

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 FANSU KU, Chief, Defense
Counsel Assistance Program, U.S. Army
Trial Defense Service, U.S. Army

LIEUTENANT COLONEL MIKE LEWIS, Chief, Military
Justice Division, U.S. Air Force

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Policy, Office of The Judge Advocate
General, U.S. Army

CAPTAIN STEPHEN MCCLEARY, Chief, Office of
Legal Policy and Program Development,
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BILL MONTGOMERY, Maricopa County Attorney,
Maricopa County, Arizona

LIEUTENANT COLONEL JAY MORSE, Chief, U.S. Army
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COLONEL MICHAEL MULLIGAN, Chief, Criminal Law
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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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1 P-R-O-C-E-E-D-I-N-G-S

2 (8:32 a.m.)

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

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

14 MS. MUNCH: Good morning.

15 (Multiple good mornings)

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

20 I am just -- it's really an honor
21 to get to educate at any level, and I wanted
22 to express appreciation for that. Also to let

1 you let know that this a presentation that I
2 provide for civilian audiences, military
3 audiences, I work a lot of with the Department
4 of Defense and with all of the branches of the
5 military.

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

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

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

22 And what I noticed when I stepped

1 into prosecuting cases and especially cases of
2 sexual assault after about a year in County
3 Court where you can't do too much damage, you
4 know, they move you up into District Court to
5 do the felonies, and I had a steady diet in
6 the Domestic Violence and Sexual Assault Unit
7 in Denver, in the Denver D.A.'s Office, of
8 these kinds of cases.

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

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

20 As I started doing cases of sexual
21 assault, and specifically sexual assault that
22 involved adult victims, I realized that this

1 assumption that I had made and what I had seen
2 in other kinds of cases where this seemed to
3 be true, in robbery cases, and other kinds of
4 cases, it wasn't true in sexual assault cases.

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

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

19 And so I decided, you know, I need
20 to understand this a little bit more because
21 the third party was influencing the outcome of
22 the cases, more than either of those two

1 entities on the board, more than the evidence
2 itself.

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

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

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

22 So that's what I'm going to do.

1 I'll take you on a tour with this Unnamed
2 Conspirator concept. The truth is to see or
3 understand the influence of the Unnamed
4 Conspirator you actually don't have to look
5 too far.

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

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

20 And she brings the paper in and
21 all was well in my world in terms of trying to
22 create a day of, you know, relaxation for

1 myself until I opened up the newspaper and on
2 the front page of the Denver Post was this
3 picture with an accompanying story.

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

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

18 But this is what they came up
19 with, right, and so it surprised everybody,
20 including the football players who were
21 running to this banner thinking boy, I was
22 here to play football today and somebody has

1 a different kind of idea, I'm sure it was
2 confusing for them.

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

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

16 As I was beginning to develop or
17 understand this concept this is what I saw
18 here and the reason is because I found myself
19 staring at this picture that morning in my
20 living room going, what is it that inspires
21 high school aged girls to think that wishing
22 rape on anyone is okay?

1 What is it that helps them
2 understand or what do they get from their
3 world that says if you really want to win, if
4 you really want to dominate, if you really
5 want to make a showing to the other side, what
6 do you do to other side, you rape the other
7 side, right?

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

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

22 And I've done all the work and

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

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

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

19 And yet what I find is that if we
20 just switch our focus, and that's what this
21 lecture will mostly be about, is switching our
22 focus to look at kind of things in other

1 realms, we see perhaps some startling
2 information.

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

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

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

22 A behavior-based question that is

1 written in a way to see whether or not
2 somebody's behavior or something they've
3 experienced has matched up with a violation of
4 the law.

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

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

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

20 So there's a big discrepancy,
21 right. They are saying yes, somebody held me
22 down, forced me, penetrated me, and I didn't

1 want it to happen. Clearly meets the legal
2 definition of rape, and yet you ask them to
3 self reflect on what that was and only 27
4 percent of them identify themselves as having
5 been sexually assaulted or raped.

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

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

19 And so we all kind of rely on or
20 we go back to that image often that we've seen
21 in the media, which is, of course, the
22 stranger who jumps out of the bushes and has

1 the knife and wears a mask and everybody knows
2 that person, he probably smells bad, too.

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

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

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

1 whether it's a coach, you name it.

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

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

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

22 But because you can't tell any

1 better than I can nor than they could most of
2 the time, they make a decision to be alone and
3 then that person takes that opportunity,
4 forces a rape on that person and then here
5 they are, right, in their college experience.

6 Perhaps part of the study that
7 bothered me the most around this was that 42
8 percent of them didn't tell anybody and only
9 5 percent of that particular study reported to
10 the police, right, so again this is one study.

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

15 So that is I think important and
16 significant for us to see, wow, you know,
17 there's plenty of them who are experiencing
18 this, very few of them are identifying what
19 happened to them as rape and then they're
20 really not talking about it, and only 5
21 percent of them are saying ah, this is
22 criminal and I need to call the police.

1 In a college setting, again,
2 different study, but, you know, we get a
3 little bit more information. We understand in
4 the later study 20 percent of college-aged
5 women experienced this, 6 percent of college-
6 aged men were experiencing this kind of
7 conduct.

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

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

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

1 population.

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

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

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

17 So what this tells us is this is a
18 cultural problem, that this happens across
19 communities, whether they're military or
20 civilian in very similar ways and that part of
21 the reason for these numbers I'm submitting to
22 you is the influence of the Unnamed

1 Conspirator, who we'll get back to now.

2 Okay. So as we develop this
3 concept of the Unnamed Conspirator what I'd
4 like to do is take a pause here and there's
5 really, the easiest way for me to help you
6 understand what I'm trying to describe is to
7 let you hear the influence of the Unnamed
8 Conspirator in the actual voice of a victim.

9 And so what I'd like to do, and
10 I'd like to just give a heads up to people,
11 I'm going to play a part of a 911 tape, all
12 right, and in this 911 tape this victim
13 describes a sexual assault.

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

21 What I'd like you to do when you
22 listen to this is to listen specifically, you

1 know, listen to what she reports or what she
2 says, but please listen specifically for the
3 influence of this character that I'm trying to
4 create for you called the Unnamed Conspirator
5 and then we'll talk about the tape.

6 (Audio playback)

7 OPERATOR: Police.

8 CALLER: Yes, I need to speak with
9 somebody.

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

12 CALLER: I was raped earlier --

13 OPERATOR: Yes.

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

16 OPERATOR: Okay. Where are you
17 right now?

18 CALLER: I'm at home.

19 OPERATOR: When did the incident
20 occur?

21 CALLER: At home.

22 OPERATOR: At home?

1 CALLER: Yes.

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

4 CALLER: A guy.

5 OPERATOR: Is he your boyfriend?

6 CALLER: No.

7 OPERATOR: Is he a friend of
8 yours?

9 CALLER: No.

10 OPERATOR: Who is he?

11 CALLER: This guy that I met at a
12 bar.

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

15 CALLER: No.

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

18 CALLER: About three hours.

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

21 CALLER: No.

22 OPERATOR: No. He left?

1 CALLER: No. Yes, he left.

2 OPERATOR: He left, okay.

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

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

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

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

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

16 OPERATOR: Okay. Did he hit you?

17 CALLER: Yes.

18 OPERATOR: He did hit you?

19 CALLER: Yes.

20 OPERATOR: Okay.

21 CALLER: My head hurts.

22 OPERATOR: He hit you with what,

1 ma'am?

2 CALLER: I don't know.

3 OPERATOR: Hit you with his hand

4 or --

5 CALLER: With his fist.

6 OPERATOR: With his fist?

7 CALLER: Yes.

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

10 CALLER: Yes. It's my fault.

11 OPERATOR: No, it's not.

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

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

16 CALLER: I said no.

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

19 CALLER: No.

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

22 CALLER: White.

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

3 CALLER: Twenty-eight.

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

6 CALLER: 6' 1".

7 OPERATOR: Six foot, six feet, or
8 6' 1"? Okay. How much do you think he
9 weighed? Was he pretty --

10 CALLER: 180.

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

13 CALLER: No.

14 OPERATOR: No.

15 CALLER: No facial hair.

16 OPERATOR: Clean shaven, okay.

17 What kind of clothing was he wearing?

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

21 OPERATOR: Are you there by
22 yourself?

1 CALLER: No. My friend is here.

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

5 CALLER: I think it's my fault.

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

8 CALLER: I was drinking.

9 OPERATOR: No. That doesn't
10 matter.

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

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

16 CALLER: He wasn't --

17 OPERATOR: He left in a car or on
18 foot?

19 CALLER: I don't know.

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

22 CALLER: He left in a car.

1 OPERATOR: Okay. So he followed
2 you from the bar?

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

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

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

8 OPERATOR: No, it's not.

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

11 OPERATOR: Okay.

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

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

22 But otherwise would she have

1 called? She tells us no. She would not have
2 called otherwise. She was calling to try to
3 get medical attention.

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

9 FEMALE PARTICIPANT: It's my
10 fault.

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

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

22 So what are some of the reasons?

1 Give me just a few reasons that she might be
2 blaming herself? Why is she doing that? If
3 you can, would you, sir?

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

9 MS. MUNCH: Right.

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

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

19 And so in her mind you can very
20 clearly hear, if you picture your internal
21 grandmother for a second, if you will, I mean,
22 you know, or someone who is wagging a finger,

1 you can almost hear that, exactly what you
2 just articulated.

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

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

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

20 MEMBER BRYANT: Well he hit her.
21 So there was a force involved.

22 MS. MUNCH: Right.

1 MEMBER BRYANT: I thought it was
2 interesting, at the very, very beginning when
3 she first starts to speak she says "I was
4 raped, or at least I think I was."

5 MS. MUNCH: Right. Very good.

6 MEMBER BRYANT: Yes.

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

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

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

13 MEMBER BRYANT: Yes.

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

17 FEMALE PARTICIPANT: No.

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

22 So in terms of verbally, because

1 when you're looking at consent we know that
2 that is either words or actions, or a
3 combination of those kinds of things.

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

17 You know, we understand what that
18 means and the rules are not different just
19 because this person is in this particular
20 category, meaning, you know, she tells him no,
21 she asked him to leave, he refuses, and then
22 he hits her in the face as you noted.

1 I cut the tape off a little early,
2 but it sounds like he may have broken her
3 nose. The doctor is concerned that her nose
4 might be broken and he is trying to get her in
5 for medical attention.

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

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

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

1 population, it's a similar stage, right.

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

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

17 To that behavior-based question 6
18 percent of his population said yes, I have
19 done that. In a similar set of studies that
20 they have done, McWhorter, and other folks at
21 the Naval Recruiting Center in Great Lakes,
22 Michigan, they learn similar information, but

1 the number is about, in the latest study, the
2 number is about 13 percent of the Naval
3 recruits who had been there one year or were
4 just coming in had done that, all right.

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

14 Yes, maybe I did that, but I'm not
15 a rapist. Okay, sure, I held her down or I
16 did this, but I'm not a rapist. Why is that?
17 Part of that is because, who do they think is
18 the real rapist. They are thinking about the
19 same person that the college-aged women are
20 thinking about. It is the stinky, smelly guy
21 who jumps out of the bush, you know, and
22 commits a stranger assault.

1 And please hear me, those are very
2 real rapes and I am not undermining the
3 importance or the significance of a rape by a
4 stranger, but it has a tendency to kind of be
5 the default, where as you see even in the
6 research when you look at Cassia Spohn's
7 research, or any other research around, how
8 juries decide cases and how prosecutors decide
9 whether to even bring charges.

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

22 And in the military survey, 71

1 percent of them were serial rapists, averaging
2 seven rapes per rapists, by the time they take
3 this survey.

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

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

15 MS. MUNCH: Please.

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

22 MS. MUNCH: I would say, well I

1 don't have a specific answer to that, I would
2 say, of course, factors such as that one would
3 play into a mind set, that and many other
4 kinds of things that could justify "why I'm
5 different."

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

14 That has influence on their, you
15 know, self-perception. Okay, so we brought up
16 the subject of alcohol, I'm going to take you
17 a little bit further into this concept. And,
18 again, these are just ways to get you to think
19 differently. So we've talked about and you
20 heard in the 911 tape, alcohol is a factor,
21 right. Probably 70 percent of our cases,
22 alcohol is a factor on one or both sides, so

1 let's look at that because this is one of the
2 great tools that the Unnamed Conspirator uses.

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

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

21 Now most people that I ask about
22 this say oh, yes, and I want you to, this is

1 a visualization for you, so just picture
2 yourself in that situation, end of the week,
3 you've had a couple beers. How does that
4 feel? If you drink responsibly, you've had a
5 couple beers at the end of a stressful week,
6 let's be honest, what is the feeling around
7 that? Collective, anybody, tell me, ah, or
8 something, you know.

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

17 And so you have now, at this
18 setting, had a couple of beers and three
19 margaritas. This is your visualization not
20 mine, but I'm assuming that people are feeling
21 kind of drunk and that nobody's driving a car,
22 et cetera. And when you picture this it can

1 become a little uncomfortable as you think
2 about the queasiness in your stomach or the
3 spinning room or whatever it is. You probably
4 should've gone home, but you didn't, you stuck
5 around and you followed that up with four
6 jello shots, okay.

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

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

1 those phone calls.

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

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

1 ambulance.

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

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

21 But, nonetheless, you know, he
22 called me, and he reached out that way. But

1 the point was, look at how he was treated, all
2 right, look at how he was treated.

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

16 So I see a very different
17 packaging of the same amount of information
18 that you just visualized yourself, having
19 consumed that much alcohol. We look at this,
20 and I'm bothered by these kinds of t-shirts
21 that are marching around all over the place.
22 I see them on college campuses, people, you

1 know, think that this is a good idea somehow.
2 This is really just an advertisement to how to
3 commit a rape, really. That's what this is
4 and how to kind of successfully do that.

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

12 Maybe you make yourself, if you
13 will, vulnerable. But the point is, we have
14 a tendency to focus on the vulnerability and
15 sometimes not on other things. The
16 vulnerability itself has no meaning unless
17 someone decides to take advantage of it. And
18 that is a place I think sometimes where we get
19 stuck, you know, that the alcohol question,
20 you know, the truth is my nephew was fine,
21 because his friends saw his vulnerability and
22 they took care of him.

1 That's where sometimes, or that is
2 where, I will say, the rapist sees an
3 opportunity as opposed to a potential
4 emergency. Anybody who has ever had a surgery
5 understands that before, you know, because
6 there are lawyers in the world, you know, we
7 have to sign consent forms and that kind of
8 thing before anybody cuts into us, but we sign
9 those forms not at this point, we sign them
10 earlier, right?

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

21 And yet it's important for us to
22 force our thinking, to see, do we have a

1 double standard? And that's the point of
2 this, because the logical consequences of
3 drinking too much alcohol is a hangover.
4 We tend to get mad at victims who drink. You
5 know, we see this all over in the literature,
6 and we certainly see this with panelists and
7 jurors, they don't like it.

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

15 There has been some, and this is a
16 condensed version that I'm giving you, but,
17 you know, we get some information by polls or
18 by talking with folks. A time CNN did a poll
19 a long time ago, but they don't do them very
20 often, what we found, or what they found was
21 that in asking about the subject matter, that
22 a whole lot of people said that a raped woman

1 is partly to blame is she dresses
2 provocatively, all right.

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

15 It wasn't this person, I don't
16 know who this is, really, but he reminded me
17 of this, and what I mean by that is that he
18 was very wealthy and he was really good
19 looking and he was beautifully coiffed, nails
20 nicer than mine, gorgeous, you know, Italian
21 suit, the whole thing. I'm seated next to
22 him, he was an elderly gentleman, and I

1 thought well, you know, this is nice, I'll
2 just try not to spill on him though because
3 he, you know, I can't afford the cleaning bill
4 for this guy.

