being willing to make reports, as we do show women, and neither number is good, right?

But I think the other thing, and I'm starting to see this, in fact, I was at Andrews Air Force Base yesterday, for the Air Force Leader Summit on Sexual Assault. And they had a male survivor and a female survivor address the group toward the end of the day. And his story was very much like what Russ and I have seen in a lot of the Army cases that we have examined, where someone,
basically, in a kind of a bullying situation, if you will, exposed his genitals, tried to place his genitals in this victim's face.

The victim was able to prevent that part from happening, but reported. And I'll tell you what, caught a lot of grief for reporting. Was called a snitch. And people giggled when he said what had just happened to him, you know, there was minimization and denial around his experience.

But the more these courageous, you know, young men join in that voice and begin their experience with us, whether it's on survey, but I like it more when it's face-to-face. We start to see that picture, we start to see what happens beneath the surface of some of these kind of more, quieter secretive communities within the military.

And so it is evolving and it is critically important that men understand that they, not only are vulnerable to this, but they are responsible to become educated and
1 become supportive within their climates of
2 other men who are experiencing this and not
telling us. So we have some distance to go.
3 We have some distance to go, but I think that
4 the things most at play by the Unnamed
5 Conspirator are homophobia and masculinity.
6 And the combination of those two things, as
7 perceived by men, as we coach them up,
sometimes keep them from talking.

   MEMBER HOLTZMAN: Right. That
9 keeps them from talking, but what triggers the
10 perpetrator in those circumstances?

   MS. MUNCH: Then I would switch to
12 the field of study that we have around
13 offenders, whether they are convicted sex
14 offenders, or more importantly, in my opinion,
15 undetected rapists, if you will.
16 You know, there is crossover. There is a lot
17 of crossover between an offender who will
18 offend against a woman and may offend against
19 a peer, or a child, or something like that.

   You know, interpersonal violence
to them is pretty normal. And it is a method of power. It is a method of, it is an extreme form of bullying, right? And if what I want to do is really put you in your place or demean you, you can talk to any domestic violence victim, a male or female, who will say that being physically assaulted is horrible, but then perhaps in their experience is nothing more demeaning or degrading than a sexual act that is committed against them against their will.

And so I think the principles of power and control are what are at play. It is very much less about sexuality, than it is about this is a method to control another person and humiliate another person and degrade another person. And we're beginning to see what it looks like in the military, but I'll just say that a lot of what I've seen or read, have to do with similar situations to the one that I just provided.

MEMBER HOLTZMAN: Thank you.
CHAIR JONES: Any further comment or questions? Thank you, so much, Ms. Munch, this is really very, very important for us to hear and I appreciate the way you did it.

MS. MUNCH: Thank you for having me.

CHAIR JONES: Okay. I think we'll take a five minute break at this point.

(Whereupon, the foregoing matter went off the record at 9:47 a.m. and went back on the record at 10:00 a.m.)

CHAIR JONES: All right, ladies and gentlemen, I think we should get started. I don't know -- he may have left. Oh, no, are those his glasses?

All right. Good morning, Colonel Winklosky. We're now going to have an overview of Article 120 of the UCMJ, and we thank you in advance for providing this to us. Go ahead.

COL. WINKLOSKY: Thank you, ma'am.

Good morning, members of the panel. My name is Lieutenant Colonel Devin Winklosky. I work at
the Army Judge Advocate General's Legal Center
and School, where I'm the Vice Chair of the
Criminal Law Department, and what I'm going to
be doing is talk with you about Article 120,
which is the military's Rape and Sexual
Assault Statute.

I'm an academic, I teach, so as
those of you who are in the academic world
know, I ask a lot of questions. There may be
areas where I don't exactly have answers
because we're still questioning the evolution
of the law.

What we're going to be doing
today, and I've broken it down into really
four areas, is: I want to give you a brief
history of Article 120, and then I want to
focus on our current version of Article 120,
its structure, its definitions, and them some
of the legal issues that are challenges for
practitioners in the field that we've talked
to. So, let's talk a little bit about the
history of Article 120 briefly.
I show you this picture because I think it is, first, an iconic picture. Second, just a few years older than the UCMJ itself, and it's the VJ Day picture of the sailor kissing the nurse. And I show it to you for a couple of reasons: because what used to be culturally acceptable may not necessarily be acceptable now, as the law evolves. And the law can force a re-examination of social and cultural norms. And I think, as we go through the history of Article 120, and as we discuss Article 120's evolution, I will show you this picture again after we've seen the definitions, and we can talk a little bit about whether the law has forced a change in cultural norms. So, let's talk a little bit about where Article 120 came from.

Prior to 2007, our law, our rape law under Article 120 had two elements: it was sexual intercourse by force and without consent, and that was it. And that was, since the inception of the UCMJ, how we prosecuted
rapes.

That caused some difficulties. The law, of course, case law attempted to compensate for various scenarios that arose with respect to this pre-2007 law, but it was still these two elements. Which, of course, the second element has without consent, which required the victim to manifest at some level a lack of consent. And that resulted in many cases in acquittals, because of mistake of facts as to consent, defenses as affirmative defenses. It also required some level of force to be involved with these cases.

Anecdotally, I will tell you when I was a defense counsel, I had a client who was acquitted. We talked to the jury, much like Ms. Munch explained to you in one of her cases, and it was a rape case. And it was a rape case that involved alcohol consumption. The jury acquitted, and when we talked to the jury afterwards they said, "Well, your client was guilty of something, it just wasn't rape."
So, as the law developed it was analyzed, and the first real comprehensive review of the UCMJ and, specifically, of the pre-2007 Article 120 was from the Cox Commission. Chief Judge Cox, among other things, looked at -- his panel looked at Article 120. And one of the recommendations that came out of the Cox Commission Report was that Article 120 needs to be updated, and it needs to conform and be more consistent with evolving state laws, as well as the federal statute.

So, what happened as a result of the Cox Commission recommendations back in 2001 was some action, some recognition of this. One of the places where this was recognized was from the Court of Appeals for the Armed Forces in the case of United States versus Lake, where it recognized -- and this is Chief Judge Baker writing this opinion, that Article 120 was antiquated in its approach to sexual offenses, it was dated.
And, as recognized in that second portion of the quote, "Traditional military rape elements were applied in conducts for which the elements were not initially contemplated, and case law, as opposed to statutory law was evolving to address this reality."

So, the push was really for Congress to do something about this to update Article 120. So, what happened is, in the fiscal year `05 NDAA, Congress mandated the Secretary of Defense to take a look at the UCMJ and the manual, and update Article 120 to conform more closely with other federal laws, and using 18 USC as the model for the new Article 120.

In what I've provided, and what, if you haven't received yet, you will, as handouts is a comparison between the federal law, federal sexual assault statute, the DC Code, and then the various versions of Article 120 that really the update and reform of Article 120 came from.
So, what happened as a result of this study was a very comprehensive review and recommendation from the Department of Defense, an analysis of all the state laws, and various courses of action for Congress to take. Congress then passed a reformed Article 120 in the FY 06 NDAA, the President signed it into law in September 2007, and that became, really, a radical change in our approaches to rape and sexual assault in the military. It was effective for all offenses on or after 1 October 2007.

And, two, -- and I say it's a radical change because two of the major changes that took place with this new Article 120 were, number one, lack of consent was, by and large, removed from the statute. And, second, it was a clear shift towards a more offender-centric prosecution of rape and sexual assault. And I will walk through some of this with you to show you where that is highlighted.
So, what happened, though, is that this new version of Article 120, the 2007 version of Article 120 had some scrutiny placed on it by the courts, not in the area of the reform with respect to the actual crimes or the offenses themselves, but more in the way Congress had fashioned the Affirmative Defenses within the punitive Article itself. In other words, Congress had built in Affirmative Defenses to Article 120, and that was causing some problems with respect to placing a burden on the defense that was unconstitutional, and that was the challenge to the law.

Nonetheless, some of the court decisions that came out after the 2007 version referred to this version of Article 120 as poorly written, confusing, absurdly structured with vague and undefined verbiage, a troubled statute, hopelessly incomplete and confusing. And Judge Ryan of CAAF called it "not a model of clarity."
So, they went back -- Congress went back, took a look at Article 120, the 2007 version, amended it and now we have our current version of Article 120, which was just a result of the fiscal year 2012 NDAA. And it is applicable to offenses that occur on or after 28 June 2012.

So, what does this leave us with? This leaves us with three versions of Article 120. And as a result of the lack of ex post facto law, any or all three of these statutes could apply in any particular case. So, if you have reports of conduct or crimes taking place that span these three time frames, then all three versions could apply at any particular case.

The other interesting thing that occurred as a result of this involves Article 43, which is the Statute of Limitations. For offenses occurring prior to 1 October 2007, they are all referred to as rape because it's a rape statute, and there is no statute of
limitations on prosecution for rape under the UCMJ. However, once the language changed in October 2007, and there was a division between rape and aggravated sexual assault at that time, Article 43 was not commensurately amended to reflect that, which meant that there was a five-year statute of limitations on aggravated sexual assaults. And that statute, that is, the Article 43 Statute of Limitations on those crimes is being amended in the FY 14 NDAA that was recently agreed to by Congress just this week. So, that gap in the law is being fixed, but it was not fixed at the time, so there is a window of time under the UCMJ where sexual assault and aggravated sexual assault, the statute of limitations has passed on prosecutions for some of those crimes.

MEMBER COOK: But just to clarify, what you said, what's been agreed to by Congress this week in Fiscal Year 14, Fiscal Year 14 NDAA, what you mean is it's come out
of the Senate. It's still got to go to the
House, but it has not yet been approved. The
language is still in play.

COL. WINKLOSKY: That's exactly
right, ma'am. So, the clock is ticking on
whether or not -- we still have to wait for
Presidential signature on Article 43's
amendment.

MEMBER COOK: I think you still
have to wait for the House's vote on the
amendment, as well. I just want to make sure
that -- so today's truth is still you can have
all three and the statute of limitations on
the post-2007 offenses still apply today.

COL. WINKLOSKY: Today. Yes, ma'am.

MEMBER COOK: Yes.

COL. WINKLOSKY: That's right. So,
we're still waiting for the change to take
place. Yes, ma'am.

CHAIR JONES: Yes, go ahead.

MEMBER HOLTZMAN: Just on the
applicability of the new statute of
limitations, assuming this legislation is passed, won't it go into effect, the new statute abolishing the statute of limitations for all offenses taking place -- well, when does it go into effect for? Tell me --

COL. WINKLOSKY: Yes, ma'am. The way it's written right now is that it will be effective upon signature, and it will be applied prospectively.

MEMBER HOLTZMAN: There's no retroactive application?

COL. WINKLOSKY: That's not the way it's written right now. No, ma'am.

MEMBER HOLTZMAN: Okay.

COL. WINKLOSKY: Okay. So, practitioners, obviously, that's one area, and I will talk more about some of the other areas where it is an interplay between what Congress passes as the legislative body; what the President then under Article 36 powers can do to implement the law, and that is by writing regulations that are embodied in the Manual.
for Courts-Martial to put these things -- to
put the law into practice; and then what the
courts, ultimately, decide all of these things
mean. And it's an interesting interplay with
respect to some of the definitions and so
forth, which I'll talk about in a moment. So,
I want to focus on our current version of
Article 120, and some of the issues that have
arisen.

As I mentioned, we have a Manual
Unfortunately, the only thing that's in the
2012 version of the manual is the statutory
text of Article 120. Usually, the President
fills in the elements, and definitions, and
other items that practitioners need in order
to prosecute this crime. That has not taken
place yet. We are still waiting for the
Executive Order to come out, to allow
practitioners to understand how to implement
this law, so what we have is raw statutory
text at this point.
However, the judges -- obviously, we still have cases being prosecuted under this article, and the judges have to put bench book instructions together. They have their best guess at what the language ought to be, in order to be able to instruct members on how to decide these cases.

CHAIR JONES: Devin, can you please explain -- excuse me. Lieutenant Colonel Winklosky, explain what a bench book is.

COL. WINKLOSKY: Oh, yes, ma'am, I'm sorry. Our bench book is -- they are comprehensive instructions that the military judges put together for use in all the services that are jury charges, basically. They are pre-formed jury charges that are instructed to jury members, the panel, on how to apply the law, what definitions apply, and then what they need to do when they go back into their deliberations.

Usually, they mirror what is in the Manual for Courts-Martial, the language
that the President has put in the manual. Without that language, the judges had to derive on their own what that language might be. We do have an Executive Order that was signed updating our Manual for Courts-Martial, and the President provided maximum punishments for Article 120.

The way Congress writes the law under the UCMJ is, normally, they'll say that if a person violates a particular crime under the UCMJ, they may be punished as a court-martial may direct. And they do not provide specific statutory limitations on what the maximum punishment would be. They leave that to the President, because the President has the authority to do that under the UCMJ.

We had a gap in time from 28 June 2012 to 15 May 2013 where the President had not acted to provide maximum punishments, so the Judiciary was left with deriving what the maximum punishments for the offense would be. There is some case law, and there is some
language in the Manual for Courts-Martial that
talks about how to do that, and you look at a
closely related offense to be able to do that.
But, nonetheless, we didn't have any
Presidential action on it until 15 May 2013.

The other thing that is currently pending, and as I mentioned, we're waiting for the President to sign an Executive Order which has already been through the public comment period in the Federal Register to give the practitioners the rest of Part 4 of the Manual for Courts-Martial, which is all of the information practitioners generally rely on to prosecute these kinds of cases. It has not been signed yet, so we are waiting -- and once it is signed, it will be incorporated into a 2014 version, hopefully, of the Manual for Courts-Martial.

So, what does this mean? It means from 28 June 2012 when the statute was effective until 30 days after the Executive Order is signed, we are dealing only with raw
statutory language and some judicial interpretation via the bench book that practitioners are using to incorporate this right now.

This is the language that appears in the Manual for Courts-Martial right after the statutory text talking about -- giving practitioners a guide on how to pursue prosecutions under the current version of Article 120.

Okay, so that's the history of Article 120. That's where it stands right now. What I'd like to do is talk a little bit more in detail about the current version of Article 120, how it's set up, what some of the definitions are, and then some of the challenges practitioners have had with respect to prosecuting these kinds of crimes.

So, the way it is now structured is there are three categories of crimes, and I say three because Article 120A had previously been incorporated into the UCMJ as
stalking. So, now we have Article 120, which
is adult crimes, 120B which deals with child
sexual crimes, and 120C which addresses other
sexual misconduct.

The other thing that is important
to note with respect to the current version of
Article 120 is, number one, it is gender
neutral now. And, number two, marriage has
been eliminated as a defense to all offenses.
The 2007 version had retained marriage as a
defense to some offenses; that defense was
eliminated in the revision in 2012.

So, this is the 2007 version of
Article 120. That changed from what it used to
be, rape by force and without consent, to this
change in 2007, so we have five adult crimes,
six child crimes, and three forms of other
sexual crimes.

We had crimes under the UCMJ like
indecent assault, indecent acts or liberties
with a child, indecent exposure, and indecent
acts with another. Those crimes were
consolidated and put into Article 120, and fall under Article 120 in some way.

In 2012 it was reformed, and this is what it looks like today. There are four adult crimes, three child crimes, and then three categories of other sexual misconduct.

It is interesting to note, and when you look at the comparison between the various statutes, that is, the federal statute, the DC statute, and the UCMJ, the retention of the word "rape" in the statute. The other two statutes upon which Article 120 is modeled dispense with the word "rape." The UCMJ Congress when amending the UCMJ opted to retain the use of the word "rape." I don't know if that's going to continue into the future, but it is an interesting distinction to make between the various statutes.

Okay. So, how do the adult crimes under Article 120 work? I think this is a pretty good illustration, one, because it's simple and it puts things in perspective. And,
two, because I created it.

(Laughter.)

COL. WINKLOSKY: But really when you look at Article 120, you're looking at two axises, you're looking at the actus reus of the offender, what did the offender do? And then under what circumstances did it take place? And then you get into the varying degrees. And I'd like to walk through this a little bit with you.

So, if you're talking about the circumstances under which the conduct takes place you're talking about things like a high level of force, force that involves death or grievous bodily harm, fear of death or grievous bodily harm, or kidnaping, or affirmative conduct on the part of the accused that is rendering someone unconscious, or affirmatively administering a substance to someone that substantially impairs their ability to consent to the activity at hand.

So, you're going to be in a more severe area
of criminal conduct; that is, either you're
going to be in rape or aggravated sexual
contact area.

Now, if you're talking about
lesser severe circumstances, such as fear for
bodily harm, fraud, or where the accused knew
or reasonably should have known the victim was
incapable of consenting, that's going to be
sexual assault or abusive sexual contact. So,
those are the two types of circumstances under
which the conduct could take place. And then
you have the actual conduct itself.

If you have a lesser form of
conduct; that is, sexual contact, and I will
talk a little bit more about the sexual -- the
definition of sexual contact, but you can see
it up there, as well. You're going to be in
the area of abusive sexual contact or
aggravated sexual contact.

If you have more egregious conduct
committed by the accused that is a sexual act
and, generally, the difference between sex act
and sex contact is a sexual act is a penetrative crime, sexual contact is something short of a penetrative act. If you have a sexual act, you're going to be in the area of sexual assault or rape.

So, the quadrant that you're in depends, again, on the circumstances and the conduct, and then the numbers in green reflect the punishments associated -- the maximum punishments associated with each of those crimes. So, rape is life without parole as a maximum punishment, sexual assault is 30 years maximum punishment, aggravated sexual contact is 20 years, and abusive sexual contact is seven years.

When we look at child crimes under Article 120B, it is a very similar scheme with respect to figuring out what crime applies under what circumstances. You still have that same conduct which is sexual act, but now the circumstances involve the age of the child.

If the child is under the age of
12 and there's a sexual act, that's going to automatically be rape of a child. If you have a child between the age of 12 and 16, and it occurs with force, that will also be rape of a child, and both of those carry with them life without the possibility of parole.

If the accused commits a sexual act on a child between the age of 12 and 16 and there's no force involved, that crime is sexual assault of a child which carries a 30-year maximum.

The other category of crime involves lewd acts. And lewd acts include sexual contact which I referred to earlier, plus three other types of conduct which I'll talk about, but it's a broader type of conduct that the accused could commit.

A lewd act on a child under the age of 16 will be sexual abuse of a child, and there are two types of sexual abuse of a child under the UCMJ. The first involves contact, actual physical contact with the child, that's
a 20-year maximum. And the other is no contact with the child, and that is a 15-year maximum.

The other crime that is new under the 2012 Article 120 is indecent viewing, visual recording or broadcasting. I refer to these as a peeping Tom, a peeping Tom with an iPhone camera, and a peeping Tom with a camera and an internet or YouTube connection. That's really what this is driving at.

So, there are two observation crimes, a person who views another, knowingly views the private area of another without their consent, and an area where that person has a reasonable expectation of privacy. That's a one-year maximum. If they take a picture, or videotape, or film, or record that in some way, that's another crime with a five-year maximum. And then if they broadcast that, that is a seven-year maximum.

I bring this up because this has been an increasing crime recently. Rolling Stone did a discussion of this a few weeks ago
in their magazine, the Steubenville rape
highlights this issue, that there are
bystanders who may not actually be engaging in
the sexual conduct itself, but they are taking
pictures of it for some reason. This crime
covers that conduct, and I think there's also
a good argument to be made that under the UCMJ
they could also be charged as principals to
the crime, as well. So, there are options out
there for addressing that kind of conduct, in
addition to sexual assault and rape.

The interesting thing about this
crime is that a private area is defined as a
naked or underwear-clad genitalia, anus,
buttocks, or female areola or nipple, so it's
a broader definition.

Additionally, reasonable
expectation of privacy is not your normal
Fourth Amendment jurisprudence reasonable
expectation of privacy. Reasonable expectation
of privacy under this crime is, could a
reasonable person disrobe in privacy without
being concerned their image is being captured, or that the private area of your person would not be visible to the public. So, it's a privacy interest with respect to vis a vis another person or the public versus a Fourth Amendment kind of analysis with respect to it. So, that's the statutory definition.

Under Article 120C, forcible pandering and indecent exposure remain under Article 120C, so you have those two crimes, plus this additional crime under Article 120C. So, that's the structure of Article 120. What I'd like to do is talk about some of the definitions, because Congress has provided statutory definitions of certain things. Practitioners have struggled in this area to attempt to figure out what some of these definitions mean. And really at the end of the day what it's come down to is the judges are instructing members and the members have to apply their own knowledge of what they believe these terms mean if there's no
specific definition provided to them. And I'll point out some of those areas.

First, let's talk about sexual act. Under the 2007 version of Article 120, this was the definition of a sexual act. You had contact between the penis and vulva, or penetration by hand, finger, or any object with a specific intent. And the intent was abuse, humiliate, harass, or degrade, or rouse the sexual desires.

Article 120 looks like this now. Sexual act now encompasses not only the traditional sexual intercourse, but it encompasses what would have otherwise been called sodomy. So, now it's for anus, anus or mouth is involved with respect to the first part of the definition that involves a penis. The second is any penetration of the vulva, anus, or mouth by any body part or object with one of those two intents.

I think what is interesting about this is how broad this definition is with
respect to the conduct we're talking about here. And it can sweep underneath its definition that conduct which may not have a sexual connotation to it. In other words, it could have an abusive connotation to it, someone putting their finger in someone's mouth, what's referred to as a fish hook. They place their -- they've penetrated the mouth of another with any body part, their finger, with the intent to abuse. And under this definition, that would be called a sexual act even though it may not have any sexual connotations whatsoever to it. It has abusive or humiliation connotations to it, but it may not have a sexual connotation to it. So, that's something that is struggled with when you have a definition that is broadened like this.

MEMBER HILLMAN: Just a question. Article 125 has survived the Supreme Court's Lawrence versus Texas decision. Does this not make Article 125, sodomy, entirely redundant?
COL. WINKLOSKY: I think it does.

Yes, ma'am. And I think the reason Article 120 survives is because of some issues with respect to animal abuse. But for the most part, practitioners have been charging conduct of sodomy under Article 120 instead. So, yes, ma'am.

Sexual contact, likewise, has changed. This is the definition under Article 120 2007 version. This is the definition under 112, excuse me, under the 2012 version. What's the difference here? Really, what happened was Congress broke up the definition into two things. The first group up there deals with genitalia, anus, groin, breast, inner thigh, or buttocks, what I refer to as kind of erogenous zones in the law, but you have to have one of those areas with an intent to abuse, humiliate, harass, or degrade, which gives it a sexual connotation. The actual area of the body gives it a sexual connotation; whereas, the intent does not.
In the second grouping you have any body part but you have a sexual intent, and that is where the sexual portion comes from there. So, you have a sexual body part with an intent to abuse, humiliate, harass, or degrade, or you have any body part but with a sexual intent.

The last definition that involves the conduct of the accused is lewd act. As I alluded to earlier, it's broader than sexual contact, so it includes sexual contact as I just described, but it also includes three other types of conduct on the part of the accused. And recall, lewd act applies to child crimes, so intentionally exposing one's self with one of two intents, and when I say one of two intents what I'm referring to is the intent to abuse, humiliate, harass, degrade, or incite lust or sexual desire. So, exposing, communicating indecent language, or any indecent conduct intentionally done with or in the presence of a child.
This has been a positive change in the sense that it used to be under military case law this type of conduct had to be done physically in the presence of the child. This version of Article 120 eliminates the physical presence requirement. So, what does that do? That means that this type of conduct that occurs over a phone, over a Skype connection, that a picture is sent over some sort of Smart phone is criminalized by this definition.

Force, the definition of force has also changed. Some of the crimes under Article 120 require force to get into one of the quadrants under the Article 120, and also in the child crimes under Article 120B. So, you can see how the definition of force has changed.

What is interesting to note here is that when you look at Article 120, 2012 version, and you look at the second and third definitions of force, you look at the second definition and it says, "Sufficient to
overcome, restrain, or injure a person." When you look at the third definition, "it is sufficient to coerce or compel submission by the victim."

We assume Congress used that differing language for a reason, which in our estimation is because the second part of that definition is a reasonable person standard, an objective standard. And the third part of that definition, because it refers to the victim is a subjective standard seen from the victim's point of view.

And here is force with respect to the child crimes under Article 120B. It's the same definition with the addition of constructive force. So, when you have a parent-child or similar relationship, abuse of that relationship can be sufficient to constitute the use of force.

So, what I'd like to do, now that you have some -- you're armed with some knowledge on definitions and how the law is
structured under the current version of Article 120, I'll revisit this picture again, and ask if the change in the law from what it used to be pre-2007 to what it is today forces us to revisit this kind of conduct, which we normally would have seen as acceptable. Is it now something that perhaps we still see as acceptable, but now at least we're taking a better look at it to see if it is something that falls within our cultural norms.

Is there force being used here? Is there -- are there circumstances -- is this a circumstance under which we think this is criminal conduct? Is the accused engaged in some type of conduct and under circumstances for which we think there ought to be criminal liability attached? I don't know. All I can tell is what the law says now as opposed to what the law said then.

Another interesting clip that we use which you might find interesting with our students when we teach this is a clip from
"Gone With The Wind," where Rhett Butler takes Scarlett O'Hara up the stairs and says, "This is one night you're not putting me out, Scarlett." While at the time, perhaps that was culturally something that was seen as acceptable, part of a movie, I think this forces -- our law is forcing a re-examination of cultural norms through Congressional action.

Okay. For this last part, I think it's interesting to analyze some of the challenges to implementing the law that practitioners have shown us, and that we've analyzed at the school, as well. One is bodily harm, and I say to wit or not to wit because when we charge crimes in our specifications, in our charging documents we use language like "to wit," to specify certain factual elements within our charges. So, this is the definition of bodily harm under the current version of Article 120.

"It's an offensive touching of
another however slight." Now, it includes, and Congress included this last bit, "including any non-consensual sexual act or non-consensual sexual conduct, or contact," excuse me. So, what does that mean?

Well, what we believe it means is that if a crime is charged in this way, that the accused sexually assaulted the victim by committing a sexual act with the victim, and that is penetration of the victim's vulva by his penis, by causing bodily harm, and then we say "to wit, pushing the victim to the bed and holding her down with his hands," then that is the specified bodily harm that the government has to prove, pushing the victim to the bed and holding her down with his hands. "And, therefore, consent is not an element."

In other words, as I mentioned in the beginning, consent by and large has been removed from the statute, or lack of consent. The only thing the government would have to prove here is that the sexual act took place,
and it was done with bodily harm. They do not have to prove the victim manifested a lack of consent.

Now, if it is charged in this manner, that is, it does not specify the actual bodily harm of holding her down and pushing -- or him down and pushing the victim to the bed, then what we have is a reintroduction of consent as an element. And Congress contemplated that the bodily harm, that is, the sexual act could serve as the bodily harm itself. And you might wonder well, what circumstance would this ever arise? Well, we believe it would arise in such a circumstance where there is a great deal of, or maybe some consensual activity, consensual sexual contact, but not to the point of penetration. In other words, there's a -- the people engaged in the conduct, it's all consensual but up to the point of the penetration. The penetration is not consensual. So, this is where this type of
charging would take place, where the bodily harm is the sexual act itself. The reason I bring it up is because it reintroduces lack of consent in this particular circumstance.

Another area that is challenging for practitioners is committing sexual acts where the accused commits a sexual act and they know, reasonably should know that the victim is impaired in some way, either by alcohol or drug, or other similar substance. So, the accused commits a sex act on a person who is incapable of consenting, and that's because the accused knows or reasonably should know that the victim is impaired. This is not a case of consent, it is a case of capacity to consent. But where this arises, and where the challenge comes in is with respect to the knowledge prong.

If the government charges the person with knowing that the other person--that the victim is incapable of consent, then they have to prove actual consent. If they
charge it as that the accused reasonably
should have known, then it's introduced into
a reasonable person standard, an objective
standard. Should the accused reasonably have
known that the victim was impaired to the
point where he or she could not consent?

What's interesting about this is,
it hinges criminal liability on a simple
negligence standard, which is an unusual thing
to see in the criminal law, is that the
absence of due care; that is, reasonably
should have known that that person was
intoxicated or impaired, is now the standard
for criminal liability under the second
element.

And, finally, there are a couple
of places, and I'll point one out where
Congress used varying language but we can't
really figure out the reason why other than
maybe it was just the drafting.

Rape by administration, this is
rape, and it's an affirmative conduct by the
1 accused to provide someone with an
2 incapacitating substance, drug, intoxicant, or
3 other substance thereby substantially
4 impairing the ability of that other person to
5 control their conduct. So, that's rape.
6 Whereas, if you look at sexual
7 assault when incapable of consent, it's simple
8 impairment. So, if the other person is
9 incapable of consent to the sexual act due to
10 impairment by any drug, intoxicant, or other
11 similar substance. So, sexual assault does not
12 require the accused to commit any affirmative
13 act against the victim as far as impairing the
14 victim. Rape does, because it requires the
15 accused to actually administer the drug or
16 other substance. But if the accused is
17 administering the drug, it has to be to the
18 point of substantial impairment. But if the
19 accused comes across a victim and did not
20 actually cause the impairment, then it is
21 simple impairment. So, there's a distinction
22 between the two in the definitions.
Just a few other examples I think that are interesting, and this is what the statute struggles with, and what practitioners have struggled with in their implementation of the statute. Consent which has been removed as an element in the statute, but yet there are still issues of force and capacity, and the interplay between what is the level of force, is there force applied, is this a capacity case, and whether or not consent is even relevant at all because it's been -- Congress has attempted to write out consent, but they can't write out capacity or force, or haven't written out capacity or force.

So, as mentioned by Ms. Munch, consent is a freely given agreement by a competent person to the conduct at issue. You cannot consent if you're sleeping, unconscious, incompetent, under threat of death or grievous bodily harm, if you've been rendered unconscious, you're under threat, or fear, or fraud. So, legally under the statute
a person cannot consent in those circumstances.

So, then is consent relevant? How is consent used? How has Congress attempted to write it out? Well, a couple of examples. Here's the one I referred to earlier, sexual assault by causing bodily harm. Two elements to this, a sexual act and bodily harm. And you can see the government does not have to prove lack of consent on the part of the victim. They have to prove a sexual act occurred, and that it was done -- caused by bodily harm. But that doesn't mean consent evidence isn't relevant.

Recall that the definition of bodily harm is an offensive touching however slight. So, certainly evidence that the victim consented to the conduct would diminish the government's evidence that this was an offensive touching. So, it's negative evidence, it eliminates the government's evidence with respect to whether or not the
conduct is offensive, but it is not in and of itself an affirmative defense. So, it goes to the definition of bodily harm, it reduces the elements -- the government's evidence on that element, but it's not a separate defense which it had been in the past.

Likewise, here's another example.

Sexual assault on a victim who is asleep, unconscious, or otherwise. Again, the government proves there was a sex act, that the victim was asleep, unconscious, or otherwise unaware, and the accused knew or reasonably should have known of that circumstance. So, this is not about consent, it's about the capacity of the victim to actually consent, so it's a step removed from actual consent. So, is consent evidence relevant? It might be to prove that the victim was not asleep, was not unconscious, or was not otherwise unaware.

And I'll just point out one more, and that is a sex act on a victim incapable of
consent due to impairment. And I mentioned this earlier. The interesting part of this is that if the members; that is, if the jury determines that the victim is capable of consent, then this should result in acquittal without them ever reaching the factual issue of whether the victim did, in fact, consent or not. That's the flip side of removing consent from the law here, is that this particular crime is about the capacity of the victim to consent. And if the members applying the law determine that the victim is capable of consent, they never really ask the question as to whether or not the victim did or did not, in fact, consent.

Now, that doesn't mean that the government couldn't compensate for that by charging the crime differently, it just means that it's an anomaly with respect to -- it's an interesting factual issue or legal issue with respect to this particular crime.

A couple of other issues that
arise with respect to consent. And I linger on
consent because it is such a monumental change
to remove it, lack of consent, from the
statute completely, but it also reflects a
progressive move in the law under the UCMJ.

So, I will just set up this
scenario where let's say you have two people
who are -- have agreed under the definition of
consent to engage in some sort of sexual
activity, so there's actual consent earlier in
the evening, but then there is the element of
alcohol that's involved that you've already
heard is involved in many of these cases.

So, between the time that these
two people consent to the sexual conduct that
they're going to engage in, obviously, that
consent is still valid up until the time they
start consuming the alcohol. But at some
point, let's assume one of them becomes
legally impaired under whatever that
definition is. We don't have a definition, a
statutory definition of impairment, but that
particular person becomes impaired. Well, does that consent follow from the time that they actually agreed and consented up and to the time that that person is legally impaired. Probably.

The question then is let's say that at some point the victim falls asleep or becomes unconscious due to this alcohol consumption. Well, between the time that the victim is legally impaired and the time that he or she falls asleep, does that consent carry over?

Well, we know from the statutory language that a person who is impaired cannot consent. We know that a person who is asleep or unconscious cannot consent, so what happens not when they say yes or no, but when they say yes, at the very beginning, but then are silent about it for the rest of the time? And the statute doesn't really tell us a lot about that.

If we think and we agree that
asleep and unconscious, and impairment are the same because people cannot consent under either of those circumstances, then the consent is invalid at the moment of impairment. In other words, it dissipates, or if we say that no, even though the person is impaired and the accused knows that they are impaired, the accused needs to re-validate the consent to determine whether or not there is consent, or maybe the consent dissipates at that point.

The problem is that we don't have any language or definitions that provide us with guidance on this issue, so the question is does prior consent apply in these type of circumstances?

MEMBER HILLMAN: Madam Chair, may I ask a question?

CHAIR JONES: Sure.

MEMBER HILLMAN: Colonel Winklosky, this is a dense area that you're giving us a detailed tour of, and I'm grateful for that,
but I'm confused on this. The statute actually does say that this would be a sexual assault, but it doesn't say anything -- so the prior consent according to the letter of the statute is irrelevant.

COL. WINKLOSKY: Yes, ma'am. The statutory language says that. The question that arises is when does the consent -- when does the capacity to consent, and when does the consent -- how do they interplay with each other? In other words, when the victim has the capacity to consent and does give affirmative consent, is that enough, or does the consent have to be renewed at some point later when there's a question of legal impairment?

MEMBER HILLMAN: But as you've pointed out, there's just nothing about consent in this, so there's -- it's just left out, because the specific sexual assault offense simply does not make that an element. Right? So, why are we inquiring into that?

COL. WINKLOSKY: That's the issue
is, can a person -- and that's exactly it. Is it even relevant, should we even be discussing this because the issue is moot because consent is not an element. But there might be issues of whether consent evidence would come in at all to determine if a person is impaired or not. It's an interesting discussion.

I think the issue that arises, ma'am, is that when a person has the capacity, it's an issue of capacity really, and how the statute handles capacity. Can a person provide affirmative consent and when do we analyze when that person provides that affirmative consent?

MEMBER HILLMAN: So, may I ask one other question.

COL. WINKLOSKY: Yes, ma'am.

MEMBER HILLMAN: It's related to how the -- the sort of typical sexual assault would be charged and what we've come to understand is the ordinary case, of which you've seen plenty.
The amount of force that is required would be the force required for penetration in a classic situation of lack of consent between a perpetrator and a victim. Right? So, essentially, that's how the statute is being interpreted on the ground, so that our prosecutors can apply what you've pointed out is a difficult statute to apply effectively both because of the changes that have been made to it, and because of the attempts to separate out these different pieces. Is that correct, the way I described that? That would be --

COL. WINKLOSKY: It's the force to achieve penetration or --

MEMBER HILLMAN: Causing bodily harm, in other words, would be interpreted to be that -- to be --

COL. WINKLOSKY: If they do not specify the bodily harm, then there's no force required. It's an offensive touching, however slight.
MEMBER HILLMAN: And which part of the statute would that get charged under? So, what's that -- there's great capacity for different charges here, I realize that. And it's an art or craft for the prosecutor to come up with the right charging here. But in that essential non-stranger rape situation, what would the -- the charge would be a sexual assault under -- and there's not force required? That's what I'm asking you, what's the ordinary way this gets charged?

COL. WINKLOSKY: Well, sexual assault by causing bodily harm, because normally there is going to be some form of offensive touching that goes along with the actual penetration itself. So, through investigation, through marshaling of the facts you're likely to have in most scenarios some offensive touching that goes along with the actual sexual act itself.

And that also avoids some of these other issues that arise with respect to
impairment, level of impairment, and
incomplete definitions within the statute.

CHAIR JONES: Yes, Mr. Bryant?

MEMBER BRYANT: Going back to this
consent issue, the way I'm looking at it on
this first blush look that you've presented to
us so well, is while Congress may have taken
the word "consent" out of the statute so it's
no longer an element the government has to
prove, it's still a defense, it could be
raised as a defense. It's not there, you don't
have to prove it, but they can raise no, this
was consent. She wasn't asleep, she wasn't
unconscious, or whatever the conditions may
be. And that's the conundrum, I would think,
for the lawyers on both sides.

COL. WINKLOSKY: That's a good
point, sir. And really what has happened is,
we've taken consent away as an affirmative
defense. And what we've done is -- what
Congress has done is they have couched the
elements in terms of consent evidence may
1 still be relevant to diminish the government's evidence on a particular element to defeat proof beyond a reasonable doubt.

    MEMBER BRYANT: Right.

    COL. WINKLOSKY: And the difference is that what used to happen was the military judges would instruct members that consent was an affirmative defense. And if they found that the victim consented, that it was a complete defense, that they would acquit.

    What happens now in the instructions is that consent is considered as relevant evidence along with everything else, and not a separate affirmative defense. So, it may be relevant evidence to diminish the offensiveness of bodily harm, but it's not a separate defense in and of itself.

    MEMBER COOK: Okay. Going on that comment, so if that's true does that mean that the -- for cases between the 2007-2012 period it probably still is an affirmative defense. Is that -- I mean, that period of when Article
under its old language, those affirmative
defenses would still exist in that way, but
does the mistake of fact defense still even
exist for post-2012 offenses? The accused who
believed they were consenting, that whatever
the circumstances were, does that still exist,
mistake of fact?

COL. WINKLOSKY: It is in extremely
limited circumstances where mistake of fact as
to consent would exist in my estimation under
the current 2012 version. You are correct that
the affirmative defense still would apply from
2007 to 2012, under the 2007 version, but --
and there are varying interpretations as to
whether or not mistake of fact as to consent
might apply. And there's a distinction to be
made here between mistake of fact as a
defense, mistake of fact as to other issues,
and mistake of fact as to consent. I think
mistake of fact as to consent has all but been
eliminated in Article 120 in its current
version.
MEMBER COOK: Okay. While you're talking, and I know it's not in the presentation, but that we've had some testimony and some questions that have come up during other public hearings in terms of another defense to an allegation of an Article 120 offense, rape, sexual assault, whatever it is. Can you briefly tell the panel to what extent, if at all, does a good soldier, good airman, good service member defense apply to rape, sexual assault type of process?

COL. WINKLOSKY: I think the good soldier defense is an available defense in just about every case. The defense is going to be able to present evidence not only because the rule allows it, but because case law has developed it to the point where currently the accused can present that kind of evidence to generate reasonable doubt about whether or not the accused committed the crime. In other words, it's almost like what I would refer to as reverse propensity evidence. Because this
person is of a certain quality or character, they are less likely to have committed an offense. I think that's the way it has been applied at courts-martial, as well.

I believe that that's going to go away. As we discussed earlier, that we have pending legislation that is probably going to eliminate that, the availability of that defense to an accused.

MEMBER COOK: Is that language to do away with that defense, is that in the current language of the Senate or the House bill, do you know?

COL. WINKLOSKY: It is. Yes, ma'am.

MEMBER COOK: That's what you're saying.

COL. WINKLOSKY: Yes, ma'am.

MEMBER COOK: Okay. And the only point -- the other point I would just clarify is earlier when Professor Hillman had asked you about Article 125, which is sodomy, the fact of whether or not that has -- is that
moot? It is, but only in terms of if the offense occurred after the 2012 statute. It is still a relevant and a necessary charge depending on the circumstances for any offenses in that gap between 2007 and 2012.

COL. WINKLOSKY: Yes, ma'am, that's correct. And I neglected to say that because as we have these various versions of Article 120, there's also an interplay with what other statutes were available for the particular conduct at the time, as well.

MEMBER COOK: And you didn't neglect anything. You've done a good job explaining a very complicated area of the law. Thank you for doing it this morning.

COL. WINKLOSKY: Thank you, ma'am.

I just have a few other things that I think are important to cover, and that is general and specific intent. You know, we have varying types of intent under this law, and the question really is why do you care? Why do practitioners care?
We have recently some new case law in the military that involves how we determine what is a lesser included offense under the offenses that we actually charge. So, just like in many jurisdictions, in the military you can charge a greater offense. If the lesser offense is included in it, you don't have to put it on the charge sheet.

Well, now there's a case, United States versus Jones that we now apply a strict elements test to determine what is a lesser included offense. And if you recall, when we have a sexual act that involves contact between the penis and vulva, mouth, or anus, that is a general intent crime. There's no specific intent to abuse, humiliate, harass, or degrade, or excite lust or sexual desires.

So, if you charge that as the greater offense and you have a specific intent crime that you think is a lesser included offense, you're actually adding an element of specific intent, and you're probably --
practitioners are probably going to have to charge it separately. So, the interplay between mental states with respect to these varying crimes can make the matters a little bit more complex.

The other issue is, and this was brought up with respect to mistake of fact, I just want to touch on it. This is our mistake of fact language in the Manual for Courts-Martial. It's a monster, it's dense, so I will break it down for you because I needed it broken down.

There are four sentences in it. The first is an introductory sentence. The second is, I think you may recognize, which is if you have an element of crime which requires premeditation, specific intent, willfulness, or knowledge, then you have a mistake of fact that just exists in the mind of the accused. Just an honest mistake. If you have an element that requires general intent or knowledge, then it has to be an honest and reasonable
mistake of fact.

And then the last sentence says that if the accused intent or knowledge is immaterial to an element, then ignorance or mistake is not an excuse. So, this is -- and what we teach judges, and how I talk to practitioners about this is you have to go into each crime that's charged, analyze each element and determine whether or not there is a mistake of fact. Not mistake of fact as to consent, but mistake of fact as to some other portion with respect to that particular element. And if it doesn't involve the accused knowledge or intent, then there will not be a mistake of fact defense applied to it.

The reason I bring this up is because this is somewhat different than the 2007 version. The 2007 version built in affirmative defenses to the punitive language, the statute itself. The 2012 version points to this language as defenses. All defenses are available that would otherwise be available,
and mistake of fact is one of them. And this
is our mistake of fact language.

One other interesting anomaly of
the statute which I will bring out is the --
what I think is an unintended consequence,
and I'll end with this. And that is, here's
the elements of sexual assault where the
victim is incapable of consent. And it's
interesting because the question I have in my
mind at the end of this is, do we have two
victims, or do we have two accused? Because
you can see that a sex act is the first
element, but then second element is, was the
victim incapable of consent due to impairment
by drug, intoxicant, or similar substance? So,
especially, was the victim impaired
potentially by alcohol to the point where they
didn't have the capacity to consent? And
should the accused reasonably have known that?
So, we apply an objective standard, the
reasonable standard, and voluntary
intoxication on the part of the accused does
not apply. We apply a reasonably sober person standard. Would a reasonably sober person have believed the victim was incapable or known the victim was incapable of consent due to impairment by an intoxicant?

Well, what if both people engaging in this conduct are incapable of consent with respect to their level of impairment? The law then, you could have one person who reports it, and then shortly thereafter the other person reports it, and the law would allow all those attendant rights and other policies to kick in for both people because you may have either two victims or two accused in these types of situations.

It's just something that the -- that I think is an unanticipated consequence of this. And as Professor Hillman brought up earlier, I think the way to avoid this is to not charge this crime, but probably charge it under a separate crime which would be sexual assault by causing bodily harm, perhaps. But
it highlights a bigger point, which is practitioners are forced to go through that art of charging because some of the definitions, and some of the scenarios that arise force them to do that, which is no different than perhaps other prosecutors or practitioners. But in this particular case, it does create a strange anomaly.

MEMBER COOK: The prosecutors go through the art of charging this, but it's ultimately the commanders currently who decide whether or not these cases go to court. So, to what extent are commanders -- I mean, the charging decision is with the trial counsel regardless of the service. To what extent does trial counsel have to go through this level of detail explaining to that convening authority why they're charging it in the way that they are, or the impacts of the various charges that are out there?

COL. WINKLOSKY: I think commanders are -- I can speak from my experience, and
from people who have talked to me about this.
I think commanders are very interested in what
the legal process is, and what is happening
with respect to the people that are members of
their command. And they have experts who
advise them on that. They have the
prosecutors, the trial counsel who are
actually in the courtroom doing the job of
prosecuting and charging these cases.

They have supervisors who are
looking at that, and then they have staff
judge advocates who are direct advisors to the
commanders, so you have a lot of lawyers
involved in the process who are advising the
commander on what action to take. They
normally do not get into this level of detail
unless they're asked. Having been on staffs,
I don't think that that's unusual for other
staff members, as well. You might have a
communications officer who doesn't get into
the level of detail about data com, or a
transportation officer who doesn't get into
the level of detail with respect to engine maintenance, but that doesn't mean that the commander is abdicating his responsibilities, or her responsibilities with respect to the system itself.

MEMBER COOK: The way I probably should have worded it is there's some -- there is a proposal in Congress. Some people have told us that commanders should be taken out of that decision, sending the cases to court. What role -- what's your view on that particular piece? I won't ask it more specific than that.

COL. WINKLOSKY: As I said in the beginning, ma'am, I'm an academic who's at the schoolhouse, so my job is to ask a lot of questions and analyze the law. I avoid policy decisions.

I'm in Charlottesville, Virginia which is nicely tucked outside of the Beltway, and so I think there are strong arguments on both sides for that decision. I can tell you
that my look at the Manual for Courts-Martial
and the preamble is that the manual is
designed to both look at justice and
discipline. And I think that is a very
difficult balancing to do, and I think
commanders are in the position where they're
the ones that have to do it, at least right
now. So, how is that for a lawyerly answer for
you, ma'am?

MEMBER COOK: That's a pretty good
lawyerly answer. Thank you.

(Laughter.)

COL. WINKLOSKY: But I really --
that particular subject is something that we
at the schoolhouse talk about, but really
don't take a position on as far as that. We
leave that up to the folks who are making the
policy.

CHAIR JONES: Yes.

MEMBER HOLTZMAN: Thank you for
your explanation. I guess what I'd like to
know is do you have a list of the terms that
you would like to see defined in an Executive Order?

COL. WINKLOSKY: We have some terms -- I don't have them for you right now, ma'am. I know there are some terms we have discussed that would be nice to have more detailed explanation on as far as statutory language, or language in the manual.

The problem we have from our perspective is that when you -- when Congress or the President provides a more detailed explanation of something there's always the law of unintended consequences that kicks in, and that statutory language becomes analyzed to death. So, to answer your question, there are some. I can provide you with that list of things we think would be good to define, and why we think so, and some of the reservations we might have with respect to that. But I don't have that with me right now, ma'am.

MEMBER HOLTZMAN: Okay. I think it would be useful, but how does this process
normally work with the White House when it prepares an Executive Order explaining or further elaborating on a statute? Does it get proposed language from the Department of Defense? Is that how it works, or does the White House just dream this up on its own --

COL. WINKLOSKY: No, ma'am --

(Simultaneous speech.)

MEMBER HOLTZMAN: -- like Athena coming out of Zeus' head.

COL. WINKLOSKY: There's a working group, the Joint Service Committee is the committee within the Department of Defense that has a working group of members from each of the services that provides input on what they believe the language of the Manual for Courts-Martial should be. That is then placed into draft form in the Federal Register for public comment, and then it becomes the draft Executive Order that goes over and through the process.

MEMBER HOLTZMAN: Has that
happened?

COL. WINKLOSKY: It has, yes.

MEMBER HOLTZMAN: So, the draft Executive Order has gone to the White House.

COL. WINKLOSKY: Yes, ma'am. It is pending signature, and that's why we're kind of flying solo right now, is we're waiting for that additional language in the manual to be signed by the President, and it's been pending for a little over a year now.

MEMBER HOLTZMAN: Okay, thank you.

COL. WINKLOSKY: Yes, ma'am.

MEMBER HOLTZMAN: But if you could give us a copy of the draft order, that would be helpful, and a list of the --

COL. WINKLOSKY: Yes, ma'am, I have it here, and I can leave it.

MEMBER HOLTZMAN: Thank you. And a list of the terms --

COL. WINKLOSKY: Yes, ma'am.

MEMBER HOLTZMAN: -- that need to be elaborated. Thank you.
MEMBER HILLMAN: Recognizing that additional change would have unintended consequences, and that attempts to clarify and progress in this statutory revision process have not always succeeded, I wonder if you'd counsel -- how should we understand this statute? Is it a hindrance to effective prosecution of sexual assault at court-martial, and is it being effectively used right now? I mean, what's -- I've read much of the criticism of it and we understand that. And you've been muted, actually, in your representation of some of that really vociferous criticism of the statute.

CHAIR JONES: Although I like your slide a lot.

(Laughter.)

MEMBER HILLMAN: But if it really should be changed I, at least, would like to know. So, does this -- should this look different in order to make this a more reasonable process for prosecutors to deal
with, and commanders, and everybody else?

COL. WINKLOSKY: I don't think we have the answer to that right now because it hasn't been in practice long enough for us to produce an empirical study with respect to cases of court-martial, and appellate review, and so forth. So, I understand what you're asking, ma'am. I just think that it's premature to say one way or the other right now because all I can do is -- I have anecdotal evidence on both sides, and without more empirical data and a look at the appellate review process over the next couple of years, I can't really say for sure.

MEMBER HOLTZMAN: Can I just follow-up on that? Do you mind?

CHAIR JONES: Of course.

MEMBER HOLTZMAN: Well, what do prosecutors tell you? Are they happy with the statute?

COL. WINKLOSKY: They are happy --

(Simultaneous speech.)
MEMBER HOLTZMAN: -- looking at it.

COL. WINKLOSKY: They -- happy -- I think they are -- they have a lot more tools to use to prosecute these cases. In other words, it's not just by force and without consent anymore. They have a menu of crimes that they can capture the criminal conduct with.

The flip side of that, however, is that it becomes complex and complicated to do that type of calculus. What ought I charge in this particular case, and how -- and what am I -- what are my anticipated results if I do this particular way? And it's just a new way of doing business. I don't think it's -- I don't think that over time it's going to be a hindrance. I think it's just a matter of getting used to the way this statute is written, that it's a little bit more complex, it has some additional challenges. But once our prosecutors are able to navigate it over
time, there won't be any further issues with it. So, that will work out over time. I hope that answers your question, ma'am.

MEMBER HOLTZMAN: Well, I was going to -- my next question is, are defense counsel happy with it?

COL. WINKLOSKY: Right now they are.

(Laughter.)

COL. WINKLOSKY: But I think their concern is over-criminalizing conduct is what I hear. Is this -- is our pendulum swinging the opposite direction, and are we sweeping too much conduct into what otherwise would be lawful in the past? And that's -- they just don't want their clients exposed to any further criminal liability than they believe they ought to. So, I think there is a healthy discussion about how to apply this law by practitioners on both sides.

MEMBER COOK: Just one comment.

Hopefully, there is a healthy discussion on
how you train all the service members who are
now subject. They don't need to know all this
detail, but understanding where the lines of
conduct are drawn would be an interesting
challenge these days.

COL. WINKLOSKY: Yes, ma'am. This
particular class I have given at least maybe
two or three times per month to practitioners
in the field from all services whether in
person or via our Distance Learning course.
And I ask them for feedback, and we have a
good discussion, academic discussion about
these things. So, thank you, ma'am.

CHAIR JONES: Thank you very much,
Colonel. Interesting, difficult topic, very
nice job. Thank you.

COL. WINKLOSKY: You're welcome,
ma'am.

CHAIR JONES: All right. Our next
panel is going to show us waterfall slides. I
love that name. And I'd like them to come up
now. This will show for us the dispositions of
cases under DOD jurisdiction.

   All right. With respect to these
slides and statistics on disposition of sexual
assault subjects, we'll begin with Colonel
Lewis for the Air Force. And to the extent
that we may have some of this detail before us
already, Colonel, if you could give us the
trends and the detail where necessary, but we
have received a lot of this information
before. Thanks.

   COL. LEWIS: Good morning again,
Judge Jones, panel members. As you know from
yesterday, I'm the Chief of the Military
Justice Division for the Air Force, and I'm
joined by Lieutenant Colonel Eric Coyne, who
is special counsel to the Judge Advocate
General. And Colonel Coyne advises General
Hardy directly, and serves as an action
officer for many different areas.

   First, I wanted to cover just a
few things, and then I'm going to turn it over
to Colonel Coyne to go through the rest of the
slides. But when we're talking about our
waterfall slides and disposition of offenses,
we are talking about substantiated reports.
And that's our unrestricted reports of sexual
assault, and the ones that have been provided
to command for some form of punitive,
corrective, or discharge action against an
offender. So, that definition comes directly
out of DOD's SAPRO policy, that's DOD
Instruction 6495.02, Enclosure 12. So, when
you see some of this terminology on this
slide, you will understand that's the source
where it's coming from.

You heard yesterday from Mr. Poorman that all unrestricted reports since
March of 2013 are opened up for an
investigation by the Air Force Office of
Special Investigation. One point is that the
Air Force does not have our investigative
agency substantiate or unsubstantiated
allegations of sexual assault. They do not
determine whether they are unfounded or not.
They forward all of them with their investigation reports to the commanders for action, where the commander with the advice of the Staff Judge Advocate is able to make that determination.

There are a couple of areas in our slides where the Air Force shows information that might be slightly different than the information that you would see on the DOD SAPRO report, and we're going to highlight a few of those things because they're specific to Air Force policy.

First of all, on this slide you can see that all penetration cases, and that includes attempts, as well, are forwarded to the General Court-Martial Convening Authority for review at least twice. Now, this is an Air Force-specific policy.

The first time that's done is within 30 days after initial disposition by the Special Court-Martial Convening Authority 06, so we're all familiar with the Department
of Defense Withhold Letter, which requires the
Special Court-Martial Convening Authority 06
to look at these cases. The Air Force has gone
one step on policy further to say that the
Special Court-Martial Convening Authority has
to tell the General Court-Martial Convening
Authority what happened within 30 days. And
what that allows the General Court-Martial
Convening Authority to do is if he or she
determines that that action was inappropriate,
that individual might have the ability to pull
a case up to their level.

Second, after the OSI
investigation is closed, OSI is always looking
for what was the disposition? Was it a court-
martial? What was the punishment? Was it a
non-judicial punishment, so on and so forth.
What we're requiring in the Air Force only is
the General Court-Martial Convening Authority
to sign out that disposition to the Air Force
OSI. This, again, insures that our General
Court-Martial Convening Authorities know
exactly what action was taken in a particular case.

I'm now going to turn it over to Colonel Coyne to go through our Air Force version of our waterfall slides.

COL. COYNE: Thank you. Good morning.

CHAIR JONES: Good morning.

COL. COYNE: Ma'am, this first slide -- this will be the same slide that you'll see throughout the presentation. The red circle will jump around to explain which area I'm discussing.

This first slide is 399 sexual assault subjects that were presented in FY 12. This is 271 subjects that were identified in FY 12, and 128 subjects that were identified from prior years, and so giving you a total of 399.

PARTICIPANT: Could you give those numbers again, please, sir?

COL. COYNE: Yes, ma'am. There was
271 subjects identified in FY 12, and 128 subjects identified prior to FY 12. Now, I should note there were 449 unrestricted reports of sexual assault in FY 12, and that -- OSI opened 449 investigations, but only 253 investigations had closed by the end of Fiscal Year 12, and of that, 271 subjects were identified. So, there's a little bit of a gap between switching from reports to subjects, and that takes place after the investigations are completed.

Of the investigations -- excuse me, of the subjects that were identified, the 399, 179 cases were still pending command action at the end of FY 12, so there was 179 cases that had been presented to commanders, but commanders have not yet acted on. And I would suspect that the vast majority of those will appear in the FY 13 slides that come out later this -- excuse me, the beginning of next year.

The next slide, 43 cases command
action is precluded, so commander would not have an opportunity to act on those 43 cases. And they're divided into those four categories. Civilian -- one I'd like to discuss is civilian foreign prosecution. Those were -- the Air Force has a policy to maximize jurisdiction, so we will generally request jurisdiction over a case in every case regardless of the offense.

Air Force policy is to request jurisdiction from the local authorities, so be it overseas or downtown, local authorities oftentimes have the first right of refusal, if you will, if the case occurred -- the offense occurred in a civilian jurisdiction. And we'll approach the local District Attorney and ask for jurisdiction in that case. Sometimes we get it, sometimes we don't. I won't get into too much detail on that. I know you've heard on that matter before, but those cases go away.

The reason I bring that up is because as we go through this, cases only get
binned, if you will, in one category. So, 12 cases were prosecuted say in civilian or jurisdictions. In those 12 cases, that doesn't necessarily mean nothing happened to the offender on the military side. But the way the slides are calculated, they only get binned in one category, so that category is the civilian foreign prosecution. It may very well be that the offender received an administrative discharge as a result of the offense that occurred downtown, but those are not captured on these slides.

So, as a result we had 177 cases presented to commanders for action, and we use that as our denominator, if you will, in determining our prosecution rate, which is unique, which is slightly different in how you could calculate the prosecution rate. And I'll discuss that shortly.

Of those 177 cases presented to commanders, 54 probable cause only for a non-sexual assault offense. And, again, that
doesn't mean nothing happened to those people
or those offenders, that's just not captured
on this slide because you're only binned in
one category.

In 32 cases there was insufficient
evidence of any offense, and those cases are
defined as although the allegations made meet
the required elements of at least one criminal
offense listed in the SAPRO definition of
sexual assault, there was insufficient
evidence to legally prove those elements
beyond a reasonable doubt and proceed with the
case.

For example, if the allegation is
a touching or a groping allegation, meaning it
might be an aggravated sexual contact case,
there may be sufficient evidence to prove the
contact occurred but not the intent element
that it was done for the sexual desire. So,
that would be one that might get binned into
the insufficient evidence of any offense.

In 24 cases, the victim declined
to participate. And this is one that we -- a
category we believe is ripe for improvement,
and some of the initiatives that have
undertaken in the last year to include Special
Victims Counsel Program, we hope will promote
ways -- promote an avenue to better explain
the process, and to allow victims to
participate in the military justice process.

We understand there's a myriad of
reasons a victim may not want to participate,
but we are -- we believe through the Special
Victims Counsel Program and other programs
that we've initiated we're trying to break
down some of those barriers, and hope to
improve this number.

Eleven were unfounded by command,
and those are allegations that reflect a
determination by the commander with the advice
of the Staff Judge Advocate that the
allegation made did not occur and was not
attempted. And, again -- excuse me. And then
the commander declined action, we had no cases
this year or last year where a commander did
-- was presented with a case and did nothing
with that case. They took action in all cases
in one of these categories. And we do not --
our investigative agencies do not unfound any
cases. Air Force OSI, for example, would not
unfound a case, so that's always going to be
zero for the Air Force.

So, that left 56 cases where
commanders did take action, and 42 of those
cases -- commander preferred charges. And
that's where we, as discussed previously,
that's where we would derive our prosecution
rate from, 24 percent down below is 42 out of
177 cases. An alternate way to calculate that
would be 42 out of 56 cases; however, that's
not how we calculate it.

Fourteen cases were non-judicial
punishment, and the last two cases -- excuse
me, the last two rows, admin discharge and
other admin action reflect the reality that
you can only bin a case in one area. So,
that's not to mean that no one was administratively discharged, or no other admin action was taken. Generally, for an admin discharge you have to have some other action, so that case would have been binned in another row.

Again, there's our prosecution rate discussed. Just comparing it to some of the civilian rates, as you know, there is no good civilian comparison on this data, so we have looked to RAINN and asked -- and looked at their data, and how they calculated their data.

And using the number of prosecutions in the numerator, reports made to police as the denominator, RAINN comes up with a 20 percent prosecution rate, so nine out of 46 cases. And a civilian arrest has some parallels to preferral of charges. And using that number for the numerator results in a 26 percent prosecution rate. However, because RAINN pulls these numbers from mixed data,
mixed time frames, they're not very reliable, but it's the best we have as we look to comparable data, leaving our conviction rate of 57 percent.

Now, that was the conviction rate of just sexual assault offenses. If you look at all offenses, so a conviction at court-martial for any offense, 20 of the 23 cases actually resulted in a conviction, and that's an 87 percent conviction rate.

MEMBER HOLTZMAN: Do you have any comparable figures? Are you going to give them with regard to other crimes so we can put this in some sort of context?

COL. COYNE: Ma'am, do you mean, for example, drug cases, or --

MEMBER HOLTZMAN: Robbery, burglary, homicide.

COL. COYNE: I do not, but we could get those.

MEMBER HOLTZMAN: Yes, it would be nice to see what this looks like in the larger
universe. Thank you.

COL. COYNE: Yes, ma'am. And,
again, as we look to the civilian rates in the
civilian comparison, the RAINN conviction rate
is about 56 percent, five of nine cases end up
in conviction.

And I'm having a hard time
figuring out which direction to go with the
clicker, but this is our FY 11 slide. I'm not
going to go through it. It's the same
analysis; however, for comparison sake you can
see where our FY 11 rates -- prosecution rate
and conviction rate are relatively comparable
to our FY 12 rates.

MEMBER HILLMAN: Colonel Coyne,
since you put that up --

COL. COYNE: Yes, ma'am.

MEMBER HILLMAN: -- why does it go
down from 522 to 399? We're looking for
increased -- whenever there's a drop it seems
like a flag to me. What do you think that's
about?
COL. COYNE: Yes, ma'am. We've talked about that quite a bit, not really sure. Reports did not -- reports went up, investigations were the same. The thought was perhaps if you look back, more cases were -- hadn't finished with their investigation yet, so you end up with a subtotal of 399 -- excuse me, 177 instead of 362, more were in the pipeline. It could be a difference in how '11 and '12 data were calculated. Because these are so -- when you pull a case, the way cases have been pulled, aggregated from the bases, you rely on a certain element of getting the right cases and calculating. That could account for some small percentage but, otherwise, there's no -- I don't have a good answer.

MEMBER BRYANT: Judge Jones?

CHAIR JONES: Sure.

MEMBER BRYANT: The prosecution rate and conviction rate, what -- is my math just that poor, or what am I missing here?
Seventy-nine were prosecuted, a conviction rate of 48 which was, I assume, a conviction of 21 versus 44, but that doesn't total the 79, that only totals the 65. So, what happened to those -- you know, 79 were prosecuted but the conviction rate shows the -- it looks to me like it's showing 65 cases, a total of 65.

COL. LEWIS: Mr. Bryant, let me take that.

MEMBER BRYANT: Yes.

COL. LEWIS: It's a great question, and usually what that's representing is cases where the commander preferred charges, they were sent to an Article 32 investigation. That investigation was done, and then those charges were not referred to trial so that we never actually got to trial. So, if you see the 79 number on this Fiscal Year 11 slide, that shows 79 preferrals, but only 44 of those would have been referred to trial and actually made it to that date where we would be arraigning the accused.
MEMBER BRYANT: So, after an Article 32, the commander --

COL. LEWIS: The General --

MEMBER BRYANT: -- did his or her thing.

COL. LEWIS: The General Court-Martial Convening Authority, once he or she has that investigation, is going to look and determine whether it meets the evidentiary standard for referral.

MEMBER BRYANT: All right. And I just picked that one because it's a similar math on all -- each fiscal year you've shown us. When you add up under prosecution rate how many were convicted versus how many went to trial, it's a different number from those that are on the slide as prosecution rate. All right, I understand.

COL. LEWIS: Okay.

MEMBER BRYANT: Thank you.

CHAIR JONES: So, what you're telling us is that there's an enormous
attrition rate between the time that it goes
during this Article 32, is that what it is,
32 process. And almost half of the cases get
dumped at that point.

COL. LEWIS: And there's certainly
a rate of cases that do not go to trial. Those
could be two different things. One, they could
be attrition. There could be that the victim
deaclines to participate at some point after
preferral of charges. And we certainly have
that happen. And our DOD policy is that we're
going to respect that decision. And sometimes
that means that a case that we would be very
happy to take to trial, ultimately cannot make
its way into the courtroom.

And then sometimes it's the case
where there was enough probable cause for
preferral of charges. That commander felt that
there was truth to the nature of those
charges, preferred the charges, but when the
Article 32 investigation was held, that
Article 32 officer made a recommendation, and
that recommendation was followed by the
Convening Authority, and the case was
dismissed and went away.

MEMBER HOLTZMAN: So, do you have
any figures that break that down?

COL. LEWIS: Not for Fiscal Year 12
or 13.

MEMBER HOLTZMAN: Or 11?

COL. LEWIS: Yes, ma'am.

MEMBER HOLTZMAN: May I just
follow-up on that?

CHAIR JONES: Sure.

MEMBER HOLTZMAN: Then that line
that says "victim declined to participate,"
that means victim declined to participate
early, but the victim also declined to
participate late, then that also appears in
that difference between the conviction and
prosecution numbers.

COL. LEWIS: Yes, ma'am. And it
goes back to the binning of cases. So, the
victim declined to participate, that 65 number
you see on the Fiscal Year 11 slide is usually individuals that decline to participate in the investigation or prior to preferral of charges said that they didn't want to participate. There's certainly an element later after preferral of charges where some will fall out and have fallen out. And Colonel Coyne may have some specifics on that number.