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

17 And he said to me, sexual assault?
18 And I said, yes. And he said rape. And I
19 said yes, you know, and he got this kind of
20 very serious, stern, kind of grandfatherish,
21 look on his face and he said to me the
22 following, and I quote, because I'll never

1 forget it, quote "You know, we wouldn't have
2 that problem if those women would just stop
3 wearing those floozy clothes."

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

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

1 from the wedding reception that you are short
2 on cash.

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

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

18 So he puts his debit card into the
19 other machine and he's getting money, too.
20 It's like Vegas, you know, everybody is
21 winning and the scene is happy until a robber
22 comes from around the corner and he sizes up

1 the situation, I said, and he picks you and he
2 takes your money, takes your wallet, takes the
3 card, loves your watch, grabs your keys, takes
4 the cash, and off he goes driving away in your
5 car and he leaves you standing there with your
6 chin on the ground."

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

16 And you say, "Help, help, I was
17 robbed." And they say, "I just have one
18 question for you. Is this what you were
19 wearing at the time that this happened? Like
20 you can't dress like that and come to an ATM
21 store, you're practically advertising that
22 you're available, you know, for this

1 particular kind of crime. I mean what were
2 you thinking? You can't wear those clothes.
3 I mean people will take from you if you do."
4 And he looked at me and I said, "But wait,
5 there's more." I said, "So you call the
6 police and the police decide to do an
7 investigation, but," I said, "Guess what, they
8 investigate you."

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

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

21 And he looked at me, and I
22 silenced him, which was not, and it's not a

1 good thing to do at dinner party, but he
2 looked at me and his comment was, "You know
3 what, Anne," he said, "I never really thought
4 of it that way."

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

18 I mean it's a concept, I'm not
19 sure where it came from, other than some
20 ancient time and yet we do drag this forward
21 and we do drag it, I mean women and men will
22 dress for sexual attention, clearly. And

1 people on beaches wear swimsuits, right, and
2 they have very little covering them, and yet
3 it is within this context that we begin to
4 assign blame if a person takes advantage of
5 another person under circumstances such as
6 that.

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

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

1 period.

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

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

20 But it was a safe town. I will
21 tell you the truth I didn't even, I wasn't
22 always diligent even about locking my doors.

1 A young woman goes out at nine o'clock at
2 night in this town to go get something to eat.

3 There's not a lot open around
4 9:00. She goes to a bakery in Telluride which
5 is called Baked in Telluride, to get a slice
6 of pizza. Unfortunately for her on her way
7 down to that bakery, she was abducted off the
8 street by a stranger, stuck into a car, driven
9 outside of Telluride up onto one of the high
10 mountain mesas in the area, where she's
11 dragged back out of the car through a barbed
12 wire fence, she's raped in a field, this man
13 drags her back through the fence, puts her
14 back in the car and drives her back into
15 basically the heart of town here and releases
16 her and then he flees, okay.

17 First question, do you think she
18 recognized what happened to her as rape?
19 Sure, right. This is the guy we all love to
20 hate, you know, so she called the police.
21 They did a great investigation. There are
22 only two ways into and out of Telluride, you

1 got to really want to get there, it's in a
2 boxed canyon, you know. So they set up blocks
3 on each of the exits out of Telluride.

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

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

17 Of course, in a civilian
18 jurisdiction, on these kinds of felony
19 matters, almost without exception you need a
20 unanimous verdict of 12 jurors, for either
21 guilt or innocence. And on the facts of the
22 case that I just told you, this is a jury that

1 hung, all right. This is a jury that was a
2 hung jury. They couldn't decide on a verdict.

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

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

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

22 MS. MUNCH: Yes, that and what

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

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

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

22 I mean, very well-meaning fathers,

1 brothers, boyfriends, mothers, tell us, honey,
2 it's a bad world, do this, don't do that,
3 right, they kind of tell us, don't walk alone,
4 get a German Shepherd, you know, whatever it
5 is, here's the things that you want to do to
6 avoid this crime.

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

15 And so sometimes the typical
16 thinking, we know this, around when we study
17 victim blaming, or we study, you know, a kind
18 of attrition of responsibility, or attribution
19 of responsibility, I think their thinking was,
20 I want to know what she did, because I want
21 something I can control. What did she do?
22 Oh, she walked alone at night, well, that's

1 why it happened. And if I can do that then
2 I'm safe, because all I have to do is not walk
3 alone at night and I can go on into my life
4 and feel and believe that I am safe, okay?

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

11 You'll learn more specifically
12 about this later, but what I will say is, just
13 in one slide, when you look at actual research
14 that has been done on actual jurors who decide
15 these cases, not mock jurors, but Calvin and
16 Zeisel and Gary LaFree, who have talked to
17 deliberating jurors on actual simple rape
18 cases, meaning, no knife, no gun, you know,
19 one assailant, one victim, et cetera, they
20 have some very strong opinions around how they
21 make their decisions, including, in the later
22 research at the University of New Mexico by

1 LaFree, admitting to disregarding the evidence
2 and making their decisions on a rape case,
3 based on their perceptions of the victim's
4 character and lifestyle.

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

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

18 He investigated a case that
19 involved a medical student who had met and had
20 a one-time casual, kind of, sexual
21 relationship for one night with a college-aged
22 freshman.

1 She left that encounter feeling
2 used and like she didn't want to continue that
3 liaison at all. About a month later, he found
4 her, he went to her fraternity party, which
5 also tells you something, right, what's a
6 medical student doing at a fraternity party
7 with freshmen?

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

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

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

22 He gets her isolated, and he uses

1 some force against her. He pushes her down,
2 he begins to rape her, she resists, cries out
3 for help.

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

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

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

1 acquitted.

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

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

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

21 It's where we orient some of our
22 first questions. And this is what we're

1 trying to change, right, some of our first
2 questions. Why did she, why didn't she, what
3 was she, if it is a female victim,
4 particularly.

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

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

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

19 You and I are the unnamed
20 conspirator, right? It's our culture, it's
21 our attitude, it's what we've grown up with,
22 it's the stew that we've kind of baked in, and

1 it's what we bring to this problem.

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

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

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

22 And when we change our focus on

1 these cases, we find again that sometimes the
2 thinking, the thinking -- that we have double
3 standards.

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

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

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

22 And so as a way to unpack this,

1 what I would do, and I'm actually going to
2 turn, if it's okay, I'm going to turn to one
3 of the subcommittees for a little bit of help
4 on this.

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

8 MR. SPRANCE: It's Bill.

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

11 (Off microphone discussion)

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

19 MR. SPRANCE: Yes.

20 MS. MUNCH: Sure. And of course,
21 Terri, you would pay him back. So at the next
22 meeting where you are, the same kind of thing,

1 Terri, your kids cleaned you out and you
2 thought you had money and you didn't, you find
3 your friend, Bill, you're like Bill, I need to
4 borrow \$10, Bill, do you think that you would
5 loan Terri \$10, based on what you know about
6 her?

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

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

12 (Off microphone discussion)

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

18 Now, so she is asking you for
19 twice as much as she asked you for last time,
20 all right? Let's say, Bill, that you are
21 like, you know what, Terri, you look at Terri
22 and you say, you know what, Terri, here's \$10,

1 that's what I'm comfortable giving you.

2 Now Terri would never do this,
3 because she's a fine upstanding person, but in
4 a moment of weakness, Terri, let's say that
5 Bill shows you a \$10 spot, but right behind it
6 he has a \$20 bill. And rather than taking the
7 \$10, because you want \$20, you take \$20. So
8 Bill offers her \$10, Terri takes \$20, would
9 that be a crime?

10 (Off microphone discussion)

11 MS. MUNCH: What's it called?
12 This is the test. Theft, right, larceny? And
13 --

14 (Off microphone discussion)

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

18 (Off microphone discussion)

19 MS. MUNCH: Robbery, right? And
20 if she takes it with this, what's it called?
21 Really bad robbery, right, don't do it
22 robbery, but it is --

1 (Off microphone discussion)

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

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

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

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

22 How is that different than the person who

1 says, you know what, I like you, come home
2 with me, I'm attracted to you. I'll have some
3 limited sexual contact with you, but I don't
4 have sex on the first date, or I don't feel
5 like having sex tonight, and they draw a line.

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

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

22 The robber's going to choose the

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

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

19 It talks about freely agreeing.
20 It talks about the things that we all know
21 consent means, because we consent to things
22 every day of our lives, and it's not different

1 just because it's sexual assault.
2 So, that's a quick run through of that
3 concept, by which I am privileged to educate
4 different people in different circles, and I'm
5 really appreciative of the opportunity to do
6 that with you. And I'm happy to answer
7 questions on that, or anything else that you
8 might have for me.

9 CHAIR JONES: Mr. Bryant?

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

16 MS. MUNCH: Sixth through ninth
17 graders.

18 MEMBER BRYANT: Can you tell us
19 how old that survey was, and was it from a
20 particular part of town, was there any
21 demographics that maybe drove that opinion
22 from that aged child?

1 MS. MUNCH: Well, they did those,
2 they did two, at least two of those surveys,
3 they didn't do a third one, but they did them
4 ten years apart, so they did a survey, I want
5 to say, in 1998, and then they did one a
6 decade apart from that.

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

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

21 MEMBER BRYANT: Do you think
22 that's because of the media, and the music

1 they listen to, that sort of thing?

2 MS. MUNCH: Yes.

3 MEMBER BRYANT: Because, that
4 survey is also scary about what's going on in
5 the homes in which they come from.

6 MS. MUNCH: Sure.

7 MEMBER BRYANT: Yes.

8 MS. MUNCH: I mean, I think it's
9 all of the above. But it's clearly what they
10 get, you know, from the internet, from the
11 media, from the influences in their lives,
12 which are very similar to the things that we
13 are also exposed to. They are vulnerable and
14 they are shaped by their ideas and their
15 opinions. And I think that, of course, the
16 Unnamed Conspirator loves the media around
17 some of this. And there is a high influence,
18 that younger people are very challenged to
19 figure out how to make sense of, and what to
20 do and how to deal with that.

21 MEMBER BRYANT: The other thing
22 that was offensive, obviously, was the t-shirt

1 that you saw, but it also made me think how
2 ingrained this is, and I'm asking this as a
3 question, because that's what we're supposed
4 to do, do you think, how ingrained it is in
5 our society? Because we all sort of giggle at
6 the Ogden Nash little poem, candy is dandy but
7 liquor is quicker.

8 MS. MUNCH: Right.

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

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

17 But it is absolutely alive and
18 well. And what I notice, of course, because
19 kids are drinking younger and younger, using
20 drugs younger and younger, having sex younger
21 and younger, if you will, that just in that
22 entire realm, I think we are seeing much more

1 of the influence of ideas and attitudes
2 attached to alcohol and what it means to
3 drink, if you're a man, or a woman, or a
4 student, or whatever, perhaps than we did when
5 I was younger.

6 MEMBER BRYANT: Thank you.

7 MS. MUNCH: You're welcome.

8 CHAIR JONES: Is there any
9 compared --

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

12 CHAIR JONES: Oh yes.

13 MEMBER HOUCK: -- may I ask a
14 question?

15 CHAIR JONES: Thank you, Admiral,
16 go ahead.

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

1 think is exactly right.

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

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

22 And what I'm about to point out,

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

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

1 to give you a chance to talk about that some.

2 MS. MUNCH: Sure. Yes, thank you.

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

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

21 The vulnerability of a person who
22 drinks too much alcohol shouldn't be at play,

1 and it wouldn't be at play in the issue of
2 sexual assault, if we didn't have people that
3 were practiced at taking advantage of that
4 very person. And so because we know that is
5 the case, and because we are all interested in
6 keeping people safe, what I would suggest to
7 you is that there are several conversations
8 that are necessary.

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

16 How do you see that person? Do
17 they cease to be a fellow soldier, or a buddy,
18 or a wingman, because of that? What do you
19 think of women who drink too much?
20 What do you think of, you know, of men who
21 drink too much? Because if we don't start
22 having the conversation and allowing the folks

1 that are the bystanders to the people that
2 take advantage of the climate where alcohol is
3 a part of it, if we don't allow them the
4 conversation around what that means and, you
5 know, how they will perhaps be witnesses to
6 the objectification of a human being and, you
7 know, somebody causing great harm to them in
8 their presence, then we're really not
9 preventing.

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

22 We need to get at the culture and

1 allow people who would walk by a t-shirt like
2 that and chuckle, instead of really pondering
3 it and going wow, what if that was my little
4 sister, or what if that was me, or my brother,
5 would that be okay? That's, I think, the
6 piece of the prevention model that we don't
7 focus enough on.

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

20 MS. MUNCH: Absolutely. Right.

21 MEMBER HOUCK: And making, and
22 constantly working on finding a way to make it

1 more acceptable to avoid these situations in
2 the first place. But thank you for the work
3 that you do.

4 MS. MUNCH: Thank you, very much.
5 Yes, ma'am?

6 CHAIR JONES: Yes.

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

10 (Off microphone discussion)

11 MEMBER HOLTZMAN: I appreciated
12 very much your presentation. I have a
13 question about how this pertains to sexual
14 assault of men, and what information do we
15 have, with regard to the circumstances in
16 which those attacks take place? And does the
17 Unnamed Coconspirator, or Conspirator, play a
18 role there too? To what extent do they -- I
19 mean, because I can see one of the things that
20 is deeper, even than some of what you've
21 talked about, is the attitudes about women in
22 the society.

1 That at some point, women become
2 property. And for different people,
3 apparently, it comes at different times, and
4 there's a signal. And women are accepting
5 that signal just the way men are, it's not,
6 that's what the high school, or the middle
7 school approach showed.

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

13 MS. MUNCH: That is a great
14 question and I'm glad that you asked it. I do
15 think that the Unnamed Conspirator is alive
16 and well in that side of the equation, as
17 well. What we don't have yet, and what we're
18 working on are more longitudinal studies and
19 surveys to help us understand that realm, as
20 much as we understand, you know, some of the
21 sexual assaults that are committed against
22 young women.

1 But here's what I believe, is part
2 of the system that keeps the men from
3 reporting and perhaps from even identifying
4 themselves as having been victimized. And it
5 has to do with our view, as a culture, of
6 masculinity.

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

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

18 And I think that's part of why
19 they don't perceive, like women do, that they
20 are at risk. You know, we're trained from the
21 time we're this big, right? Men are typically
22 not getting that kind of education, because of

1 what it means to be strong and that this
2 doesn't happen to strong men.

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

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

1 homophobia and trying to understand that.

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

14 But I think the other thing, and
15 I'm starting to see this, in fact, I was at
16 Andrews Air Force Base yesterday, for the Air
17 Force Leader Summit on Sexual Assault.
18 And they had a male survivor and a female
19 survivor address the group toward the end of
20 the day. And his story was very much like
21 what Russ and I have seen in a lot of the Army
22 cases that we have examined, where someone,

1 basically, in a kind of a bullying situation,
2 if you will, exposed his genitals, tried to
3 place his genitals in this victim's face.

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

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

19 And so it is evolving and it is
20 critically important that men understand that
21 they, not only are vulnerable to this, but
22 they are responsible to become educated and

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

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

13 MS. MUNCH: Then I would switch to
14 the field of study that we have around
15 offenders, whether they are convicted sex
16 offenders, or more importantly, in my opinion,
17 undetected rapists, if you will.

18 You know, there is crossover. There is a lot
19 of crossover between an offender who will
20 offend against a woman and may offend against
21 a peer, or a child, or something like that.

22 You know, interpersonal violence

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

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

22 MEMBER HOLTZMAN: Thank you.

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

5 MS. MUNCH: Thank you for having
6 me.

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

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

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

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

20 COL. WINKLOSKY: Thank you, ma'am.
21 Good morning, members of the panel. My name is
22 Lieutenant Colonel Devin Winklosky. I work at

1 the Army Judge Advocate General's Legal Center
2 and School, where I'm the Vice Chair of the
3 Criminal Law Department, and what I'm going to
4 be doing is talk with you about Article 120,
5 which is the military's Rape and Sexual
6 Assault Statute.

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

13 What we're going to be doing
14 today, and I've broken it down into really
15 four areas, is: I want to give you a brief
16 history of Article 120, and then I want to
17 focus on our current version of Article 120,
18 its structure, its definitions, and then some
19 of the legal issues that are challenges for
20 practitioners in the field that we've talked
21 to. So, let's talk a little bit about the
22 history of Article 120 briefly.

1 I show you this picture because I
2 think it is, first, an iconic picture. Second,
3 just a few years older than the UCMJ itself,
4 and it's the VJ Day picture of the sailor
5 kissing the nurse. And I show it to you for a
6 couple of reasons: because what used to be
7 culturally acceptable may not necessarily be
8 acceptable now, as the law evolves. And the
9 law can force a re-examination of social and
10 cultural norms. And I think, as we go through
11 the history of Article 120, and as we discuss
12 Article 120's evolution, I will show you this
13 picture again after we've seen the
14 definitions, and we can talk a little bit
15 about whether the law has forced a change in
16 cultural norms. So, let's talk a little bit
17 about where Article 120 came from.

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

1 rapes.

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

14 Anecdotally, I will tell you when
15 I was a defense counsel, I had a client who
16 was acquitted. We talked to the jury, much
17 like Ms. Munch explained to you in one of her
18 cases, and it was a rape case. And it was a
19 rape case that involved alcohol consumption.
20 The jury acquitted, and when we talked to the
21 jury afterwards they said, "Well, your client
22 was guilty of something, it just wasn't rape."

1 So, as the law developed it was
2 analyzed, and the first real comprehensive
3 review of the UCMJ and, specifically, of the
4 pre-2007 Article 120 was from the Cox
5 Commission. Chief Judge Cox, among other
6 things, looked at -- his panel looked at
7 Article 120. And one of the recommendations
8 that came out of the Cox Commission Report was
9 that Article 120 needs to be updated, and it
10 needs to conform and be more consistent with
11 evolving state laws, as well as the federal
12 statute.

13 So, what happened as a result of
14 the Cox Commission recommendations back in
15 2001 was some action, some recognition of
16 this. One of the places where this was
17 recognized was from the Court of Appeals for
18 the Armed Forces in the case of United States
19 versus Lake, where it recognized -- and this
20 is Chief Judge Baker writing this opinion,
21 that Article 120 was antiquated in its
22 approach to sexual offenses, it was dated.

1 And, as recognized in that second portion of
2 the quote, "Traditional military rape elements
3 were applied in conducts for which the
4 elements were not initially contemplated, and
5 case law, as opposed to statutory law was
6 evolving to address this reality."

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

16 In what I've provided, and
17 what, if you haven't received yet, you will,
18 as handouts is a comparison between the
19 federal law, federal sexual assault statute,
20 the DC Code, and then the various versions of
21 Article 120 that really the update and reform
22 of Article 120 came from.

1 So, what happened as a result of
2 this study was a very comprehensive review and
3 recommendation from the Department of Defense,
4 an analysis of all the state laws, and various
5 courses of action for Congress to take.
6 Congress then passed a reformed Article 120 in
7 the FY 06 NDAA, the President signed it into
8 law in September 2007, and that became,
9 really, a radical change in our approaches to
10 rape and sexual assault in the military. It
11 was effective for all offenses on or after 1
12 October 2007.

13 And, two, -- and I say it's a
14 radical change because two of the major
15 changes that took place with this new Article
16 120 were, number one, lack of consent was, by
17 and large, removed from the statute. And,
18 second, it was a clear shift towards a more
19 offender-centric prosecution of rape and
20 sexual assault. And I will walk through some
21 of this with you to show you where that is
22 highlighted.

1 So, what happened, though, is that
2 this new version of Article 120, the 2007
3 version of Article 120 had some scrutiny
4 placed on it by the courts, not in the area of
5 the reform with respect to the actual crimes
6 or the offenses themselves, but more in the
7 way Congress had fashioned the Affirmative
8 Defenses within the punitive Article itself.
9 In other words, Congress had built in
10 Affirmative Defenses to Article 120, and that
11 was causing some problems with respect to
12 placing a burden on the defense that was
13 unconstitutional, and that was the challenge
14 to the law.

15 Nonetheless, some of the court
16 decisions that came out after the 2007 version
17 referred to this version of Article 120 as
18 poorly written, confusing, absurdly structured
19 with vague and undefined verbiage, a troubled
20 statute, hopelessly incomplete and confusing.
21 And Judge Ryan of CAAF called it "not a model
22 of clarity."

1 So, they went back -- Congress
2 went back, took a look at Article 120, the
3 2007 version, amended it and now we have our
4 current version of Article 120, which was just
5 a result of the fiscal year 2012 NDAA. And it
6 is applicable to offenses that occur on or
7 after 28 June 2012.

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

17 The other interesting thing that
18 occurred as a result of this involves Article
19 43, which is the Statute of Limitations. For
20 offenses occurring prior to 1 October 2007,
21 they are all referred to as rape because it's
22 a rape statute, and there is no statute of

1 limitations on prosecution for rape under the
2 UCMJ. However, once the language changed in 1
3 October 2007, and there was a division between
4 rape and aggravated sexual assault at that
5 time, Article 43 was not commensurately
6 amended to reflect that, which meant that
7 there was a five-year statute of limitations
8 on aggravated sexual assaults. And that
9 statute, that is, the Article 43 Statute of
10 Limitations on those crimes is being amended
11 in the FY 14 NDAA that was recently agreed to
12 by Congress just this week. So, that gap in
13 the law is being fixed, but it was not fixed
14 at the time, so there is a window of time
15 under the UCMJ where sexual assault and
16 aggravated sexual assault, the statute of
17 limitations has passed on prosecutions for
18 some of those crimes.

19 MEMBER COOK: But just to clarify,
20 what you said, what's been agreed to by
21 Congress this week in Fiscal Year 14, Fiscal
22 Year 14 NDAA, what you mean is it's come out

1 of the Senate. It's still got to go to the
2 House, but it has not yet been approved. The
3 language is still in play.

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

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

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

16 MEMBER COOK: Yes.

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

20 CHAIR JONES: Yes, go ahead.

21 MEMBER HOLTZMAN: Just on the
22 applicability of the new statute of

1 limitations, assuming this legislation is
2 passed, won't it go into effect, the new
3 statute abolishing the statute of limitations
4 for all offenses taking place -- well, when
5 does it go into effect for? Tell me --

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

10 MEMBER HOLTZMAN: There's no
11 retroactive application?

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

14 MEMBER HOLTZMAN: Okay.

15 COL. WINKLOSKY: Okay. So,
16 practitioners, obviously, that's one area, and
17 I will talk more about some of the other areas
18 where it is an interplay between what Congress
19 passes as the legislative body; what the
20 President then under Article 36 powers can do
21 to implement the law, and that is by writing
22 regulations that are embodied in the Manual

1 for Courts-Martial to put these things -- to
2 put the law into practice; and then what the
3 courts, ultimately, decide all of these things
4 mean. And it's an interesting interplay with
5 respect to some of the definitions and so
6 forth, which I'll talk about in a moment. So,
7 I want to focus on our current version of
8 Article 120, and some of the issues that have
9 arisen.

10 As I mentioned, we have a Manual
11 for Courts-Martial. It's a 2012 version.
12 Unfortunately, the only thing that's in the
13 2012 version of the manual is the statutory
14 text of Article 120. Usually, the President
15 fills in the elements, and definitions, and
16 other items that practitioners need in order
17 to prosecute this crime. That has not taken
18 place yet. We are still waiting for the
19 Executive Order to come out, to allow
20 practitioners to understand how to implement
21 this law, so what we have is raw statutory
22 text at this point.

1 However, the judges -- obviously,
2 we still have cases being prosecuted under
3 this article, and the judges have to put bench
4 book instructions together. They have their
5 best guess at what the language ought to be,
6 in order to be able to instruct members on how
7 to decide these cases.

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

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

21 Usually, they mirror what is in
22 the Manual for Courts-Martial, the language

1 that the President has put in the manual.
2 Without that language, the judges had to
3 derive on their own what that language might
4 be. We do have an Executive Order that was
5 signed updating our Manual for Courts-Martial,
6 and the President provided maximum punishments
7 for Article 120.

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

17 We had a gap in time from 28 June
18 2012 to 15 May 2013 where the President had
19 not acted to provide maximum punishments, so
20 the Judiciary was left with deriving what the
21 maximum punishments for the offense would be.
22 There is some case law, and there is some

1 language in the Manual for Courts-Martial that
2 talks about how to do that, and you look at a
3 closely related offense to be able to do that.
4 But, nonetheless, we didn't have any
5 Presidential action on it until 15 May 2013.

6 The other thing that is currently
7 pending, and as I mentioned, we're waiting for
8 the President to sign an Executive Order which
9 has already been through the public comment
10 period in the Federal Register to give the
11 practitioners the rest of Part 4 of the Manual
12 for Courts-Martial, which is all of the
13 information practitioners generally rely on to
14 prosecute these kinds of cases. It has not
15 been signed yet, so we are waiting -- and once
16 it is signed, it will be incorporated into a
17 2014 version, hopefully, of the Manual for
18 Courts-Martial.

19 So, what does this mean? It means
20 from 28 June 2012 when the statute was
21 effective until 30 days after the Executive
22 Order is signed, we are dealing only with raw

1 statutory language and some judicial
2 interpretation via the bench book that
3 practitioners are using to incorporate this
4 right now.

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

11 Okay, so that's the history of
12 Article 120. That's where it stands right now.
13 What I'd like to do is talk a little bit more
14 in detail about the current version of Article
15 120, how it's set up, what some of the
16 definitions are, and then some of the
17 challenges practitioners have had with respect
18 to prosecuting these kinds of crimes.

19 So, the way it is now structured
20 is there are three categories of crimes, and
21 I say three because Article 120A had
22 previously been incorporated into the UCMJ as

1 stalking. So, now we have Article 120, which
2 is adult crimes, 120B which deals with child
3 sexual crimes, and 120C which addresses other
4 sexual misconduct.

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

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

19 We had crimes under the UCMJ like
20 indecent assault, indecent acts or liberties
21 with a child, indecent exposure, and indecent
22 acts with another. Those crimes were

1 consolidated and put into Article 120, and
2 fall under Article 120 in some way.

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

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

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

1 two, because I created it.

2 (Laughter.)

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

11 So, if you're talking about the
12 circumstances under which the conduct takes
13 place you're talking about things like a high
14 level of force, force that involves death or
15 grievous bodily harm, fear of death or
16 grievous bodily harm, or kidnaping, or
17 affirmative conduct on the part of the accused
18 that is rendering someone unconscious, or
19 affirmatively administering a substance to
20 someone that substantially impairs their
21 ability to consent to the activity at hand.
22 So, you're going to be in a more severe area

1 of criminal conduct; that is, either you're
2 going to be in rape or aggravated sexual
3 contact area.

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

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

20 If you have more egregious conduct
21 committed by the accused that is a sexual act
22 and, generally, the difference between sex act

1 and sex contact is a sexual act is a
2 penetrative crime, sexual contact is something
3 short of a penetrative act. If you have a
4 sexual act, you're going to be in the area of
5 sexual assault or rape.

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

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

22 If the child is under the age of

1 12 and there's a sexual act, that's going to
2 automatically be rape of a child. If you have
3 a child between the age of 12 and 16, and it
4 occurs with force, that will also be rape of
5 a child, and both of those carry with them
6 life without the possibility of parole.

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

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

18 A lewd act on a child under the
19 age of 16 will be sexual abuse of a child, and
20 there are two types of sexual abuse of a child
21 under the UCMJ. The first involves contact,
22 actual physical contact with the child, that's

1 a 20-year maximum. And the other is no contact
2 with the child, and that is a 15-year maximum.

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

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

20 I bring this up because this has
21 been an increasing crime recently. Rolling
22 Stone did a discussion of this a few weeks ago

1 in their magazine, the Steubenville rape
2 highlights this issue, that there are
3 bystanders who may not actually be engaging in
4 the sexual conduct itself, but they are taking
5 pictures of it for some reason. This crime
6 covers that conduct, and I think there's also
7 a good argument to be made that under the UCMJ
8 they could also be charged as principals to
9 the crime, as well. So, there are options out
10 there for addressing that kind of conduct, in
11 addition to sexual assault and rape.

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

17 Additionally, reasonable
18 expectation of privacy is not your normal
19 Fourth Amendment jurisprudence reasonable
20 expectation of privacy. Reasonable expectation
21 of privacy under this crime is, could a
22 reasonable person disrobe in privacy without

1 being concerned their image is being captured,
2 or that the private area of your person would
3 not be visible to the public. So, it's a
4 privacy interest with respect to vis a vis
5 another person or the public versus a Fourth
6 Amendment kind of analysis with respect to it.
7 So, that's the statutory definition.

8 Under Article 120C, forcible
9 pandering and indecent exposure remain under
10 Article 120C, so you have those two crimes,
11 plus this additional crime under Article 120C.

12 So, that's the structure of
13 Article 120. What I'd like to do is talk about
14 some of the definitions, because Congress has
15 provided statutory definitions of certain
16 things. Practitioners have struggled in this
17 area to attempt to figure out what some of
18 these definitions mean. And really at the end
19 of the day what it's come down to is the
20 judges are instructing members and the members
21 have to apply their own knowledge of what they
22 believe these terms mean if there's no

1 specific definition provided to them. And I'll
2 point out some of those areas.

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

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

21 I think what is interesting about
22 this is how broad this definition is with

1 respect to the conduct we're talking about
2 here. And it can sweep underneath its
3 definition that conduct which may not have a
4 sexual connotation to it. In other words, it
5 could have an abusive connotation to it,
6 someone putting their finger in someone's
7 mouth, what's referred to as a fish hook. They
8 place their -- they've penetrated the mouth of
9 another with any body part, their finger, with
10 the intent to abuse. And under this
11 definition, that would be called a sexual act
12 even though it may not have any sexual
13 connotations whatsoever to it. It has abusive
14 or humiliation connotations to it, but it may
15 not have a sexual connotation to it. So,
16 that's something that is struggled with when
17 you have a definition that is broadened like
18 this.

19 MEMBER HILLMAN: Just a question.
20 Article 125 has survived the Supreme Court's
21 Lawrence versus Texas decision. Does this not
22 make Article 125, sodomy, entirely redundant?

1 COL. WINKLOSKY: I think it does.
2 Yes, ma'am. And I think the reason Article 120
3 survives is because of some issues with
4 respect to animal abuse. But for the most
5 part, practitioners have been charging conduct
6 of sodomy under Article 120 instead. So, yes,
7 ma'am.

8 Sexual contact, likewise, has
9 changed. This is the definition under Article
10 120 2007 version. This is the definition under
11 112, excuse me, under the 2012 version. What's
12 the difference here? Really, what happened was
13 Congress broke up the definition into two
14 things. The first group up there deals with
15 genitalia, anus, groin, breast, inner thigh,
16 or buttocks, what I refer to as kind of
17 erogenous zones in the law, but you have to
18 have one of those areas with an intent to
19 abuse, humiliate, harass, or degrade, which
20 gives it a sexual connotation. The actual area
21 of the body gives it a sexual connotation;
22 whereas, the intent does not.

1 In the second grouping you have
2 any body part but you have a sexual intent,
3 and that is where the sexual portion comes
4 from there. So, you have a sexual body part
5 with an intent to abuse, humiliate, harass, or
6 degrade, or you have any body part but with a
7 sexual intent.

8 The last definition that involves
9 the conduct of the accused is lewd act. As I
10 alluded to earlier, it's broader than sexual
11 contact, so it includes sexual contact as I
12 just described, but it also includes three
13 other types of conduct on the part of the
14 accused. And recall, lewd act applies to child
15 crimes, so intentionally exposing one's self
16 with one of two intents, and when I say one of
17 two intents what I'm referring to is the
18 intent to abuse, humiliate, harass, degrade,
19 or incite lust or sexual desire. So, exposing,
20 communicating indecent language, or any
21 indecent conduct intentionally done with or in
22 the presence of a child.