MEMBER HILLMAN: This term you're using, "binning." I'm sorry, can you help me with that?

COL. LEWIS: It's my term for describing how a case needs to fit into the slides here and into DOD's SAPRO system, such that the numbers add up when they're counted. It's the best I can describe it. Perhaps my colleagues may have a better term for it.

MEMBER DUNN: May I ask --

CHAIR JONES: Sure.

MEMBER DUNN: So, to clarify, each case is only in one category.

COL. LEWIS: That is correct.
MEMBER DUNN: So, all of your victims who fall out before a referral are in that 65. Yes, your victims who decline to participate before referral are in that --

COL. LEWIS: No, ma'am.

MEMBER DUNN: -- 65.

COL. LEWIS: That 65 'victim declined to participate' would be prior to preferral of charges.

MEMBER DUNN: To preferral. That's -- prior to preferral. And then the ones that fall out after preferral are not in that 65. They're just not -- there's no number for them.

COL. LEWIS: There's no specific number for them.

(Simultaneous speech.)

COL. LEWIS: But we know that it's the difference between -- it's 33 total cases that did not go to trial. A percentage of them the victim declined to participate. And we may have the specifics, I just don't have it in
front of me.

MEMBER DUNN: So, you're saying when we get down to this 79 out of 362, that there are 33 more victims who declined to participate somewhere in that process?

COL. LEWIS: It may be that of that 33, a percentage of those are victims --

(Simultaneous speech.)

COL. LEWIS: -- who declined --

MEMBER DUNN: The other percentage is commanders who based on the evidence and the Article 32 investigation report decided not to refer the case to trial.

MEMBER DUNN: Right.

MEMBER HOLTZMAN: Okay. Just, Madam Chair, just to follow that up. So, you're going to -- you may have figures as --

COL. COYNE: Yes, ma'am, for FY 12 I do.

MEMBER HOLTZMAN: -- on that issue, but are there instances in which -- because I see the commander has the right to
intercede after there's the Article 32
hearing, are there instances in which the
Article 32 hearing examiner believes the case
should go forward, and the commander has said
no? Do you track that in your numbers?

COL. LEWIS: Those numbers aren't
tracked particularly for these slides that we
have in the Air Force. We have looked at that
and determined when, in fact, commanders and
their Judge Advocates disagree on referral.
And the numbers that the Air Force came up
with, and we looked at all cases, was less
than 1 percent of the time did we have that
sort of disagreement between the commander and
the Judge advocate who's providing the
pretrial advice.

MEMBER HOLTZMAN: Well, that's one
-- but that's not my question. My question was
suppose both of them disagree. Okay? With the
trial -- the person handling the Article 32
wants to prefer charges at that point. The
commander and the counselor, the lawyer, say
no, we're not going ahead. Do we have any
numbers on that?

COL. LEWIS: Ma'am, I think I have
to back up into the question a little bit. I
mean --

MEMBER HOLTZMAN: Okay. Maybe I'm
phrasing it incorrectly, and so I apologize
for that.

COL. LEWIS: The preferral of
charges in the Air Force is normally at the
squadron commander level. And that is usually
done with the advice of the Wing Staff Judge
Advocate. And that's based on the truth of the
nature of the charges, and that's what starts
our process in terms of our prosecution rate
number.

Most of these cases are general
courts-martial, and in order to have a general
court-martial you have to have an Article 32
investigation, or the accused has to waive it.
That Article 32 investigating officer provides
an independent recommendation to the Convening
Authority. That goes first to the Special 
Court-Martial Convening Authority, and then if 
the Special Court-Martial Convening Authority 
thinks the case should go forward, it gets 
forwarded to the General Court-Martial 
Convening Authority. So, it's not the 
commander who preferred the charges who is 
making the decision on referral in the Air 
Force. It's just a different individual. And 
it's, many times in the Air Force, a different 
Judge Advocate that is providing the advice.

MEMBER HOLTZMAN: Okay. Whoever it 
is, okay, can we just -- I just want to know 
what that process is between the decision of 
the person who's handling the Article 32, that 
decision to prefer and whether there's 
something that tracks that decision, whether 
it's the initial Convening Authority, or it's 
a new Convening Authority, whether it's a 
Special Court-Martial Authority, or a General 
Court-Martial Authority, there's this process 
that's taking place after the Article 32
hearing in which the Convening Authority, the commander, has some opportunity to say no.

My question is, once the -- do you have any statistics on any incidents in which the trial -- the person trying Article 32 case, says I think this case should go forward, and those authorities say no.

COL. LEWIS: Ma'am, I would say no, because the government representative at an Article 32 hearing does not provide pretrial advice to the General Court-Martial Convening Authority. It is that General Court-Martial -

MEMBER COOK: No. Just to make it clear, the question is if an investigating officer in charge of the Article 32, whether that's a lawyer, whether that's anybody, if that person says I just heard all the -- I just heard the evidence presented. That's not the complete case, but I, as an investigating officer, recommend, because it's only a recommendation, recommend not proceeding with the court-martial.
I think what the question is, any commander, any level, any Judge Advocate in that process, if they say no, but the investigating officer has said yes, do you have cases in that category? And, if so, do you track statistics about how often that happens, where there's a disagreement where the investigating officer who got the credibility, got the people in the room say go to court, but somebody else says no?

MEMBER HOLTZMAN: Thank you.

(Laughter.)

MEMBER HOLTZMAN: I thought I said it, but --

COL. LEWIS: I don't have statistics in front of me that can tell when the Article 32 officer recommends the case go to court, and the Convening Authority says no, I'm not referring that case to court. But that would only be done with the advice of a General Court-Martial Convening Authority, Staff Judge Advocate.
MEMBER HOLTZMAN: Okay, that's fine.

COL. LEWIS: We'll look and see --

MEMBER HOLTZMAN: But I still want to know if that happens.

COL. LEWIS: We'll take for the record, ma'am.

MEMBER HOLTZMAN: Thank you.

MEMBER COOK: I'll add to that. As you're looking at that, my guess is an investigating officer might say no, don't send the case forward. But are there cases where, if you're looking at the statistic anyway, are there cases where that Judge Advocate and the commander instead decide to send the case forward anyway, overruling the investigating officer's recommendation. So, I know you don't have the answer to that, but when you're looking at the one where the investigating officer says go to court, look also at when the investigating officer says no, but they go anyway.
COL. LEWIS: Yes, ma'am.

MEMBER COOK: Thank you.

CHAIR JONES: How are you doing, Colonel?

(Laughter.)

COL. MULLIGAN: If I could break protocol, I can answer that question. In 25 years I've never had a case where the investigating officer said go forward, and the commanding general said no. My only experience has been the investigating officer said no, and the commanding general said yes.

CAPTAIN McCLEARY: Ma'am, just -- and I realize with the Coast Guard you're dealing with a lot fewer numbers, but that's been my experience. I have never seen anything other than the Convening Authority deciding to proceed where an IO recommended against it, not the opposite.

MEMBER HOLTZMAN: Well, I appreciate that clarification but we'd like it from the other services if they could get it
for us. Thank you.

CHAIR JONES: Anyone else want to comment on that before we go on to -- I think we're going to the Navy next, Captain Crow.

CAPTAIN CROW: I'll comment on it, and then I'll just jump in. I would say there's a caveat to that a little bit, because the IO has a determination to make as to reasonable grounds which we would consider to be probable cause, which does not necessarily mean proof beyond a reasonable doubt. So, they could find probable cause just based on an allegation, and then say therefore recommend trial by General Court-Martial. But then within their analysis and recommendations say, however, this doesn't even rise to preponderance much less proof beyond a reasonable doubt. And the commander could say based on that, there's insufficient evidence to get a conviction, and not go forward.

Now, we don't track whether or not that happens on a systemic measure. We just
have to go back and look at individual reports. And to Colonel Cook, we actually for the benefit of Congress this last year, I think all answered RFIs, and similar to Colonel Mulligan and Captain McCleary's comments, where if the Staff Judge Advocate recommended going forward, has a commander ever gone against that recommendation? In the Navy, we pulled data for the last three years and not an instance where that took place, so it's -- I agree completely. Typically, it's been commanders. There's been testimony in other bodies where commanders have said to them it's more about the process than getting the conviction; therefore, sometimes they go forward against the advice, not from the lawyers not to take a case forward. And we've made that public before Congress earlier this year.

Ma'am, very similar to the Air Force as far as methodology, but I'll read kind of what the Navy's rates are, but
understanding that there is no uniform way on how we measure prosecution rate. There is no uniform way on how we measure conviction rate. What you have from the Navy is just our waterfall slides from DOD SAPRO. And even within that, within the DOD SAPRO report, the actual waterfall slides are combined for all services. Within that, we've asked DOD SAPRO to break out the individual Navy waterfall slides, and I've provided you FY 12 and FY 11. But, candidly, I mean, it's mind numbing, so I didn't do a separate breakout for this specific purpose. This is our official report to Congress, and I've spent a significant amount of time trying to understand this. And each time you look at it, it's tough. So, I raise that really to raise the discussion issues.

This one actually is different than the ones I previously provided that are in the waterfall format, so I wasn't going to go with this particular slide here, though.
It's a bit of a snapshot, but that's fine. We can use that.

And I say that, and it goes back to Colonel Lewis' comments on binning a case. We go through and individually take every case, so I sort of refer to it as once they go into a bin they fall off, so they don't keep dropping down. So, if you go through the slides all the way -- or all the bins all the way down, when you get to the end, the numbers have to add up. So, once we put it in that category and victim declination is a perfect example of that, that once it goes in there, it stays in there.

And I'll use another example here in a moment between unfounded and victim declination, and which way we may actually put that in. So, I'm really more going to raise some issues, because I think this is an area worth examining because we are compared. And I will say within the DOD SAPRO report, we capture a whole lot of data, all the way down
into NJPs and administrative separations.

In FY 12, the Navy had 726 reports. Now, going back to Colonel Coyne's comments earlier, all of this data is a snapshot in time, so we've got reports from previous fiscal years that we carry forward. Once a case falls out on adjudication, we've got investigations and prosecutions that cross fiscal years, so it is a snapshot in time up through 30 September of that fiscal year on where that case falls out, is the best way I can explain it on when it falls out, and others are carried forward on the following year. So, a report in a given year won't necessarily match up to an adjudication in a given year, but we had 726 reports.

If you go forward, the Navy preferred charges in FY 12 in 99 sexual assault cases, compared to FY 11 where charges were preferred in 67 cases. That's a 48 percent increase, Professor Hillman, to your point earlier of cases being taken forward to
an Article 32 pretrial investigation and/or courts-martial. And, again, that's preferral, that's not referral to actual court.

The Navy, the question that was raised earlier, of the 99 cases in which charges were preferred, many of which went into an Article 32, some may have actually been then referred to a special court-martial, or later referred to a general court-martial. But of those 99 cases, they were out of 137 sexual assault cases where commander's action could be taken. That's one of the categories within the waterfall charts on commander's action could be taken on sexual assault charges.

This also is an increase over FY 11 where 121 cases permitted commander's action on sexual assault charges, and 67 resulted in preferral of charges. So, the Navy's overall prosecution rate for FY 12 was 72 percent, and it's calculated by preferral of charges in 99 out of 137 cases. So, out of
137 where action could be taken, preferral in 99.

Now, you see the number on that where it actually says commander action taken 176. If you remove the bottom category of the slide below that where it says probable cause for non-sexual offense only, so you reduce that, and then we're back to just sexual assault. So, it may have been investigated as a sexual assault, but there's only probable cause for non-sexual assault defenses, which begs the question of why is that not unfounded over on the other side by command, as opposed to probable cause for separate offenses? And it goes back to once it goes into a bin, it's complicated, and it's a judgment call in putting these cases in the bins. Yes, ma'am?

MEMBER HILLMAN: Do you guys talk to each other about the bins?

(Laughter.)

COL. MULLIGAN: No, ma'am.

MS. MANSFIELD: I can answer that.
The guidance comes from DOD SAPRO on how to bin cases, so the services provide -- there's a set of instructions, and the services then coordinate with DOD SAPRO with guidance from SAPRO on how we're supposed to bin cases in order to make it consistent.

MEMBER HILLMAN: So, then -- but these slides are different than what we have from SAPRO. Are they exactly the same thing? I thought that -- like, for instance, I thought that the Air Force prosecution rate is somewhat different than what it looked like in the SAPRO report. Is that not correct?

COL. COYNE: The rate we show is lower than what the DOD SAPRO report would reflect, because we believe you should take out the non-sexual assault cases and just report the sexual assault cases, because this is a sexual assault report. So, we just look at that; hence, our numbers reflect a lower prosecution rate, and a lower -- excuse me, conviction rate for just the sexual assault
offenses.

MEMBER HILLMAN: Is that the only
difference between what you do and what
everybody else does? And does everybody else
do anything else different than what SAPRO did
on this?

COL. COYNE: One of the other
unique differences, I think most of us, the
investigating — so the MCIO, Air Force OSI
does not unsubstantiate any of our cases. So,
before — so, our commanders get all of our
cases to adjudicate, which I think it gets
factored in when you look at — and I use this
very subjectively, but the quality, the type
of case that is presented. If you have an
investigative agency that said no, we
unsubstantiate this, so you're only being
presented with substantiated cases, I think
you get a different type of case. So, that's
one difference that we don't -- our MCIO does
not substantiate or unsubstantiate any case.
And then how we calculate our prosecution and
conviction rates, I believe is another
difference.

CAPTAIN McCLEARY: Ma'am, one thing
I will say, and I'll wait and take my turn,
but we did ours fairly differently, because we
don't -- we're not required to participate in
the DOD SAPRO, and we broke things up somewhat
differently when we did our waterfall.

CAPTAIN BROWN: And just to make
one more point. I'm sorry to jump in,
gentlemen. The issue with binning is
difficult, and I think the services do it a
little bit differently. And to illustrate that
point, I'd just like to go over a brief
hypothetical about how one case can be binned
different ways, and each service might be
doing it a little bit differently.

So, take the example of a Marine,
and there's an allegation of a sexual assault
out in town, so there's concurrent
jurisdiction with the civilian jurisdiction.
At the beginning, the civilian jurisdiction
decides to take that case, and over the course
of their investigation the victim then decides
to decline or participate in that
investigation. So, even right there you have
two possible bins, civilian jurisdiction
taking the case, or victim declined to
participate. So, then after the civilians
decide we don't want this case any more, the
commander can then say well, you might not
want it, but I want it.

So, then the commander will do his
investigation, it may go to an Article 32
hearing. And then at some point along the way,
the victim again decides to -- declines to
participate in the military action. So, then
in that case I think you have -- and the
commander says well, based on that, I'm going
to unfound this case. I don't think this
happened. So, in that case you have four
possible bins that that case could have gone
into.

First it could have gone into
subject -- civilian or foreign authorities
prosecuting the service member. In that case
it would have fallen out early. Victim
decided to participate, or then the action,
charges were preferred because it went to an
Article 32, so it could have gone in that bin.
But then afterwards, the commander said I'm
going to unfound this case because I don't
believe it happened. So, four different bins
for the same case, and we all might be doing
it a little bit differently, which is part of
the reason why this is not the model of
clarity either, and to the extent that you are
a panel that's going to make recommendations,
I think this is ripe for recommendations.

COL. COYNE: And I would agree with
that. The other problem is regardless of where
you bin the cases -- somebody once told me
eyevery not everything you can count counts. And
I think as you look at this, I would -- what
are we counting, and what are we getting
after? We are counting a lot of stuff, and I
-- the more I look at it, I -- like Captain Crow alluded to, every time I look, and I've got tons of fancy spreadsheets, and I've compared and contrasted, and I look at it, and at the end of the day, I'm always left with -- and I don't mean this negatively, but I'm left with somewhat of a so what? What does this tell me? Is this good, is this bad? Is it going in the right direction? And I think that's one of the things we grapple with, as does the civilian prosecutors, I would suspect. What is a good rate?

I know General Harding has mentioned before, you know, is 100 percent conviction rate a good rate? Well, I think most prosecutors would say no, that it's a broken system. Zero percent, probably the same answer. So, as we struggle with this, I think that is -- where you bin it is somewhat -- somewhat clouds the real question of what are we getting after? And just because we can count it, does it really count? And how do we
find the statistics that really help us understand where we're going, and where we can make improvements?

COL. MULLIGAN: Colonel Mulligan for the Army. Ma'am, if you -- when we get to our slides, our slides are completely different because this is how we look at ourselves. This is not -- the numbers come originally from SAPRO, which aren't necessarily helpful to looking at yourself. How do you improve yourself? Where are things going? So, what we did as a level of fidelity, every case that I'm going to give you, every number has a case attached to it. I can go back with fidelity and tell you exactly what happened. The bins to us were unimportant. What we wanted to know is where are we? What are we doing?

And even in things like sex assault is not sex assault across the board, there's a difference between rape and a touch. And if you bin them all together, the numbers
get skewed. And if the panel is looking at rape, penetrative sex assault versus the touching offenses, those should be broken out. And if you start with a number that has all founded offenses, but there's 100 unknown perpetrators, then certainly the prosecutor shouldn't be held accountable for 100 people that are unknown perpetrators that you can't prosecute. And, at the same time, we shouldn't be held accountable for the 100 cases that are downtown, because a civilian District Attorney had a greater interest in prosecuting those cases. So, if I start with 500 and I have 100 unknown perpetrators, and 100 cases downtown, but you want to give me my denominator of 500, I'm 200 short before I ever get to prefer all the charges.

So, that's why -- I spent most of my career as a litigator. I want to know where I am. I don't get better if I don't know where I am. So, binning all that stuff together for me, that may be great for someone who has a
statistical background. I was an English major.

(Laughter.)

COL. MULLIGAN: I need to have a staff member sit beside me so I can interpret the data, and it has to be broken out simply. And I think the frustration across the people you have sitting in front of you is your frustration as you try and look at that waterfall slide and figure out what does that mean?

CHAIR JONES: Why don't we go to the Army?

(Laughter.)

MEMBER COOK: You're up, Colonel Mulligan.

CHAIR JONES: All right. Captain Crow, was there anything else you wanted to add?

CAPTAIN CROW: No. I mean, I can give you the rates of prosecution. I can give you the conviction rates within that, and each
one of the methodology for the Navy. I did
follow the DOD methodology just going down
that waterfall, so prosecution rate, again,
preferral of the cases, and then the
prosecution rate, or conviction rate of those
cases that went to trial, you know, what the
results were.

But I think just for purposes
here, and we can provide that in writing, as
well. I may have a couple of other comments to
just raise to the panel, in general, but let
the Army walk through theirs.

CHAIR JONES: Yes, go ahead.

MEMBER HOLTZMAN: Have you
explained what unfounded means? Is there a
general definition of --

COL. MULLIGAN: Ma'am, that's my
first slide.

MEMBER HOLTZMAN: Okay.

COL. MULLIGAN: Thank you very
much.

MEMBER HILLMAN: And is it
different for all the services?

COL. MULLIGAN: Yes, ma'am, it is
different for the services. I can only speak
to --

PANELIST: We don't use it at all.

COL. MULLIGAN: Ma'am, I apologize
for seizing the reigns. However, thank you
very much for this opportunity to address you
today, and I am joined by Janet Mansfield, a
staff attorney with the Office of the Judge
Advocate General, who has devoted a
substantial amount of time to this, and will
help keep me straight.

First of all, some of our critics
have -- I have prepared remarks that I will
also give to the panel members, and our slides
have already been made available.

I'll jump right down to -- the DOD
method of tracking is flawed. It's flawed for
four reasons, and I'll follow-up with that.
It's first flawed because the DOD annual
report is a snapshot in time. The total
figures report include those made throughout the fiscal year, so necessarily reports that have not yet even been investigated or disposed of by a commander are, in fact, included.

In fact, at any given time, approximately half the reports are still pending investigation and disposition. There's been no meaningful prosecution rate that could ever include allegations that haven't even yet been investigated.

Second, the total reports figure includes reports in which a soldier is a victim but the offender is a civilian. It does not even fall within the jurisdiction of the Army, and certainly no prosecution rate for the Army can include allegations over which we have no jurisdiction.

Third, the total reports include restricted reports which the victim has elected not to have the allegation reported to law enforcement; therefore, there's been no
investigation, and there's been no disposition by the command. Certainly, no meaningful prosecution rate can include those allegations.

Fourth, and most importantly, the total report figure covers a wide spectrum of eight separate offenses. It ranges from rape to an unwanted touch over the clothing.

The grouping together of the disposition data collectively across that spectrum does not accurately measure the disposition decisions. At one end of the spectrum, rape, commanders should be considering general courts-martial, while at the other end of the spectrum an unwanted touch over clothing, perhaps non-judicial punishment or administrative action is more likely appropriate.

No meaningful prosecution rate would ever group all of those offenses together. Therefore, in order to accurately study the disposition of the decisions Army
commanders have taken, the Army has broken this data down to examine offenses separately in which there's jurisdiction over the offender, a completed investigation, and a disposition decision made by a commander.

So, with your permission I'll walk you through eight slides clarifying Army commander's disposition of the allegations of rape, and aggravated sexual assault, the two most serious penetrative offenses covered in the annual report.

My first four slides will address rape allegations, slides 5-8 will address aggravated sexual assault allegations, and I believe this will give you a fidelity to understand our efforts.

COLONEL HAM: Colonel Mulligan, when you say aggravated sexual assault, you're talking about the pre 28 June 2012 version of Article 120. Is that correct?

COL. MULLIGAN: Yes, ma'am. We've actually grouped together for '12 both
offenses that were in play at the time, so the incapacitated sleeping victim is included in there, as well.

Slide 1. Now, what you have up there right now answers Judge Holtzman's question on a definition of founding.

(Simultaneous speech.)

COL. MULLIGAN: I apologize, ma'am.

Founding is a probable cause determination, so when you look at the total subjects in completed rape investigations from FY 12, and preceding, the ones that were carried forward, you get 476. That's merely rape, so right away you'll notice from the other numbers reported the Army by size has a much bigger number when it comes to our sex crimes, in general, but certainly regarding rape.

Founding is the probable cause determination. The commander does not have a role in a founding or unfounding of a case. Lawyers in coordination with investigating agencies, CID for the Army, make that
determination. And it is a permanent law enforcement record.

Unfounding would be -- unfounding does not equal false reports. Unfounding means that there is a missing element of the crime that does not allow you to found it. It does not mean something didn't happen, it means you lack probable cause. So, of 476 allegations 358 were founded, 118 were unfounded. Again, it does not mean they were false reports.

So, now let's look at the founded cases. On Slide 2, 358 subjects were founded allegations at the top, so now we start subtracting out as we come down to get to what we can actually action. So, we first subtract the 66 subjects who were civilians or unknown perpetrators because the Army didn't have jurisdiction over them. You then take out -- now, we'll come back to the civilian jurisdictions. So, 68 soldier offenders, civilian jurisdiction was retained, and then in that box it's broken out further what
happened to those.

Just because the civilians took them, we didn't forget about them. We tracked those. Commanders had an interest in what happened. So, 224 remaining Army reports, 38 are still pending, and they'll be carried forward.

This leaves us with 186 subjects in which there was jurisdiction over the offender, and a final disposition. Army commanders preferred court-martial charges against 104 subjects of those that were ready for disposition, so if charging is your prosecution rate, then it's 56 percent.

On the same slide, if you look to the box to the right of the 68 soldiers subject to prosecution by civilian jurisdiction, those are the results, 22 were dismissed, seven were prosecuted, 11 were prosecuted for non-sex assault offenses, 28 are still pending. So, if you use 40 as your denominator it was a 17 percent prosecution
Slide 3, please. So, we look at the 104 cases who were -- charges were preferred. The charges were indicted, brought by information, whatever your system brings. Thirty-eight are still pending, so 66 cases were completed by the end of the FY. Of those 66 cases, 16 resulted in dismissals for evidentiary issues. And this is something a little different in the military system versus my experience in Tulsa, Oklahoma, 10 cases there was admin separations. RILO is a Resignation in Lieu of Court-Martial, that's an officer. So, 10 accused accepted punitive discharges rather than face court-martial. In those cases, a prosecutor would have been presented with sort of like a plea bargain. The defense will come and say in those cases the person has to admit guilt, and they are dismissed. They relinquish all benefits of their military service, and they receive a punitive discharge, something that was not
available to me or to Mr. Bryant in his practice as a civilian, so I can eliminate someone from the service, I can strip them of all benefits and rank, but I don't get a conviction. Forty cases were tried to findings, that means a verdict. Of the 40 cases tried to findings, 31 were convicted, nine were acquitted, 78 percent conviction rate for those cases that were tried to findings.

Next slide. So, I want to go back to the 82 subjects in the founded allegations that did not go to court-martial. That doesn't mean nothing happened to them. We, again, tracked each one of those individually. Two soldiers were administratively separated for rape after the victim declined to cooperate, so they were still -- action was still taken against them even though the victim declined to cooperate. Seventeen soldiers were given non-judicial punishment for a non-sex assault offense, four soldiers were given some type of
adverse action for a non-sex assault offense. Thirty soldiers were given no punishment because there was insufficient evidence of any offense to prosecute, and 23 soldiers were given no punishment because the victim declined to cooperate in the investigation or prosecution, and there was no other available information. We do go forth in cases where the victim declines to participate if we can through other means prove the offense.

So, what I've tried to do with these four slides in contrast to SAPRO's waterfall slides is to give you some fidelity how the Army accounts for every allegation of rape in Fiscal Year 12 to a level of detail that I think you require.

Each allegation can be traced to the name of a victim and a subject in our database. A description of each of these offenses and the exact punishment imposed is publicly available on the DOD SAPRO website, and we think this level of transparency is
important to the services and understanding of our system.

Slides 5 through 8 do the same thing, the same analysis that I've just taken through for sex assault, aggravated sex assault involving a sleeping or intoxicated victim. Next slide.

On slide 6 you'll see in cases which there was jurisdiction over the offender and a final disposition, the Army commanders had a prosecution rate of 59 percent. Of the 37 cases that the civilians took, they had a prosecution rate of 14 percent.

Again like before in the rape cases, we start with 379 suspects and founded allegations. We first subtract the 23 subjects who are civilians or unknown perpetrators. Again, we can't be held accountable for our inability to prosecute them.

Next, we subtract the 37 subjects who were soldier offenders over which there was concurrent jurisdiction, but the soldier
and the civilian authorities elected to have
the case tried by the civilians.

Finally, we subtract the 53
subjects who had a completed investigation and
were still pending disposition. And on this
same slide if you look to the box to the
right, 37 soldiers subject to prosecution by
civilian jurisdiction, the Army also tracked
the results of those. Of the 37 subjects, four
were prosecuted for sex assault, 10 were
prosecuted for lesser offenses, 14 subjects
had charges dismissed, and it results in a 14
percent prosecution rate. Next slide.

Of the 157 cases preferred, 55 are
still pending. You have 102 cases completed by
the end of FY, 102 cases completed, 13 were
dismissed, 20 admin separations, 69 cases
tried to findings for a 78 percent conviction
rate. Next slide.

Coming back to the 109 founded
allegations that did not result in court-
martial, there's a breakdown individually of
action taken against each and every one of
those soldiers. In some cases there was no
punishment because there was insufficient
evidence. Next slide.

So, of the 272 founded allegations
of wrongful sexual contact now, now we're down
to the touching where you would not -- even in
those cases, 68 soldiers were court-martialed,
33 soldiers were administratively separated,
91 received non-judicial punishment, 46
received other adverse action, and only in 34
cases was there no action taken. Next slide.

Again, I was an English major, not
a math major, so I had to have Janet explain
this to me three times to include this morning
at breakfast.

(Laughter.)

COL. MULLIGAN: So, what is
important here is when you look SVP Program
2009, and as I appeared before you yesterday,
that is when the Army initiated the Special
Victim Prosecutor Program. When we took our
best litigators and we put them in special billets, specially trained. They did OJT with civilian jurisdictions, and they were brought on board. And what you see is a dramatic increase both in the number of courts-martial from 2009 to present, the number of convictions, and the number of discharges of court-martial results, almost 100 percent.

So, the Army in 2009 recognized through our TJAG and our other senior leaders that we needed to do a better job in the prosecution of these cases, so we dedicated our best litigators into this fight, and it's paid pretty significant dividends.

This is my final slide. It shows what I believe is the success of the SVP Program, and it also shows that working with commanders at every level, these hand-selected professionals have developed an expertise in sex assault cases that's unprecedented.

Since these efforts started, the Army has seen an over 100 percent increase in
prosecutions, convictions, and sentences. The program now is being expanded. It will now include dedicated paralegal and Special Victim Witness Liaisons to these prosecutors to better resource them, and these efforts demonstrates that Army is taking the issue of sex assault accountability very seriously.

I thank you for your patience, and I'm happy to answer any questions.

CHAIR JONES: Thank you, Colonel.

Any questions?

MEMBER BRYANT: I have a question, whether it's service-wide or maybe this has come up in some of our other hearings, and I just missed it.

Is there a time frame in which the Convening Authority has to make the decision? And, if so, what is that time frame? Once you've been through the Article 32 and it's referred up, is there a time frame, a prescribed time frame for that Convening Authority to make that decision?
COL. MULLIGAN: He's the -- we have a speedy trial, 120-day speedy trial clock. You have to get to arraignment within 120 days of preferral excluding defense delay. So, the Convening Authority has to get those charges referred to court-martial in time to do an arraignment. For a general court-martial it's five days, so the accused gets the charge -- he can waive service, but he gets the charges five days prior to what we know as civilian arraignment. So, in my experience, you see the Convening Authority about once or twice -- once a week, maybe twice a week. And as soon as a investigation comes in, it's the next appointment.

MEMBER BRYANT: Is that 120 days, whether the defendant, I'll call him the defendant at this point, is in custody, or out of custody?

COL. MULLIGAN: There's additional requirements for speedy trial if he's in custody. And you can still have an Article 10
violation for not moving forward. You can't sit on something. The defense -- we have aggressive defense counsel, so even though you're within your 120 days, if your case is not moved for a period of time, they can file dismissal.

MEMBER BRYANT: All right, thank you.

CAPTAIN BROWN: Sir, the 120 days starts either from the date of preferral or the date that the accused entered pretrial confinement. So, usually when he's in pre-trial comment, that's prior to preferral.

MEMBER BRYANT: All right.

COL. MULLIGAN: Sir, my experience, every staff Judge Advocate has a pretrial confinement report. That's like your redline. If someone is in pretrial confinement, you know exactly what day 120 is, and you are moving significantly faster in those cases. It would be relief for a trial counsel to have a case break 120. You would not want to go back
to the office if you just had a case dismissed.

MEMBER BRYANT: Well, that's --
yes, civilian prosecutor's offices track it the same way, that same way, and it will be the -- it's a job ender to miss one.

COL. MULLIGAN: Right.

MEMBER BRYANT: Yes. Thank you.

MEMBER HOLTZMAN: Might I just ask a question? First of all, thank you for the clarity of the figures. And it just raised one question in my mind. And it may be just -- I didn't quite understand how you were presenting it. You said that these are founded cases, when you went through the numbers you had founded cases, which means probable cause --

COL. MULLIGAN: Yes, ma'am.

MEMBER HOLTZMAN: -- to proceed.

COL. MULLIGAN: Yes, ma'am.

MEMBER HOLTZMAN: Then you say in the reasons for not having a conviction, that
there was insufficient evidence. Can you --

COL. MULLIGAN: Yes, ma'am.

MEMBER HOLTZMAN: Is there an inconsistency between those? I don't want to call them bins because you're not doing bins. But is there inconsistency, or could you explain that for me?

COL. MULLIGAN: No, ma'am. I think in your experience you would believe there are cases where there's probable cause to believe a crime has been committed, and the offender has been identified, and in an analysis of whether there is beyond a reasonable doubt in the ability to get a conviction.

MEMBER HOLTZMAN: Okay. So, that's what you're referring to.

COL. MULLIGAN: Yes, ma'am.

MEMBER HOLTZMAN: Because you say insufficient evidence to prosecute, but if you have probable cause you do have sufficient evidence to prosecute, so there's a little bit of lack of clarity in those numbers.
COL. MULLIGAN: Yes, ma'am, but it could be you went to the Article 32 and realized you have search issues, you have search and seizure issues, you have witness availability issues other than the victim. So, what you have, you remain with probable cause, it remains as a founded offense, but your ability to action that through trial to get to beyond a reasonable doubt, you've made the determination --

MEMBER HOLTZMAN: Do you have the ability to access the analysis for the insufficient evidence, and then -- I mean, in other words, to drill down and then analyze it, and then say well, we need to work on this issue, we need to work on that issue?

COL. MULLIGAN: Yes, ma'am.

MEMBER HOLTZMAN: Okay, thank you.

CHAIR JONES: Because am I right that cases are never unfounded by a commander. They're unfounded by the investigative --

COL. MULLIGAN: In the Army, yes,
ma'am.

CHAIR JONES: In the Army.

COL. MULLIGAN: Yes, ma'am.

CHAIR JONES: CID.

COL. MULLIGAN: Yes, ma'am.

CHAIR JONES: Okay.

COL. MULLIGAN: Ma'am, my experience with CID is they never unfound anything.

(Laughter.)

CHAIR JONES: Okay.

COLONEL HAM: Do they have to seek the advice of prosecutor/trial counsel for that decision?

COL. MULLIGAN: Yes, ma'am.

COLONEL HAM: Is it binding on them? This is the probable cause decision, the founding or unfounding, is it binding on them?

COL. MULLIGAN: I have had disagreements in my career with founding and unfounding. They've always been -- CID was more likely to found than I was as the
prosecutor, but I'll have to get back. I know
-- I'd have to go back into the regulation. I
believe it is --

MS. MANSFIELD: An unfounding is
not binding on the decision to then later
prosecute that case. So, for example, we will
open a case with a new victim, sometimes look
backward, find another victim of that same
offender where that offense might have been
unfounded and that doesn't prohibit us from
then prosecuting that case. So, if further
evidence developed, new victims, that type of
thing then the Army commander could take an
unfounded case to trial.

COL. MULLIGAN: And, anecdotally,
we just had that happen yesterday.
Anecdotally, we had a case prosecuted and a
15-year conviction in a sex assault case for
a case that was originally unfounded.

MEMBER COOK: Just one question. We
have -- as part of the materials that were
provided to the panel for read-aheads were a
couple of articles, one of which talked about
the UCMJ system only being -- even in a
deployed environment all the cases -- the hard
cases are generally brought back, and then
there's a reply to that that talks about no,
some of them are there. Do you know for your
cases during the statistics that you've given,
some of those cases, were they tried in the
deployed environments versus returning them
back to home station?

COL. MULLIGAN: Cases are tried in
the deployed environment. In fact, we have
judges do regular rotations to theater. There
is a vigorous debate within the JAG community
about deployed justice, whether you can do
justice in theater. I firmly believe you can.
We have SVPs that were actually in theater
doing Article 32s.

Cases that are brought back, are
usually brought back for logistical reasons.
Cases can be tried forward.

MEMBER COOK: Can and are.
COL. MULLIGAN: Can and are tried forward. Cases are brought back for logistical reasons. They're not brought back because you can't do them. They just may be hard.

MEMBER COOK: Thanks.

MEMBER HILLMAN: Okay. I think we'll move on to the remaining bins. So, shall we do the Marine Corps first? Captain Brown.

CAPTAIN BROWN: Yes, ma'am. And I'll report FY 12 numbers, and I'll go through this relatively quickly because I know we're well over time. But before I do, I'd just like to mention that the legal reorganization of the Marine Corps, the old community, started at the beginning of FY13, so we really feel like those numbers are going to be more indicative of the current state of affairs in the Marine Corps. That said, I'll go through the FY 12 numbers.

In FY 12, the Marine Corps had 435 reports of sexual assault, 102 of those are restricted, and then 333 of those were...
unrestricted. So, as you can see here of those
-- when we go from reports to subjects
including pre-FY 12 subjects, there are 387.
Of those 387 subjects, 288 had a disposition
for reporting in FY 12, so the remaining ones
-- the remaining subjects were still pending
at the time this report was created.

So, like previous members
mentioned, this is a snapshot in time, so the
extent that these numbers offer any fidelity
it's that one snapshot in time.

So, if you move on to J, which is
the next page. So, J includes every subject
who had a disposition for reporting. Of the
288, 93 subjects were outside of the DOD legal
authority, and just to issue spot one more
problem with the way this data is reported,
included in subject outside of DOD legal
authority, are those subjects where the
civilian or the foreign authority is
prosecuting the case. And in that case,
they're not necessarily outside of DOD's legal
authority because the commander can also take
case either after the civilian prosecution or
concurrently.

So, once you drop the 93 out who
are outside of the DOD's legal authority, the
Marine Corps had 195 subjects in FY 12 who had
a disposition, or the commander considered
possible action, 85 of those subjects the
command action was not possible.

Additional issue spotting with
that, it's titled, "Command action not
possible," however, it includes the victim
delaying to participate in the military
action and insufficient evidence. So, command
action in those cases is possible, but that's
a policy decision; we do not go forward with
those cases. So, that leaves 89 subjects where
evidence supported commander action. Thirty of
those subjects had sexual assault charges that
were substantiated, and 59 of those subjects
had other misconduct charges substantiated.

Of the 29 subjects where sexual
assault charges were preferred, 24 of those
proceeded to trial, 83 percent, and then 16 of
those subjects were convicted for 66 percent
conviction rate.

Now, there's obviously a lot of
different ways to calculate conviction rates,
prosecution rates depending on your agenda,
and at what point you want to start. This is
how the Marine Corps calculates its conviction
rates.

The other slides show dispositions
for NJPs and non-sexual assault offenses. But
barring any questions, that's the Marine
Corps' data that it has to present.

MEMBER HILLMAN: Thank you, Captain
Brown. Do we have any questions for the --
okay, let's hit the Coast Guard, Captain
McCleary.

CAPTAIN McCLEARY: There are some
hazards to going last. And, also part of it
being that in Fiscal Year 13 we had a total
service-wide of 11 cases go to trial, so our
numbers end up being a lot smaller, so rather than kind of walk you through what all of our numbers are. I wanted to talk a little bit about some of ways -- we ended up doing our waterfall that differs slightly from how DOD SAPRO puts them together. As we were engaging in this exercise, there was some information that we thought would be useful for us to know that we just weren't getting. So we made the decision to measure not only what the disposition was by subject, but then also to measure the disposition based on the victim and what the allegations involving specific victims were, because the numbers don't match up. We have subjects who were involved with several different victims, so we measured it both ways. And then we did break out how we measure between what we characterize as serious sex crimes: rape, forcible sodomy, aggravated sexual assault, and aggravated sexual contact. And we did lump them together because, again, our numbers are fairly small.
And then cases where it was more of the sexual contact events.

And the way that we made the decision for which way they ended up was based on what the initial allegation was. So, this involves on of our attorneys and the CGIS Sexual Assault Program Managers going through every single file and looking for what information was in there about what the victims had alleged. And based on that, that's how we decided whether it fit into one of the -- either the serious or the contact crimes.

The other thing I'd just very quickly point out is, we don't use any form of founded or unsubstantiated in our assessment of cases. Basically, if CGIS conducts an investigation, the legal office that serves the Convening Authority gets involved in all of those, are presented in some form to the Convening Authority. And we don't use any method by which they don't make it there because we don't think there's probable cause.
Again, we somewhat have a luxury in that we don't have that many cases, but we don't use that process at all, nor use those terms. And CGIS is extremely careful about -- their reports of investigation never make an assessment as to whether or not they think there's probable cause or likelihood of conviction. So, rather than drag you through yet more numbers, I'd be happy to take any questions.

MEMBER COOK: I have one. On page -- on your complete investigations where you also looked at what allegations the victim may have made, on page 5 of your submission it talks about how -- you have 11 cases, in two of your cases there was -- the investigation revealed the allegation was fabricated by the victims, and that -- and on your chart it then says that command action was inadvisable. Can you mention whether or not -- I mean, if it was completely fabricated what, if any, action was taken against the person who made a false
allegation against another service member or a civilian?

CAPTAIN McCLEARY: There's two cases. I'm familiar with the facts of one of them. I don't know the facts of the other one. The one that I'm familiar with was basically a ship had made a port call. There were allegations that there was a sexual assault that took place in a Navy lodge at Guantanamo Bay, and the person alleged that they had been drinking and were assaulted by three crew members.

In the course of the investigation there were two other people in the room at the time the assault took place besides the three alleged attackers. There was someone that walked in the room while there was activity going on, and the drapes were open so there were actually three other people that stood by the window and watched what was going on. And those nine people all agreed that the person that made the allegation was actively
participating in what was going on.

The other instance I'm not familiar with. And that person was -- that individual was later court-martialed but not for the allegation, it was for drug use that the person engaged in after the incident that resulted in the initial charges against the three individuals. And those three individuals were also prosecuted, but they were prosecuted for indecent acts, basically because they were doing certain things in front of an audience.

MEMBER HILLMAN: Thank you, Captain McCleary. I wonder if you or others have general comments. I know, Captain Crow, you had mentioned you might have a sort of general comment about the numbers. You were a little bit cut short there in your presentation of the statistics. As we think about what we ought to take away from these, and what sort of guidance we might consider, if you have general comments, and then we'll see if there's other questions before we close.
Captain Crow?

CAPTAIN CROW: Not as to the numbers overall other than I would say each individual case is evaluated on its own merits, and so it's really hard -- you know, we track them all the way through, but not every invest -- or every report is a true allegation, not every allegation is a true crime.

And the one comment I did want to talk -- and the other thing I'll say, probably have seen more of a trend over the last year, at least. And I know Admiral Buck testified previously that maybe for this Fiscal Year 13 our numbers aren't final yet, and we haven't released them, but probably expecting around a 40-45 percent increase. So, three different trends, Representative Holtzman, going to your question on the trending.

But I wanted to comment just briefly on victim declinations, and I talked about that as an example of putting it in two
different, you can call it a bin or category, but labeling what that was. And I kind of throw it out as food for thought in the sense that if you've got a case that the commander is going to unfound, and that -- within the Navy, just like the other services, except Army, NCIS does not make that judgment call. That goes -- all those cases go to the command, and the command then makes the determination with all the legal advice that's been described earlier. But when you've got a case that just doesn't meet the elements, so really it's going to be unfounded. But if you talk to the victim and you explain that, and the victim says okay, I don't want to go forward, you know, which category do you put that in?

If you put victim declination, then they have buy-in to that process as opposed to what most state jurisdictions would do, is just evaluate it, write the one-page letter and say, "Declined to prosecute due to
insufficient evidence." So, getting the victim buy-in into that decision on declination, we then call it a victim declination as opposed to unfounded.

Now, you could go the other direction on that, but I raise that in the sense of there's been a fair amount of discussion of victim declinations is because they were unsatisfied in the process. And that's not necessarily the case. In fact, sometimes they're given everything and then they make that decision, and that's just the category we put that in. So, I just wanted to raise that as not every victim declination means they're unsatisfied with the investigation, they're unsatisfied with the prosecution.

In fact, the two years that I headed the Trial Counsel Assistance Program, you know, we actively educated the victims on the different challenges within the cases, and would take the declination statements. I know
it was raised yesterday, and I'll kind of
finish with that, on do we follow victim's
preferences. And it is in DOD policy, and I'll
quote it. "The victim's decision to decline to
participate in an investigation or prosecution
should be honored by all personnel charged
with the investigation or prosecution." So,
that is our policy.

Does that mean that you cannot
order or subpoena if it's a civilian victim to
testify? No, but do we give great deference to
an adult sexual assault victim's preference on
cooperating? Yes. And, again, all these
numbers we've talked about here today are all
adult cases. These aren't the child cases, as
well. Child cases, I submit, you know, is
probably quite the opposite. Even if the
family does not want the offender prosecuted,
especially if it's in her family, we give no
deferece to that decision and go forward on
prosecution.

So, I leave that as just a couple
of other thoughts out there when we're looking
at some of these different reasons that some
of these cases, I called it fall off, but
don't get all the way into prosecution or to
verdict.

MEMBER HILLMAN: Thank you, Captain
Crow.

COL. COYNE: Ma'am, just to follow-up on the FY 13 data. I think it's important
to evaluate that, as well, when it comes out
later next -- early next year because of so
many things that occurred at the end of FY 12,
for example, the SECDEF's initial disposition
memo came out the 28th of June, 2012,
elevating the initial disposition to the first
06 Special Court-Martial Convening Authority
on all penetration offenses, other programs
for the Air Force we instituted this Special
Victims Counsel in early 2013, so those -- a
lot of the statistics, a lot of those
initiatives that took place will be reflected,
at least in part in the FY 13 data. So, I
think as we look through, I think most folks have mentioned that the FY 13 data will be very important for trend analysis.

Again, I go back to what I mentioned earlier. I'm not sure what trends are important an what aren't, but it's -- I think it will be informative.

MEMBER HILLMAN: We look forward to having you all to help us figure this out, what's important and what's not.

MEMBER HOLTZMAN: Also, I don't know if you're prepared to do this now, but if you could give us your own individual assessment of how this data should be reported, that would be more accurate, clearer, and more acceptable to you, we would -- I, at least, would be very grateful to receive it. I know the Army is totally satisfied with what it's doing, but the rest of you seem to be quite frustrated. I don't want to put words in your mouth, but -- by the present system. So, we would welcome your
explicit suggestions on how it should be changed.

MEMBER HILLMAN: I do appreciate Colonel Mulligan and Ms. Manfield's focus on the individual, identifying the data behind them. I mean, these are stale numbers as they come before us, and we realize they represent individuals. And to have a victim-centered, offender-focused process, we have to realize that there are people that are behind this. And the way that the Army has broken that out does help with that.

It does make me worry, though, about the say 53 in the rape cases of persons, or in the -- there are more than 100 persons on that list who no action was taken against because of -- for different reasons. So, the offender-focused part of that, your slides actually highlight what we're concerned about with the soldiers who are out there who, at least, might be -- pose potential risk to other service members. So, focusing on those
individuals, I know, helps me.

So, thank you all. Any other questions from the panel? Okay. I think then for Judge Jones we should take a break for lunch, so thank you for your time. We'll get back in half an hour.

(Whereupon, the proceedings went off the record at 12:49 p.m., and went back on the record at 1:34 p.m.)

COLONEL HAM: If everyone could please get seated, we're going to get started again. Thank you.

CHAIR JONES: Good afternoon, everybody. We have and I mentioned this yesterday, we're very lucky to have Dr. Spohn who is the Foundation Professor and Director of Graduate Programs School of Criminology and Criminal Justice at Arizona State University. And we'd be delighted to hear from you now, Doctor.

DR. SPOHN: Good afternoon. Thank you for inviting me here today and for asking
me to talk about this critically important
issue. First by way of introduction, I've
spent probably the last two and a half decades
doing research on case processing decisions in
sexual assault cases. Most, but not all of my
work has focused on prosecutorial charging
decisions in these cases, but I recently
completed a study for the National Institute
of Justice on policing and prosecuting
decisions in sexual assault cases in Los
Angeles County.

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

So I've been asked to review the
material prepared by the various branches of
the military service and to compare and contrast outcomes in the military justice system with those in the civilian justice system. I'm going to begin my presentation by talking about some of the challenges that are inherent in making those comparisons and then with these very important caveats in mind, I'll talk about three outcomes, unfounding prosecution and conviction.

So one of the challenges and we've already heard some about this today and yesterday, is that the definitions that civilian law enforcement agencies use and those used by the Department of Defense are different. For most of its existence, the Uniform Crime Reporting Program used the definition of forcible rape that was very similar to the pre-2007 definition used by the Department of Defense, that is carnal knowledge of a female forcibly and against her will. This definition which was changed by Attorney General Holder in January of 2012,
did not include oral copulation, sodomy, penetration with an object, offenses against men or female on female offenses. And all of that changed then with the change in the definition that was implemented, as I said, in 2012.

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

Another difference and a challenge is that the data that was presented in the waterfall slides includes both the restricted
and the unrestricted reports and that causes some challenges in terms of knowing what the denominator of these rates should be and I'll talk about that in a moment.

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

Again, this complicates the situation in that data for the military services, but not data for civilian authorities must account for cases that fall outside the jurisdiction of the military services. Although there may be some cases that are reported to civilian authorities that involve crimes that are committed outside the
jurisdiction of that agency, these cases are rare. When this occurs, typically the law enforcement agency to whom the report was made will unfound the report and refer the case to the appropriate jurisdiction. As I said, however, these kinds of cases are rare. And in contrast in Fiscal Year 2012, cases that fell outside the jurisdiction of the military services accounted for 16 percent of all unrestricted reports of sexual assaults.

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

This is complicated, however, by
the fact that the military services use
different definitions of outcomes, especially
unfounding, and they calculate prosecution and
conviction rates differently as we just saw in
the presentation just prior to this. So
again, this raises issues about trying to make
comparisons, not only between the civilian and
the military systems, but among the different
military services and so I'll have a
recommendation at the end of my presentation
regarding this.

Another challenge that I
encountered in trying to make some sense out
of all of this data is that the outcomes are
not directly comparable. If we look at the
Uniform Crime Reporting Program, we know that
the FBI does not distinguish between offenses
that are cleared by arrests and offenses that
are cleared by exceptional means. And so --
and I can talk about the difference between
those categories if you would like, but what
this means basically is that clearance rates
are not the same as arrest rates. Although they are sometimes interpreted the same, they do not mean the same thing.

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

Let's start with the decision to unfound the case. One of the most important and highlighted criticized decisions made by law enforcement officials is the decision whether to unfound the crime or the charges. In the civilian system, if the official investigating the crime determines -- believes the victim's account of what happened and determines that the incident constitutes a crime, the case becomes one of the offenses
known to the police that will be included in the jurisdiction's crime statistics and reported to the Uniform Crime Reporting Program. If on the other hand the officer does not believe the victim's story and therefore concludes that a crime did not occur, the case is unfounded.

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

This was apparently the case in Baltimore in 2010. The Baltimore Sun reported
that about a third of all rape cases were
unfounded by the Baltimore Police Department.
They have since changed their unfounding
policies and procedures and I believe that
their unfounding rate is now down to about
nine percent. So the FBI guidelines on
clearing cases for Uniform Crime Reporting
purposes state that a case can be unfounded
only if it is determined through an
investigation to be false or baseless.

The handbook also stresses that
police are not to unfound a case simply
because the complainant refuses to prosecute
or they are unable to make an arrest.
Similarly, the International Association of
Chiefs of Police on investigating sexual
assault cases states that "the determination
that a report of sexual assault is false can
be made only if the evidence establishes that
no crime was committed or attempted and that
this determination can be made only after a
thorough investigation." Both the Uniform
Crime Report's handbook and the IACP policies and procedures guidelines, in other words, stress that unfounding is possible only after the police have conducted a thorough investigation and they must conclude that a crime did not occur.

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

The problem, of course, is that these are decisions made by individual law enforcement agencies which may not interpret
the FBI guidelines in the same way. For example, in the study that I recently conducted in Los Angeles, we found that the Los Angeles Police Department generally was making unfounding decisions that were consistent with the FBI guidelines. By contrast, the detectives with the Los Angeles County Sheriff's Department unfounded very few cases, about one percent of their cases. If they believe that the allegations were false, many of the detectives in the Sheriff's Department cleared the case by exceptional means which is a misuse of the exceptional clearance.

So in contrast, the Department of Defense Annual Report on Sexual Assault in the Military defines unfounding in the following way. "When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense or the offense was improperly reported or recorded as a sexual assault, the
allegations against the subject are considered to be unfounded." Although the report also refers to allegations that are false or baseless, there are subtle differences in the definitions that the two systems use in defining unfounding.

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

So it appears from the data and the accompanying material that I was provided with that both the definitions of unfounding and the procedures by which cases are unfounded vary among the military services and I think we just saw evidence of that in the presentations that preceded mine. In the
Army, the decision to unfound is not made by commanders, but by the prosecutor and only cases that are deemed to be founded are presented to commanders to investigate. Moreover, in the Army, founding is a probable cause determination, not a determination that the case is false or baseless. The Air Force and the other agencies, the determinations that cases are to be unfounded are made by commanders, but the definitions of what constitutes unfounding differs somewhat. The Air Force follows the UCR guidelines in referencing cases that are false or baseless. The Coast Guard categorizes cases as unfounded if the investigation revealed that the entire allegation was fabricated which would seem to leave out those baseless complaints. And then both the Navy and the Marine Corps simply, at least in the materials that I was presented, simply use the term unfounded without really defining it.

Again, this makes comparing
MEMBER HOLTZMAN: Excuse me, perhaps I misunderstood the testimony, but you say here that in the Army the decision to unfound is made by the prosecutor. It was my understanding from the prior testimony that it was made by the investigative agencies.

DR. SPOHN: No.

MEMBER HOLTZMAN: Okay.

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

MEMBER HOLTZMAN: I thought it was by the CID.

MEMBER McGUIRE: The CID -- they work together.

MEMBER HOLTZMAN: Okay.

DR. SPOHN: So again, this makes comparing data on unfounding across the military services problematic if they're using different definitions and different procedures. But in reality, it's not unlike
the civilian system where in reality the
different law enforcement agencies also may be
using somewhat different interpretations of
the Uniform Crime Reporting Guidelines with
respect to unfounding.

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

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

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

Again, the study that I conducted in Los Angeles, we reviewed the cases that were unfounded by the Los Angeles Police Department in 2008. We found that most, but not all of these cases were, in fact, false or
baseless and we estimated the proportion of false reports in Los Angeles to be 4.5 percent of all the sexual assaults that were reported to the LAPD in 2008. So this is consistent with that two to eight percent range that is found in other research.

So in calculating the rate of unfounding the military, one must first determine what the denominator should be. Should it be the total number of allegations in any particular year, the total number of allegations investigated in a particular year that had a disposition by the end of that year, or the total number of allegations that had a disposition in a particular year and also involved the subject who fell within the Department of Defense legal authority?

If we use the latter as the denominator, as the appropriate denominator for calculating the rate of unfounding, there were 594 subjects, excuse me, there were 2,661 subjects of investigation with a disposition
by the end of Fiscal Year 2012. If we subtract from that the 594, who were subjects outside the Department of Defense's legal authority, this yields 2,067 subjects. Three hundred sixty-three or 17.6 percent involved allegations that were unfounded by MCIO and therefore no action was taken against the subject. And an additional 81 or 4.8 percent involved allegations that were unfounded by commanders. Thus, the overall unfounding rate for the Department of Defense was 22.4 percent.

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

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

Nonetheless, starting with the
Army, we can see that of the 476 completed
rape investigations in Fiscal Year 2010, 25
percent were unfounded. Now this rate is
high, but we have to keep in mind that this is
not a determination that the allegations are
false or baseless. This is a determination
that there was not probable cause to move
forward in the case. And so it's not
surprising then that this rate is higher
because the definition of unfounding is
different. There were an additional 30 cases
in which there was insufficient evidence of any offense to prosecute.

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

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

So for the Marine Corps, again,
there were no cases in which the allegations were unfounded. But there were 41 subjects in which action was not taken due to insufficient evidence of any offense and 21 subjects in which action was declined by the commander and no reason was given on the chart for that declination. So it's not clear why action was not taken in those cases.

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

So what can we make of these statistics given that the civilian and the military systems include different offenses, forcible rape versus the broader category of sexual assault, define unfounding in different ways, and have different policies and
procedures for making unfounding decisions.

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

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

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

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

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

A second way would be to divide preferred cases by reports that were presented to command for some type of action. In doing this, we come up with a prosecution rate of 23.7 percent. And it seems to me that this is probably the most analogous denominator to use with respect to the way that prosecution rates are calculated in the civilian justice system.
which I'll talk about in a minute.

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

So there are similar problems with calculating prosecution rates for the civilian justice system. Do we determine the odds of prosecution based on all cases reported? I think most prosecutors would say no. On all cases that were closed or cleared? Again, I think most prosecutors would say no because this would include cases that were cleared by exceptional means which may or may not have been presented to the prosecutor for a
charging decision. All cases that resulted in an arrest? This is the denominator that is typically used by researchers? Or all cases screened by the prosecutor before or after an arrest or all cases screened by the prosecutor only after an arrest was made.

And again, depending upon how we calculate the prosecution rate, you can see that the odds of prosecution would vary pretty dramatically. I'm using the data from the Los Angeles Police Department from 2005 to 2009 and these are all rapes and attempted rapes. There were 5,031 during that 5-year time period. If we calculate prosecution based on reports, we come up with a prosecution rate of 9.7 percent. If we calculate it based on all closed cases, the rate of prosecution would be just over 20 percent. But if we use the more appropriate charges filed by all cases screened after arrest, we come up with a prosecution rate of 82.2 percent. This figure is a little bit misleading for Los Angeles
because as we discovered in doing our study there, detectives from both the Police Department and the Sheriff's Department present cases to the prosecutor before an arrest is made and the prosecutors make charging decisions in those cases. And so the data that we had from 2005 to 2009 did not allow us to determine the cases that were screened by the prosecutor before an arrest was made. But I'll come back to that data in a minute.

So if we assume that the appropriate denominator for calculating the prosecution rate is the total number of subjects who can be considered for possible Department of Defense action during a particular fiscal year, for 2012, that number was 1,714. However, even making this assumption does not eliminate the challenge of determining the prosecution rate as there are different ways of calculating the rate, depending upon how the numerator is defined.
If we consider only cases in which court-martial charges for sexual assault were initiated, and this again is data for the Department of Defense in 2012, we find that there were 594 cases which yields a prosecution rate of 34.7 percent. If on the other hand our numerator is court-martial charges for any offense initiated, the prosecution rate increases somewhat to 36.8 percent. If we consider only sexual assault charges that were substantiated, but court-martial charges were not necessarily initiated in those cases, the prosecution rate increases to about one out of every two. And if we consider that the evidence supported some type of commander action, the prosecution rate increases to about two thirds.

So the question is which of these is the appropriate way to calculate the prosecution rate? So in the civilian courts, most prior research defines the prosecution rate as the proportion of cases presented to
the prosecutor for a charging decision that result in the filing of charges. We do not have data on the prosecution rate for cases for the United States as a whole, but we do have data for individual jurisdictions and this data seems to hover around a mean of about 50 percent. For example, in Detroit, charges were filed against 66 percent of all criminal sexual conduct suspects. In Kansas City and Miami, charges were filed in 57.5 percent of the cases in Kansas City and 56.8 percent of the cases in Miami.

A six-city study of rape law reform that a colleague and I did back in the early 1990s found that prosecution rates ranged from 37 percent in Washington, D.C. to 62 percent in Houston with the other jurisdictions particularly Philadelphia, Detroit, and Atlanta with rates about 50 percent. In the study that I conducted in Los Angeles most recently, charges were filed against 50.2 percent of all the suspects who
were arrested by the LAPD and the Sheriff's Department in 2008.

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

So in an attempt to sort of summarize what all of this means, there are problems with determining both the denominator and the numerator and this makes calculating rates particularly for the military services difficult and it makes making comparison across systems somewhat problematic. With these important caveats in mind, the rates appear to be somewhat lower for the military system. The overall military rate is 36.8 percent if we think of prosecution as court-
martial charges divided by subjects in cases in which DoD action is possible. The civilian rate again is about 50 percent.

MEMBER DUNN: May I ask a question?

DR. SPOHN: Yes, please.

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

DR. SPOHN: Correct.

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

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

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

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

MEMBER DUNN: Okay.
DR. SPOHN: I only had the --

MEMBER DUNN: But the civilian data is rapes.

DR. SPOHN: Yes.

MEMBER DUNN: Okay, so there's a -

- 

DR. SPOHN: It's apples and oranges.

MEMBER DUNN: Okay.

DR. SPOHN: It is.

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

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

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

DR. SPOHN: Exactly. And if one
had the data, one could reach those kinds of conclusions based on the rape and sexual assault cases only, taking out the aggravated sexual contact and sexual contact offenses.

MEMBER DUNN: Okay, thank you.

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

For the Navy, again, using this consistent definition, one would arrive at a prosecution rate of 26 percent. The Navy presentation indicated that their rate was 56
percent, but this was based on cases in which commander action was taken, not on cases that were presented to the commander for action.

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

        So moving on to conviction rates. I think there are fewer problems inherent in calculating conviction rates, especially for the civilian system. Again, I'll use the data for the Los Angeles Police Department to begin. Charges were filed in 486 of the rapes and attempted rape cases from 2005 to 2009. And of these 486 cases, just over 80 percent of the defendants were convicted. Very few, one percent were acquitted. Charges were dismissed in just about 10 percent of the
cases and in another 9 percent, the cases were still pending.

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

These data, I don't think are necessarily representative of outcomes in the civil justice system overall. And in part, I think that reflects the fact that the Los Angeles County District Attorney files charges only if there is evidence that meets the standard of proof beyond a reasonable doubt and if there is corroboration of the victim's allegations. In other words, they file charges only if they believe that they can take the case to trial and win. And the conviction rate in Los Angeles confirms that that is, in fact, what is happening there.
But we do have data from other jurisdictions that also calculates convictions rates and the SCPS data is probably the most comprehensive source of data on conviction rates in the United States. These are data that come from 75 large, urban counties. The data are collected every two years and it’s a sample of cases that were filed in May of the year in which the data are collected. So the SCPS data, the problem with that data is that it begins with charges being filed and so we cannot calculate prosecution rates using these data. But we do know that the conviction rate for these large, urban jurisdictions was 62 percent with about half of the defendants being convicted of felonies and an additional 12 percent being convicted of misdemeanors. All of these defendants were charged with felony rape. Two percent were acquitted which is similar to the one percent rate in Los Angeles. Thirty-two percent were dismissed. So the conviction rate for these 75 large,
urban counties is lower. The dismissal rate is higher than what was found in Los Angeles County.

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

So in the Department of Defense there were 594 subjects against whom sexual assault courts-martial charges were initiated according to the 2012 report. And of those, 40 percent were convicted of the charges; 10 percent were acquitted. The acquittal rate is higher than the rate that one would see in the civilian jurisdictions which was one percent
to two percent. Charges were dismissed in 14.8 percent of the cases. Now I think the lower conviction rate for the Department of Defense reflects the fact that there are options other than conviction, acquittal, and dismissal in the military system. And these are reflected in the discharge/resignation category which includes about 12 percent of all of these cases.

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

So I have a couple of
recommendations and then some thoughts about where future research might go. One recommendation is I think that the military services should use a consistent definition of unfounding and consistent procedures for determining whether a case should be unfounded or not. The fact that the definitions and the procedures are different means that the overall data for the Department of Defense is in many ways meaningless because it includes cases that for the Army were unfounded because of a lack of probable cause and cases for the other services that were fabricated, false, or baseless. So I think that's sort of a first step is that the military services should use a consistent definition and consistent procedures.

I also think the data I was provided was to say to put it mildly confusing because of the agencies presented their data in a slightly different way so that the case attrition or the case flow slides are not
consistent and so I think there should be a consistent methodology for characterizing case flow or case attrition and for calculating prosecution and conviction rates. I tried to go back and use a consistent methodology for calculating prosecution rates, but if you look through the slides that were presented, the data that were presented by the various military services, you'll see that they have different ways of calculating those rates. And so again, it makes comparing the data across services difficult, if not impossible.

So some conclusions -- I think I'll skip this. I think I've already talked about this. Let me just talk about what I see as the research agenda for the future. I think that one thing that should be done is there should be some kind of analysis to determine why the unfounding rate is higher for the Department of Defense than for civilian jurisdictions. And this would involve a case file review that would be
designed to determine if cases that are
unfounded are, in fact, false or baseless or
if unfounding is being used to dispose of what
might be referred to as problematic cases.
And this is what Dr. Tellis and I did in Los
Angeles and we have a paper coming out in Law
and Society Review, I think in January or
February, that uses this approach and really
tries to tease out what these unfounding
decisions involve and whether in fact, in this
case Los Angeles Police Department was making
unfounding decisions consistent with the

I think a second research priority
should be to identify the correlates of cases
that are not prosecuted and that result in
dismissal or acquittal and questions that
might be asked, what role does victim
cooperation or lack of victim cooperation
play? Research in the civilian justice system
reveals that this is a key factor in cases
handled by the civilian court system. But I
would argue that a related research question would be why do victims decide not to cooperate with the prosecution of the case? So there ought to be some attention paid to that as well.

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

CHAIR JONES: Any questions?

MEMBER HILLMAN: Hi. I don't
really have a question, but just a comment
that I'm relieved that we weren't unreasonably
confused by the data and I appreciate your
guidance for how we might be able to push in
the right direction.

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

DR. SPOHN: There would be
consensus if I were convinced that the
agencies were interpreting the guidelines they
have in a similar way. The Uniform Crime
Reports Handbook is very clear on what
constitutes unfounding, that the case must be
false or baseless and those terms are defined.
Now whether individual agencies are
interpreted those in the same way, I think is
questionable. With respect to prosecution and
conviction, I think there's more consistency
across the civilian jurisdictions that prosecution rates should be calculated based on the cases that are presented to the prosecutor for a filing decision. But the question is what is the analogous stage in the process for the military? And conviction rates, I think that's fairly clear, cases that either result in a guilty plea or a conviction at trial, but again, it's complicated in the Department of Defense by the fact that there are these other outcomes that are possible. But I think some consistent guidelines from the Department of Defense would make making these kinds of comparisons substantially easier.