1 This has been a positive change in
2 the sense that it used to be under military
3 case law this type of conduct had to be done
4 physically in the presence of the child. This
5 version of Article 120 eliminates the physical
6 presence requirement. So, what does that do?
7 That means that this type of conduct that
8 occurs over a phone, over a Skype connection,
9 that a picture is sent over some sort of Smart
10 phone is criminalized by this definition.

11 Force, the definition of force has
12 also changed. Some of the crimes under Article
13 120 require force to get into one of the
14 quadrants under the Article 120, and also in
15 the child crimes under Article 120B. So, you
16 can see how the definition of force has
17 changed.

18 What is interesting to note here
19 is that when you look at Article 120, 2012
20 version, and you look at the second and third
21 definitions of force, you look at the second
22 definition and it says, "Sufficient to

1 overcome, restrain, or injure a person." When
2 you look at the third definition, "it is
3 sufficient to coerce or compel submission by
4 the victim."

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

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

20 So, what I'd like to do, now that
21 you have some -- you're armed with some
22 knowledge on definitions and how the law is

1 structured under the current version of
2 Article 120, I'll revisit this picture again,
3 and ask if the change in the law from what it
4 used to be pre-2007 to what it is today forces
5 us to revisit this kind of conduct, which we
6 normally would have seen as acceptable. Is it
7 now something that perhaps we still see as
8 acceptable, but now at least we're taking a
9 better look at it to see if it is something
10 that falls within our cultural norms.

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

20 Another interesting clip that we
21 use which you might find interesting with our
22 students when we teach this is a clip from

1 "Gone With The Wind," where Rhett Butler takes
2 Scarlett O'Hara up the stairs and says, "This
3 is one night you're not putting me out,
4 Scarlett." While at the time, perhaps that was
5 culturally something that was seen as
6 acceptable, part of a movie, I think this
7 forces -- our law is forcing a re-examination
8 of cultural norms through Congressional
9 action.

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

22 "It's an offensive touching of

1 another however slight." Now, it includes, and
2 Congress included this last bit, "including
3 any non-consensual sexual act or non-
4 consensual sexual conduct, or contact," excuse
5 me. So, what does that mean?

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

18 In other words, as I mentioned in
19 the beginning, consent by and large has been
20 removed from the statute, or lack of consent.
21 The only thing the government would have to
22 prove here is that the sexual act took place,

1 and it was done with bodily harm. They do not
2 have to prove the victim manifested a lack of
3 consent.

4 Now, if it is charged in this
5 manner, that is, it does not specify the
6 actual bodily harm of holding her down and
7 pushing -- or him down and pushing the victim
8 to the bed, then what we have is a
9 reintroduction of consent as an element. And
10 Congress contemplated that the bodily harm,
11 that is, the sexual act could serve as the
12 bodily harm itself. And you might wonder well,
13 what circumstance would this ever arise? Well,
14 we believe it would arise in such a
15 circumstance where there is a great deal of,
16 or maybe some consensual activity, consensual
17 sexual contact, but not to the point of
18 penetration. In other words, there's a -- the
19 people engaged in the conduct, it's all
20 consensual but up to the point of the
21 penetration. The penetration is not
22 consensual. So, this is where this type of

1 charging would take place, where the bodily
2 harm is the sexual act itself. The reason I
3 bring it up is because it reintroduces lack of
4 consent in this particular circumstance.

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

19 If the government charges the
20 person with knowing that the other person--
21 that the victim is incapable of consent, then
22 they have to prove actual consent. If they

1 charge it as that the accused reasonably
2 should have known, then it's introduced into
3 a reasonable person standard, an objective
4 standard. Should the accused reasonably have
5 known that the victim was impaired to the
6 point where he or she could not consent?

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

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

21 Rape by administration, this is
22 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.

1 Just a few other examples I think
2 that are interesting, and this is what the
3 statute struggles with, and what practitioners
4 have struggled with in their implementation of
5 the statute. Consent which has been removed as
6 an element in the statute, but yet there are
7 still issues of force and capacity, and the
8 interplay between what is the level of force,
9 is there force applied, is this a capacity
10 case, and whether or not consent is even
11 relevant at all because it's been -- Congress
12 has attempted to write out consent, but they
13 can't write out capacity or force, or haven't
14 written out capacity or force.

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

1 a person cannot consent in those
2 circumstances.

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

15 Recall that the definition of
16 bodily harm is an offensive touching however
17 slight. So, certainly evidence that the victim
18 consented to the conduct would diminish the
19 government's evidence that this was an
20 offensive touching. So, it's negative
21 evidence, it eliminates the government's
22 evidence with respect to whether or not the

1 conduct is offensive, but it is not in and of
2 itself an affirmative defense. So, it goes to
3 the definition of bodily harm, it reduces the
4 elements -- the government's evidence on that
5 element, but it's not a separate defense which
6 it had been in the past.

7 Likewise, here's another example.
8 Sexual assault on a victim who is asleep,
9 unconscious, or otherwise. Again, the
10 government proves there was a sex act, that
11 the victim was asleep, unconscious, or
12 otherwise unaware, and the accused knew or
13 reasonably should have known of that
14 circumstance. So, this is not about consent,
15 it's about the capacity of the victim to
16 actually consent, so it's a step removed from
17 actual consent. So, is consent evidence
18 relevant? It might be to prove that the victim
19 was not asleep, was not unconscious, or was
20 not otherwise unaware.

21 And I'll just point out one more,
22 and that is a sex act on a victim incapable of

1 consent due to impairment. And I mentioned
2 this earlier. The interesting part of this is
3 that if the members; that is, if the jury
4 determines that the victim is capable of
5 consent, then this should result in acquittal
6 without them ever reaching the factual issue
7 of whether the victim did, in fact, consent or
8 not. That's the flip side of removing consent
9 from the law here, is that this particular
10 crime is about the capacity of the victim to
11 consent. And if the members applying the law
12 determine that the victim is capable of
13 consent, they never really ask the question as
14 to whether or not the victim did or did not,
15 in fact, consent.

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

22 A couple of other issues that

1 arise with respect to consent. And I linger on
2 consent because it is such a monumental change
3 to remove it, lack of consent, from the
4 statute completely, but it also reflects a
5 progressive move in the law under the UCMJ.

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

14 So, between the time that these
15 two people consent to the sexual conduct that
16 they're going to engage in, obviously, that
17 consent is still valid up until the time they
18 start consuming the alcohol. But at some
19 point, let's assume one of them becomes
20 legally impaired under whatever that
21 definition is. We don't have a definition, a
22 statutory definition of impairment, but that

1 particular person becomes impaired. Well, does
2 that consent follow from the time that they
3 actually agreed and consented up and to the
4 time that that person is legally impaired.
5 Probably.

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

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

22 If we think and we agree that

1 asleep and unconscious, and impairment are the
2 same because people cannot consent under
3 either of those circumstances, then the
4 consent is invalid at the moment of
5 impairment. In other words, it dissipates, or
6 if we say that no, even though the person is
7 impaired and the accused knows that they are
8 impaired, the accused needs to re-validate the
9 consent to determine whether or not there is
10 consent, or maybe the consent dissipates at
11 that point.

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

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

19 CHAIR JONES: Sure.

20 MEMBER HILLMAN: Colonel Winklosky,
21 this is a dense area that you're giving us a
22 detailed tour of, and I'm grateful for that,

1 but I'm confused on this. The statute actually
2 does say that this would be a sexual assault,
3 but it doesn't say anything -- so the prior
4 consent according to the letter of the statute
5 is irrelevant.

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

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

22 COL. WINKLOSKY: That's the issue

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

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

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

17 COL. WINKLOSKY: Yes, ma'am.

18 MEMBER HILLMAN: It's related to
19 how the -- the sort of typical sexual assault
20 would be charged and what we've come to
21 understand is the ordinary case, of which
22 you've seen plenty.

1 The amount of force that is
2 required would be the force required for
3 penetration in a classic situation of lack of
4 consent between a perpetrator and a victim.
5 Right? So, essentially, that's how the statute
6 is being interpreted on the ground, so that
7 our prosecutors can apply what you've pointed
8 out is a difficult statute to apply
9 effectively both because of the changes that
10 have been made to it, and because of the
11 attempts to separate out these different
12 pieces. Is that correct, the way I described
13 that? That would be --

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

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

19 COL. WINKLOSKY: If they do not
20 specify the bodily harm, then there's no force
21 required. It's an offensive touching, however
22 slight.

1 MEMBER HILLMAN: And which part of
2 the statute would that get charged under? So,
3 what's that -- there's great capacity for
4 different charges here, I realize that. And
5 it's an art or craft for the prosecutor to
6 come up with the right charging here. But in
7 that essential non-stranger rape situation,
8 what would the -- the charge would be a sexual
9 assault under -- and there's not force
10 required? That's what I'm asking you, what's
11 the ordinary way this gets charged?

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

21 And that also avoids some of these
22 other issues that arise with respect to

1 impairment, level of impairment, and
2 incomplete definitions within the statute.

3 CHAIR JONES: Yes, Mr. Bryant?

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

17 COL. WINKLOSKY: That's a good
18 point, sir. And really what has happened is,
19 we've taken consent away as an affirmative
20 defense. And what we've done is -- what
21 Congress has done is they have couched the
22 elements in terms of consent evidence may

1 still be relevant to diminish the government's
2 evidence on a particular element to defeat
3 proof beyond a reasonable doubt.

4 MEMBER BRYANT: Right.

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

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

18 MEMBER COOK: Okay. Going on that
19 comment, so if that's true does that mean that
20 the -- for cases between the 2007-2012 period
21 it probably still is an affirmative defense.
22 Is that -- I mean, that period of when Article

1 120 under its old language, those affirmative
2 defenses would still exist in that way, but
3 does the mistake of fact defense still even
4 exist for post-2012 offenses? The accused who
5 believed they were consenting, that whatever
6 the circumstances were, does that still exist,
7 mistake of fact?

8 COL. WINKLOSKY: It is in extremely
9 limited circumstances where mistake of fact as
10 to consent would exist in my estimation under
11 the current 2012 version. You are correct that
12 the affirmative defense still would apply from
13 2007 to 2012, under the 2007 version, but --
14 and there are varying interpretations as to
15 whether or not mistake of fact as to consent
16 might apply. And there's a distinction to be
17 made here between mistake of fact as a
18 defense, mistake of fact as to other issues,
19 and mistake of fact as to consent. I think
20 mistake of fact as to consent has all but been
21 eliminated in Article 120 in its current
22 version.

1 MEMBER COOK: Okay. While you're
2 talking, and I know it's not in the
3 presentation, but that we've had some
4 testimony and some questions that have come up
5 during other public hearings in terms of
6 another defense to an allegation of an Article
7 120 offense, rape, sexual assault, whatever it
8 is. Can you briefly tell the panel to what
9 extent, if at all, does a good soldier, good
10 airman, good service member defense apply to
11 rape, sexual assault type of process?

12 COL. WINKLOSKY: I think the good
13 soldier defense is an available defense in
14 just about every case. The defense is going to
15 be able to present evidence not only because
16 the rule allows it, but because case law has
17 developed it to the point where currently the
18 accused can present that kind of evidence to
19 generate reasonable doubt about whether or not
20 the accused committed the crime. In other
21 words, it's almost like what I would refer to
22 as reverse propensity evidence. Because this

1 person is of a certain quality or character,
2 they are less likely to have committed an
3 offense. I think that's the way it has been
4 applied at courts-martial, as well.

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

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

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

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

17 COL. WINKLOSKY: Yes, ma'am.

18 MEMBER COOK: Okay. And the only
19 point -- the other point I would just clarify
20 is earlier when Professor Hillman had asked
21 you about Article 125, which is sodomy, the
22 fact of whether or not that has -- is that

1 moot? It is, but only in terms of if the
2 offense occurred after the 2012 statute. It is
3 still a relevant and a necessary charge
4 depending on the circumstances for any
5 offenses in that gap between 2007 and 2012.

6 COL. WINKLOSKY: Yes, ma'am, that's
7 correct. And I neglected to say that because
8 as we have these various versions of Article
9 120, there's also an interplay with what other
10 statutes were available for the particular
11 conduct at the time, as well.

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

16 COL. WINKLOSKY: Thank you, ma'am.

17 I just have a few other things
18 that I think are important to cover, and that
19 is general and specific intent. You know, we
20 have varying types of intent under this law,
21 and the question really is why do you care?
22 Why do practitioners care?

1 We have recently some new case law
2 in the military that involves how we determine
3 what is a lesser included offense under the
4 offenses that we actually charge. So, just
5 like in many jurisdictions, in the military
6 you can charge a greater offense. If the
7 lesser offense is included in it, you don't
8 have to put it on the charge sheet.

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

18 So, if you charge that as the
19 greater offense and you have a specific intent
20 crime that you think is a lesser included
21 offense, you're actually adding an element of
22 specific intent, and you're probably --

1 practitioners are probably going to have to
2 charge it separately. So, the interplay
3 between mental states with respect to these
4 varying crimes can make the matters a little
5 bit more complex.

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

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

1 mistake of fact.

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

16 The reason I bring this up is
17 because this is somewhat different than the
18 2007 version. The 2007 version built in
19 affirmative defenses to the punitive language,
20 the statute itself. The 2012 version points to
21 this language as defenses. All defenses are
22 available that would otherwise be available,

1 and mistake of fact is one of them. And this
2 is our mistake of fact language.

3 One other interesting anomaly of
4 the statute which I will bring out is the --
5 what I think is an unintended consequence,
6 and I'll end with this. And that is, here's
7 the elements of sexual assault where the
8 victim is incapable of consent. And it's
9 interesting because the question I have in my
10 mind at the end of this is, do we have two
11 victims, or do we have two accused? Because
12 you can see that a sex act is the first
13 element, but then second element is, was the
14 victim incapable of consent due to impairment
15 by drug, intoxicant, or similar substance? So,
16 essentially, was the victim impaired
17 potentially by alcohol to the point where they
18 didn't have the capacity to consent? And
19 should the accused reasonably have known that?
20 So, we apply an objective standard, the
21 reasonable standard, and voluntary
22 intoxication on the part of the accused does

1 not apply. We apply a reasonably sober person
2 standard. Would a reasonably sober person have
3 believed the victim was incapable or known the
4 victim was incapable of consent due to
5 impairment by an intoxicant?

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

16 It's just something that the --
17 that I think is an unanticipated consequence
18 of this. And as Professor Hillman brought up
19 earlier, I think the way to avoid this is to
20 not charge this crime, but probably charge it
21 under a separate crime which would be sexual
22 assault by causing bodily harm, perhaps. But

1 it highlights a bigger point, which is
2 practitioners are forced to go through that
3 art of charging because some of the
4 definitions, and some of the scenarios that
5 arise force them to do that, which is no
6 different than perhaps other prosecutors or
7 practitioners. But in this particular case, it
8 does create a strange anomaly.

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

21 COL. WINKLOSKY: I think commanders
22 are -- I can speak from my experience, and

1 from people who have talked to me about this.
2 I think commanders are very interested in what
3 the legal process is, and what is happening
4 with respect to the people that are members of
5 their command. And they have experts who
6 advise them on that. They have the
7 prosecutors, the trial counsel who are
8 actually in the courtroom doing the job of
9 prosecuting and charging these cases.

10 They have supervisors who are
11 looking at that, and then they have staff
12 judge advocates who are direct advisors to the
13 commanders, so you have a lot of lawyers
14 involved in the process who are advising the
15 commander on what action to take. They
16 normally do not get into this level of detail
17 unless they're asked. Having been on staffs,
18 I don't think that that's unusual for other
19 staff members, as well. You might have a
20 communications officer who doesn't get into
21 the level of detail about data com, or a
22 transportation officer who doesn't get into

1 the level of detail with respect to engine
2 maintenance, but that doesn't mean that the
3 commander is abdicating his responsibilities,
4 or her responsibilities with respect to the
5 system itself.