MEMBER HOLTZMAN: Thank you very much for your very clear testimony. I just have a couple of questions. One is I notice that you identified earlier on a point that I had raised in prior presentation which was the category of insufficient evidence and how that relates back and what does it consist of? And
so I was just wondering whether that ought to be part of your research agenda for the future which is a clearer analysis of what that is. I mean I asked the question and was told well that could conclude, for example, issues of fourth amendment searches which would exclude the evidence and so forth. Who knows what that means and so I think that's a big category out there that in my view should be looked at.

DR. SPOHN: Yes.

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

DR. SPOHN: No.

MEMBER HOLTZMAN: So how would you go about doing an analysis of the victim's
refusal to cooperate? Have you done that in
other jurisdictions?

   DR. SPOHN: Yes. In other
jurisdictions, if the victim refuses to
cooperate there would typically be some
indication in the case notes from the
prosecutor or from the police agency
indicating why the victim refused to
cooperate. Now sometimes it is something
ambiguous. A victim could not be found, for
example. Or victim refused -- victim did not
return telephone calls. But other times there
would be something more detailed written
either by the detective investigating or by
the prosecutor to whom the case was assigned
so that one could go back, if that is
documented in case files, one would be able to
then do some analysis on what types of victims
are less likely to cooperate and what are the
reasons that they give for their failure or
for their unwillingness to cooperate, but that
would have to be documented in the case files
because obviously you wouldn't have access to victims to ask them those questions.

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

DR. SPOHN: One of the allegations, not allegations, but one of the findings of research on victim cooperation or lack thereof is that -- and this is from studies in which victims were interviewed after the fact. Victims get subtle and sometimes not so subtle hints from law enforcement or from prosecutors that this is going to be very difficult and it's unlikely that this case is going to move forward and you would be better off if you would simply let this case disappear, go away. Victims who -- we did some focus group interviews with victims and we found that they were actually
told by law enforcement in some cases that
they should just simply drop the charges or
decide to prosecute or refuse to cooperate,
whatever the terminology is.

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

DR. SPOHN: Exactly.

MEMBER HOLTZMAN: Thank you very
much.

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

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

CMDR KING: Thank you, Madame
Chair. Thanks for having me here today. I am
Commander Donald King. I have been an active duty Navy Judge Advocate since 1995. I will provide background information on the Navy's Defense Service Office, Navy defense counsel, DCAP, as well as discuss the training and experience level of Navy defense counsel in that regard, including attachments that will show you what those training classes entail.

But just to sum that up, the training that our defense counsel gets starts as soon as they're commissioned as a JAG officer within the Navy.

The first thing they do is they go to what we call the basic lawyer course which is about an eight to ten week course on being a basic JAG within the military. Significant amounts of time are devoted during that to trial advocacy and military justice.

So they get the basics of military justice, courts-martial, criminal law, military criminal law, at the basic lawyer course.
Once they leave the basic lawyer course, they go to what we call a RLSO, a region legal service office. That houses most of our Counsel for SJAs and prosecutors. And they also now do our legal assistance.

The counsel, right out of basic lawyer course, will go to that 24 month tour and cycle through the different kinds of things that we do in the Navy, including trial and defense counsel work. However, they're not assigned cases. They can help, they can help write motions, they can do those types of things. But they're not assigned cases.

During that first 24 months, however, they do do some advocacy. They represent our Sailors and Marines, Coast Guard at admin boards, where the Government is trying to forcibly separate them from the service. So they do get some advocacy.

Once they're done with that 24 month tour, then they're eligible to be assigned to a DSO, Defense Service Office,
which is the office that houses our Defense Counsel.

We have four of those, one in DC, one in Norfolk, one in San Diego and one in Yokosuka, Japan, and then DETs of those places spread out all over the world.

So once they get to a DSO, then they receive additional training. The first six months, they'll get what's called defense counsel orientation. And that's just what it sounds like.

Within six months after that, they'll get basic trial advocacy training which is a week long program that focuses on their abilities to argue to members, voir dire, openings, closings, et cetera.

Also within their first year, we send our defense counsel to what we call the defending sexual assault cases class which is a very intense one week course where we bring in experts from forensics and psychology as well as very experienced civilian defense
counsel. And that lasts a week long. So that's usually their first year of training.

Also within that period of time, my office, DCAP, provides training to them, both over the Web, lots of on the spot training over the phone. Our counsel call us quite often, five, ten, 15 calls a day where we'll provide training and answers to their questions.

And there are also, after their first year, some continuing education that's set forth in the packet that I've provided you. Resources permitting, we also attend civilian courses, NACDL, Gerry Spence College, there's a bunch of them out there that we also attend for CLEs. So that's a little bit about training. The rest of it is in the package.

As far as experience, we have counsel who will show up at the DSO with anywhere from zero experience, absolutely never having tried a case before in their lives, all the way up to counsel who've been
doing it for 20 years and are designated as an expert in the military justice track. So the experience varies greatly.

To offset any experience gaps, we have military justice qualified officers stationed in all of our headquarters and some of our DETs.

And then we also, when it's appropriate, we second seat counsel on sexual assault cases when we can. So that's a little bit about the experience level. And I'm going to close it at that and happy to answer any questions you might have at the end of this. Thank you.

CHAIR JONES: Thank you. And for the Army, is that Colonel Ku?

LT COL KU: Yes, ma'am. Good afternoon, members of the panel. My name is Lieutenant Colonel Fansu Ku. And I am Chief of the United States Army's Defense Counsel Assistance Program. I have served in this position since June of 2013.
Today I will just highlight a few areas from the written statement that I have previously submitted to this panel.

First, I'll highlight the mission of our Trial Defense Service, or TDS, and Defense Counsel Assistance Program, or DCAP for short, two, the training and resources that DCAP provides to defense counsel at the trial level and, three, the general procedures that are followed when detailing defense counsel to cases to include cases involving sexual assault.

Our TDS mission is to provide independence, competence and ethical defense legal services to Soldiers. To that end, DCAP provides training, resources and assistance for defense, trial defense counsel worldwide.

Established in 2007, DCAP is staffed by five experienced trial practitioners, military and civilian, to include two civilian highly qualified experts, or HQEs. Both of our HQEs are former military
judges and experienced trial practitioners
with over 40 years of combined military
justice experience.

The majority of defense counsel
come to TDS with prior military justice
experience to include time in the courtroom.
At a minimum, they're graduates of the Judge
Advocate Officer Basic Course, where they have
been trained to serve as the second chair in
all phases of a court-martial.

Once assigned to a TDS, defense
counsel undergo further training from
introductory courses, like Defense Counsel
101, to advanced trial advocacy courses, like
the Sexual Assault Training Advocacy Course.

Besides formal training, the
training status of each defense counsel is
continuously monitored by their supervisors
and adjusted based on individual development.

In addition, defense counsel
routinely reach back to DCAP for advice on
individual cases. As the Chief of DCAP, I
personally view this capability as important as, if not more important than classroom training. As such, a member of DCAP is available around the clock for case consultation.

During Fiscal Year 2013, DCAP received over 2,000 inquiries from defense counsel in the form of emails, phone calls and in-person inquiries during training events.

When court-martial charges to include sexual assault allegations are preferred against a soldier, the senior defense counsel reviews the charges and assigns the case to a qualified counsel. Where appropriate, the senior defense counsel may assign a second counsel to assist on the case.

In sexual assault and other complex cases, a second counsel is always assigned. Every complex case requires and receives an individual assessment of what is the best pair of defense counsel for that
given case.

In conclusion, each of our defense counsel, regardless of their individual experience level, takes to heart our mission to provide independence, professional and ethical defense services to all Soldier clients.

The majority of them are young, company-grade officers, some of them in their very first tour as judge advocates and military justice practitioner, as Colonel Colin, Chief of Army's TDS, previously stated before this panel.

With more and more resources dedicated to the prosecution of sexual assault cases, it may become increasingly challenging to attract and retain defense counsel with the experience who can go on to serve as senior and regional defense counsel.

We currently make up for this inexperience with a strong training program and reachback capability. Moreover, while
many judge advocates start their tours as defense counsel with limited military justice experience, they make up for that lack of experience with a tremendous work ethic and a desire to provide each of their clients with the highest quality representation.

They are supported in their efforts by their peers, supervisors and DCAP. With that, I thank you for the opportunity to address this panel. And I stand ready to answer your questions.

CHAIR JONES: Thank you, Colonel.

All right. Is that Colonel Pitvorec?

LT COL PITVOREC: Yes, ma'am.

Thank you, good afternoon. I am Lieutenant Colonel Julie Pitvorec. I'm the Air Force Chief Senior Defense Counsel for the Eastern and European Regions, and this is my third assignment as an Air Force defense counsel.

Unfortunately, the Air Force currently does not have a defense counsel assistance program. However, setting up this
capability is currently our number one priority within the trial defense division. We've seen what all the other services are able to do with this program. And we are working very hard to get to that capability as well.

The Air Force criminal defense network is broadly divided into three regions worldwide. In total, there are 187 attorneys and paralegals assigned, serving at 69 operating locations worldwide with 85 area defense counsel or base level counsel and 19 senior defense counsel.

Together, we are responsible for providing defense services to the active duty Air Force members worldwide. The vast majority of our operating locations have only one attorney and one paralegal assigned. And they are responsible for defense services at that installation.

The Air Force is unique in that their defense counsel are selected in a very
competitive best qualified standard by the Air Force Judge Advocate General.

   Usually, our first time defense counsel have two to five years of experience working in a base legal office where acting as a trial counsel in court-martial is among their various duties.

   Our new defense counsel have somewhere between eight to ten courts before starting as a defense counsel. But even with that experience level of new defense counsel, one of our biggest challenges that we face, with the defense counsel networks spread geographically all over the world, is training.

   For our formalized training, we rely heavily upon the Judge Advocate General School. In order to be a defense counsel, they have already gone through, obviously, the basic course.

   However, in addition to that, we have our basic course for defense counsel
called the defense orientation course. It is primarily taught by the trial defense division at our Judge Advocate General School.

This course is unique to defense counsel and is a combined course with defense counsel and defense paralegal which focus primarily on how to run a defense office and the minor legal issues which they can anticipate encountering during their tenure.

The defense orientation course is held twice a year in an attempt to catch the incoming defense counsel and defense paralegals as they're coming into the job.

Subsequent training includes advocacy courses at our JAG School. But at the end of the day, we rely heavily on OJT. Likewise, the difficult, for on-the-job training for geographically separated counsel proves complicated.

Out of the 19 SDC regions, only three, San Antonio, Colorado Springs and the National Capitol region have the majority of
their bases in close proximity where driving in for a group training is possible.

It is a constant struggle to maintain a specialized training regimen because of the limited time that defenders remain in the position, usually, only 18 to 24 months for an area defense counsel and 24 to 36 months for a senior defense counsel.

This year, for the first time, the Air Force has initiated a litigation training course specific to prosecuting and defending sexual assault cases.

Air Force defense counsel participated in two different levels of courses, the intermediate sexual assault litigation course and the advanced sexual assault litigation course. Both of these courses were successful and are being reviewed based on feedback for ways to improve.

In closing, let me say that I'm very grateful to be here today. As a judge advocate, I am very concerned about some of
the proposals being considered to modify the Uniform Code of Military Justice, the Manual for Courts-Martial and our Military justice system, more generally.

I appreciate this opportunity to discuss these concerns and the topic of sexual assault in our Armed Forces with all of you. And I look forward to your questions.

CHAIR JONES: Thank you very much, Colonel. Captain Shinn?

CAPTAIN SHINN: Good afternoon, esteemed panel. Thank you for the opportunity to discuss the training of Marine defense counsel as a tack on the issue of representing our clients accused of sexual assault.

My name is Captain Russell Shinn. And I am the Officer in Charge of the Defense Counsel Assistance Program, DCAP, for the Marine Corps Defense Services Organization. I've been in this position since October of 2011.

The views that I express today are
my own. For context to my remarks, I've spent my entire adult life in the Marine Corps. I enlisted when I was 18. And I spent 11 years as an enlisted infantryman and over eight years as an officer and judge advocate.

The vast majority of my billets as an attorney have been in litigation, I've spent both in the defense and Government from Okinawa, to Guantanamo, to DC.

I have been in non-litigation billets as well, Company Commander and Infantry Platoon Sergeant, and led Marines in direct combat in Iraq. I am also a sexual assault survivor.

I say this not to make the testimony about me, personally, but to highlight that when I talk about justice my comments come from both an individual and professional position.

During your thoughtful deliberations today, I urge this panel to look at our clients as people, some of whom stand
falsely accused. Our clients, like victims of sexual assault and other crimes, are real people, impacted by decisions and recommendations that this panel will make.

You've heard pejorative terms like predator and master manipulator. There is a place for terms like those, at sentencing when the facts support the use of them. But the wild abandoned applying them, writ large to accuse service members, is not only incorrect, but it cheapens the overall message by reducing its efficacy. I ask that you keep the message but lose the rhetoric.

The vast majority of our 72 defense counsel, our first two are judge advocates with less than three years experience as an attorney. They typically serve 18 months as a defense counsel before moving on to another assignment.

Right now, the average litigation experience of both senior defense counsel and defense counsel in DSO is a mere 14 months.
That includes both prosecution and defense time.

Despite this unique challenge, the DSO has consistently provided superior representation to our clients owing to the dedication of the individual attorneys and the mentorship provided by the DSO.

Our entry level requirements to become a judge advocate are similar to our sister services and almost identical to the outline provided by Commander King earlier. After a judge advocate joins the DSO, our leadership provides additional training, resources and assistance for defense counsel worldwide.

Part of that piece is my office, DCAP, established in 2011, which is staffed by only two people, me and Ms. Kate Coyne, the DSO's highly qualified expert. She's a retired civilian, public defender from San Diego, with over 30 years experience. And she brings a lot to the table. But at the end of
the day, it's just her and me.

Earlier, the Army Colonel, I forget his name, I apologize, but he talked about fidelity in data. And I'd like to talk about that when addressing challenges facing the DSO.

Last year, Fiscal Year 2013, we tracked data according to cases, because we have clients. We have real people. We have 427 general courts-martial and special courts-martial that went to findings. Of those 427, 108 of those were 120 cases, sexual assault cases. That's a quarter, a quarter of our cases that went to trial were sexual assault. Two hundred and nine of the 427 were contested, half, give or take. So 218 were guilty pleas.

In each one of those sexual assault cases, the defense counsel is faced with the vast resources of the United States Government. In addition, it's often a fight for defense counsel to obtain access to
witnesses, evidence and resources needed to ensure a fair trial.

I'll discuss this fight a bit more later. But combined with the challenges faced at trial, Marines accused of sexual assault are frequently shunned at their unit and on occasion subjected to unlawful pre-trial punishment and unlawful command influence.

While a client who is found guilty may get some relief during sentencing, the innocent client is left with no recourse for the months squandered in the brig, the ridicule suffered and often a career left in shambles.

This is not a non-trivial number of people. Almost 30 percent of the contested cases last year from the DSO resulted in full acquittals.

We must not forget that these Marines and Sailors are also victims. They are victims of the very justice system designed to protect us all. And experience by
the defense counsel to get justice at trial is
only part of the battle.

So ours is a practice dealing with
constant turnover. We normally start at zero,
training young defense counsel for 15 months
or so only to start ratcheting a caseload back
at 15 months, since cases detailed after that
point will not be finished at the point where
the attorney is expected to transfer to his or
her next assignment. Many times this transfer
is to a non-litigation assignment.

Placing greater institutional
value on high quality litigation is key. Our
sister services advocate an exclusive career
litigation track to solve this issue.

However, the Marine Corps is a much smaller
force which presents challenges to adopting
this within our system.

You heard yesterday about
promotion and retention precepts to discuss
the importance of litigation experience, and
that is a possible solution within the Marine
Corps. I would ask that this panel consider
that for recommendations.

The DSO fights for access to
witnesses, evidence and resources daily. And
the effective delivery of litigation services
within the Marine Corps is hampered by the
lack of dedicated defense investigative
resources. So in addition to the lack of
experience, we don't have the people on the
deck to get things done on a case-by-case
basis.

Congress has provided
investigators for the adequate representation
of Federal indigent defendants. And virtually
every state and Federal public defender's
office has in-house investigators.

For example, in the central branch
of the San Diego Public Defender's Office, 80
attorneys are supported by 16 investigators.
In the DSO, we have 72 defense counsel, but
not a single defense investigator.

Based on my and the DSO HQE's
experience, the most efficient and cost
effective way to provide this service is to
create a DSO criminal investigative division
or CID billet as a normal progression in duty
assignments for CID agents.

If each of the four DSO regions
had just two assigned investigators, that's
half the number of comparable to civilian
public defenders, the efficiency and
effectiveness of the DSO mission and the fair
administration of justice would be enhanced by
an order of magnitude.

The next thing that is lacking is
subpoena power. At the 8 November hearing
before this panel, you heard testimony about
the subpoena power, so I won't go into depth
on that. But suffice it to say that the
Defense Board does not have that authority.
We have to request it.

All that information goes through
the prosecutor, who gets to review all that
information before we get it. And they can
summarily deny it. That is an area that is ripe for this panel's inquiry as well.

And that gap can be easily fixed by giving the defense, who are both officers of the Court and commissioned officers, and so when the argument comes forth about abuse of the system, I ask this panel to evaluate who the person is who is asking for the information. These are people who are commissioned officers, who have sworn to protect and defend the Constitution, not someone who is trying to attack the Constitution.

Moving to training, each year the Chief Defense Counsel of the Marine Corps publishes a DSO training plan which outlines the priorities and responsibilities of the leaders and members of our DSO provided in our written statement, an outline of all the courses that the DSO provides and also the on-the-job training that our senior defense counsel and regional defense counsel provide
at the branch offices within the regions.

In addition to those training events, our counsel can also attend our sister services courses and non-DOD training.

My office provides reachback globally. We are on the phone and on email 24/7. We provide a SharePoint site, a Web site that's an online database of motions, discussion boards, you name it. We try to provide that to our defense counsel.

But a discussion of training would be insufficient without describing how the DSO pays for it. And the DSO's budget has taken significant hits over the past few years, as has the entire DOD's budget.

But in Fiscal Year 2011 when I came onboard, our budget was $80,000. It dropped to $64,000 in Fiscal Year 2012, to $60,000 in Fiscal Year 2013 and then again to $36,000 this Fiscal Year, $36,000 for 72 attorneys for training.

Put simply, we cannot train our
defense counsel on this amount. We can't. We have to ask other agencies, the LSSSs to help support us, I'm sorry, the Legal Services Support Section.

And there's a mechanism to ask for that assistance. But it's a situation where we have to beg, borrow and not steal, but beg, and borrow and scrounge to get our counsel to training. We've been able to do that.

Last year we were able to get significant assistance through Department of Navy SAPRO. But without that, it would have been mission failure. And hope is not a strategy.

So I cannot hope that SAPRO is going to give us money so that we can train. But that's where we're at.

COLONEL HAM: For comparison, Captain, do you know how much was allocated to your prosecution counterparts for training?

CAPTAIN SHINN: No, I don't have that. I do have those numbers. I do not have
them in my head, ma'am. What I do know is
last year we spent over 30, I'm sorry,
$300,000 in training for the DSO.

So we were able to cobble together
enough money within to get $300,000 worth of
training for our attorneys, despite having
only our meager budget. But again, that was
cobbled. I don't have that information.

Now, this isn't through some
nefarious intent by the Government to withhold
training from us, as I just alluded to.
They're giving us money, but it's not fenced
off, as was earlier described.

But the prosecution is getting the
lion's share of the resources. They have four
HQEs, whereas we only have one. They have
complex trial teams with a dedicated
investigator and a legal administrative
officer.

Put more simply, getting serious
about sexual assault and complex litigation
requires as a necessary component, getting
serious about funding training for both
counsel about staff.

Now, I've had the privilege of
serving with hundreds of defense counsel
during my 19 plus years of service. And
regardless of their experience level, each
defense counsel takes to heart the DSO motto
of Marines Defending Marines.

Despite the dedication, our
mission is not without significant challenges,
as I mentioned above and in-depth in my
written comments. The right to counsel comes
with it the right to effective counsel. And
we owe it to our service members to make their
counsel effective.

Dr. Martin Luther King, Jr.
famously said, "We shall overcome because the
arc of a moral universe is long, but it bends
towards justice."

And it's up to each of us to
continue to push that arc towards justice,
both for victims which has been the push for
most of the testimony, but also for the accuseds.

And it's relatively easy to stand up for beliefs when it's the popular thing or the in vogue thing. It's relatively easy to be pro-victim or anti-crime. But it can be quite another to be against the injustice done to accuseds, especially when they are already considered guilty by society, by the media, by their unit and by their commander, all prior to trial.

Accused, the tone and tenor of that word being hurtled at you, and stuck on you, and immovable as a label, is powerful. And that rush to judgement, the pre-judging of individual guilt, causes us, as a society, to lose sight of what our founders sought to protect.

Through recent violent revolution from the British Crown, no less, they established in the sixth amendment, they enshrined our right to a speedy and fair
A hundred and eighteen years ago, the Supreme Court held that the principle that there is a presumption of innocence in favor of the accused is the undoubted law, undoubted law, there's a presumption of innocence. But 118 years later, we still struggle with that fact.

And too often, the court of public opinion rushes to judgement, people without all the facts, sometimes facilitated by advocacy groups, or those with an axe to grind or even with a wallet to pad.

But trial at any allegation, even one as serious as sexual assault, can never be merely an inconvenience on the way to conviction and punishment. If the innocent accused are convicted for a lack of defense training, investigation or resources, justice is not served.

And without public faith that the justice system is fair, the system itself will
crumble. And it is up to us as concerned citizens to help ensure that this is remedied. Thank you for your time, and I look forward to your questions.

CHAIR JONES: Thank you, Captain Shinn. There were a lot of issues raised by, for a lot of representatives from each of the services. But I'd like to continue and hear from our civilian defenders.

And as we hear from you, I wonder if you'd begin to talk about things like how many years do you need to be a defender and your own resource issues in training. All right, Mr. Borg.

MR. BORG: Thank you.

CHAIR JONES: Could we start with you?

MR. BORG: Yes, I have to follow that. That's really amazing. I feel like I should invoke Monty Python, but now for something completely different.

My name is Lane Borg. I'm the
executive director of Metropolitan Public
Defenders in Portland, Oregon. We're a
private nonprofit, but we're the primary
defenders in two of the three metropolitan
counties in Portland.

I have a staff of 60 lawyers, 135
staff total, and it's no match to Captain
Shinn, I have 20 in-house investigators for
that. We do everything you can get a court-
appointed lawyer for except appellate work.
So we do everything from civil commitments and
juvenile work up to capital crimes.

We don't divide ourselves in terms
of like a sexual crimes unit. We divide among
major felonies, minor felonies and
misdemeanors. And you work your way up based
on state guidelines for experience.

So if you have a bar card and
you're alive you can do misdemeanors, but
beyond that you need to have demonstrated
experience. So years and trials will get you
into minor felonies and then up into major
felonies where a lot of the sex crimes are.

But one of the reasons I was kind of interested in this, thinking about this and when I was invited here, is to really, you know, why isn't that? I did private practice for 13 years and did a lot of retained work in sex crimes.

I suspect there's, in the civilian world, more percentage or a higher percentage of retained work in sex crimes, but in Multnomah County we have about 1,500 pending cases, as of last week, adult crimes. And of those, 54 sex crimes. So only about three and a half percent of the crimes. It's not a big, huge percentage of our caseload.

And so we tend to focus more in terms of the training. I mean, first of all, and I counsel my friends in the prosecution, I don't why they organize themselves that way. I think it does damage and trauma to people to make them only prosecute sex crimes or only defend sex crimes. I think it's good to get
to do other things.

But as I said, we focus more on training on specific things. And we've actually conspired a little bit in our discussions, and Mr. Porter's going to talk about some training stuff. It's very similar between the states.

So I'm going to talk about, and in preparation for this was talking about some trends, some new practices we're looking at in our state for resolution, not just of major crimes but particularly sex crimes, and that is risk assessment, and trying to incorporate risk assessment into dispositions.

So I'm going to start by telling you I am not an expert in risk assessment, but I think after about 18 months I'm an expert in attending briefings on risk assessment and what I've learned that is going to be important to defense.

And I think this is also relevant and important as I've listened today to your
charge, as the military has expanded sex
crimes into the boundary issues, the touching,
not just a rape or a violent assault, but it's
a much broader definition of what's going to
be brought up. That's very similar to the
states. The states have been dealing with
that and sort of sweeping up different people
and deciding what's going to be a sex crime
and then what's going to be labeled, as I'll
get to, I'll talk about later, sex offenders.

And what I've learned is that
we've got three, so it'll be three levels of
risk assessment that we've applied. Historic
is unstructured judgment, the sociologists
will tell us, which is what we've just talked
about. It's a gut feeling. A judge will have
a gut feeling about what to do or how to
sentence it. And that turns out to be the
worst risk assessment. It doesn't pan out to
be very well.

Then the next that comes in, and
what we're using a lot of in Oregon right now
is what will be considered straight actuarial. So a public safety checklist, the Static-99, these are validated risk assessment to predict whether or not a particular person is going to reoffend in a predictable period of time. One year, three years, five years, I think is the longest that I've seen.

And then what we're getting to in Oregon and what we're really trying to push is the concept of structured judgment. So you look at the actuarial assessment and then you, taking the factors that went into developing that you have a discretionary authority exercising judgment to deviate from that when it may be warranted because one particular factor may be driving the risk assessment.

We've noticed recently as we've endeavored in this that we have a way you can charge if you're 15 or older you can be charged with a major felony in adult court in Oregon.

And we've got a way -- so we
looked at that and we went to the public safety checklist, we're seeing that they're kind of off the charts. They're high risk-high risk because we tend to think youth are high risk. And so we've got to figure out a way to account for that in the analysis.

But a lot of people have asked, well, why would a defense attorney be interested in risk assessment? Why would we be talking about that? And I'll admit, I've drunk the Kool-Aid a little bit. I believe there's something to this. I've been to enough demonstrations and sort of presentations on it that I think that risk assessment is something we should be looking at.

But I also, as I said before, I've never had in 30 years the experience, in absence of information, a judge or a prosecutor assumed that my client is low risk. So if there's something that can talk to that I want to engage that.
Also, more and more and particularly in sex offenses, and I'm hearing that in this presentation today that this is where the military may be going or thinking about going, it's the charge that determines the outcome that determines everything else. So what the person is convicted of is going to determine what their incarceration is going to be, what their conditions of probation are going to be, the length of the requirement to register as a sex offender and the length of that. And if the prosecutor or the judge is going to be interested in what the level of risk is in order to be comfortable with a lower level of disposition we've got to pull that into the pre-adjudication time period. We've got to get that before we decide what the charges ultimately are.

And I want to again emphasize, this is not about someone who's asserted innocence. When someone has asserted
innocence there's a whole process, and some of
the other presenters are going to talk about
that about how you fight that and what needs
to be done and what the standards are.

But I'm talking about using risk
assessment to try to change this concept of
just throw everybody in incarceration and make
them a registered sex offender for the rest of
their life. Because in Oregon we tried that
and we overshot the mark, and we've got a
whole class of people that cannot get jobs,
cannot live anywhere, and they are now going
to be taken care of financially and everything
by society. They're never really going to be
contributors again because they're never going
to have meaningful employment and those types
of things, or they're going to have big
challenges on that.

And the other thing that I've
learned in my journey through this risk
assessment and corrections theory is that
dosage matters. If you overreact to somebody
you can turn a low-risk offender into a high-risk offender.

So if you react in a way to overincarcerate, to oversupervise, you can take someone who may have been, made a mistake with some boundary issues, and after three years that person's no longer going to be a low risk to commit a new crime in the next three years, they're going to be high risk.

And I was talking about one of, I employ, we have a VA assistance program and so I employ a former JAG officer as my VA assistant and he was talking about some of these ideas. And we recognized that, you know, you really have that third option that people have been talking about the civilian doesn't have, the civilian process doesn't have banishment. You know, you can be out, you're not around anymore. We don't have that in the civilian world. They're going to be here.

So I keep hearing 99 percent of
offenders are released from prison back into society. And so it really does matter, if you're taking people that were low risk and turning them into high risk you're doing harm. You're not fixing the system, you're creating a risk to an offender down the road or a victimization down the road.

So I've become a believer in that, you know, we need to do this. This is happening, and finally, I guess, if no other reason, Oregon has made it statutory. All offenders going into supervision will go through a risk assessment and then that probation officer can change their conditions of supervision based upon that.

So we've got to learn how to do this. So what I've learned and what I'm trying to get and we're engaging in, in Oregon with defense counsel, is really teaching the defense counsel what these risk assessments are about. What they do and what they don't do. For instance, they're very good
predictors for low-risk offenders at
predicting at who's not going to recidivate.

If you look at low-risk offenders it's pretty high, 85 percent correct, 90 percent correct in some areas of who's going to be, who's going to not recidivate. Not so good on the medium and high-risk offenders.

If you look at the numbers they will predict, they have false positives. They'll predict that the person is going to reoffend as a high-risk offender, and about 60 percent of the time that person does not reoffend.

And so we've incarcerated them, we've done a bunch of things to them and yet when you track the history that person in fact did not go out and reoffend. Risk assessment is not a validated tool for length of stay.

That's the other thing that we get concerned about is that prosecutors will say, well, this person's a high-risk offender so you should max them out. You should give them
the maximum amount of time. There's no
studies that support that at all. All you're
going to do is make them a higher risk
offender and keep them in prison longer and
spend a lot more resources. And if you think
you're making it better because they're given
a longer sentence that's a misuse of it.

And then as I have learned in
going into it, the factors like the Static-99
which is the most common, widely spread in
North America anyway, most of the validation's
been done in Canada, a tool for sex offenders
is that there's only about ten or 11 factors
that go into it.

Well, one of the factors is have
you lived in a stable, domestic relationship
for two years? Well, look around at 22-year-
olds, look around at folks in the military,
look around at, you know, with the changing
and emerging issues on gay marriage, look at
gay couples, you know, they're not going to be
able to score probably well on that factor,
and we as defense counsel in advocating for that structured judgment need to know that and need to understand these so that we can get behind the test, look at it and say, well, was that an outlier? Did that person score higher on the test because of something that is not really a risk factor in this person's situation or is controllable, something we can meet a needs on or change?

And so that's one of the big training challenges we're engaging in as we go down this road of using risk assessment to try to determine who really is somebody we need to be worried about and somebody who really needs, you know, with some addressed needs and supervision can live safely in society and not be reoffending on that.

And I'll be glad to answer any questions. Thank you.

CHAIR JONES: Thank you, Mr. Borg.

Is it Ms. Kepros?

MS. KEPROS: Kepros.
CHAIR JONES: Kepros? I see you are the director of sexual litigation, so you do specialize in your office, is that right?

MS. KEPROS: I do. My name is Laurie Rose Kepros. I work for the Colorado Office of the State Public Defender. We have a statewide agency. Our office is in charge of all the public defense through the State of Colorado. We have 21 regional offices. As of the 1st of January we will have over 600 attorneys. We are expecting to handle 134,000 cases in this fiscal year.

Just to give you some points of reference to some of the military numbers, I investigated overnight how many felony sex cases were filed in Colorado. It looks like in the last fiscal year there were about 2,200. So again, it's a small percentage of cases, but these are cases that take a grossly disproportionate share of resources. And frankly, I can tell you that my prison system would say the same. We have over 25 percent
of our prison population is there for sex
crimes. My probation agencies would say the
same. We have something like a third of their
resources going to supervising those people
who are convicted of sex crimes. So it's a
very complicated world when sex crimes are
involved, no question about it.

Of the cases that my agency
handles I can tell you that my job did not
exist until 2010. There was no such thing.
In terms of general training we have what we
call a boot camp program that our attorneys go
into. It's a seven-day intensive bring-your-
own-case-work-shopping-kind of a program.
They get that at about a year. There are
other shorter trainings delivered by the
agency on court trial skills. So they get
general litigation skills.

Similar to some of the other
people you're hearing from right now, we have
a lot of turnover. We're a public defender's
office. That is where people go to get some
experience, and sometimes unfortunately they move on. So we are constantly training new people and so we're very sensitive to those challenges.

What largely drove the creation of my position I believe was the State of Colorado's decision in 1998 to pass something called the Lifetime Supervision Act, which means that for almost all felony contact sex crimes the defendant is facing a life sentence either on probation or in prison, depending on the charge. We became very concerned about the quality of representation that we were providing to these defendants whose lives were literally at stake and my position was created to provide support, not just to people who are charged with those crimes, but representation on sex cases across the board.

I provide a service that I think is most similar to the military model of highly qualified expert. I no longer carry a caseload. I did serve as a trial attorney for
over 10 years in the public defender's office. I am the only public defender that I know of in my state who ever had a sex offense caseload. In the years 2005 and 2006 I personally represented five percent of the defendants in the state who were charged with one of these lifetime crimes.