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

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

19 I'm in Charlottesville, Virginia
20 which is nicely tucked outside of the Beltway,
21 and so I think there are strong arguments on
22 both sides for that decision. I can tell you

1 that my look at the Manual for Courts-Martial
2 and the preamble is that the manual is
3 designed to both look at justice and
4 discipline. And I think that is a very
5 difficult balancing to do, and I think
6 commanders are in the position where they're
7 the ones that have to do it, at least right
8 now. So, how is that for a lawyerly answer for
9 you, ma'am?

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

12 (Laughter.)

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

19 CHAIR JONES: Yes.

20 MEMBER HOLTZMAN: Thank you for
21 your explanation. I guess what I'd like to
22 know is do you have a list of the terms that

1 you would like to see defined in an Executive
2 Order?

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

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

21 MEMBER HOLTZMAN: Okay. I think it
22 would be useful, but how does this process

1 normally work with the White House when it
2 prepares an Executive Order explaining or
3 further elaborating on a statute? Does it get
4 proposed language from the Department of
5 Defense? Is that how it works, or does the
6 White House just dream this up on its own --

7 COL. WINKLOSKY: No, ma'am --

8 (Simultaneous speech.)

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

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

22 MEMBER HOLTZMAN: Has that

1 happened?

2 COL. WINKLOSKY: It has, yes.

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

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

11 MEMBER HOLTZMAN: Okay, thank you.

12 COL. WINKLOSKY: Yes, ma'am.

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

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

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

20 COL. WINKLOSKY: Yes, ma'am.

21 MEMBER HOLTZMAN: -- that need to
22 be elaborated. Thank you.

1 MEMBER HILLMAN: Recognizing that
2 additional change would have unintended
3 consequences, and that attempts to clarify and
4 progress in this statutory revision process
5 have not always succeeded, I wonder if you'd
6 counsel -- how should we understand this
7 statute? Is it a hindrance to effective
8 prosecution of sexual assault at court-
9 martial, and is it being effectively used
10 right now? I mean, what's -- I've read much of
11 the criticism of it and we understand that.
12 And you've been muted, actually, in your
13 representation of some of that really
14 vociferous criticism of the statute.

15 CHAIR JONES: Although I like your
16 slide a lot.

17 (Laughter.)

18 MEMBER HILLMAN: But if it really
19 should be changed I, at least, would like to
20 know. So, does this -- should this look
21 different in order to make this a more
22 reasonable process for prosecutors to deal

1 with, and commanders, and everybody else?

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

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

17 CHAIR JONES: Of course.

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

21 COL. WINKLOSKY: They are happy --
22 (Simultaneous speech.)

1 MEMBER HOLTZMAN: -- looking at
2 it.

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

10 The flip side of that, however, is
11 that it becomes complex and complicated to do
12 that type of calculus. What ought I charge in
13 this particular case, and how -- and what am
14 I -- what are my anticipated results if I do
15 this particular way? And it's just a new way
16 of doing business. I don't think it's -- I
17 don't think that over time it's going to be a
18 hindrance. I think it's just a matter of
19 getting used to the way this statute is
20 written, that it's a little bit more complex,
21 it has some additional challenges. But once
22 our prosecutors are able to navigate it over

1 time, there won't be any further issues with
2 it. So, that will work out over time. I hope
3 that answers your question, ma'am.

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

7 COL. WINKLOSKY: Right now they
8 are.

9 (Laughter.)

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

21 MEMBER COOK: Just one comment.
22 Hopefully, there is a healthy discussion on

1 how you train all the service members who are
2 now subject. They don't need to know all this
3 detail, but understanding where the lines of
4 conduct are drawn would be an interesting
5 challenge these days.

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

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

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

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

1 cases under DOD jurisdiction.

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

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

20 First, I wanted to cover just a
21 few things, and then I'm going to turn it over
22 to Colonel Coyne to go through the rest of the

1 slides. But when we're talking about our
2 waterfall slides and disposition of offenses,
3 we are talking about substantiated reports.
4 And that's our unrestricted reports of sexual
5 assault, and the ones that have been provided
6 to command for some form of punitive,
7 corrective, or discharge action against an
8 offender. So, that definition comes directly
9 out of DOD's SAPRO policy, that's DOD
10 Instruction 6495.02, Enclosure 12. So, when
11 you see some of this terminology on this
12 slide, you will understand that's the source
13 where it's coming from.

14 You heard yesterday from Mr.
15 Poorman that all unrestricted reports since
16 March of 2013 are opened up for an
17 investigation by the Air Force Office of
18 Special Investigation. One point is that the
19 Air Force does not have our investigative
20 agency substantiate or unsubstantiated
21 allegations of sexual assault. They do not
22 determine whether they are unfounded or not.

1 They forward all of them with their
2 investigation reports to the commanders for
3 action, where the commander with the advice of
4 the Staff Judge Advocate is able to make that
5 determination.

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

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

19 The first time that's done is
20 within 30 days after initial disposition by
21 the Special Court-Martial Convening Authority
22 06, so we're all familiar with the Department

1 of Defense Withhold Letter, which requires the
2 Special Court-Martial Convening Authority 06
3 to look at these cases. The Air Force has gone
4 one step on policy further to say that the
5 Special Court-Martial Convening Authority has
6 to tell the General Court-Martial Convening
7 Authority what happened within 30 days. And
8 what that allows the General Court-Martial
9 Convening Authority to do is if he or she
10 determines that that action was inappropriate,
11 that individual might have the ability to pull
12 a case up to their level.

13 Second, after the OSI
14 investigation is closed, OSI is always looking
15 for what was the disposition? Was it a court-
16 martial? What was the punishment? Was it a
17 non-judicial punishment, so on and so forth.
18 What we're requiring in the Air Force only is
19 the General Court-Martial Convening Authority
20 to sign out that disposition to the Air Force
21 OSI. This, again, insures that our General
22 Court-Martial Convening Authorities know

1 exactly what action was taken in a particular
2 case.

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

6 COL. COYNE: Thank you. Good
7 morning.

8 CHAIR JONES: Good morning.

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

14 This first slide is 399 sexual
15 assault subjects that were presented in FY 12.
16 This is 271 subjects that were identified in
17 FY 12, and 128 subjects that were identified
18 from prior years, and so giving you a total of
19 399.

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

22 COL. COYNE: Yes, ma'am. There was

1 271 subjects identified in FY 12, and 128
2 subjects identified prior to FY 12. Now, I
3 should note there were 449 unrestricted
4 reports of sexual assault in FY 12, and that
5 -- OSI opened 449 investigations, but only 253
6 investigations had closed by the end of Fiscal
7 Year 12, and of that, 271 subjects were
8 identified. So, there's a little bit of a gap
9 between switching from reports to subjects,
10 and that takes place after the investigations
11 are completed.

12 Of the investigations -- excuse
13 me, of the subjects that were identified, the
14 399, 179 cases were still pending command
15 action at the end of FY 12, so there was 179
16 cases that had been presented to commanders,
17 but commanders have not yet acted on. And I
18 would suspect that the vast majority of those
19 will appear in the FY 13 slides that come out
20 later this -- excuse me, the beginning of next
21 year.

22 The next slide, 43 cases command

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

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

21 The reason I bring that up is
22 because as we go through this, cases only get

1 binned, if you will, in one category. So, 12
2 cases were prosecuted say in civilian or
3 jurisdictions. In those 12 cases, that doesn't
4 necessarily mean nothing happened to the
5 offender on the military side. But the way the
6 slides are calculated, they only get binned in
7 one category, so that category is the civilian
8 foreign prosecution. It may very well be that
9 the offender received an administrative
10 discharge as a result of the offense that
11 occurred downtown, but those are not captured
12 on these slides.

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

20 Of those 177 cases presented to
21 commanders, 54 probable cause only for a non-
22 sexual assault offense. And, again, that

1 doesn't mean nothing happened to those people
2 or those offenders, that's just not captured
3 on this slide because you're only binned in
4 one category.

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

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

22 In 24 cases, the victim declined

1 to participate. And this is one that we -- a
2 category we believe is ripe for improvement,
3 and some of the initiatives that have
4 undertaken in the last year to include Special
5 Victims Counsel Program, we hope will promote
6 ways -- promote an avenue to better explain
7 the process, and to allow victims to
8 participate in the military justice process.

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

16 Eleven were unfounded by command,
17 and those are allegations that reflect a
18 determination by the commander with the advice
19 of the Staff Judge Advocate that the
20 allegation made did not occur and was not
21 attempted. And, again -- excuse me. And then
22 the commander declined action, we had no cases

1 this year or last year where a commander did
2 -- was presented with a case and did nothing
3 with that case. They took action in all cases
4 in one of these categories. And we do not --
5 our investigative agencies do not unfound any
6 cases. Air Force OSI, for example, would not
7 unfound a case, so that's always going to be
8 zero for the Air Force.

9 So, that left 56 cases where
10 commanders did take action, and 42 of those
11 cases -- commander preferred charges. And
12 that's where we, as discussed previously,
13 that's where we would derive our prosecution
14 rate from, 24 percent down below is 42 out of
15 177 cases. An alternate way to calculate that
16 would be 42 out of 56 cases; however, that's
17 not how we calculate it.

18 Fourteen cases were non-judicial
19 punishment, and the last two cases -- excuse
20 me, the last two rows, admin discharge and
21 other admin action reflect the reality that
22 you can only bin a case in one area. So,

1 that's not to mean that no one was
2 administratively discharged, or no other admin
3 action was taken. Generally, for an admin
4 discharge you have to have some other action,
5 so that case would have been binned in another
6 row.

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

14 And using the number of
15 prosecutions in the numerator, reports made to
16 police as the denominator, RAINN comes up with
17 a 20 percent prosecution rate, so nine out of
18 46 cases. And a civilian arrest has some
19 parallels to preferral of charges. And using
20 that number for the numerator results in a 26
21 percent prosecution rate. However, because
22 RAINN pulls these numbers from mixed data,

1 mixed time frames, they're not very reliable,
2 but it's the best we have as we look to
3 comparable data, leaving our conviction rate
4 of 57 percent.

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

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

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

17 MEMBER HOLTZMAN: Robbery,
18 burglary, homicide.

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

21 MEMBER HOLTZMAN: Yes, it would be
22 nice to see what this looks like in the larger

1 universe. Thank you.

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

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

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

17 COL. COYNE: Yes, ma'am.

18 MEMBER HILLMAN: -- why does it go
19 down from 522 to 399? We're looking for
20 increased -- whenever there's a drop it seems
21 like a flag to me. What do you think that's
22 about?

1 COL. COYNE: Yes, ma'am. We've
2 talked about that quite a bit, not really
3 sure. Reports did not -- reports went up,
4 investigations were the same. The thought was
5 perhaps if you look back, more cases were --
6 hadn't finished with their investigation yet,
7 so you end up with a subtotal of 399 -- excuse
8 me, 177 instead of 362, more were in the
9 pipeline. It could be a difference in how `11
10 and `12 data were calculated. Because these
11 are so -- when you pull a case, the way cases
12 have been pulled, aggregated from the bases,
13 you rely on a certain element of getting the
14 right cases and calculating. That could
15 account for some small percentage but,
16 otherwise, there's no -- I don't have a good
17 answer.

18 MEMBER BRYANT: Judge Jones?

19 CHAIR JONES: Sure.

20 MEMBER BRYANT: The prosecution
21 rate and conviction rate, what -- is my math
22 just that poor, or what am I missing here?

1 Seventy-nine were prosecuted, a conviction
2 rate of 48 which was, I assume, a conviction
3 of 21 versus 44, but that doesn't total the
4 79, that only totals the 65. So, what happened
5 to those -- you know, 79 were prosecuted but
6 the conviction rate shows the -- it looks to
7 me like it's showing 65 cases, a total of 65.

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

10 MEMBER BRYANT: Yes.

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

1 MEMBER BRYANT: So, after an
2 Article 32, the commander --

3 COL. LEWIS: The General --

4 MEMBER BRYANT: -- did his or her
5 thing.

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

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

19 COL. LEWIS: Okay.

20 MEMBER BRYANT: Thank you.

21 CHAIR JONES: So, what you're
22 telling us is that there's an enormous

1 attrition rate between the time that it goes
2 -- during this Article 32, is that what it is,
3 32 process. And almost half of the cases get
4 dumped at that point.

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

16 And then sometimes it's the case
17 where there was enough probable cause for
18 preferral of charges. That commander felt that
19 there was truth to the nature of those
20 charges, preferred the charges, but when the
21 Article 32 investigation was held, that
22 Article 32 officer made a recommendation, and

1 that recommendation was followed by the
2 Convening Authority, and the case was
3 dismissed and went away.

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

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

8 MEMBER HOLTZMAN: Or 11?

9 COL. LEWIS: Yes, ma'am.

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

12 CHAIR JONES: Sure.

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

20 COL. LEWIS: Yes, ma'am. And it
21 goes back to the binning of cases. So, the
22 victim declined to participate, that 65 number

1 you see on the Fiscal Year 11 slide is usually
2 individuals that decline to participate in the
3 investigation or prior to preferral of charges
4 said that they didn't want to participate.
5 There's certainly an element later after
6 preferral of charges where some will fall out
7 and have fallen out. And Colonel Coyne may
8 have some specifics on that number.

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

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

18 MEMBER DUNN: May I ask --

19 CHAIR JONES: Sure.

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

22 COL. LEWIS: That is correct.

1 MEMBER DUNN: So, all of your
2 victims who fall out before a referral are in
3 that 65. Yes, your victims who decline to
4 participate before referral are in that --

5 COL. LEWIS: No, ma'am.

6 MEMBER DUNN: -- 65.

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

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

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

17 (Simultaneous speech.)

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

1 front of me.

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

6 COL. LEWIS: It may be that of that
7 33, a percentage of those are victims --

8 (Simultaneous speech.)

9 COL. LEWIS: -- who declined --

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

14 MEMBER DUNN: Right.

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

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

20 MEMBER HOLTZMAN: -- on that
21 issue, but are there instances in which --
22 because I see the commander has the right to

1 intervene after there's the Article 32
2 hearing, are there instances in which the
3 Article 32 hearing examiner believes the case
4 should go forward, and the commander has said
5 no? Do you track that in your numbers?

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

17 MEMBER HOLTZMAN: Well, that's one
18 -- but that's not my question. My question was
19 suppose both of them disagree. Okay? With the
20 trial -- the person handling the Article 32
21 wants to prefer charges at that point. The
22 commander and the counselor, the lawyer, say

1 no, we're not going ahead. Do we have any
2 numbers on that?

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

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

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

17 Most of these cases are general
18 courts-martial, and in order to have a general
19 court-martial you have to have an Article 32
20 investigation, or the accused has to waive it.
21 That Article 32 investigating officer provides
22 an independent recommendation to the Convening

1 Authority. That goes first to the Special
2 Court-Martial Convening Authority, and then if
3 the Special Court-Martial Convening Authority
4 thinks the case should go forward, it gets
5 forwarded to the General Court-Martial
6 Convening Authority. So, it's not the
7 commander who preferred the charges who is
8 making the decision on referral in the Air
9 Force. It's just a different individual. And
10 it's, many times in the Air Force, a different
11 Judge Advocate that is providing the advice.

12 MEMBER HOLTZMAN: Okay. Whoever it
13 is, okay, can we just -- I just want to know
14 what that process is between the decision of
15 the person who's handling the Article 32, that
16 decision to prefer and whether there's
17 something that tracks that decision, whether
18 it's the initial Convening Authority, or it's
19 a new Convening Authority, whether it's a
20 Special Court-Martial Authority, or a General
21 Court-Martial Authority, there's this process
22 that's taking place after the Article 32

1 hearing in which the Convening Authority, the
2 commander, has some opportunity to say no.

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

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

13 MEMBER COOK: No. Just to make it
14 clear, the question is if an investigating
15 officer in charge of the Article 32, whether
16 that's a lawyer, whether that's anybody, if
17 that person says I just heard all the -- I
18 just heard the evidence presented. That's not
19 the complete case, but I, as an investigating
20 officer, recommend, because it's only a
21 recommendation, recommend not proceeding with
22 the court-martial.