So I've spent a lot of time looking at these issues, but we end up with these cases being geographically disseminated throughout the state. Some of our offices have two or three attorneys in them. Some of them have more than 50 attorneys in them. So what's available in terms of support and resources varies a lot. So I consult on a lot of cases. I threw out that number for one fiscal year of approximately 2,200 felonies. I should actually correct that. It was 1,750 felonies. It was 2,200 total adult sex filings. So that included misdemeanors that were more like 400 or 500.

In the last three years that my
job has existed I have consulted on approximately 1,600 cases. So I think you can say I have touched 20 to 25 percent of the sex cases that have been filed in the State of Colorado personally. And so that is a resource that I provide among the special issues that I feel arise in the context of sexual offense representation. And I do regional training. I go out to these offices. I give them a lot of this information.

A particular area of concern that I have has to do with the use of experts in these cases. We are the Government. We don't just give people money because they say they want to hire an expert. We expect our defense counsel to understand why they would need an expert. We require of them justification for spending that money.

The difficulty is if you have naïve defense counsel, they will not identify those needs. They will not be able to justify the appropriate resources and support for
their cases. I think some of the issues that Mr. Borg brought up are a great example. You know, we have in my state also a mandatory psychosexual evaluation process for anybody who is convicted of a sex crime. Well, you know, knowing how to make sense of that is an important skill to have and it takes a lot of reading and research and training to be able to do that. And knowing the nuances of instruments like the static 99, it takes skill.

Things have come up in the course of other testimony before this Panel over the last couple days, frankly, that I can tell you as somebody who's done a lot of reading and research, I disagree with some of the claims that have been made about crossover, some of the claims that have been made about the average number of victims for whatever this thing is, quote, "sex offender," close quote, because it's not a homogenous thing. But, you know, you need to have a lot of education and
training to appreciate these are even issues.

Certainly we have tons of cases where there is no physical evidence, and that can make the social science issues even more complicated to tease out as people come in and say, well, is this behavior consistent with someone who's been sexually assaulted? And, you know, boy, I really need to know a lot to do an effective cross-examination on that kind of topic.

If somebody is in a case where there's physical evidence, I better know how to cross-examine a SANE nurse. I better know something about gynecology. I've had to learn about abortion. I've had to learn about hysterectomy. I'm just throwing out some, you know, things that come up in practice that you have to go get educated about to be effective at representing your clients.

Above and beyond that, there are the realities of things like plea bargaining, sentencing, what is appropriate? One issue
that is really concerning to me is the collateral consequences that may flow from even being accused of a sex crime. In the last I think just two years the United States Supreme Court has recognized a specific duty of defense counsel to advise clients of collateral consequences, including I would submit to you things like registration as a sex offender, things like all the other things that will happen in your life if you are adjudicated for this kind of offense. In my state we do include military dispositions among the things that will trigger registration.

Across the country you will find from state to state to state all kinds of rules, rules about whether you can photograph children, rules about whether or not you can go into a public library, rules about whether or not people can trick or treat at your house that may be triggered by some sort of contact with a sexual assault allegation.
I can tell you if somebody were accused through the military process of a sex crime, even if they were never adjudicated, even if there was never a court-martial, if there's some record of that floating out there and it is learned about by my prison system, if you come into my prison for a non-sex crime, for a crime like let's say theft, if that's out there, it may be enough to create a situation where you'll be treated as a sex offender subject to mandatory sex offender treatment, required to submit to full sex offender conditions on parole which tend to include things like absolutely no contact with anyone under age 18, including your own children, restrictions on access to the Internet, restrictions on where you may live. You know, it's a very serious consequence, even aside from incarceration consequences. And that could flow from something that is never adjudicated even by the military.

So I'm very concerned about
defense counsel being aware of these things.

The other major concern I have is that we see because of the desire to prosecute these cases, a desire that legislators I think often understandably share -- we see the constitutional protections that generally are made available to defendants have exceptions cut into them when it comes to sexual assault cases. We see rape shield laws. We see laws that allow certain kinds of hearsay to come in that might otherwise not in another case.

So we take a case that is among the most serious kind of accusations that someone can face and we take away some of the protections that might otherwise be present for them. So you need defense counsel who are effectively constitutional experts who have the skill and knowledge and legal ability to bring constitutional challenges to some of these rules that are peeling back some of the protections that we are accustomed to having in normal criminal defense practice. And, you
know, these are not minor things. These take
a lot of knowledge. These take a lot of hard
work.

The other thing is you've heard
about FETI. You heard about some of the
different interview techniques that have come
up during this panel. Those techniques change
all the time. I hope they're changing for the
better. That's a great thing if they are,
right? We want evidence-based practices. But
it also means now I have to go learn about
that, and I have to train my staff about that.
And so it's not that, oh, we've trained up
somebody one time and now we're done. It's
here's the next hot thing or here's the next
trend and suddenly we all need to go learn
about it.

Risk needs responsivity, which is
sort of the short term for what Mr. Borg was
talking about. Don't over-supervise low-risk
people. That's become kind of a buzz word in
the policy world that I'm in right now. And
so you need to go read the literature and know about these things and being some sophistication to the process.

Because one of the other realities is at the end of the day well-meaning prosecutors, well-meaning judges, well-meaning probation officers, they may not have all the relevant information themselves. And especially if we are looking at systems, model systems where investigators are going into the process saying we are going to believe the victim no matter what, well, somebody else needs to be investigating what else may be going on. Somebody else needs to be figuring out what other concerns or considerations need to be brought to bear in this situation to have any shot at any kind of just results.

CHAIR JONES: Thank you very much, Ms. Kepros.

Is that Ms. Muth?

MS. MUTH: Muth, Your Honor.

CHAIR JONES: Muth?
MS. MUTH: Thank you. My name is Amy Muth. I'm from Seattle, Washington. I'm in private practice, different from my colleagues, but I was a public defender for seven years and very proudly still identify myself as being a public defender.

We do things differently in Washington in terms of how we administer public defense services. We don't have a statewide agency. Rather, it sort of goes county by county and there are a couple of larger counties like the Spokane County Public Defender's Office, Pierce County, Snohomish County, Whatcom County which all have agencies that contract with their county government. King County, which is where Seattle is, is a little bit different in that we have four non-profits which contract with the government. And that of course is being consolidated into one or two different agencies. It's kind of a mess right now. But the main way in which public defense services are administered
throughout Washington State is through public defense contracts.

So individuals can apply for and receive a public defense contract by submitting a request for proposal when the appropriate times comes up with either the statewide Office of Public Defense or with the local county agency. In Washington we now have standards that counsel needs to certify and has to sign off on; every public defender in the state needs to do this, which indicated they're going to abide by certain standards of representation. I submitted those in my materials.

Specific to sex crime cases there are minimum standards of qualifications. You need to have been a lawyer for at least a year. You need to have done at least one felony trial and another trial with the assistance of another attorney. What I would say about that standard -- and I want to talk more about my experience having worked for the
largest agency in the state, the Defender Association in Seattle, what my experience was in practice in terms of what the expectations were for counsel. That standard is a floor. It's not a ceiling.

My experience, both having worked for a small public defense firm and having worked in Seattle is that at most agencies it's the typical you'll start out in district court, you know, doing misdemeanors for about two years, eventually move up to doing felonies. And you'll start off with low-level felonies. And most people usually don't start taking on sex offenses until they've been in practice for some time. And there are a variety of reasons for that.

A big one is what has been touched upon by this panel already. If there's one thing we can drive home to you it is that the consequences for these offenses are severe if you are convicted. In Washington State we have the Indeterminate Sentencing Review
Board, basically a parole board that was formed by the legislature in 2006. And an individual who was convicted of a sex offense that is eligible for the ISRB has a minimum sentencing term set by a judge. And then when that person goes to prison, the Indeterminate Sentencing Review Board can either parole them at the time that they've served their minimum term or they can have another five years set and another five years up until they've served the statutory maximum, which for many of these cases is life. So it has resulted in a lot of cases now being viewed as potential life sentences.

So when we do trainings for this and when I do trainings -- and I've spoken at a number of facilities. I've done trainings for a lot of the agencies throughout the state. That's one thing that we need to drive home to them. And I certainly echo Ms. Kepros' remarks regarding how difficult and the level of expertise that it takes to do
these cases properly.

It was a sex offense case, a juvenile case, but the principles are the same, that really led to the development of having even these model indigent standards that counsel needs to abide by in these cases. And I think it touches very nicely upon Captain Shinn's remarks regarding the duty to investigate these offenses properly. And that case is State v. A & J.

And in this case a 15-year-old kid accused of a sex offense spent, according to the opinion by the Washington Supreme Court in its findings, defense counsel spent 55 minutes total with the client before his plea hearing, did no independent investigation including interviewing witnesses that the client had produced, made on discovery requests, filed no motions, did not even review the plea agreement, did not consult with experts, did not inform the child that his school would learn that he was a sex offender, did not
inform the child of the mandatory minimum
sentencing term and had not even used an
investigator during the prior contract term.

And I'm not at all suggesting that
this is the standard of practice in the
military, but I say this to point out the need
to rigorously defend and enforce the duty of
counsel to investigate these cases properly
and to make certain that they are given the
tools to properly investigate these cases.
That means having investigators available.
That means having training with counsel. And
in fact our supreme court said that even
counsel believed that his client was guilty,
he still had a duty to do some investigation
in this case so as to properly advise the
individual of the consequences of pleading
guilty or whether it was a good idea to do
that.

And I would also point out that
doing a proper investigation often has the
impact of reducing prosecutions because cases
resolve. I cannot tell you how many times I have gone into a witness interview with a client who has said, you know, Ms. Muth, Amy, you know, I'm not guilty. I didn't do this. I didn't do this. I interview the witness. I have a tape recording. I play it for the client. And the client hears how that witness sounds and the client now has a different assessment of what his case should look like. Or conversely, I produce a witness for the prosecution to interview and I just say, you know, you've got to listen to this witness. You've got some problems with your case. And the prosecutor will listen and will say, you know, you're right, Amy. I need to make a different decision about what I need to do with this case.

So investigating it's not only what is required under the 6th Amendment. It is what makes certain that justice happens in these cases. These are cases that carry serious consequences for individuals. There
are a number of competing difficult interests
to balance against and I just urge that based
on our experience in Washington this rather
unfortunate experience that we all learn from
that and that we rigorously protect and defend
the duty of counsel to investigate these cases
properly. Thank you for your remarks.

CHAIR JONES: Thank you.

MS. MUTH: Or -- sorry. Oh, yes.

CHAIR JONES: Mr. Porter, you're a
statewide trainer in New Mexico?

MR. PORTER: Yes, Madam Chair,
good afternoon, and distinguished members of
the Panel. I first want to say I am just
honored to be sitting at this table with these
men and women in our military service that are
providing blood, sweat and tears for people
that are accused of crime within our military
justice system.

I am the training director for the
State of New Mexico Public Defender
Department. We have 200 in-house attorneys
and about 120 contract attorneys and I'm basically responsible that when they go in to defend one of our citizens in New Mexico that they are able to do that very competently. And I kind of look at your role here, too, because you're to be coming up with a system and developing a system that is for our military members. And I find it a little tragically ironic that the folks that defend our Constitution day in and day out, they actually in the military justice system have much less rights than someone would if they are a civilian.

You know, in New Mexico if you're charged with one of these crimes, you're going to get 12 jurors. The prosecution has the burden of proof to prove it beyond a reasonable doubt to all 12 unanimously. And in a military court of justice it's much less and it's actually just a fraction thereof has to find you responsible for something. So I think what I would do is echo the concerns of
my counsel here is that these cases have dire consequences and they have dire consequences that last well after the military service, especially the sex offender registration. Throughout I think every state now has a lifetime registration system in place or will soon have one in place.

So as they have in Colorado, in New Mexico we have seen that these cases, they're the toughest cases that land on our desk, right? And we have a mantra where we say give me a homicide any day. Just don't give me one of those sex cases, right? And of course the most difficult ones are the children sex cases.

And so we have stepped up our training. And I talked to Commander King earlier about the military's training, at least in the Navy, and I was very impressed that they do a lot of training. And just like all public defense systems throughout this country, there is a turnover issue, right?
And there is always going to be a turnover issue. It's something that we have to live with. I practiced in the Public Defender Department in Hawaii for 10 years and now in New Mexico for 10 years, and that's just part of what we have to deal with.

So what you folks have to deal with is creating a system that addresses that as well. And it's really about training, about setting limits of how much experience and how much training counsel should have before they handle these cases, because we know the consequences are so great.

In the New Mexico Public Defender Department we have very similar training to what the Navy has. We have a one-week-type boot camp. Then we have a year later a one-week advanced trial skills workshop, two to four weeks of mentoring in court before anybody actually does anything on the record. And then we have in-service trainings every Thursday that are broadcast over the Internet.
to all of our regional offices. And I think
that would be something that the Armed Forces
who are spread out throughout the world could
certainly take advantage of as well.

To answer your question, Madam
Chair, about the level of experience and my
experience in doing these cases for 20 years
now, minimally three years, and they shouldn't
be doing it alone for threes. And optimally
somebody should have five years of criminal
law litigation experience.

And then along with that
experience -- and we don't have to look very
far -- and I know maybe all of you are
lawyers, but I know a couple of you are. We
don't have to look very far for good
professional guidelines. The American Bar
Association, right? And what the military has
is a lot like a public defense system. That's
basically what it is. They have the 10 key
components to a successful public defense
system. And so I just want to kind of cover
what some of those are.

One of them is training. The other one is independence. And I think that's a real problem that maybe you folks can address. I've learned from military counsel here they don't have the subpoena power and in order to actually get a subpoena you have to go seek it through the government. That's not the case in I think most states and in New Mexico an individual attorney has the subpoena power. They don't even have to go to the court to issue a subpoena.

The other thing is the use of experts and the training or experts, because this is such a particularized field. This is just one of the books that we have in our library that we maintain, the "Atlas of Sexual Assault." Anybody doing these cases needs to know this book inside and out, right? Another book that I didn't want to bring because it's so good is "Forensic Nursing" by Virginia Lynch. They need to have regular forensic
training about sexual assault injuries, about all the studies that have been done about say a SANE nurse, and I know you've probably heard some testimony about SANE nurses. And most of these cases now are involving SANE-type testimony. Well, we have to be able to look at it analytically and provide the jury with a rebuttal basically to a SANE nurse's testimony.

And getting back to the independence that the military does not have right now, if they want to hire an expert, they have to go up a chain of command and it can be denied pretty readily. If I want to hire an expert in New Mexico, I hire him, right? And I don't see any reason why somebody who's charged with one of these crimes in our military branches should have any less protection and representation.

Let's see. The other thing I would echo is the use of risk assessments. And one thing that Mr. Lang said is that
dosage matters. And I think you may be able
to address mandatory sentences. And I know
some of you have experience in federal court
and how mandatory sentences really hamstring
judges and don't allow them to actually dose
out the right kind of punishment so that we
keep recidivism rates as low as we possibly
can.

And then the other thing is I
watched on the Web some of the testimony, and
there was a request for specialized units.
And we heard this morning that there's a
Special Victims Program within the Army
branch. The other branches don't have that.
And at first blush I think, oh, if you're
going to do that in the branches, then you
should also do it for the defense. There
should be specialized units for the defense.
But then on hindsight, we've thought about
doing that. And our offices have done it from
time to time; Colorado is doing it, but we
find that attorneys burn out on these cases
because they’re so emotionally driven and the
impact on our clients.

Lastly, that brings up the issue
of vicarious trauma that we do trainings on
and that I would encourage you folks to
include for all of the prosecutors and all of
the defense counsel that deal with these cases
that are so emotionally charged that they need
training on vicarious trauma and the impact
that it has on their lives and what they take
back to their families.

That’s all the comments I have for
now.

CHAIR JONES: Thank you, Mr.
Porter.

We’ll hear now from Mr. Whitehead.

And you're in the Public Defender's in D.C.?

MR. WHITEHEAD: Yes. Yes, ma'am.

Good afternoon to everybody.

I certainly will echo everything
that has been already said, but I don't want
to retread a lot of those things. But as far
as the D.C. Public Defender Service is involved, I'm a supervising attorney there. I've been there for nine years. We have a lot of training. I think we end up training a lot of the Criminal Justice Act attorneys that are also in D.C. that take court-appointed cases and we train across the country sometimes.

As far as how we progress, we start out as juvenile lawyers. Typically our attorneys are straight out of law school, or had just clerked from local or federal judges, or have very little litigation experience. We don't have a lot of laterals that come through. So when we do have lawyers, they have a lot of energy. We put them through a 10-week training involving substantive training as well as skills that culminates in kind of a mock trial with judges at the end. And then they start picking up juvenile cases.

With the juvenile cases you range from having your misdemeanors all the way up to your juvenile homicides and sexual assault
cases. And all of this kind of progresses because of the consequences involved or lack thereof, because with juvenile cases they're bench trials with rehabilitation being in mind sort of where the most that you could get is commitment to the age of 21.

After that year of juvenile court that attorney will then go into adult court handling felonies, mostly guns and drugs, kind of your minor felony cases. Once you've done that for about a year or so, at least getting -- I think they want at least a couple of trials, solo jury trials, some co-counsels, then you'll progress to the more serious felonies involving mandatory minimum sentencings; your armed robberies, your armed car jackings, things of that nature.

And after around five years, mostly about six or seven years, then you'll go into your felony 1 practice, which we don't have a specific practice for sex offenses, but where I'm at we do sex offenses; your rape
cases, your assaults with intent to kill and
your homicides. So those three are the three
specific types of cases that you'll handle as
your most senior lawyers there.

I mean we train more generally and
try to raise a lawyer that can practice pretty
much any type of case, so we don't
specifically have kind of a week-long sex
offense training like some of the other places
may have or a specific sex offense director.
But what we will have are trial practice
groups, where we're a pretty tight knit, I
would say, family of lawyers there.

And right now we have around 47
trial lawyers, 16 or which are in the felony
1 group. And we're all in the same office, so
we're not a statewide. We're a district where
we're in one particular place. And so we're
in constant communication with each other so
that we could talk about our specific cases
with other lawyers that may have information
that we may not as a single person. So what
makes us unique I think is the fact that we have all these resources in one base place. So we have our trial lawyers.

And we're not the smartest in the world, so we have an appellate division. We have our special litigation division that will deal with overarching themes such as Brady information or withholding of exculpatory information from the defense. We have a parole division, community defender division that deal with institutional issues, whether or not it's with BOP or within the Department of Corrections with our specific clients. We have social workers that will help out and kind of deal with this risk assessment and help out with the different things that our clients are going through to present mitigation at the end of the day.

And of course we have investigations. I mean it's surprising to hear about the lack of investigators involved when we're trying to uphold the Constitution
here and try to give our clients the utmost in representation and being zealous. But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for awhile. I share one now.

But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things -- sometimes complainants do not tell the truth.

So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word "victim." When we talk about pre-trial matters that have not resulted in
conviction or that have not resulted in the
guilty plea, we deal with complainants,
because a lot of times we understand that
alleged victims aren't victims at all when we
investigate and even the government finds out
before we do that things have been made up.
So I think that just reemphasizes the
importance of having investigators and having
all the different aspects of the case, whether
or not it's legal or on the field, done in
order to have a decent -- not only a decent,
but a zealous defense.

I mean I think the rest of the
things that I have to say would pretty much
echo what the other counsel -- whether or not
it's having access to experts with DNA, with
SANE nurses. Our office has those resources
so that we don't have to talk to other
individuals in order to justify or get
vouchers from the court. We just do that in
house. And if the particular lawyer does not
know how to talk about getting an expert, we
have other lawyers that are there that can figure out why we would need one. So I think that the fact that we have such a close-knit group of people that have resources so readily available is one thing that helps us stand out and help our clients to the utmost. Thank you.

CHAIR JONES: Thank you very much, Mr. Whitehead.

Do we have any additional questions or comments from the Panel? Beth?

MEMBER HILLMAN: Just a question first. Thank you all for bringing this perspective to us. We get pulled in many directions and it's very compelling to have that many of you in front of us right now all the way across, and I appreciate everybody's comments.

You reminded me, Mr. Whitehead, of a question I wanted to ask those of you who have a perspective on this, and that's about the limits of appellate review for those
convicted at court-martial.

For our judge advocates, your perspectives on that, and if you find that's a significant limit on your ability or the appellate division's ability to represent your clients down the road. And your reaction to it, too.

CAPTAIN SHINN: I always have an opinion.

(Laughter.)

CAPTAIN SHINN: First my personal opinion, ma'am, to answer your question, is I think that much like our civilian accused, right to appeal to the supreme court should be available to our service members.

Second, the non-jurisdictional cases, the cases that don't trigger Article 66 appeal, those are silent.

MEMBER HILLMAN: Which can you just explain for us?

CAPTAIN SHINN: Oh, absolutely.

MEMBER HILLMAN: I don't know if
all our civilian counsel know.

CAPTAIN SHINN: Yes. So within the cases there's a subset of cases that don't trigger automatic appellate review. Those cases are ones that do not receive a discharge or do not receive a sentence of a year or more confinement.

So if your client does not receive that, then your case does not go up on appeal. You have a limited review by a judge advocate there within the local shop.

What this does is if you are accused of a 120 and you get six months confinement, or let's say 30 days confinement, which is within the range of possible punishments, and you serve your confinement and you're administratively discharged, that conviction now triggers sex offender registration, all the collateral consequences, but does not trigger appellate review. And that is a huge gap for Lance Corporal Smith, PFC Jones, Sergeant Whomever. And it
desperately needs to be fixed.

MR. BORG: I guess the comment I'd make is a corollary we have in Oregon is that the Department of Justice does the appeals, and the state would love to just eliminate appeals. Let's not have any appeals at all. And we did this determinate sentencing. We call it Measure 11. So 15 years and up on certain crimes. You get automatically an adult court, long determinate sentences. And one of the effects it's had on it is that it's really put all the discretion in the prosecutor's office. And so if you plead guilty, you eliminate the right to appeal say bad police conduct or any challenge to what brought your case about.

And on the other end of it; and I believe in treatment, we embrace treatment courts, drug courts, all these other things, but we're really lowering the bar to police conduct. We're really, you know -- you know, cynically one of my colleagues at the state
office is saying, you know, at what point are
we just going to start rounding people up
because we got seats in drug court, you know?
We only have 150 and we have 200 places.
Let's start arresting people to get them into
drug court.

But that's the concern I guess
that I would have. And it is a limiting of
appeal because you don't get to challenge it
to get these benefits either of treatment
court or on the other end, if they threaten
you with such a huge hammer that you don't
want to risk, you know, the 15 years or 20
years and you'll take a plea deal to something
else.

We've tried to correct for that in
Oregon by really having a concept of a
conditional plea where you can raise and file
your motions, challenge the 4th Amendment
issues and then enter a conditional plea that,
you know, doesn't require a fact trial but
preserves your right to appeal the search
issues.

CAPTAIN SHINN: Ma'am, if I could respond just -- I missed a section of that. Another piece of that puzzle, especially with recent proposed legislation removing the Article 60 power from the convening authority's action, without having a robust appellate review, if we're going to remove the convening authority's ability to set aside the findings, that removes now some of the protection that those lower-level offenses had by having just a judge advocate review.

And the analogy is a stack of cards. And the military justice system has been set up over the past -- the number escapes me, but over the years, 50 or 60 years, carefully and through a process of trial and error. And it's interwoven. And so by removing the convening authority's power through Article 60, there needs to be a separate balance put on the scale through appellate reviews. Thank you, ma'am.
CHAIR JONES: Liz?

MEMBER HOLTZMAN: I want to thank all the panel members for very important testimony. It's a perspective that we need to have and appreciate the travel and the articulateness of what we've heard.

I want to turn to the military and try to explore this issue a little bit more about expert witnesses and subpoenas.

Can you explain to me who is reviewing your request for the subpoena and what does this do in terms of revealing defense strategy, confidential information? I'm not familiar with this system. I'm getting a little bit more information now, but I'm still relatively ignorant about it. So I'd like to understand from your point of view how it works and what the problems are with the injustices, if there is one, and what the difficulties are that you see in terms of providing proper defense.

LIEUTENANT COLONEL PITVOREC: Yes,
ma'am. For the defense if you were to request an expert witness, you have to make a written request that goes through the trial counsel, so the prosecutor in this case, that includes in detail why you need the expert. You don't necessarily have to reveal the theory of your case, but if you do not, it is likely that your request will not be approved. So it goes through the trial counsel to the convening authority.

MEMBER HOLTZMAN: Wait. Does the trial counsel have to approve it?

LIEUTENANT COLONEL PITVOREC: No. No, ma'am. The trial counsel then forwards that request through the staff judge advocate to the convening authority for approval.

MEMBER HOLTZMAN: Yes.

LIEUTENANT COLONEL PITVOREC: However, in practice if you do not lay out your theory of the case which requires the expert, it is unlikely that it would be approved, and often is not approved anyway.
Often we have to go to the military judge in order to have the expert appointed, because the military judge can do that.

MEMBER HOLTZMAN: Okay. So you have an alternative if you don't use this system going through the --

LIEUTENANT COLONEL PITVOREC: No, ma'am.

MEMBER HOLTZMAN: -- trial counsel?

LIEUTENANT COLONEL PITVOREC: No, ma'am.

MEMBER HOLTZMAN: The prosecutor?

LIEUTENANT COLONEL PITVOREC: Your request has to be denied first by the convening authority --

MEMBER HOLTZMAN: Oh, okay.

LIEUTENANT COLONEL PITVOREC: -- before you can go to the military judge to ask for a motion to compel the appointment of an expert.

MEMBER HOLTZMAN: And what's the
point of having this go through the trial prosecutor? Is there a reason for this?

COMMANDER KING: That's a great question, ma'am.

(Laughter.)
COMMANDER KING: That's a great question.

MEMBER HILLMAN: There is no court. There's, as yet, no court yet to be petitioned. This is a part of the ad-hoc nature of the --

MEMBER HOLTZMAN: I understand that, but it could go directly to the staff advocate, couldn't it, without going to the trial counsel?

LIEUTENANT COLONEL PITVOREC:
Well, generally speaking, ma'am, the trial counsel works for the staff judge advocate. So while the staff judge advocate is supposed to be --

MEMBER HOLTZMAN: Neutral.

LIEUTENANT COLONEL PITVOREC: --
neutral. Often that is not the case.

COMMANDER KING: And, ma'am,

there's no requirement that it go to the trial
counsel first under the rules for court-
martial, but practically, effectively, what
will happen is if you send it straight up to
the SJA, the SJA will say, what does the
Government think about this request? So it
will have to go back to the trial counsel
before most SJAs will even advise the
convening authority on whether or not they
should do it.

And I should point out, ma'am,

that that also applies to just our basic
witnesses, not just expert consultant and
expert witnesses. But if we have alibi
witnesses, or any other type of basic fact
witness that we want to bring to a court-
martial and they need to be provided funds to
travel, we have to submit that request to the
trial counsel and tell the trial counsel why
we want that witness to testify, a synopsis of
that witness' testimony. And the trial
counsel does approve or deny that. And then
if they disapprove it, we go up to the
military judge and ask the military judge to
order that those witnesses be provided.

MEMBER HOLTZMAN: Okay. Just to
clarify something, in response to my question,
I was told that the trial counsel, trial
counsel prosecutor doesn't have to make a
recommendation. But I just heard from you
that the staff judge advocate is going to say,
well, what does the Government think about
this?

COMMANDER KING: Yes, ma'am.

MEMBER HOLTZMAN: Which means that
they are going to ask for his or her opinion.

COMMANDER KING: In practice,
absolutely, every time.

MEMBER HOLTZMAN: In practice
that's the case?

COMMANDER KING: Yes, ma'am.

MEMBER HOLTZMAN: Do you think
that's a fair system?

COMMANDER KING: I don't. And I
don't think --

MEMBER HOLTZMAN: Can you give any
go examples of how you think it's affected your
ability to provide an adequate defense?

CAPTAIN SHINN: I can.

(Laughter.)

CAPTAIN SHINN: I just finished up
a case at Parris Island; and this is an
anecdotal evidence, but I requested witnesses
that I had interviewed. I had spent
significant time doing witness interviews,
submitted a witness request for each one of
these witnesses that was relevant, necessary
and material to the defense of my client. I
submitted that witness request in accordance
with the trial guidelines and whatnot. All
but three were denied. Then went through the
motions practice and then got some more
approved, but not all of them.

MEMBER HOLTZMAN: From whom, the
judge?

CAPTAIN SHINN: By the judge.

Then coming up on -- I get the witness list from the Government. And so I call the witness list, doing my due diligence. One of them was a sergeant major. I talked to the sergeant major, Sergeant Major Brown. She had never spoken to the trial counsel. She had already gotten orders. She had already been approved and gotten funding to travel down for the trial, but had never spoken to the trial counsel. So I had to go through all of this rigmarole, for lack of a better word. I can think of much better words actually.

(Laughter.)

CAPTAIN SHINN: And yet the trial counsel can just make a request without actually ever speaking to the witness and getting approved.

COMMANDER KING: And they certainly don't tell us why they want their witnesses to show up for trial.
CAPTAIN SHINN: Right. Absolutely right.

MEMBER HOLTZMAN: Okay. But your example didn't really tell me how this inhibited your ability to defend your client.

CAPTAIN SHINN: Well, in this situation --

MEMBER HOLTZMAN: That's what I was asking about.

CAPTAIN SHINN: -- I was not able -- I had four witnesses that paid their own way from Bronx, New York to South Carolina and whatnot. They were able to fund their own travel to come down to testify on my client's behalf. Had they not been financially stable enough to do that, they would not have been able to do that.

MEMBER HOLTZMAN: And would that have affected your case?

CAPTAIN SHINN: We would not have been able to put on that testimony and my client would not have gotten the outcome that
he did.

MEMBER HOLTZMAN: Which was? An acquittal?

CAPTAIN SHINN: Well, I --

CAPTAIN HOLTZMAN: No? Okay.

Well, if you can't --

CAPTAIN SHINN: We got a very good outcome, ma'am.

MEMBER HOLTZMAN: Okay. Does anybody else want to talk about this problem with --

COMMANDER KING: Ma'am, I had --

MEMBER HOLTZMAN: -- subpoenas or --

COMMANDER KING: Yes.

MEMBER HOLTZMAN: -- expert witnesses? Please?

COMMANDER KING: There's been a few occasions in my career where I've wanted witnesses, and oftentimes when you go through the process that we have available to us that we're mandated to use, the information gets to
the potential witness through the Government. And it will go through the Government and it will be handed down that this witness needs to testify at trial. So it will be handed down through the chain of command. Once the trial counsel received the witness requests in the case that I'm thinking of, he then went out to the witness' chain of command, informed the witness' chain of command that this witness was going to be requested by the defense.

The chain of command -- and certainly I don't allege the trial counsel was involved in this, but the chain of command -- after I had talked to the witness, the chain of command had leaned on the witness and said, look, we're going to sea. We need you here. Do you really need to testify, et cetera? And then the next thing I heard back, the witness didn't want to come, didn't want to testify. So we had to litigate that, force the judge to force the witness to come, litigate the unlawful command influence of that whole
situation.

Whereas, if I would have just had my own budget and my own -- the ability to bring that witness without all of that, I would have gone through the chain of command to make sure that they understood that their sailor was going to be gone for a little while. But it wouldn't have been a matter of the chain of command talking to the witness about do you want to testify, do you want to go do this, because they would never have known about it until I was ready to give them money to fly that individual out to testify at my trial.

So that's an area where -- in that case, as well, we won and it didn't impact our defense, but the fight that we had to go through to do that could have turned out very differently and could have impacted the defense.

LIEUTENANT COLONEL KU: Ma'am, if I can add an additional aspect, it's the -- a
lot of them have mentioned that we can go to
the judge and ask the judge to force the
Government to give us the expert that we want
and the witnesses that we want. But an
important aspect of preparation, it's the
pretrial preparation before a case gets
referred to trial. And the judge doesn't step
in until a case has been referred to trial.

And some of the -- and I'm sorry,
I can't remember your name. She mentioned the
sexual assault in terms of all the importance
of a SANE -- how do we cross-examine a SANE
nurse? And all of that the defense counsel
can't approach a witness, an expert witness to
even discuss that pretrial. Because at that
point we don't have a judge to go to, to say,
Your Honor, I need a witness for these
reasons. We have to go to the convening
authority and then we have to go through of
course experience of problems that you have
already heard. So that's another -- it's an
example of just a waste of traditional
resources that we can't -- we don't even have
the ability to go to a judge until the court
has been convened.

COLONEL HAM: You served as a
military judge, Lieutenant Colonel Ku?

LIEUTENANT COLONEL KU: Yes,
ma'am. Yes, ma'am.

COMMANDER KING: Which impacts the
speedy trial, I would argue. The Government
is able to use consultant and expert
witnesses, essentially from preferral. But if
the defense asks for an expert consultant, as
the colonel just pointed out, we have to wait
until it's referred to trial and there's a
judge. We can't use a consultant prior to
that unless we can convince the convening
authority to give us one.

If the convening authority says no
to that consultant, then we have to either go
to the family, to seek the family to fund that
expert, which we often do, or we have to wait
until the military judge is assigned, the case
is referred and the military judge takes
control of the case. Well guess what? Now
the clock's ticking and now all of the delay
from that point on has to be taken as defense
delay, which is subtracted from the 120-day
clock you heard the colonel talk about
earlier, because now we've got to wait so we
can do our consulting and our investigation
because we have to wait for a judge.

MEMBER HOLTZMAN: Okay. Thank you
very much.

CHAIR JONES: Anything further?
(No audible response.)

CHAIR JONES: Thanks very, very
much. It was terrific. Very important for us
to know. Thank you.

All right, ladies and gentlemen.

I think we're going to move right to our next
panel. Ladies and gentlemen, could I have our
next panel come up?

(Whereupon, at 4:12 p.m., the
above-entitled matter went off the record
Member Hillman: Maybe we'll go ahead and get started. Thanks to everybody for your tenacity in addressing these issues over the course of these two days and for everybody on our final panel of the day to compare --

Colonel Ham: Please take your seats.

Member Hillman: -- thank you -- military and civilian prosecutors. I imagine we'll just go from left to right here. So, Colonel Christensen, if you want to kick it off for us.

Colonel Christensen: Sure. Thank you. I'd like to first say that General Harding has been very dedicated to making sure that we have the resources and manning to properly prosecute cases in the Air Force. Last April of 2012 he established a special victim's unit within our Senior Trial Counsel Program, and since its inception we've had a
75 percent conviction rate in Article 120 cases with special victims prosecutors.

He has made sure that we reach out to local and civilian communities to get their best practices. Approximately three weeks ago, my deputy and I spent a week with the Boulder County DA's office. They have a reputation as being very good at prosecuting sexual assaults to see what works, what they're doing well and what we can incorporate in our system.

I think one of the great things that they have is a continuity among their prosecutors. They'll have a long time at the DA's office, and a long time in their special victims prosecution, something that General Harding has been supporting. We have been able to keep our prosecutors longer. I'm going into my fourth year as the Chief Prosecutor of the Air Force. We also make sure we get the training that we need within the military, within Air Force courses and
within our sister services' courses.

My special victim unit is made up of 10 very dedicated prosecutors who have demonstrated that they have the ability to try our toughest cases. All of them have come from at least one assignment prior to becoming special victims prosecutors. And once they become a senior trial counsel, they have to demonstrate that they can excel for at least a year before they're entitled to become special victims prosecutors.

The feedback I get from the victims of cases that our special victims prosecutors work on is very positive. They feel like they have someone that's advocating for them, who believes in them and believes in seeking justice. And having talked to each one of my special victims prosecutors, they really are seeking justice. They see it as a badge of honor to be a special victims prosecutor. Those who are not yet on it start to wonder what's wrong with them because they
haven't been picked yet. It is something that is seen as a very big positive for them in their career. General Harding has, I think, done everything he can as the Judge Advocate General to ensure that we have the resources for training to make sure that they are the best that they can be.

The training established a specific special victims prosecutor course held each hear at Maxwell, in July, in which we bring in six of my senior trial counsel that are not yet a special victims prosecutors to give them the advance training they need for sexual assault cases.

Now obviously, it is always best if we have people with experience, and I think General Harding has looked at the possibility of coming up with a career track so that we can get more litigation experience in there, something I personally support very much. In my career I've done over 250 courts as a defense counsel, trial counsel and a military
judge. And I think experience is invaluable, making sure you have the right people prosecuting sexual assault cases.

As you all know, sexual assault cases are unique. Dealing with the victim dynamics is unique, and the ability to do that can only come from experience. So I know that General Harding and the entire Air Force is dedicated to making sure we have the right people in those positions. Each one of my special victims prosecutors and senior trial counsel is handpicked from a pool of hundreds. It is a very elite unit and I believe we're doing a great job at prosecuting sexual assault.

CHAIR JONES: Thank you. Captain McCleary?

CAPTAIN McCLEARY: Good afternoon, ma'am. Yes, my name is Steve McCleary. I'm currently the executive assistant to our Judge Advocate General, but part of my duties are: I oversee the training of both our military
and civilian lawyers, and in a previous assignment I was the chief of our Office of Military Justice.

And I think maybe the easiest civilian analogy for, like the Coast Guard sitting here with the other services is if you kind of view the other services, particularly like the Army, the Navy and the Air Force as large metropolitan jurisdictions, we're kind of a small rural one, just because we're very small. We have a relatively small number of cases. We train with the other services, particularly the Navy. We get a lot of support from them from the programs that they develop.

We rely very heavily on the Navy and the Army Trial Counsel Assistance Program to assist our folks. But one of the big challenges that we face is experience. When you only put on 11 trials, service-wide, in a year, you're not going to have very many people with an extensive amount of trial
And then another challenge that we face that is somewhat different, other than perhaps, in the Marine Corps, is that we are expected to serve line assignments. I've spent about half my career in line assignments, including command cadre assignments. And so most of us are always in and out of legal assignments. So we're not constantly practicing law, which also then diminishes the opportunity that a lot of us have to develop trial experience. You know, how do we deal with that? Mostly by trying to take advantage of what opportunities there are with the other Armed Forces and to take advantage of what opportunities there are to train with civilians.

We regularly send folks through the NDAA courses dealing with sexual assault and we have -- particularly where we have legal offices around the country several of them have established relationships with local
prosecutors so that they can get some interaction and learn some, you know, trial skills and particularly specific trial skills associated with sexual assault that we would have a hard time generating on our own, simply because we don't have the volume in order to generate a high level of expertise.

CHAIR JONES: Thank you.

LIEUTENANT COLONEL MORSE: Honorable Jones, members of the Panel, good afternoon. Thank you for the opportunity to share with you today, hopefully about seven-and-a-half minutes.

My name is Lieutenant Colonel Jay Morse. I'm the chief of the Army's Trial Counsel Assistance Program. We're based at Fort Belvoir, Virginia. TCAP is composed of five captain training officers, a lieutenant colonel deputy, and myself. We also have two highly-qualified experts. They're two civilians who have more than 30 years of prosecution experience between the two of
them. Additionally, I supervise the Army's 23 special victim prosecutors. I'll speak more about them later, but they focus specifically on prosecuting cases involving sexual assault, domestic violence, and those cases where children are victims.

This afternoon I want to speak on four topics. One is how we train prosecutors, or trial counsel, as we call them, the Special Victim Prosecutor Program, the development of complex cases and then challenges and how we've overcome them.

First on training trial counsel.

Where the basic course provides basic instruction to all new judge advocates, TCAP provides focused instruction once a judge advocate is appointed as a prosecutor or trial counsel. Within the first six months of that officer assuming duties he's to attend the five-day new prosecutor course. The first two-and-a-half of those days are spent on basic prosecution, basic instruction. The
second two-and-a-half days are called essential strategies for sexual assault prosecution where we focus on the nuanced aspects of prosecuting sexual assault. TCAP continues throughout that prosecutor's tenure to provide assistance. We have a 24-hour-a-day, 7-day-a-week help line that at any given time all 5 of my training officers, the deputy, myself and the two HQEs are responsive to. We have training opportunities throughout the year on diverse topics. We have outreaches to individual installations where we provide in-depth personalized experience to individual trial counsel and actually help out on specific cases. And we do provide direct assistance where I will actually provide a counsel to an installation to be detailed to a specific case when requested by a staff judge advocate. Our training is nested with the instruction provided by the legal center and school. We augment our instruction using
experts from the civilian community. We do
that on a regular basis. The overall training
plan is designed to build on both the
experience of the individual attorney and the
expertise found throughout the JAG Corps. Our
goal is that we build expert practitioners.
So those new trial counsel we have, the goal
is that we will go on to be experienced and
capable defense counsel, chiefs of military
justice, hopefully future special victim
prosecutors, deputy staff judge advocates and
staff judge advocates.

I'll talk for a minute about the
Special Victim Prosecutor Program. SVPs are
experienced hand selected litigators who again
focus on those cases involving special
victims. They're selected at the Department
of the Army level by our Personnel Plans and
Training Office, and that's done in
conjunction with me personally for each SVP.
The program has been in place
since 2009. We have 23 SVPs that are
currently located at 21 installations throughout the world. They have regional jurisdiction so they may have more than one installation that falls within their purview, but I also have the authority from the TJAG to shift those resources wherever they're needed. So if I have a particularly challenging case, or an SVP who has a lighter case load, or one is simply better, I can shift him or her to help out in another region.

They have a secondary mission to assist in the development of a Sexual Assault and Family Violence Training Program that's both for investigators and for junior trial counsel within the region. This is done with the support of the local commander and there's actual training that involves commanders, first-line supervisors, mental health professionals, victim care advocates and frequently civilian professionals in all facets of service.

The litigation experience is
essentially in assessing these new SVPs. I've found that it's crucial that the SVPs have really advanced interpersonal skills as well. They have to be able to expertly train and mentor a young attorney, direct investigators, coordinate victim care with a victim advocate, advise the staff judge advocate, work with the chief of military justice while simultaneously preparing for trial. On top of that, what we really have them focus on is developing a trusting relationship with the victim so that she not only understands, or he understands the significant emotional event that is a court-martial, but is an able participant to achieve justice.

Within the first six months of assuming duties an SVP spends two weeks with a civilian special victim unit. My preference is that they get a meaningful experience, so we've sent them everywhere from Dallas to Manhattan to Honolulu to even jurisdictions that abut military installations. They attend
a two-week sexual assault trial advocacy
course. They attend a three-day training
event with all the other 22 special victim
prosecutors and with my officers at TCAP.

They attend that five-day training
course I spoke about that's designed for our
junior prosecutors. In addition, they can
attend a career prosecutor course run by the
National District Attorneys Association.
Throughout their tenure they do attend
recurring both civilian and military training,
frankly, as they request it. I'd rather have
them get more training than less.

I next want to talk about the
development of a complex case. Though we
don't have a specific definition of what makes
a case complex, I am confident when I say that
just about every case these guys touch is
absolutely within the definition of that term.

Most of our cases include both
young offenders and young victims, both of
whom are junior in rank. The offender and
victim typically know one another. They often
even have a preexisting sexual relationship.
Alcohol is routinely involved. Victims are
frequently reluctant to report, not because of
fear of reprisal from commanders or fear that
the command won't do something, but out of a
concern for their loss of privacy and I
believe how reporting that sexual assault will
affect their ability to interact with his or
her peers on a daily basis.

I think it's important to
understand the social dynamic at play in our
cases as opposed to a case that might happen
in the civilian contract. A victim, an
offender, witnesses, they all frequently know
one another. They even work together. All of
this can contribute to a victim's reluctance
to immediately report. So as a result there's
often limited, sometimes no physical evidence.
Clothes and bedding are washed. Memories are
c clouded. Time has eliminated the usefulness
of blood or urine samples. So oftentimes the
pivotal issue at trial boils down to simply whether or not there was consent in a particular case.

So this is a significant challenge. The way we overcome it is through a multi-disciplinary approach. I want to talk briefly about the SVP's relationship with CID or our detectives, with the victim care professionals, with my office at TCAP and our highly-qualified experts, and even the other 22 special victim prosecutors.

So first, each SVP has a close working relationship with his local or her local sexual assault investigator. In many cases they're actually located in the very same office. TJAG's guidance to ever staff judge advocate is that you will immediately report any sexual assault offense to the special victim prosecutor. Because of that close working relationship with the prosecutor and the detectives frequently, almost always, the SVP knows about it even before the staff
judge advocate does.

Second, each SVP has a close working relationship with the local victim care professionals. We instruct each SVP and each SVP instructs each trial counsel that your initial meeting with any victim is simply to inform them of the process and ensure that they understand the resources that are available to him or her.

Third, each SVP has a close relationship with TCAP. I talk to them, either email or over a shared website, frankly, almost weekly for sure, and also with our highly-qualified experts. Last year each of those HQEs spent more than 80 percent of their time of the calendar year, not the work year, the calendar year away from their home at a specific installation working with specific SVPs on individual cases.

Fourth, the SVPs communicate with each other on a daily basis. We use a common website where SVPs post questions and other
requests for assistance. They share successful motions and tactics both in preparation for and actually at trial, recommend experts for use in cases with similar issues. Or if they see that there's an expert on a defense witness list, they'll see if anyone else has experience with that expert, and then share lessons learned and best practices after each court-martial.

Lastly, the Judge Advocate General has recently directly the implementation of 23 special victim non-commissioned officers, trained paralegals who will be assigned to work personally for each one of those special victim prosecutors. They're actually undergoing initial training right now from my office at Fort Belvoir, Virginia.

In summation, preventing sexual assault and domestic violence and prosecuting these complex crimes, whether they occur in the civilian or in the military community, is a difficult task requiring time, resources and
expertise, but the SVP Program has proven over the last four years to be a significant step towards success.

Thank you for this opportunity to share how proud I am of both TCAP and the special victim prosecutors and I look forward to answering any questions. Thank you.

CHAIR JONES: Thank you, Colonel Morse.

Commander -- is it Rugh?

COMMANDER RUGH: Yes, ma'am, Rugh.

Everyone, good afternoon. Again, my name is Commander Aaron Rugh. I'm the current director of the Navy TCAP. I'm also a member of the Military Justice Litigation Career Track, which means that the majority of my last 16 years have been in litigation billets. Before this job I was a military judge. Before that I was a defense counsel. I'll leave this job and move onto some other kind of litigation job.

I feel a little bit like I'm the
last kid on Santa's lap. All the really good stuff today has already been mentioned, so I'll keep my comments relatively short.

The training of effective litigators takes both actual training and experience. We are a young law firm. Most of us can retire 20. All of us most retire by 30. More than half of our members will be in the first 10 years of their lives as a lawyer. And so just by the nature of our businesses we'll always be on the short end when it comes to experience. We make up for that in training. We probably do more training than any other group of lawyers on the planet.

And that's I guess my plug for right now. If I were to ask for something for Christmas, cash is always nice. Training is expensive. It costs a lot of money for us to substitute experience with training. It costs money for us to send our defense counsel and prosecutors out to exceptional courses. It costs a lot to bring outside instructors and
experts in to teach our courses. We try to
send nearly all of our litigation track
specialists to get their LL.M.s for civilian
institutions and litigation or trial advocacy.
And that all costs money.

And so in a time when money is
particularly tight, it is my opinion that the
tooth you get for the tail on spending money
for training for our prosecutors and defense
counsel is exceptionally worth the value.

COLONEL HAM: Commander, could you
tell us what your training budget is for TCAP,
and is it a separate budget for all other
prosecutors? Does TCAP have its own?

COMMANDER RUGH: Yes, ma'am.

Well, we don't --

COLONEL HAM: And each of the
services is the same?

COMMANDER RUGH: Yes, ma'am. We
don't personally have a budget. TCAP doesn't
have a budget by itself. So and our budgets
actually come from lots of different budgets.
The Marine TCAP, Navy TCAP, Navy DCAP And
Marine DCAP get together quarterly with
Captain Crow and some of our assistant Judge
Advocate Generals to talk about the litigation
training for the quarter and for the coming
year. We work really hard to try to divide
the money that we do have equally amongst the
defense and prosecution in the Marine and the
Navy.

Some of that money comes from
centrally-managed funds at our Naval Justice
School, our central school house. Some of
that money comes -- in the past has come from
DoD SAPRO or DoN SAPRO, although this last
year we didn't any of that. To try to offset
that we beg, borrow and steal; we do steal I
guess, from here and there to try to put
together budgets.

It's surprising though how far
just a little bit of money could go. I think
with just $300,000 in a year you can do a lot
of training. You can do a lot of valuable
training.

    COLONEL HAM: So you don't have
fenced off sexual assault prosecution training
funds?

    COMMANDER RUGH: What's that, ma'am?

    COLONEL HAM: You don't have
fenced off sexual assault prosecution training
funds?

    COMMANDER RUGH: We do not, ma'am.

    COLONEL HAM: Do you, Colonel Morse?

    LIEUTENANT COLONEL MORSE: Ma'am, we do. It's not purely a TCAP budget. We
have a budget of about $3 million a year. That includes civilian pay for our HQEs. It
pays for all training for every prosecutor at
whatever installation. So the cost of the
individual unit at Fort Bragg, North Carolina
is nothing. We pay to bring those officers to
us to train them. That does include some
joint training with the Defense Counsel
Assistance Program as well.

COMMANDER RUGH: All right. So my summation of my one point here is that as you develop your recommendations, don't forget the strength or the importance of training to offset the lack of experience within our divisions. Thank you very much.

CHAIR JONES: Thank you. Major Sameit?

MAJOR SAMEIT: Yes, ma'am. Panel members, thank you for giving me this opportunity to speak. Major Mark Sameit. I am the branch head for Trial Counsel Assistance Program. We fall within Judge Advocate Division working for General Ary, the SJA, the commandant of the Marine Corps.

We're viewed as an augment to the 2012 reorganization of the legal services within the Marine Corps. Being the Marine Corps model, we've pushed the majority of our assets down to the four L triple Ss. We have two HQEs, one on the East Coast, one of the
West Coast. We currently don't have an HQE within TCAP. It is manned by myself and my deputy, Captain Brian Magee. We are a Reachback Act resource and we frequently receive phone calls, approximately 5 to 10 a week, from prosecutors in the field.

Additionally, that's our primary mission along with receiving inquiries and maintaining a website for prosecutors, sharing motions and best practices throughout the Marine Corps.

Our secondary mission is to actually go out and do the training. In conjunction with Commander Rugh, we put on two trial counsel orientation courses every year trying to get every prosecutor within their first six months to a trial counsel orientation course.

Additionally, we put on three prosecuting sexual assault courses. Two are put on specifically just for the Marine Corps. And we put every single Marine trial counsel
through these prosecuting sexual assault
courses including a mix of experts,
toxicologists, DNA, forensic psychologists.
With the turnover at the Marine Corps, even if
you run this course every single year, you're
going to have 60 percent new trial counsel in
this course every single year with as quickly
as we turn over.

   It's also taught by the regional
trial counsel and the senior trial counsel who
are going to be instructing courses to ensure
that those students are putting their best
practices, their best effort forward when it
gets to the advocacy part of that course.

Additionally, we run monthly
conference calls with all those regional trial
counsel to talk about best practices within
the Marine Corps and share it and push down
these best practices throughout.

   And finally, we do work with NDAA,
as well as fellow TCAPs to find best practices
throughout the services and share them
throughout the Marine Corps. And I'll keep my
comments brief at that.

CHAIR JONES: Thank you very much.

It's my pleasure now to introduce Martha
Bashford, and it's my pleasure because we
served together, worked together in the
Manhattan District Attorney's Office. I was
there nine years. But, Ms. Bashford, I think
you'll tell us you were there a lot longer and
are still in the sex crimes unit. So we'd be
delighted to hear from you.

MS. BASHFORD: Thank you. I'm
Martha Bashford. I'm Chief of the Manhattan
Sex Crimes Unit. I've been in the office 34
years since graduating from law school, and
have been prosecuting sex crimes for 30 of
those 34 years.

I want to preface my remarks by
saying all I have to do is prosecute sex
crimes in Manhattan. I don't have to field a
cohesive, worldwide fighting force as the
military has to, and do everything else at the
same time.

My office had the first Sex Crimes Unit in the country formed about 40 years ago. Talking about continuity, I am only the fourth chief of that unit.

People stay in it a long time. Yesterday I heard, and again today that the Air Force has ten, I may have the terminology wrong, senior trial counsel devoted to prosecuting sex crimes, and the Army has 23. That's worldwide.

I have 60, just for Manhattan, and I could add ten more when I get home tomorrow, but I simply cannot supervise that many people effectively. People are lined up wanting to come to sex crimes. I don't see them burning out.

Our Sex Crimes DAs do also handle other felony types of cases, but nobody who's not in sex crime handles sex crimes. To get in, you have to interview with me and my two deputies. You have to bring a portfolio of
what trials you have done.

The very, very minimal amount of experience is three years, and normally our entry level is at five or six years of prosecuting statements.

I want to know how many statements you've taken from defendants, how many search warrants have you done, how many DNA cases have you put on, how many fingerprint experts have you put on, how many defendants have you cross-examined, how many jury trials have you had, how many judge trials you've had.

We provide ongoing substantive training. For our new people, we do the sexual assault laws, evidentiary rules specific to sex crimes. But we also continue to train our most senior people. We bring in outside speakers. We just did a training on adolescent interview techniques.

We require an attempt to take a videotaped statement from every defendant in a sex crime, no matter how serious the crime
is or how minor. Which means we try to take videotaped statements from defendants accused of forcible touching, grabbing somebody through the clothing out on the street. We will try to take a statement from that.

Many of those statements are done in our own office post-arrest. Sometimes we go up to the precinct to take statements. I did one two weeks ago at three o'clock in the morning. ADAs must be at all lineups. I want to make sure that they are conducted with adherence to the highest structures.

When a new person starts in Sex Crimes, all of their initial witness interviews are supervised by me or one of my deputies. If they go into the grand jury and we have a non-hearsay grand jury state. So in order to get an indictment, the complainant must testify in front of a grand jury.

We will go in on the first of those, first few of those presentations. No matter how long you've been in Sex Crimes, and
I have people who have been in Sex Crimes for 20 years, if a defendant is testifying in the grand jury, one of us will go in and accompany them at that point.

One of us will sit in on every single felony trial, no matter how senior the person is. We have another rule that if you are conducting an interview of a complainant, you must have another witness present. You can't do that alone.

We have a very close working relationship with our police department, and we're notified pretty much immediately of every stranger sexual assault in Manhattan. Either I or one of my two deputies gets a phone call from the supervising commander.

We also get notified, probably not as immediately, on all intimate partner cases and acquaintance cases. I just want to take a moment. I hate the term "acquaintance cases," because it covers such a gamut. So if the superintendent that you've known for 25
years sexually assaults you, that's an acquaintance.

If you met the guy this night at the club and you think his name is Ty, that's an acquaintance case. I think those are very different. So I've started trying to break that down into acquaintance and what I call semi-strangers, because I think to say an acquaintance covers too much ground.

We start with our cases pre-arrest wherever possible, interviewing witnesses, interviewing complainants before an arrest has even been made. One of the techniques we use extensively in acquaintance cases, intimate partner cases and sometimes semi-stranger cases, if there's contact information, is a controlled call.

It can be arranged by the police department, or it can be arranged by my office. By the way, I have six full-time investigators assigned just to Sex Crimes. Some of them are retired police department
from Special Victims; some of them are not.

A controlled call is invaluable in prosecuting these cases, and it's not just invaluable for prosecuting the cases. Sometimes, by listening to the controlled call, we actually wind up exonerating the party who's been accused.

We try to do this as very open-ended as possible. We do not want somebody on the phone saying "Why did you rape me last night?" That's going to get a hangup. What we try to do is, "What happened?", "I was so out of it", "I don't really remember much.", "Why do I have all these bruises, you know?", "Did you wear a condom?" "How come everything changed so quickly?", things of that nature, and we listen to what people say.

But we have to be aware, because I'm old, the way people communicate is changing, and I'm sure you see that with the younger members of the military. People don't talk on the phone.
They text. They text, they IM, they do chats, and although I much prefer a phone call because I get to hear the tenor of the voices, people say I've never talked to this person in my life on the telephone. So we monitor and take pictures of every text that goes by, or we monitor the chats.

The importance of having our own investigators is not only can we supplement the work that the police department does, but we can completely supplant it if necessary. That's rarely necessary. But we do have a hotline. We do take calls directly, where somebody for whatever reason doesn't want the police to know about their complaint.

We can do the entire investigation, including an arrest, with our investigators. They're also very important to supplant the police investigation when an arrest has been made on the street by patrol, and we haven't had the benefit of using detectives to thoroughly investigate.
If it's a right there on the street arrest, our investigators will go out, pull such things as pull video, interview witnesses, canvass and take over, because a patrol officer, after he's made the arrest and filed the paper work, is going back out on patrol, and not going to be around to do the work that needs to be done.

I personally, we call it "scrubbing." I scrub every case that comes through my office, whether it's a misdemeanor or a felony. Which means on a daily basis, I review every single arrest, one to make sure that the case has not been misclassified as a misdemeanor when it's really a felony.

Sometimes, I hate to say it, but there is a push to keep your numbers low, and when there's a push to keep numbers low, occasionally things that really should be felonies get characterized as misdemeanors. Sometimes it's done because the person making the arrest doesn't have the knowledge of the
penal code.

So I look at every single case. I make sure they're assigned to the appropriate person, and I will establish an investigative plan on everything that comes through.

In addition to our investigators, we have four paralegals assigned to our unit. They are right out of college, and it's a two-year commitment, and at the moment we have two from Harvard, one from Georgetown, one from Columbia. They're amazing. They do the work of several attorneys.

Every plea offer on every case is set by me or my deputies to ensure consistency across the office. I want to make sure that if you are similarly situated and charged with a similar crime, that you get similar treatment.

If there's going to be any deviation from that offer, if circumstances change, the assistant has to come back to me or my deputy for approval to change the offer.
We have a computer system that allows us to track our cases, not necessarily the most efficient way.

But I can tell you year-to-date, as of yesterday, we have 584 cases that have been referred to us. It's a little hard, because once a case has pled guilty or been convicted, it pops out of our system. So I can only tell you as of today, we have 132 pending indictments. Those are felony charges.

We have 88 felonies awaiting grand jury action, disposition or possible dismissal, depending on how the investigation proceeds, and we have 262 misdemeanors. I want to say a brief word about colleges, because that came up yesterday.

We have a lot of colleges in Manhattan, from very small institutions to worldwide institutions, and they are not reporting sexual assaults to the police department. They are not reporting them to
Yesterday, the New York Post ran an exposé about one university's 100 percent non-reporting rate in 2003. Do we get cases where the complainant is a college student? Yes, of course we do. But that status is usually incidental to the crime. It does not usually happen on a university campus.

Anecdotally, we have heard that students are actively discouraged from going to the police by the advocates, the campus-based advocates, or they think that reporting to the campus police engenders a police report. No disrespect to campus police, NYPD can do a much better job of investigating. They have more resources.

The other thing that's hugely important, without a police report or without a report to my office, well of course you can get medical treatment and a sexual assault kit done. Our lab will not analyze it. They cannot analyze a kit that does not have some
sort of report to authorities.

Next month, my office is inaugurating a Family Justice Center which, if you're not familiar with the term "under one roof," we will have a variety of social service providers on one half of the floor. On the other half, we will have sex crimes, DV, child abuse, human trafficking, which is under my supervision in Sex Crimes, which is most places have that in Rackets. We keep it in Sex Crimes. We think it's sex crimes-related, and elder abuse, all in contiguous offices.

What we find is somebody comes in with a domestic violence complaint, and we find out that they've been -- it's an intimate partner sexual assault case as well. Somebody comes in with a black eye and says "My boyfriend hit me," we find out that they're really being trafficked, and the boyfriend is really a pimp.

Child abuse is interrelated with
all of these things, and we think having this altogether will really facilitate working in a much more efficient way, and making prosecutions easier.

We also handle child pornography cases, because child pornography cases can often lead to child victims. I was very heartened by the statistic I heard yesterday, that 52 percent of lawyers report hands-on female child molestation, because we also handle what is colloquially referred to as "upskirting cases," unlawful surveillance.

In the summer, there's a epidemic of people on subway escalators or subway stairs filming under women's skirts. It's a felony, and we take those very seriously.

I just want to briefly touch on another theme I heard yesterday, what to do with the reluctant complainant, and my answer is it depends. It depends what the crime is, it depends the status of the case. If on DV case, did the victim have a twisted arm or was
she knifed in the stomach? It makes a
difference in what we're going to do if
somebody doesn't want to go forward.
Is there a danger to the wider
community? Has the defendant been
incarcerated for a year awaiting trial? And
statutory rape. I know Rebecca Campbell,
who's been mentioned from Michigan, believes
that you do more harm to people who don't want
to prosecute than by prosecuting.
I disagree with her on that, on
statutory cases, because I can't allow a 13 or
a 14 year-old to make these decisions. We
don't allow them to consent to sexual
intercourse. I can't allow them to say I
don't want to prosecute my boyfriend who's 32
years old.
What we do do in those cases is
say why don't you go into the grand jury and
tell the grand jury how much you love this
guy, and how much you really want to be with
him, and that seems to be fairly effective.
They go in and say "I really, really love him," you know, and you bring out, you know, what's the nature of your relationship?

Has he ever taken you to a movie?
No. Has he ever taken you out to dinner? No. But they've had a chance to say how much they love him.

We started out in human trafficking and domestic violence cases with the assumption that our victim is not going to be around at the time of the trial. Maybe we'll be pleasantly surprised. But we start from day one with that assumption.

So with human trafficking, we've moved into wire tapping; we've moved into tracking the money. I now find myself approving money laundering indictments, of which I knew nothing until about six months ago. But that's been very effective.

On the DV front, we have a professional photographer who takes professional photographs. We're not left with
-- it's probably not Polaroids anymore, but
even blurry Instagram camera things from the
hospital that never -- you can never tell what
is this. It's supposed to be a bruise. It
looks like absolutely nothing.

Manhattan is blessed or cursed,
depending on your civil liberties take, I
guess, with lots and lots of video
surveillance, both private and government. We
track that, and that is often very key to
either solving, proving a case or exonerating
a suspect.

Our lab, I know I'm jumping around
a little bit, but different things that came
up. Our lab analyzes every single kit that
has been released to law enforcement, which I
think is very are across the country. We
don't care if it's an intimate partner. We
don't care if it's an acquaintance. We will
analyze every single one of them, not just
stranger cases.

We work in collaboration with the
wider community, which I think is something
that the military could benefit from doing.
I help -- host a monthly sexual assault task
force meeting, in which I bring my senior
people, senior PD, Special Victims people,
advocates, hospital personnel and external
advocacy organizations around a large table,
and we talk for about two hours.

That way, we can nip any problems
in the bud. If police are being rude to
victims in the hospital, we can deal with it
on a monthly basis. The other person that we
have invited is the head of New York City's
Nightlife Association, dealing with night
clubs, and that's very important.

Alcohol is a huge problem. I just
can't stress that enough, and the nature of
drinking has changed, certainly since I was
young and used to go out and have some fun.
It's categorically different than it used to
be.

People are binge drinking, bars
have bottle service, so there's nobody monitoring, once you sell the bottle, how much any individual is consuming. People are pre-gaming, getting halfway drunk before they go out.

It's not unusual for us to interview a young woman who says she had 11 or 12 vodka sodas in one night, and then move to -- what's that's green stuff, Jagermeister shots.

It's inconceivable. If you walk around a college campus on a Monday morning, you'll listen to the men and the women talking about how they got wasted, how they blacked out. People report multiple alcoholic blackouts, and this is while they're still in college.

We have to change that culture. We just have to do something about changing that culture, and I want to say this is not blaming the victim. Nobody should be victimized when they're incapacitated.
But we do tell people watch out for your purse. We tell people watch out for your -- don't leave your phone on a bar. We tell people if you're jogging, don't have headphones blasting really loud, because you can't hear something.

I think we should be saying you've got to be careful about overdrinking, because it makes you vulnerable to falling on the subway tracks. It makes you vulnerable to being hit by a car. It makes you vulnerable to being robbed, and it makes you vulnerable to being sexually assaulted.

So we have rolled out, just last month, a new training program with Nightlife, and we're going to the nightclubs. We're going to the bars with this program, and we're trying to train the security and the bouncers of various things to do.

We have found that friends put somebody in a car, a cab to take somebody home who's incapacitated, and they think they're
doing them a service. Well, the cab driver, we have found, is the attacker.

So we're encouraging the bouncers and the security, if you put somebody in a car, take a picture of the license plate. Take a picture of the guy.

We're encouraging, training them what do you do if somebody comes up and says "I was just sexually assaulted in the bathroom downstairs." How do you establish a minimal crime scene? How do you get help, and we're hoping that that will make a big difference.

One of our big problems, though, is I wish I had the rules that the Army has about incapacitation, because under New York law, you are only incapacitated if you involuntarily, involuntarily ingest alcohol or drugs. That's not our problem.

People are voluntarily ingesting huge amounts of it, and we have a typical case will be the last thing I remember was walking into the club, and then I woke up with my
clothes off in a strange place the next day.

I don't remember anything.

We have to show, in order to go forward, that they were either unconscious or asleep. If they don't remember anything from walking into the club, but we have video that shows them dancing in the club, walking out on the street, walking up the stairs with somebody, some stranger, I cannot prosecute that case.

I cannot show, because they can't remember whether they were simply in an alcoholic blackout or unconscious or asleep. I cannot prove that, and I have to turn these cases away. It doesn't fit our laws.