1 I think what the question is, any
2 commander, any level, any Judge Advocate in
3 that process, if they say no, but the
4 investigating officer has said yes, do you
5 have cases in that category? And, if so, do
6 you track statistics about how often that
7 happens, where there's a disagreement where
8 the investigating officer who got the
9 credibility, got the people in the room say go
10 to court, but somebody else says no?

11 MEMBER HOLTZMAN: Thank you.

12 (Laughter.)

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

15 COL. LEWIS: I don't have
16 statistics in front of me that can tell when
17 the Article 32 officer recommends the case go
18 to court, and the Convening Authority says no,
19 I'm not referring that case to court. But that
20 would only be done with the advice of a
21 General Court-Martial Convening Authority,
22 Staff Judge Advocate.

1 MEMBER HOLTZMAN: Okay, that's
2 fine.

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

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

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

8 MEMBER HOLTZMAN: Thank you.

9 MEMBER COOK: I'll add to that. As
10 you're looking at that, my guess is an
11 investigating officer might say no, don't send
12 the case forward. But are there cases where,
13 if you're looking at the statistic anyway, are
14 there cases where that Judge Advocate and the
15 commander instead decide to send the case
16 forward anyway, overruling the investigating
17 officer's recommendation. So, I know you don't
18 have the answer to that, but when you're
19 looking at the one where the investigating
20 officer says go to court, look also at when
21 the investigating officer says no, but they go
22 anyway.

1 COL. LEWIS: Yes, ma'am.

2 MEMBER COOK: Thank you.

3 CHAIR JONES: How are you doing,
4 Colonel?

5 (Laughter.)

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

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

20 MEMBER HOLTZMAN: Well, I
21 appreciate that clarification but we'd like it
22 from the other services if they could get it

1 for us. Thank you.

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

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

21 Now, we don't track whether or not
22 that happens on a systemic measure. We just

1 have to go back and look at individual
2 reports. And to Colonel Cook, we actually for
3 the benefit of Congress this last year, I
4 think all answered RFIs, and similar to
5 Colonel Mulligan and Captain McCleary's
6 comments, where if the Staff Judge Advocate
7 recommended going forward, has a commander
8 ever gone against that recommendation? In the
9 Navy, we pulled data for the last three years
10 and not an instance where that took place, so
11 it's -- I agree completely. Typically, it's
12 been commanders. There's been testimony in
13 other bodies where commanders have said to
14 them it's more about the process than getting
15 the conviction; therefore, sometimes they go
16 forward against the advice, not from the
17 lawyers not to take a case forward. And we've
18 made that public before Congress earlier this
19 year.

20 Ma'am, very similar to the Air
21 Force as far as methodology, but I'll read
22 kind of what the Navy's rates are, but

1 understanding that there is no uniform way on
2 how we measure prosecution rate. There is no
3 uniform way on how we measure conviction rate.
4 What you have from the Navy is just our
5 waterfall slides from DOD SAPRO. And even
6 within that, within the DOD SAPRO report, the
7 actual waterfall slides are combined for all
8 services. Within that, we've asked DOD SAPRO
9 to break out the individual Navy waterfall
10 slides, and I've provided you FY 12 and FY 11.
11 But, candidly, I mean, it's mind numbing, so
12 I didn't do a separate breakout for this
13 specific purpose. This is our official report
14 to Congress, and I've spent a significant
15 amount of time trying to understand this. And
16 each time you look at it, it's tough. So, I
17 raise that really to raise the discussion
18 issues.

19 This one actually is different
20 than the ones I previously provided that are
21 in the waterfall format, so I wasn't going to
22 go with this particular slide here, though.

1 It's a bit of a snapshot, but that's fine. We
2 can use that.

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

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

1 into NJPs and administrative separations.

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

17 If you go forward, the Navy
18 preferred charges in FY 12 in 99 sexual
19 assault cases, compared to FY 11 where charges
20 were preferred in 67 cases. That's a 48
21 percent increase, Professor Hillman, to your
22 point earlier of cases being taken forward to

1 an Article 32 pretrial investigation and/or
2 courts-martial. And, again, that's preferral,
3 that's not referral to actual court.

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

16 This also is an increase over FY
17 11 where 121 cases permitted commander's
18 action on sexual assault charges, and 67
19 resulted in preferral of charges. So, the
20 Navy's overall prosecution rate for FY 12 was
21 72 percent, and it's calculated by preferral
22 of charges in 99 out of 137 cases. So, out of

1 137 where action could be taken, preferral in
2 99.

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

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

20 (Laughter.)

21 COL. MULLIGAN: No, ma'am.

22 MS. MANSFIELD: I can answer that.

1 The guidance comes from DOD SAPRO on how to
2 bin cases, so the services provide -- there's
3 a set of instructions, and the services then
4 coordinate with DOD SAPRO with guidance from
5 SAPRO on how we're supposed to bin cases in
6 order to make it consistent.

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

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

1 offenses.

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

7 COL. COYNE: One of the other
8 unique differences, I think most of us, the
9 investigating -- so the MCIO, Air Force OSI
10 does not substantiate any of our cases. So,
11 before -- so, our commanders get all of our
12 cases to adjudicate, which I think it gets
13 factored in when you look at -- and I use this
14 very subjectively, but the quality, the type
15 of case that is presented. If you have an
16 investigative agency that said no, we
17 substantiate this, so you're only being
18 presented with substantiated cases, I think
19 you get a different type of case. So, that's
20 one difference that we don't -- our MCIO does
21 not substantiate or substantiate any case.
22 And then how we calculate our prosecution and

1 conviction rates, I believe is another
2 difference.

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

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

18 So, take the example of a Marine,
19 and there's an allegation of a sexual assault
20 out in town, so there's concurrent
21 jurisdiction with the civilian jurisdiction.
22 At the beginning, the civilian jurisdiction

1 decides to take that case, and over the course
2 of their investigation the victim then decides
3 to decline or participate in that
4 investigation. So, even right there you have
5 two possible bins, civilian jurisdiction
6 taking the case, or victim declined to
7 participate. So, then after the civilians
8 decide we don't want this case any more, the
9 commander can then say well, you might not
10 want it, but I want it.

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

22 First it could have gone into

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

16 COL. COYNE: And I would agree with
17 that. The other problem is regardless of where
18 you bin the cases -- somebody once told me
19 every not everything you can count counts. And
20 I think as you look at this, I would -- what
21 are we counting, and what are we getting
22 after? We are counting a lot of stuff, and I

1 -- the more I look at it, I -- like Captain
2 Crow alluded to, every time I look, and I've
3 got tons of fancy spreadsheets, and I've
4 compared and contrasted, and I look at it, and
5 at the end of the day, I'm always left with -
6 - and I don't mean this negatively, but I'm
7 left with somewhat of a so what? What does
8 this tell me? Is this good, is this bad? Is it
9 going in the right direction? And I think
10 that's one of the things we grapple with, as
11 does the civilian prosecutors, I would
12 suspect. What is a good rate?

13 I know General Harding has
14 mentioned before, you know, is 100 percent
15 conviction rate a good rate? Well, I think
16 most prosecutors would say no, that it's a
17 broken system. Zero percent, probably the same
18 answer. So, as we struggle with this, I think
19 that is -- where you bin it is somewhat --
20 somewhat clouds the real question of what are
21 we getting after? And just because we can
22 count it, does it really count? And how do we

1 find the statistics that really help us
2 understand where we're going, and where we can
3 make improvements?

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

19 And even in things like sex
20 assault is not sex assault across the board,
21 there's a difference between rape and a touch.
22 And if you bin them all together, the numbers

1 get skewed. And if the panel is looking at
2 rape, penetrative sex assault versus the
3 touching offenses, those should be broken out.
4 And if you start with a number that has all
5 founded offenses, but there's 100 unknown
6 perpetrators, then certainly the prosecutor
7 shouldn't be held accountable for 100 people
8 that are unknown perpetrators that you can't
9 prosecute. And, at the same time, we shouldn't
10 be held accountable for the 100 cases that are
11 downtown, because a civilian District Attorney
12 had a greater interest in prosecuting those
13 cases. So, if I start with 500 and I have 100
14 unknown perpetrators, and 100 cases downtown,
15 but you want to give me my denominator of 500,
16 I'm 200 short before I ever get to prefer all
17 the charges.

18 So, that's why -- I spent most of
19 my career as a litigator. I want to know where
20 I am. I don't get better if I don't know where
21 I am. So, binning all that stuff together for
22 me, that may be great for someone who has a

1 statistical background. I was an English
2 major.

3 (Laughter.)

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

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

14 (Laughter.)

15 MEMBER COOK: You're up, Colonel
16 Mulligan.

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

20 CAPTAIN CROW: No. I mean, I can
21 give you the rates of prosecution. I can give
22 you the conviction rates within that, and each

1 one of the methodology for the Navy. I did
2 follow the DOD methodology just going down
3 that waterfall, so prosecution rate, again,
4 preferral of the cases, and then the
5 prosecution rate, or conviction rate of those
6 cases that went to trial, you know, what the
7 results were.

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

13 CHAIR JONES: Yes, go ahead.

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

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

19 MEMBER HOLTZMAN: Okay.

20 COL. MULLIGAN: Thank you very
21 much.

22 MEMBER HILLMAN: And is it

1 different for all the services?

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

5 PANELIST: We don't use it at all.

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

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

18 I'll jump right down to -- the DOD
19 method of tracking is flawed. It's flawed for
20 four reasons, and I'll follow-up with that.
21 It's first flawed because the DOD annual
22 report is a snapshot in time. The total

1 figures report include those made throughout
2 the fiscal year, so necessarily reports that
3 have not yet even been investigated or
4 disposed of by a commander are, in fact,
5 included.

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

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

19 Third, the total reports include
20 restricted reports which the victim has
21 elected not to have the allegation reported to
22 law enforcement; therefore, there's been no

1 investigation, and there's been no disposition
2 by the command. Certainly, no meaningful
3 prosecution rate can include those
4 allegations.

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

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

19 No meaningful prosecution rate
20 would ever group all of those offenses
21 together. Therefore, in order to accurately
22 study the disposition of the decisions Army

1 commanders have taken, the Army has broken
2 this data down to examine offenses separately
3 in which there's jurisdiction over the
4 offender, a completed investigation, and a
5 disposition decision made by a commander.

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

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

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

21 COL. MULLIGAN: Yes, ma'am. We've
22 actually grouped together for `12 both

1 offenses that were in play at the time, so the
2 incapacitated sleeping victim is included in
3 there, as well.

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

7 (Simultaneous speech.)

8 COL. MULLIGAN: I apologize, ma'am.
9 Founding is a probable cause determination, so
10 when you look at the total subjects in
11 completed rape investigations from FY 12, and
12 preceding, the ones that were carried forward,
13 you get 476. That's merely rape, so right away
14 you'll notice from the other numbers reported
15 the Army by size has a much bigger number when
16 it comes to our sex crimes, in general, but
17 certainly regarding rape.

18 Founding is the probable cause
19 determination. The commander does not have a
20 role in a founding or unfounding of a case.
21 Lawyers in coordination with investigating
22 agencies, CID for the Army, make that

1 determination. And it is a permanent law
2 enforcement record.

3 Unfounding would be -- unfounding
4 does not equal false reports. Unfounding means
5 that there is a missing element of the crime
6 that does not allow you to found it. It does
7 not mean something didn't happen, it means you
8 lack probable cause. So, of 476 allegations
9 358 were founded, 118 were unfounded. Again,
10 it does not mean they were false reports.

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

1 happened to those.

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

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

15 On the same slide, if you look to
16 the box to the right of the 68 soldiers
17 subject to prosecution by civilian
18 jurisdiction, those are the results, 22 were
19 dismissed, seven were prosecuted, 11 were
20 prosecuted for non-sex assault offenses, 28
21 are still pending. So, if you use 40 as your
22 denominator it was a 17 percent prosecution

1 rate.

2 slide 3, please. So, we look at
3 the 104 cases who were -- charges were
4 preferred. The charges were indicted, brought
5 by information, whatever your system brings.
6 Thirty-eight are still pending, so 66 cases
7 were completed by the end of the FY. Of those
8 66 cases, 16 resulted in dismissals for
9 evidentiary issues. And this is something a
10 little different in the military system versus
11 my experience in Tulsa, Oklahoma, 10 cases
12 there was admin separations. RILO is a
13 Resignation in Lieu of Court-Martial, that's
14 an officer. So, 10 accused accepted punitive
15 discharges rather than face court-martial. In
16 those cases, a prosecutor would have been
17 presented with sort of like a plea bargain.
18 The defense will come and say in those cases
19 the person has to admit guilt, and they are
20 dismissed. They relinquish all benefits of
21 their military service, and they receive a
22 punitive discharge, something that was not

1 available to me or to Mr. Bryant in his
2 practice as a civilian, so I can eliminate
3 someone from the service, I can strip them of
4 all benefits and rank, but I don't get a
5 conviction. Forty cases were tried to
6 findings, that means a verdict. Of the 40
7 cases tried to findings, 31 were convicted,
8 nine were acquitted, 78 percent conviction
9 rate for those cases that were tried to
10 findings.

11 Next slide. So, I want to go back
12 to the 82 subjects in the founded allegations
13 that did not go to court-martial. That doesn't
14 mean nothing happened to them. We, again,
15 tracked each one of those individually. Two
16 soldiers were administratively separated for
17 rape after the victim declined to cooperate,
18 so they were still -- action was still taken
19 against them even though the victim declined
20 to cooperate. Seventeen soldiers were given
21 non-judicial punishment for a non-sex assault
22 offense, four soldiers were given some type of

1 adverse action for a non-sex assault offense.
2 Thirty soldiers were given no punishment
3 because there was insufficient evidence of any
4 offense to prosecute, and 23 soldiers were
5 given no punishment because the victim
6 declined to cooperate in the investigation or
7 prosecution, and there was no other available
8 information. We do go forth in cases where the
9 victim declines to participate if we can
10 through other means prove the offense.

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

17 Each allegation can be traced to
18 the name of a victim and a subject in our
19 database. A description of each of these
20 offenses and the exact punishment imposed is
21 publicly available on the DOD SAPRO website,
22 and we think this level of transparency is

1 important to the services and understanding of
2 our system.

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

8 On slide 6 you'll see in cases
9 which there was jurisdiction over the offender
10 and a final disposition, the Army commanders
11 had a prosecution rate of 59 percent. Of the
12 37 cases that the civilians took, they had a
13 prosecution rate of 14 percent.

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

20 Next, we subtract the 37 subjects
21 who were soldier offenders over which there
22 was concurrent jurisdiction, but the soldier

1 and the civilian authorities elected to have
2 the case tried by the civilians.

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

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

20 Coming back to the 109 founded
21 allegations that did not result in court-
22 martial, there's a breakdown individually of

1 action taken against each and every one of
2 those soldiers. In some cases there was no
3 punishment because there was insufficient
4 evidence. Next slide.

5 So, of the 272 founded allegations
6 of wrongful sexual contact now, now we're down
7 to the touching where you would not -- even in
8 those cases, 68 soldiers were court-martialed,
9 33 soldiers were administratively separated,
10 91 received non-judicial punishment, 46
11 received other adverse action, and only in 34
12 cases was there no action taken. Next slide.

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

17 (Laughter.)

18 COL. MULLIGAN: So, what is
19 important here is when you look SVP Program
20 2009, and as I appeared before you yesterday,
21 that is when the Army initiated the Special
22 Victim Prosecutor Program. When we took our

1 best litigators and we put them in special
2 billets, specially trained. They did OJT with
3 civilian jurisdictions, and they were brought
4 on board. And what you see is a dramatic
5 increase both in the number of courts-martial
6 from 2009 to present, the number of
7 convictions, and the number of discharges of
8 court-martial results, almost 100 percent.