The last thing I just want to say is when we decline a case, when we investigate a case and decide we do not have enough evidence to go forward, we try always to bring the complainant in for a face-to-face interview, where we explain the results of our investigation. We explain the relevant
statutes, and we try to explain why we can't go forward.

Many times, people agree with our assessment. Sometimes they do not. We do have counselors on staff who partly are trained for dealing with people's disappointment in the system, that they may feel that the system has failed them, and given the status of some of our laws, sometimes we do fail them.

But we try to be as transparent about it as possible, and explain our thinking process and explain the statutes, which I think is very valuable to people to understand what really happened to their case.

I could talk about this for hours, but it is late. I thank you very much for inviting me here, and if I can ever be of any service to anybody, I would be more than happy to. Thank you so much.

JUDGE JONES: Thank you, Ms. Bashford. Ms. Higashi, one of the few U.S.
Attorney's offices that because you're in D.C.
actually has a Sex Crimes docket. We'd be
pleased to hear from you.

MS. HIGASHI: That's right. Thank
you very much. Thanks for inviting me. I'm
happy to share my experience with you all.

I am chief of the Sex Offense and
Domestic Violence Section at the U.S.
Attorney's Office, and as Her Honor just
pointed out, we are very unique in the U.S.
Attorney's Office in D.C., by serving not only
as the U.S. Attorney, but we also serve as the
local DA.

My section is also unique among
the criminal prosecutor's sections in the
office, because it is a hybrid section. My
section prosecutes, investigates and
prosecutes all cases involving sexual assault,
domestic violence, child abuse, stalking,
human trafficking, child exploitation, like
online child exploitation, and violations of
the local and the federal sex offender
registration laws.

We prosecute cases wherever they are best prosecuted, whether it's in the local Superior Court or the federal court. So we don't have to shop a local case to another prosecutor. If we believe it would make a good federal prosecution, it stays with the same prosecutor, and charges just get filed in federal court.

So I have been with the U.S. Attorney's Office for over 19 years, and I have spent most of those 19 years prosecuting sexual assaults and domestic violence. If I could leave you with two concrete pieces of advice about how to structure what I think is the ideal sexual assault unit in a prosecutor's office, the first piece of advice would be to treat sexual assaults as the highly specialized and continually evolving field that I believe that it is.

The second concrete piece of advice is to co-locate your prosecutors with
victim advocates. The victim advocates that we have in my section are not victim witness coordinators, who are common to other U.S. Attorney's Offices.

They are social workers. They come into our office with sometimes decades of experience working with domestic violence victims or sexual assault victims, running shelters. They are really, really invaluable. They're co-located with us and they are fully a part of the prosecution team, and they are some of the people who have taught us, as prosecutors, the most about working with vulnerable victims.

The Sex Offense and Domestic Violence Section, my section in the office, has about 60 people in it. 35 of them are prosecutors. Then we have 12 specialized advocates who are dedicated just to these type of cases, domestic violence, child abuse, sexual assault, and then we have 12 to 13 support staff members.
My section, in terms of the prosecutors, is a three-tiered section. So we handle all of those specialized types of cases, from the most minor misdemeanors, all the way to the most serious cases. In my office, when you start out as a prosecutor, you're required to spend your first few years going through various rotations, to develop different skills, and to learn how to investigate and prosecute different types of cases.

Your training in the office usually starts out with a stint of between six and nine months in the appellate division. After that, you're sent to one of the misdemeanor sections, and my section is one of the misdemeanor sections.

We have a group of anywhere between 12 and 16 misdemeanor level domestic violence prosecutors. So we start early on, and even at that early level, we will only take people who express an interest in working
these types of cases.

If someone does not have an interest or for some reason feels that they cannot work on domestic violence cases, they get sent to the General Misdemeanor section, where they prosecute misdemeanor theft cases, misdemeanor simple assault cases, shoplifting cases, things like that.

The Misdemeanor Section in my -- the misdemeanor unit of my section is a very important training ground. Like I said, I have about 12 to 16 prosecutors, and they start out in the general three-week basic training program. It's a basic trial advocacy training program, and then after that, they get section-specific training for domestic violence.

After those people have about four to six months of experience trying misdemeanor domestic violence bench trials, we chose two who -- out of the people who express an interest, I always get more people who are
interested than we can take.

But out of the people who express
an interest in staying an additional anywhere
between two to six months in my section doing
misdemeanor sexual assaults and misdemeanor
child abuse, we interview those people, and
choose two of them.

So after getting about maybe 30
bench trials doing domestic violence cases, we
choose two people to handle a smaller caseload
of misdemeanor sexual assault cases, and those
people have a reduced caseload of between 50
and 75 cases, and they end up getting
approximately 15 to 20 bench trials, sexual
assault bench trials.

In D.C., there are a number of
cases that we prosecute at the misdemeanor
level, that are not just sexual touching
cases. So there are cases that we will
prosecute that involve much more serious
behavior, but there are cases that we evaluate
as cases that will have a better chance of
getting a conviction, charging a sexual act
where the defendant knew or should have known
he engaged in the sexual act with the victim,
without her permission, and there's no right
to a jury trial because the maximum penalty
for those offenses is 180 days.

So our misdemeanor sexual abuse
prosecutors get a good amount of experience.
After that, they do have to go on and they
rotate into other sections of the office,
where they learn how to conduct jury trials,
and they start out with the easier ones, the
drug possession, gun possession cases where
the majority of their witnesses are law
enforcement witnesses.

They go through other rotations
and then they can elect to make a preference
to come back to my section in the mid-level,
and that mid-level of prosecutors I have seven
of them, and they do the most serious domestic
violence felony cases and felony child abuse
case, with the exception of infant abuse
cases, which are handled by my most senior AUSAs.

So I get some of those people who got experience working with vulnerable victims, with a lot of bench trials in domestic violence and sexual assault cases coming back, doing felony domestic violence cases, felony child abuse cases.

They then go on and do other rotations in the office. My senior level of prosecutors, I have 15 of them, and those are the people who do the felony sexual assaults in Superior Court, and they also prosecute the child exploitation cases in federal court.

Similar to what Martha just said, we have the same type of system where in order to get into that unit, people have to wait for a vacancy. They have to apply. We review their experience, we review their experience similar to what Martha said with DNA, with vulnerable victims. How many children have you put on the stand? How many sexual assault
victims have you worked with?

And we interview them also, though, to make sure that they really understand what prosecuting sexual assaults is all about. We are able to weed out people who say they want to be a sex offense prosecutor because they're really moved by a trial that they saw, that another AUSA tried, where it involved an abduction at gunpoint and a violent rape by a convicted sex offender of a woman walking home from work.

We are looking for people who are suited for what most, what we know most sexual assaults involve, which are a defendant and a victim who are acquainted with each other in some way. Whether it's someone, workplace acquaintances, as Martha mentioned, or we call them brief encounters, semi-strangers, brief encounters.

So we really need people who -- so that goes back to the specialized unit. You need to get people who are suited for the
work. Not just people who volunteer for it, but people who are really suited for it. There are some people who are fabulous homicide prosecutors in our office, who we have not chosen for senior sex offense prosecutors, because we believe they're not the best suited for it.

So we want people to understand what the work is about. We want people who are committed to the continual learning process, especially with scientific subject matter that a lot of lawyers tend to shy away from. So DNA, the medical aspects of sexual assault, the neurobiology of trauma, computer and cell phone forensics, which is now present in almost every one of our cases.

And most of all, we need people who are committed to doing the extremely challenging work of day-in and day-out working with victims in cases that are very, very challenging, and people who are going to be just as satisfied and just as rewarded,
putting the same amount of time and energy
into a case that may end up, after an
exhaustive investigation, not in a
prosecution.

For a lot of prosecutors, they
don't want to do that. They want to work on
cases that are all going to be prosecuted,
that are all going to go to trial, and to be
a successful and fulfilled sex offense
prosecutor, you have to be committed to
victims in cases that look weak initially and
turn out to be weak, or cases that look weak
initially and turn out to be great, strong
cases, and then cases that look strong
initially and end up being strong.

So I can't stress enough about why
this three-tiered structure is so important to
us, because learning to work with vulnerable
victims and developing the skill that you need
in order to earn a victim's trust, to get a
full disclosure, and we know that most
disclosures in sexual assaults are
progressive, and they take a long time and it
takes a huge investment of mental energy and
physical time, to develop that relationship
with the victim.

It takes a lot of skill to get a
full, complete and truthful disclosure, such
that you have a strong prosecutable case, and
that you can gather all of the corroborating
evidence that you need. It's more than a
matter of being personable; it's more than a
matter of having a canned speech, that the
truth is important; I'm not going to judge
you.

It's a skill that takes a long
time to develop. So that's why we so believe
in this. My division chief, my supervisor,
calls it "the farm team system" that we have
in my section. So the senior sex offense
prosecutors generally have about three or more
years by the time they apply.

They also have to make a
commitment to stay in the section for at least
two years. They won't be considered for the
Federal White Collar Section or whatever, or
National Security, if they are within the two
years in my section, and I really don't have
a problem with that though.

I have, as Martha said, people
that are lining up waiting for people to
retire or whatever. So, and I would, of
course, love more people. But our office has
the same kinds of resource restraints that a
lot of prosecutors' offices have.

As for training, we have a lot of
in-house training. We have outside
conferences. It's really important that our
office maintain its commitment, and it's been
increasingly difficult with sequestration and
reduced budget.

But it's really important to me
that our office maintain our commitment to
sending people from my section, and we are
more fortunate than the other sections, to get
people sent to some national conferences every
Another great way that we have found to get high quality training for our people is to partner up with the other members of the Sexual Assault Response Team. So it sounds like it's similar to your task force that you have. We have a Sexual Assault Response Team, and it's all the different agencies, the SANE Program and the NGOs that provide the advocates, the police departments, my office and the Mayor's Office of Victim Services is part of that.

So through that office, we have been able to bring in very high quality training. So some of the types of trainings that I think are essential for a good sex offense unit in a prosecutor's office, of course, are multidisciplinary training, really understanding disclosures in sexual assaults, interviewing victims.

This year, we were able to bring Dr. Campbell from Michigan to our SARC for a
two-day training conference, and she repeated
her training, her multi-hour training.

She repeated it twice, so that
police and prosecutors working different
shifts, or prosecutors who had to be in court
during one session, would be able to go to the
other session. She had one in the morning and
one that started late in the afternoon and
went into the evening.

That's mandatory. It was
mandatory for all the sex detectives. It's
mandatory for AUSAs in my office. The SARC is
bringing in Russ Strand to train people on the
FETI interviewing methods. It's important
that all sexual assault attorneys get
training, continual training from the sexual
assault nurses, and we have a wonderful doctor
who is the medical director for the sexual
assault nurses.

The Sexual Assault Nurse Program
offers very frequent training for us, training
on DNA evidence, training on digital evidence.
That is critical, as Martha mentioned, and in terms of resources, our office has investigators, in-house investigators. We fought for years to get these investigators, who supplement the work of the MPD detectives. There are eight of them who are devoted just to the street crimes or the Superior Court Division cases in my office.

There are none of them that are exclusively assigned to my section, but they do get a lot of work from my section. There's also one investigator in our office who is solely a computer forensic examiner. That's critical, because otherwise we would be relying on the FBI, which has limited resources and violent crimes are not as high a priority these days. So that's real critical.

What else? Secondary trauma is very, very important. We definitely want people to remain healthy. We don't want burnout. Luckily, we don't have burnout
problems, but it is very important to train on secondary trauma.

Sex offender registration, DNA collection, specialized supervised release, crime victims rights laws, and then we have all sorts of different types of special cases that we have small trainings on like cold hit cases, doctor-patient cases, jail cases, human traffickings, things like that.

As far as supervision, it's also, of course, critical, because a lot of the skill development, as I keep saying over and over, really takes a lot of time. So I'm the chief of the section. There are two deputy chiefs who have a tremendous amount of experience.

We conduct a pre-trial conference before every felony trial, and we observe every felony trial and give support during the trial, and then feedback after the trial. All plea offers must be approved by supervisors, and all counteroffers.
One thing that Martha said about college students that made me think about our SARC. One of the things that -- really wonderful things that came out of the SARC this year, we've had similar problems with the colleges in our area, instructing the students to report sexual assault first to the campus police and then they will, in certain cases -- it seems to happen faster when the offender is not part of the campus community, they will facilitate a 911 call.

But one of the grants that came out of the Mayor's Office of Victim Services funded the development of an app that they call U, capital "U Ask." So it's available to anyone; anyone can download it. But it's geared towards college students, and it's an app that provides not only tremendous information on sexual assault awareness and resources, but it also has very practical applications.

So there is a direct link. You
can just press one button if you want to go to
the hospital and get a sexual assault exam,
and you want a free ride. Press one button
and a car will show up.

JUDGE JONES: Ms. Higashi, I'm
totally overwhelmed by the amount of programs
and the wonderful things you're doing in your
office. I'd like to move on to Mr. Montgomery
now, if I could. Mr. Montgomery. You're the
county attorney in Maricopa County?

MR. MONTGOMERY: That's correct.
I'm the elected county attorney. They're
known as the district attorney in other
jurisdictions.

Well good evening. Based on what
I have heard over the entirety of the day and
from my fellow prosecutors in and out of
uniform, I'm going to jettison my prepared
remarks, though I understand they'll be
available for you, and I want to hit on a few
areas.

I also want to take advantage of
the fact that because I'm not in uniform and
I'm an elected official, I have a little bit
more freedom in what I can say.

To start with, a little bit more
about my background. I serve four million
people in Maricopa County, and we have over
9,200 square miles. So we're the fourth
largest in population, 15th largest in size.

I've worked in the office as a
line prosecutor before leading it, starting in
November of 2010. But before going to law
school, after working in Silicon Valley a
couple of years, and even preceding that, I
was an active duty Army officer for six and a
half years.

I received my commission from West
Point in 1989. My first duty station was at
Fort Hood, meaning I am very familiar with 6th
Street and Trinity here in Austin. I was a
tank platoon leader. I deployed with the 1st
Cavalry Division in support of Operations
Desert Shield and Desert Storm, during which
I got to be an Article 32 investigator.

Subsequent to that, returning stateside, I later testified at a court-martial on behalf of a soldier who had previously been in my platoon. Later on, my second assignment at Fort Bliss in El Paso, I was a cavalry troop commander with the 3rd ACR, where I had responsibility for imposing non-judicial punishment, as well as participating in administrative separations and the court-martial of one of my soldiers.

So some of what I'll share is also going to be informed by that military experience. Now admittedly, I left active duty in 1995. But again, after sitting through what I've seen here today, it's nice to know that some things never change.

With respect to what it is that I think the panel's looking at in general, and what we try to do in the civilian community with respect to responding to sex assault defenses in general, we want to encourage
Much as the military has tried to deal with the differences between a survey on victimization and the numbers that they actually have of reports, I deal with the same thing in my office.

I have UCR reports that give me a view of what I know we're dealing with in terms of reported crime, but then I'll read a victimization survey that would suggest that I have three times as many offenses, sexual assault or otherwise, as what I'm dealing with.

But in carrying out the prosecution function, I can only prosecute the crimes that law enforcement submits to me, that results from somebody reporting them. So we want to improve that reporting.

We want to improve awareness generally among potential victims, as well as among potential offenders about the nature of the crimes that we have in statute in Arizona,
to try to preclude people from being victims
or perpetrators in the first place.

    We want to improve the scope and
thoroughness of investigations, so that we can
make better decisions at the prosecution end
for charging, and that goes to whether to
clear somebody or to go forward with a charge
and the appropriate one.

    It's at that point too where, you
know, I got to hear some of the standard
defense shibboleth about prosecutors. It's
our job to make sure that we seek justice in
each and every case. I love the quote from
the 1935 case of Berger v. United States, in
which it specifically states that prosecutors
are in a peculiar and very definite sense the
servant of the law, the twofold aim of which
is that guilt shall not escape or innocence
suffer, because we want to have successful
prosecutions with just outcomes, where that's
what is called for.

    In order to do that in my office,
I'm organized with a specific Sex Crimes Bureau, as some of my fellow prosecutors have already discussed, and prosecutors in that unit average anywhere from three to 17 years. At any given time, we may have upwards of 20 prosecutors, including a supervisor, about four to five paralegals with a similar number of legal support specialists.

On an annual average over the last three years, they're handling about 230 sex assault cases and they're handling about 400 sex abuse cases, sex assault being the penetrative crimes, and sex abuse being the non-penetrative crimes.

We have about a 90 percent average conviction rate for the sex assault cases, about an 86 percent conviction rate for sex abuse. Here's how I define my conviction rate. Those are the number of guilty resolutions by trial or by plea, divided by the number of charged cases.

I never want to be in a position
where I feel, and I certainly hope this panel
never makes a recommendation that puts
military prosecutors in a position where they
feel they must charge, they must prosecute,
because the number of submittals is going to
be the overall denominator.

There are times when people report
that the evidence just isn't there. Overall
office wide, our conviction rates exceed 93
percent. Our charging rate overall is 75
percent, and then focusing on that, and not
every case that gets submitted can be charged,
our charging rate for sex assault cases is
about 45 percent. Sex abuse cases is about
the same.

The reason for that is we
encourage our police departments that wherever
they have evidence that there was a sexual
act, submit it.

We'll review it. It's up to us to
look at the evidence that may relate to issues
involving consent or with respect to any of
the other evidentiary issues, that I think
Colonel Morse from the Army mentioned earlier.

We see a lot of the same thing
within my County, and I should point out too,
we have Arizona State University in Tempe. So
we have that environment. I also have Luke
Air Force Base out in Glendale. We work a lot
with the Judge Advocate General officers
there.

And as quick note too, I will
generally retain cases for prosecution if I
have a civilian victim. Why? Victims in
Arizona have constitutional rights. They
don't have the same thing within the military
justice system, let alone within the federal
criminal justice system.

So if I'm concerned about the
nature of the harm caused and I want to make
sure those rights are protected, I'll
prosecute in my system. Additionally, what I
have to work with, because victims in Arizona
have constitutional rights, I have a Victims
Services Division staffed with about 50 victim advocates, all of whom are required to have a Bachelor's degree, many with a social services background.

They assist prosecutors in making sure that victims stay informed, court dates, what's the status of the case, what's the next hearing going to be, answering questions in general about the criminal justice system, and then relaying information from the victim to the prosecutor and back and forth.

I also have within my Appeals Bureau an attorney specifically assigned to deal with victims rights litigation issues. They will train my prosecutors in victims rights issues, they will appear in court and advocate for specific issues addressing victims rights, and they will also then take up appellate action if they need to.

Victims in Arizona, in order to enforce their rights, have standing in court and have standing to challenge issues that
affect their rights in courts of appeal.

As far as special programs go that address the area of sex assault cases, my prosecutors in the Sex Crimes Bureau over their first year must go through a standard protocol of training. The same too for investigators within Maricopa County and any one of the 26 different municipal agencies, and what I've done lately is we conduct joint training for them. Same basic subject matter that they have to go through, in order to make sure that everybody is on the same page, so we don't have different standards and we don't have different vernacular.

That also helps to give me a good audience when I bring in national experts. We cover a number of different areas, as has already been mentioned. I'll highlight a few. Forensic interviews, confrontation calls, the dealing with forensic analysis of evidence, in particular DNA. But that also goes for social media, texts, Facebook, offender profiles and
Prosecutors need to learn up front that there is as many different responses to the trauma of a sexual assault as there are victims. The one person who presents with a stereotypical stress-related trauma may not be the same as the next person, who is rather stoic.

Neither one of those responses is necessarily indicative of how successful that case might ultimately be. We also utilize Family Advocacy Centers. There are six within Maricopa County alone, where multi-disciplinary teams will come together to help investigate, provide medical care, counseling services and service referrals for victims of sexual assault.

Now mind you, I'm focusing on sex assault, but this really encompasses both adult and child victims, and the whole gamut of sex offenses.

Additionally, we have a peer
support program for prosecutors. I want my
prosecutors to have 20 year careers, and to be
healthy and happy inside and outside of the
office, and we found for some prosecutors,
based upon the subject matter of sex offenses
that they've prosecuted for a number of years,
they start to burn out.

I don't want them to do that.

I've even utilized the national expert Dr. Gil
Martin, who deals a lot with law enforcement
agencies for officers having to deal with the
stress of being in that environment day-in and
day-out. Prosecutors are in that environment
too, and so we've begun that.

I would make one, a couple of
particular recommendations on behalf of our
nation's military. One, I would ask the panel
to recommend specific rights for victims of
crime in military justice proceedings, that
would ensure, just as in Arizona, that they
would have a right to be free from
intimidation, harassment or abuse.
We have rape shield laws, because some defense attorneys abused the ability to advocate zealously for their clients, and used it as an excuse for unethical conduct. Victims should also be treated with fairness, dignity and respect throughout criminal justice proceedings.

They should have a right to be heard on release conditions at the time of entry of a plea, and at sentencing. They should have a right to be present whenever a defendant has a right to be present, and there are many more rights within Arizona's constitution that should be considered.

Having said that though, here's an important caveat. Do not civilianize the military's justice system. It's different for a reason. You do not have a right to be in the military. It is an honor to serve. But if you cannot conform your conduct to contribute to the mission of your unit, and to support fellow soldiers, airmen, sailors,
marines, Coastguardsmen, then you should not
be there.

How you wind up being sent from
that service assignment can differ based upon
what your conduct was. But not every right
that a civilian defendant has within the
civilian justice system is necessarily
something that needs to be present within the
military's justice system.

The fact that cases involving
sexual assault need to be focused on doesn't
reflect that the military's justice system
overall is broken. Are there areas to
improve? Certainly.

One other specific recommendation
I would make too is do not remove commanders
from their responsibility to ensure that
justice and discipline are being served in
these cases. Commanders are responsible for
everything that happens and does not happen
within their area of responsibility,
regardless of whether they're a company
1 commander or a theater commander.

2 If they do not perform their
3 duties and responsibilities the way our
4 civilian control of the military wants that to
5 be done, then relieve them, if they don't
6 follow through, if they don't allow cases to
7 go to courts-martial that should.

8 If they're overturning decision of
courts-martial where they shouldn't, relieve
9 them. But don't relieve them of their
10 responsibility in the first place. I'd be
11 happy to take any of your questions.

12 JUDGE JONES: Thank you, Mr.
13 Montgomery. Ms. Patrick. You're San Diego
14 District Attorney's Office?

15 MS. PATRICK: Yes. Thank you very
16 much. Yes, I have the distinction, I believe,
of being the last speaker of the day.

17 JUDGE JONES: I was going to say
18 that but --

19 MS. PATRICK: But as my colleague
20 Bill Montgomery reminds me, prosecutors like
to have the last word. So I'm right at home.

I am a prosecutor in San Diego County, a sex crimes prosecutor. However, I began my career as a deputy public defender. So I very much sympathize with much of the sentiments I've heard expressed by the last panel.

I also, for my doctoral dissertation for my Ph.D., I chose the topic of how sexual predators use the psychology of attraction to lure victims. So with all of the years of research I did in preparing that, I also got myself up to speed on the investigative arm, and how we can prevent and, as the saying goes, to catch a predator when we're out in the community.

So it's a training issue that I also bring to my combined 20 years of experience trying cases on both sides. Currently in San Diego County, I am in charge of the SVP unit. However, unlike what it stands for in my colleague's jurisdiction,
it's not Special Victim Prosecutors; it's Sexually Violent Predators.

And in San Diego County, we have three million people, 300 prosecutors, and most of my time is spent on these kinds of cases. The ones that we seek to civilly commit after they've served their prison term, because they have a qualifying mental disorder that renders them, and I'm paraphrasing, too dangerous to be out in the community, too high of a risk, too not in control of their behavior.

So because it's late in the day, I've really streamlined my remarks, and I'm going to hit upon some of what we have found have been the best practices in a couple of different areas.

What I think distinguishes my jurisdiction in several interesting points relevant to both investigating, detecting and prosecuting sexual assault cases, the first thing is that we are a convention city. Like
some of the other jurisdictions that are represented, we have a lot of people that travel there on business trips. So we have a lot of -- and I also dislike the term "acquaintance rape." What does that mean? I will say rape by known perpetrators, sexual assault by known perpetrators, that occur during convention business. Thankfully, we also have a lot of surveillance footage in all the bars and restaurants in the areas of San Diego County. But that also puts us as prosecutors in the often untenable position of confronting a victim with, or a complaining witness, someone who is now stating that she's been sexually assaulted, confronting her with what we have on tape. We have cameras not only in establishments, but also even between buildings. So we're also able to catch portions of some of the stranger rapes. So we're also distinguished by our
proximity to the Mexican border. That requires us to move very quickly when an assault is committed. We don't have a lot of time before we worry about people fleeing the jurisdiction. That's not only the suspects, but also the complaining witnesses and also the other witnesses.

We try to get, you know, cell phones as quickly as we can, so when we're looking at all those selfies that have been taken the night in question, we're able to identify who else may have been there, and may have -- may be able to provide good testimony for us. So we have to move very quickly because of our proximity to Mexico.

We also have lots of universities like New York, so we have a large presence on college campuses, of people that are very interested in doing what we can to identify how we can stop these assaults to begin with, and that's an educational component that I'll talk about in just a minute.
Our crimes are very victim-focused, and so when we talk about training to be in the unit or even to be part of law enforcement, it's got to contain that sort of factor of why are these cases so different? You know, we've got a lot of different crimes that focus on what did the suspect do?

But unfortunately, it's challenging that a lot of our cases focus on what did the complaining witness do, and they're focused on that from the beginning. You know, I've heard for 20 years my victims say well, I feel like I'm the one on trial.

And in a lot of cases, she is in some facets of the law that allow everyone to look at, you know, what led up to the crime. All of what's been discussed both today and yesterday actually is a big part of the case.

But another part of it is we also, right from the beginning, have found it to be a best practice to look at what category of offender are we dealing with, right from the
beginning. Are we dealing with a true predator that is hiding out between two buildings down, you know, in what we call the "Gas Lamp Quarter," if any of you have ever been to San Diego, a highly populated string of bars and restaurants.

Do we have one category of offender that really is a predator and is going to wait there and try to find someone vulnerable with her headphones on or too much to drink and attack? Or is it somebody who we'll call an opportunistic kind of offender, the kind that can be rehabilitated?

Maybe somebody that's watched, you know, too many of these movies, where they talk about well just wait 'til she has too many drinks and then maybe you can get together. Is it one of these kinds of people that maybe is, you know, guilty of an intoxication rape, that could be prevented by best practices, maybe you know, messages getting out there by peers.
Maybe not so much by supervisors, but by one of the things we've really found has caught on in college campuses is having a message come from within. You know, maybe having sexual assaults be on the way to being viewed as a shameful act, as we view drunk driving in a lot of our jurisdictions, not as something cool, not as something to brag about the next day, but something to be ashamed of.

So there's this big educational component that maybe is present in a type of opportunistic offender, that isn't present in a predatory offender. So this is something else that we try to look at right from the beginning.

And along those lines, we also, you know, victims advocates has been discussed by my colleague, Ms. Higashi, and that is one of the things we talk about a lot, because sometimes we find, and this is certainly not unique to my jurisdiction, that we might be working at cross-purposes with victim
advocates, who have a role that's very
different to ours.

In California, and I know this is
again, other jurisdictions deal with this as
well, if we use internal victim advocates and
they talk too much about the case with the
complaining witnesses, we're generating
statements that then have to be disclosed to
the other side.

Whereas with external victim
advocates, they're protected by evidentiary
privileges. So they can have totally separate
conversations that don't then become a part of
the prosecution team.

But regardless of which category
our victim advocates fall under, we have found
that it is so much easier to conduct an
investigation when we really think those
issues through before we even have anybody
speak to the victim, to see who is going to
have a better chance at giving her the support
that she needs, and also not accidentally
creating and generating statements that we're
going to have to turn over.

So these are all things to think
about quickly. Because we're so close to
Mexico, we try to act as quick as we can, in
order to get the evidence we need before we
lose anything. That includes, by the way,
those valuable text messages that we all know
how quickly those are erased, if we don't get
the phone right away.

And that's if we can even get the
cooperation of the phone companies. So as
quickly -- we even sometimes need to take
screen shots if we have to, to have a law
enforcement officer testify before we lose
that kind of evidence.

So the investigative arm of it is
what I'm going to talk about next, and I
really am going to be brief in my remarks
here. I'm going to hit on what I've not heard
discussed, in order to not corroborate
anything that's already been so eloquently
stated.

We, as with every other jurisdiction, are short. We're short investigators. That's both internally and externally, and we have the same kind of issues that I know other agencies face, where different arms of law enforcement are pointing fingers and saying "Well, I think that's your job, because we're short-staffed," and of course the direction the finger's pointing, they're short-staffed too.

What we don't want to have is the complaining witnesses suffer because everyone is short-staffed, because a lot of these both young women and men that are victims in our cases, they rely very heavily on us and on law enforcement.

Sometimes they even feel far more comfortable disclosing to us than they do maybe to victim advocates and agencies that they're not connected with. And that sort of bleeds into the next issue, is do we draw
internally from -- and I know that's something that's very near and dear to the heart of the military, is do we draw and do these investigations all internally?

What we have found as just some of the challenges that are involved, is our agency, to use it as an example, is like a family. It's not only a career; it's also a family.

So when we have a crime where the victim is somebody in the DA's office, we choose to have another agency review it, because a lot of our victims have stated not only are they afraid that whatever they say might be used against them, might embarrass them, they may not be as forthcoming, but they also worry about getting another member of the family in trouble.

And it's a close-knit community. I know we've got three million people in my jurisdiction, but you'd be amazed how close-knit the legal community is and the law
enforcement community is. So we have the 
attorney general's office prosecute. 

Even then, you know, we still have 
the issue of we're just so close, it seems 
like that there's a candor issue, there's an 
embarrassment factor and there's a guilt 
factor. The 911 tape we heard earlier today 
is just an excellent example of even though 
you of course know the victim knows she's not 
to blame, there's still this reluctance that 
might come about when you're prosecuting 
somebody, or complaining about the conduct of 
somebody that's in the same community. 

I'm going to sort of end with jury 
selection and technology, just very briefly. 
I could talk all day on technology. 

Obviously, I won't. I'm last and I know, you 
know, it is evening now, right? It's no 
longer good afternoon but good evening. 

Let me just say technology has 
raised some challenges in the last year that 
are changing daily. They change daily in
terms of how do we use what we can get. Facebook is a great example. That has changed the face -- no pun intended -- of investigations, hasn't it?

You know, we want to not only use it as the great investigative tool that it is, but we want to do it without violating ethics rules. One of the other distinctions I've had in California is I'm the immediate past chair of the California State Bar Ethics Committee, Legal Ethics Committee.

So we are on the front burner of investigating. How can we use this great new technology in a fashion that doesn't result in us losing the evidence, because we've cut corners ethically, or putting ourselves at risk at being prosecuted for doing something that's unethical.

So for example, we know that we can't misrepresent our identity online. We know that we can't friend people that are represented parties, even if they're
And when we're picking a jury, there's a new New York opinion that just came out last year that says when we're investigating potential jurors, which we can do if it is, you know, public record, public knowledge, we now, according to one ethics opinion, should not be using technology that will let the prospective know that we've looked.

Which the whole point of all of this is not to say that we have all the answers to the questions, but that we need to be savvy and aware and on the cutting edge of all of the ethical rules as law enforcement and as prosecutors that apply to us, that by the way those rules apply to the defense bar as well.

We just have to make sure that we use technology as the great tool that it is, without stepping in these land mines that it is now exposed, because we may not even know
how easy it is to make accidental contact with others in the system.

And really in summation, I know the panel may have some questions, you know, let me just say that, you know, these last two days we've heard of so many new ways that we can consider technology has also made it incumbent upon us, that as we consider all of these new ideas, technology has given us a way to do it faster and more efficiently, but also has created just some issues to be aware of, to make sure that we also do these things ethically.

So these are some of the best practices from sunny San Diego. I couldn't bring the weather, but hopefully I can share some of the wisdom. Thank you so much.

JUDGE JONES: Thank you. Any questions? Any questions?

(No response.)

JUDGE JONES: Well, I think we've had an abundance of riches, particularly in
our last panel tonight. So thank you very,
very much for waiting all day.

I know some of you have been here
both days, so we thank you for your interest
as well, in addition to your contribution. So
I will say good evening. Thanks a lot.

(Whereupon, the above-entitled
matter went off the record at 5:56 p.m. and
resumed at 6:23 p.m.)

JUDGE JONES: So the panel members
have reviewed a summary of today's proceedings
and we've agreed that it's accurate, and Mr.
Sprance, would you close the meeting now?

MR. SPRANCE: Yes ma'am. This
meeting of the Response Systems Panel is
closed.

(Whereupon, at 6:24 p.m., the
meeting was adjourned.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual Assault Crimes Panel Meeting

Before: US DOD

Date: 12-12-13

Place: Austin, TX

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

______________________________
Court Reporter