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

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

21 Since these efforts started, the
22 Army has seen an over 100 percent increase in

1 prosecutions, convictions, and sentences. The
2 program now is being expanded. It will now
3 include dedicated paralegal and Special Victim
4 Witness Liaisons to these prosecutors to
5 better resource them, and these efforts
6 demonstrates that Army is taking the issue of
7 sex assault accountability very seriously.

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

10 CHAIR JONES: Thank you, Colonel.
11 Any questions?

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

16 Is there a time frame in which the
17 Convening Authority has to make the decision?
18 And, if so, what is that time frame? Once
19 you've been through the Article 32 and it's
20 referred up, is there a time frame, a
21 prescribed time frame for that Convening
22 Authority to make that decision?

1 COL. MULLIGAN: He's the -- we have
2 a speedy trial, 120-day speedy trial clock.
3 You have to get to arraignment within 120 days
4 of preferral excluding defense delay. So, the
5 Convening Authority has to get those charges
6 referred to court-martial in time to do an
7 arraignment. For a general court-martial it's
8 five days, so the accused gets the charge --
9 he can waive service, but he gets the charges
10 five days prior to what we know as civilian
11 arraignment. So, in my experience, you see the
12 Convening Authority about once or twice --
13 once a week, maybe twice a week. And as soon
14 as a investigation comes in, it's the next
15 appointment.

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

20 COL. MULLIGAN: There's additional
21 requirements for speedy trial if he's in
22 custody. And you can still have an Article 10

1 violation for not moving forward. You can't
2 sit on something. The defense -- we have
3 aggressive defense counsel, so even though
4 you're within your 120 days, if your case is
5 not moved for a period of time, they can file
6 dismissal.

7 MEMBER BRYANT: All right, thank
8 you.

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

14 MEMBER BRYANT: All right.

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

1 to the office if you just had a case
2 dismissed.

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

7 COL. MULLIGAN: Right.

8 MEMBER BRYANT: Yes. Thank you.

9 MEMBER HOLTZMAN: Might I just ask
10 a question? First of all, thank you for the
11 clarity of the figures. And it just raised one
12 question in my mind. And it may be just -- I
13 didn't quite understand how you were
14 presenting it. You said that these are founded
15 cases, when you went through the numbers you
16 had founded cases, which means probable cause
17 --

18 COL. MULLIGAN: Yes, ma'am.

19 MEMBER HOLTZMAN: -- to proceed.

20 COL. MULLIGAN: Yes, ma'am.

21 MEMBER HOLTZMAN: Then you say in
22 the reasons for not having a conviction, that

1 there was insufficient evidence. Can you --

2 COL. MULLIGAN: Yes, ma'am.

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

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

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

17 COL. MULLIGAN: Yes, ma'am.

18 MEMBER HOLTZMAN: Because you say
19 insufficient evidence to prosecute, but if you
20 have probable cause you do have sufficient
21 evidence to prosecute, so there's a little bit
22 of lack of clarity in those numbers.

1 COL. MULLIGAN: Yes, ma'am, but it
2 could be you went to the Article 32 and
3 realized you have search issues, you have
4 search and seizure issues, you have witness
5 availability issues other than the victim. So,
6 what you have, you remain with probable cause,
7 it remains as a founded offense, but your
8 ability to action that through trial to get to
9 beyond a reasonable doubt, you've made the
10 determination --

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

17 COL. MULLIGAN: Yes, ma'am.

18 MEMBER HOLTZMAN: Okay, thank you.

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

22 COL. MULLIGAN: In the Army, yes,

1 ma'am.

2 CHAIR JONES: In the Army.

3 COL. MULLIGAN: Yes, ma'am.

4 CHAIR JONES: CID.

5 COL. MULLIGAN: Yes, ma'am.

6 CHAIR JONES: Okay.

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

10 (Laughter.)

11 CHAIR JONES: Okay.

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

15 COL. MULLIGAN: Yes, ma'am.

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

19 COL. MULLIGAN: I have had
20 disagreements in my career with founding and
21 unfounding. They've always been -- CID was
22 more likely to found than I was as the

1 prosecutor, but I'll have to get back. I know
2 -- I'd have to go back into the regulation. I
3 believe it is --

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

15 COL. MULLIGAN: And, anecdotally,
16 we just had that happen yesterday.
17 Anecdotally, we had a case prosecuted and a
18 15-year conviction in a sex assault case for
19 a case that was originally unfounded.

20 MEMBER COOK: Just one question. We
21 have -- as part of the materials that were
22 provided to the panel for read-aheads were a

1 couple of articles, one of which talked about
2 the UCMJ system only being -- even in a
3 deployed environment all the cases -- the hard
4 cases are generally brought back, and then
5 there's a reply to that that talks about no,
6 some of them are there. Do you know for your
7 cases during the statistics that you've given,
8 some of those cases, were they tried in the
9 deployed environments versus returning them
10 back to home station?

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

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

22 MEMBER COOK: Can and are.

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

5 MEMBER COOK: Thanks.

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

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

20 In FY 12, the Marine Corps had 435
21 reports of sexual assault, 102 of those are
22 restricted, and then 333 of those were

1 unrestricted. So, as you can see here of those
2 -- when we go from reports to subjects
3 including pre-FY 12 subjects, there are 387.
4 Of those 387 subjects, 288 had a disposition
5 for reporting in FY 12, so the remaining ones
6 -- the remaining subjects were still pending
7 at the time this report was created.

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

12 So, if you move on to J, which is
13 the next page. So, J includes every subject
14 who had a disposition for reporting. Of the
15 288, 93 subjects were outside of the DOD legal
16 authority, and just to issue spot one more
17 problem with the way this data is reported,
18 included in subject outside of DOD legal
19 authority, are those subjects where the
20 civilian or the foreign authority is
21 prosecuting the case. And in that case,
22 they're not necessarily outside of DOD's legal

1 authority because the commander can also take
2 case either after the civilian prosecution or
3 concurrently.

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

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

22 Of the 29 subjects where sexual

1 assault charges were preferred, 24 of those
2 proceeded to trial, 83 percent, and then 16 of
3 those subjects were convicted for 66 percent
4 conviction rate.

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

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

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

19 CAPTAIN McCLEARY: There are some
20 hazards to going last. And, also part of it
21 being that in Fiscal Year 13 we had a total
22 service-wide of 11 cases go to trial, so our

1 numbers end up being a lot smaller, so rather
2 than kind of walk you through what all of our
3 numbers are. I wanted to talk a little bit
4 about some of ways -- we ended up doing our
5 waterfall that differs slightly from how DOD
6 SAPRO puts them together. As we were engaging
7 in this exercise, there was some information
8 that we thought would be useful for us to know
9 that we just weren't getting. So we made the
10 decision to measure not only what the
11 disposition was by subject, but then also to
12 measure the disposition based on the victim
13 and what the allegations involving specific
14 victims were, because the numbers don't match
15 up. We have subjects who were involved with
16 several different victims, so we measured it
17 both ways. And then we did break out how we
18 measure between what we characterize as
19 serious sex crimes: rape, forcible sodomy,
20 aggravated sexual assault, and aggravated
21 sexual contact. And we did lump them together
22 because, again, our numbers are fairly small.

1 And then cases where it was more of the sexual
2 contact events.

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

13 The other thing I'd just very
14 quickly point out is, we don't use any form of
15 founded or unsubstantiated in our assessment
16 of cases. Basically, if CGIS conducts an
17 investigation, the legal office that serves
18 the Convening Authority gets involved in all
19 of those, are presented in some form to the
20 Convening Authority. And we don't use any
21 method by which they don't make it there
22 because we don't think there's probable cause.

1 Again, we somewhat have a luxury
2 in that we don't have that many cases, but we
3 don't use that process at all, nor use those
4 terms. And CGIS is extremely careful about --
5 their reports of investigation never make an
6 assessment as to whether or not they think
7 there's probable cause or likelihood of
8 conviction. So, rather than drag you through
9 yet more numbers, I'd be happy to take any
10 questions.

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

1 allegation against another service member or
2 a civilian?

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

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

1 participating in what was going on.

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

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

1 Captain Crow?

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

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

20 But I wanted to comment just
21 briefly on victim declinations, and I talked
22 about that as an example of putting it in two

1 different, you can call it a bin or category,
2 but labeling what that was. And I kind of
3 throw it out as food for thought in the sense
4 that if you've got a case that the commander
5 is going to unfound, and that -- within the
6 Navy, just like the other services, except
7 Army, NCIS does not make that judgment call.
8 That goes -- all those cases go to the
9 command, and the command then makes the
10 determination with all the legal advice that's
11 been described earlier. But when you've got a
12 case that just doesn't meet the elements, so
13 really it's going to be unfounded. But if you
14 talk to the victim and you explain that, and
15 the victim says okay, I don't want to go
16 forward, you know, which category do you put
17 that in?

18 If you put victim declination,
19 then they have buy-in to that process as
20 opposed to what most state jurisdictions would
21 do, is just evaluate it, write the one-page
22 letter and say, "Declined to prosecute due to

1 insufficient evidence." So, getting the victim
2 buy-in into that decision on declination, we
3 then call it a victim declination as opposed
4 to unfounded.

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

18 In fact, the two years that I
19 headed the Trial Counsel Assistance Program,
20 you know, we actively educated the victims on
21 the different challenges within the cases, and
22 would take the declination statements. I know

1 it was raised yesterday, and I'll kind of
2 finish with that, on do we follow victim's
3 preferences. And it is in DOD policy, and I'll
4 quote it. "The victim's decision to decline to
5 participate in an investigation or prosecution
6 should be honored by all personnel charged
7 with the investigation or prosecution." So,
8 that is our policy.

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

22 So, I leave that as just a couple

1 of other thoughts out there when we're looking
2 at some of these different reasons that some
3 of these cases, I called it fall off, but
4 don't get all the way into prosecution or to
5 verdict.

6 MEMBER HILLMAN: Thank you, Captain
7 Crow.

8 COL. COYNE: Ma'am, just to follow-
9 up on the FY 13 data. I think it's important
10 to evaluate that, as well, when it comes out
11 later next -- early next year because of so
12 many things that occurred at the end of FY 12,
13 for example, the SECDEFs initial disposition
14 memo came out the 28th of June, 2012,
15 elevating the initial disposition to the first
16 06 Special Court-Martial Convening Authority
17 on all penetration offenses, other programs
18 for the Air Force we instituted this Special
19 Victims Counsel in early 2013, so those -- a
20 lot of the statistics, a lot of those
21 initiatives that took place will be reflected,
22 at least in part in the FY 13 data. So, I

1 think as we look through, I think most folks
2 have mentioned that the FY 13 data will be
3 very important for trend analysis.

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

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

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

1 explicit suggestions on how it should be
2 changed.

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

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

1 individuals, I know, helps me.

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

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

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

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

21 DR. SPOHN: Good afternoon. Thank
22 you for inviting me here today and for asking

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

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

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

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

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

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

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

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

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

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

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

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

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

22 This is complicated, however, by

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Army, the decision to unfound is not made by
2 commanders, but by the prosecutor and only
3 cases that are deemed to be founded are
4 presented to commanders to investigate.
5 Moreover, in the Army, founding is a probable
6 cause determination, not a determination that
7 the case is false or baseless. The Air Force
8 and the other agencies, the determinations
9 that cases are to be unfounded are made by
10 commanders, but the definitions of what
11 constitutes unbounding differs somewhat. The
12 Air Force follows the UCR guidelines in
13 referencing cases that are false or baseless.
14 The Coast Guard categorizes cases as unfounded
15 if the investigation revealed that the entire
16 allegation was fabricated which would seem to
17 leave out those baseless complaints. And then
18 both the Navy and the Marine Corps simply, at
19 least in the materials that I was presented,
20 simply use the term unfounded without really
21 defining it.

22 Again, this makes comparing

1 statistics --

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

8 DR. SPOHN: No.

9 MEMBER HOLTZMAN: Okay.

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

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

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

17 MEMBER HOLTZMAN: Okay.

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

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

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

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

1 involving non-strangers.

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

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

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

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

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

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

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

22 So moving on to the different

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

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

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

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

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

22 So for the Marine Corps, again,

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

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

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

1 procedures for making unbounding decisions.

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

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

1 explain the higher rate for the Navy.

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

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

1 command action for sexual assault.

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

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

1 which I'll talk about in a minute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MEMBER DUNN: May I ask a
5 question?

6 DR. SPOHN: Yes, please.

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

12 DR. SPOHN: Correct.

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

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

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

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

22 MEMBER DUNN: Okay.

1 DR. SPOHN: I only had the --

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

4 DR. SPOHN: Yes.

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

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

9 MEMBER DUNN: Okay.

10 DR. SPOHN: It is.

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

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

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

22 DR. SPOHN: Exactly. And if one

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

5 MEMBER DUNN: Okay, thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 So I have a couple of

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

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

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

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

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

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

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

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

21 CHAIR JONES: Any questions?

22 MEMBER HILLMAN: Hi. I don't

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

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

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

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

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

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

11 DR. SPOHN: Yes.

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

20 DR. SPOHN: No.

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

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

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

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

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

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

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

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

8 DR. SPOHN: Exactly.

9 MEMBER HOLTZMAN: Thank you very
10 much.

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

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

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

1 Commander Donald King. I have been an active
2 duty Navy Judge Advocate since 1995. I will
3 provide background information on the Navy's
4 Defense Service Office, Navy defense counsel,
5 DCAP, as well as discuss the training and
6 experience level of Navy defense counsel in
7 that regard, including attachments that will
8 show you what those training classes entail.

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

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

19 So they get the basics of military
20 justice, courts-martial, criminal law,
21 military criminal law, at the basic lawyer
22 course.

1 Once they leave the basic lawyer
2 course, they go to what we call a RLSO, a
3 region legal service office. That houses most
4 of our Counsel for SJAs and prosecutors. And
5 they also now do our legal assistance.

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

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

20 Once they're done with that 24
21 month tour, then they're eligible to be
22 assigned to a DSO, Defense Service Office,

1 which is the office that houses our Defense
2 Counsel.

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

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

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

17 Also within their first year, we
18 send our defense counsel to what we call the
19 defending sexual assault cases class which is
20 a very intense one week course where we bring
21 in experts from forensics and psychology as
22 well as very experienced civilian defense

1 counsel. And that lasts a week long. So
2 that's usually their first year of training.

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

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

18 As far as experience, we have
19 counsel who will show up at the DSO with
20 anywhere from zero experience, absolutely
21 never having tried a case before in their
22 lives, all the way up to counsel who've been

1 doing it for 20 years and are designated as an
2 expert in the military justice track.

3 So the experience varies greatly.
4 To offset any experience gaps, we have
5 military justice qualified officers stationed
6 in all of our headquarters and some of our
7 DETs.

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

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

17 LT COL KU: Yes, ma'am. Good
18 afternoon, members of the panel. My name is
19 Lieutenant Colonel Fansu Ku. And I am Chief
20 of the United States Army's Defense Counsel
21 Assistance Program. I have served in this
22 position since June of 2013.

1 Today I will just highlight a few
2 areas from the written statement that I have
3 previously submitted to this panel.

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

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

18 Established in 2007, DCAP is
19 staffed by five experienced trial
20 practitioners, military and civilian, to
21 include two civilian highly qualified experts,
22 or HQEs. Both of our HQEs are former military

1 judges and experienced trial practitioners
2 with over 40 years of combined military
3 justice experience.

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

11 Once assigned to a TDS, defense
12 counsel undergo further training from
13 introductory courses, like Defense Counsel
14 101, to advanced trial advocacy courses, like
15 the Sexual Assault Training Advocacy Course.

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

20 In addition, defense counsel
21 routinely reach back to DCAP for advice on
22 individual cases. As the Chief of DCAP, I

1 personally view this capability as important
2 as, if not more important than classroom
3 training. As such, a member of DCAP is
4 available around the clock for case
5 consultation.

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

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

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

1 given case.

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

8 The majority of them are young,
9 company-grade officers, some of them in their
10 very first tour as judge advocates and
11 military justice practitioner, as Colonel
12 Colin, Chief of Army's TDS, previously stated
13 before this panel.

14 With more and more resources
15 dedicated to the prosecution of sexual assault
16 cases, it may become increasingly challenging
17 to attract and retain defense counsel with the
18 experience who can go on to serve as senior
19 and regional defense counsel.

20 We currently make up for this
21 inexperience with a strong training program
22 and reachback capability. Moreover, while

1 many judge advocates start their tours as
2 defense counsel with limited military justice
3 experience, they make up for that lack of
4 experience with a tremendous work ethic and a
5 desire to provide each of their clients with
6 the highest quality representation.

7 They are supported in their
8 efforts by their peers, supervisors and DCAP.
9 With that, I thank you for the opportunity to
10 address this panel. And I stand ready to
11 answer your questions.

12 CHAIR JONES: Thank you, Colonel.
13 All right. Is that Colonel Pitvorec?

14 LT COL PITVOREC: Yes, ma'am.
15 Thank you, good afternoon. I am Lieutenant
16 Colonel Julie Pitvorec. I'm the Air Force
17 Chief Senior Defense Counsel for the Eastern
18 and European Regions, and this is my third
19 assignment as an Air Force defense counsel.

20 Unfortunately, the Air Force
21 currently does not have a defense counsel
22 assistance program. However, setting up this

1 capability is currently our number one
2 priority within the trial defense division.

3 We've seen what all the other
4 services are able to do with this program.
5 And we are working very hard to get to that
6 capability as well.

7 The Air Force criminal defense
8 network is broadly divided into three regions
9 worldwide. In total, there are 187 attorneys
10 and paralegals assigned, serving at 69
11 operating locations worldwide with 85 area
12 defense counsel or base level counsel and 19
13 senior defense counsel.

14 Together, we are responsible for
15 providing defense services to the active duty
16 Air Force members worldwide. The vast
17 majority of our operating locations have only
18 one attorney and one paralegal assigned. And
19 they are responsible for defense services at
20 that installation.

21 The Air Force is unique in that
22 their defense counsel are selected in a very

1 competitive best qualified standard by the Air
2 Force Judge Advocate General.

3 Usually, our first time defense
4 counsel have two to five years of experience
5 working in a base legal office where acting as
6 a trial counsel in court-martial is among
7 their various duties.

8 Our new defense counsel have
9 somewhere between eight to ten courts before
10 starting as a defense counsel. But even with
11 that experience level of new defense counsel,
12 one of our biggest challenges that we face,
13 with the defense counsel networks spread
14 geographically all over the world, is
15 training.

16 For our formalized training, we
17 rely heavily upon the Judge Advocate General
18 School. In order to be a defense counsel,
19 they have already gone through, obviously, the
20 basic course.

21 However, in addition to that, we
22 have our basic course for defense counsel

1 called the defense orientation course. It is
2 primarily taught by the trial defense division
3 at our Judge Advocate General School.

4 This course is unique to defense
5 counsel and is a combined course with defense
6 counsel and defense paralegal which focus
7 primarily on how to run a defense office and
8 the minor legal issues which they can
9 anticipate encountering during their tenure.

10 The defense orientation course is
11 held twice a year in an attempt to catch the
12 incoming defense counsel and defense
13 paralegals as they're coming into the job.

14 Subsequent training includes
15 advocacy courses at our JAG School. But at
16 the end of the day, we rely heavily on OJT.
17 Likewise, the difficult, for on-the-job
18 training for geographically separated counsel
19 proves complicated.

20 Out of the 19 SDC regions, only
21 three, San Antonio, Colorado Springs and the
22 National Capitol region have the majority of

1 their bases in close proximity where driving
2 in for a group training is possible.

3 It is a constant struggle to
4 maintain a specialized training regimen
5 because of the limited time that defenders
6 remain in the position, usually, only 18 to 24
7 months for an area defense counsel and 24 to
8 36 months for a senior defense counsel.

9 This year, for the first time, the
10 Air Force has initiated a litigation training
11 course specific to prosecuting and defending
12 sexual assault cases.

13 Air Force defense counsel
14 participated in two different levels of
15 courses, the intermediate sexual assault
16 litigation course and the advanced sexual
17 assault litigation course. Both of these
18 courses were successful and are being reviewed
19 based on feedback for ways to improve.

20 In closing, let me say that I'm
21 very grateful to be here today. As a judge
22 advocate, I am very concerned about some of

1 the proposals being considered to modify the
2 Uniform Code of Military Justice, the Manual
3 for Courts-Martial and our Military justice
4 system, more generally.

5 I appreciate this opportunity to
6 discuss these concerns and the topic of sexual
7 assault in our Armed Forces with all of you.
8 And I look forward to your questions.

9 CHAIR JONES: Thank you very much,
10 Colonel. Captain Shinn?

11 CAPTAIN SHINN: Good afternoon,
12 esteemed panel. Thank you for the opportunity
13 to discuss the training of Marine defense
14 counsel as a tack on the issue of representing
15 our clients accused of sexual assault.

16 My name is Captain Russell Shinn.
17 And I am the Officer in Charge of the Defense
18 Counsel Assistance Program, DCAP, for the
19 Marine Corps Defense Services Organization.
20 I've been in this position since October of
21 2011.

22 The views that I express today are

1 my own. For context to my remarks, I've spent
2 my entire adult life in the Marine Corps. I
3 enlisted when I was 18. And I spent 11 years
4 as an enlisted infantryman and over eight
5 years as an officer and judge advocate.

6 The vast majority of my billets as
7 an attorney have been in litigation, I've
8 spent both in the defense and Government from
9 Okinawa, to Guantanamo, to DC.

10 I have been in non-litigation
11 billets as well, Company Commander and
12 Infantry Platoon Sergeant, and led Marines in
13 direct combat in Iraq. I am also a sexual
14 assault survivor.

15 I say this not to make the
16 testimony about me, personally, but to
17 highlight that when I talk about justice my
18 comments come from both an individual and
19 professional position.

20 During your thoughtful
21 deliberations today, I urge this panel to look
22 at our clients as people, some of whom stand

1 falsely accused. Our clients, like victims of
2 sexual assault and other crimes, are real
3 people, impacted by decisions and
4 recommendations that this panel will make.

5 You've heard pejorative terms like
6 predator and master manipulator. There is a
7 place for terms like those, at sentencing when
8 the facts support the use of them. But the
9 wild abandoned applying them, writ large to
10 accuse service members, is not only incorrect,
11 but it cheapens the overall message by
12 reducing its efficacy. I ask that you keep
13 the message but lose the rhetoric.

14 The vast majority of our 72
15 defense counsel, our first two are judge
16 advocates with less than three years
17 experience as an attorney. They typically
18 serve 18 months as a defense counsel before
19 moving on to another assignment.

20 Right now, the average litigation
21 experience of both senior defense counsel and
22 defense counsel in DSO is a mere 14 months.

1 That includes both prosecution and defense
2 time.

3 Despite this unique challenge, the
4 DSO has consistently provided superior
5 representation to our clients owing to the
6 dedication of the individual attorneys and
7 the mentorship provided by the DSO.

8 Our entry level requirements to
9 become a judge advocate are similar to our
10 sister services and almost identical to the
11 outline provided by Commander King earlier.
12 After a judge advocate joins the DSO, our
13 leadership provides additional training,
14 resources and assistance for defense counsel
15 worldwide.

16 Part of that piece is my office,
17 DCAP, established in 2011, which is staffed by
18 only two people, me and Ms. Kate Coyne, the
19 DSO's highly qualified expert. She's a
20 retired civilian, public defender from San
21 Diego, with over 30 years experience. And she
22 brings a lot to the table. But at the end of

1 the day, it's just her and me.

2 Earlier, the Army Colonel, I
3 forget his name, I apologize, but he talked
4 about fidelity in data. And I'd like to talk
5 about that when addressing challenges facing
6 the DSO.

7 Last year, Fiscal Year 2013, we
8 tracked data according to cases, because we
9 have clients. We have real people. We have
10 427 general courts-martial and special courts-
11 martial that went to findings. Of those 427,
12 108 of those were 120 cases, sexual assault
13 cases. That's a quarter, a quarter of our
14 cases that went to trial were sexual assault.
15 Two hundred and nine of the 427 were
16 contested, half, give or take. So 218 were
17 guilty pleas.

18 In each one of those sexual
19 assault cases, the defense counsel is faced
20 with the vast resources of the United States
21 Government. In addition, it's often a fight
22 for defense counsel to obtain access to

1 witnesses, evidence and resources needed to
2 ensure a fair trial.

3 I'll discuss this fight a bit more
4 later. But combined with the challenges faced
5 at trial, Marines accused of sexual assault
6 are frequently shunned at their unit and on
7 occasion subjected to unlawful pre-trial
8 punishment and unlawful command influence.

9 While a client who is found guilty
10 may get some relief during sentencing, the
11 innocent client is left with no recourse for
12 the months squandered in the brig, the
13 ridicule suffered and often a career left in
14 shambles.

15 This is not a non-trivial number
16 of people. Almost 30 percent of the contested
17 cases last year from the DSO resulted in full
18 acquittals.

19 We must not forget that these
20 Marines and Sailors are also victims. They
21 are victims of the very justice system
22 designed to protect us all. And experience by

1 the defense counsel to get justice at trial is
2 only part of the battle.

3 So ours is a practice dealing with
4 constant turnover. We normally start at zero,
5 training young defense counsel for 15 months
6 or so only to start ratcheting a caseload back
7 at 15 months, since cases detailed after that
8 point will not be finished at the point where
9 the attorney is expected to transfer to his or
10 her next assignment. Many times this transfer
11 is to a non-litigation assignment.

12 Placing greater institutional
13 value on high quality litigation is key. Our
14 sister services advocate an exclusive career
15 litigation track to solve this issue.
16 However, the Marine Corps is a much smaller
17 force which presents challenges to adopting
18 this within our system.

19 You heard yesterday about
20 promotion and retention precepts to discuss
21 the importance of litigation experience, and
22 that is a possible solution within the Marine

1 Corps. I would ask that this panel consider
2 that for recommendations.

3 The DSO fights for access to
4 witnesses, evidence and resources daily. And
5 the effective delivery of litigation services
6 within the Marine Corps is hampered by the
7 lack of dedicated defense investigative
8 resources. So in addition to the lack of
9 experience, we don't have the people on the
10 deck to get things done on a case-by-case
11 basis.

12 Congress has provided
13 investigators for the adequate representation
14 of Federal indigent defendants. And virtually
15 every state and Federal public defender's
16 office has in-house investigators.

17 For example, in the central branch
18 of the San Diego Public Defender's Office, 80
19 attorneys are supported by 16 investigators.
20 In the DSO, we have 72 defense counsel, but
21 not a single defense investigator.

22 Based on my and the DSO HQE's

1 experience, the most efficient and cost
2 effective way to provide this service is to
3 create a DSO criminal investigative division
4 or CID billet as a normal progression in duty
5 assignments for CID agents.

6 If each of the four DSO regions
7 had just two assigned investigators, that's
8 half the number of comparable to civilian
9 public defenders, the efficiency and
10 effectiveness of the DSO mission and the fair
11 administration of justice would be enhanced by
12 an order of magnitude.

13 The next thing that is lacking is
14 subpoena power. At the 8 November hearing
15 before this panel, you heard testimony about
16 the subpoena power, so I won't go into depth
17 on that. But suffice it to say that the
18 Defense Board does not have that authority.
19 We have to request it.

20 All that information goes through
21 the prosecutor, who gets to review all that
22 information before we get it. And they can

1 summarily deny it. That is an area that is
2 ripe for this panel's inquiry as well.

3 And that gap can be easily fixed
4 by giving the defense, who are both officers
5 of the Court and commissioned officers, and so
6 when the argument comes forth about abuse of
7 the system, I ask this panel to evaluate who
8 the person is who is asking for the
9 information. These are people who are
10 commissioned officers, who have sworn to
11 protect and defend the Constitution, not
12 someone who is trying to attack the
13 Constitution.

14 Moving to training, each year the
15 Chief Defense Counsel of the Marine Corps
16 publishes a DSO training plan which outlines
17 the priorities and responsibilities of the
18 leaders and members of our DSO provided in our
19 written statement, an outline of all the
20 courses that the DSO provides and also the on-
21 the-job training that our senior defense
22 counsel and regional defense counsel provide

1 at the branch offices within the regions.

2 In addition to those training
3 events, our counsel can also attend our sister
4 services courses and non-DOD training.

5 My office provides reachback
6 globally. We are on the phone and on email
7 24/7. We provide a SharePoint site, a Web
8 site that's an online database of motions,
9 discussion boards, you name it. We try to
10 provide that to our defense counsel.

11 But a discussion of training would
12 be insufficient without describing how the DSO
13 pays for it. And the DSO's budget has taken
14 significant hits over the past few years, as
15 has the entire DOD's budget.

16 But in Fiscal Year 2011 when I
17 came onboard, our budget was \$80,000. It
18 dropped to \$64,000 in Fiscal Year 2012, to
19 \$60,000 in Fiscal Year 2013 and then again to
20 \$36,000 this Fiscal Year, \$36,000 for 72
21 attorneys for training.

22 Put simply, we cannot train our

1 defense counsel on this amount. We can't. We
2 have to ask other agencies, the LSSSs to help
3 support us, I'm sorry, the Legal Services
4 Support Section.

5 And there's a mechanism to ask for
6 that assistance. But it's a situation where
7 we have to beg, borrow and not steal, but beg,
8 and borrow and scrounge to get our counsel to
9 training. We've been able to do that.

10 Last year we were able to get
11 significant assistance through Department of
12 Navy SAPRO. But without that, it would have
13 been mission failure. And hope is not a
14 strategy.

15 So I cannot hope that SAPRO is
16 going to give us money so that we can train.
17 But that's where we're at.

18 COLONEL HAM: For comparison,
19 Captain, do you know how much was allocated to
20 your prosecution counterparts for training?

21 CAPTAIN SHINN: No, I don't have
22 that. I do have those numbers. I do not have

1 them in my head, ma'am. What I do know is
2 last year we spent over 30, I'm sorry,
3 \$300,000 in training for the DSO.

4 So we were able to cobble together
5 enough money within to get \$300,000 worth of
6 training for our attorneys, despite having
7 only our meager budget. But again, that was
8 cobbled. I don't have that information.

9 Now, this isn't through some
10 nefarious intent by the Government to withhold
11 training from us, as I just alluded to.
12 They're giving us money, but it's not fenced
13 off, as was earlier described.

14 But the prosecution is getting the
15 lion's share of the resources. They have four
16 HQEs, whereas we only have one. They have
17 complex trial teams with a dedicated
18 investigator and a legal administrative
19 officer.

20 Put more simply, getting serious
21 about sexual assault and complex litigation
22 requires as a necessary component, getting

1 serious about funding training for both
2 counsel about staff.

3 Now, I've had the privilege of
4 serving with hundreds of defense counsel
5 during my 19 plus years of service. And
6 regardless of their experience level, each
7 defense counsel takes to heart the DSO motto
8 of Marines Defending Marines.

9 Despite the dedication, our
10 mission is not without significant challenges,
11 as I mentioned above and in-depth in my
12 written comments. The right to counsel comes
13 with it the right to effective counsel. And
14 we owe it to our service members to make their
15 counsel effective.

16 Dr. Martin Luther King, Jr.
17 famously said, "We shall overcome because the
18 arc of a moral universe is long, but it bends
19 towards justice."

20 And it's up to each of us to
21 continue to push that arc towards justice,
22 both for victims which has been the push for

1 most of the testimony, but also for the
2 accuseds.

3 And it's relatively easy to stand
4 up for beliefs when it's the popular thing or
5 the in vogue thing. It's relatively easy to
6 be pro-victim or anti-crime. But it can be
7 quite another to be against the injustice done
8 to accuseds, especially when they are already
9 considered guilty by society, by the media, by
10 their unit and by their commander, all prior
11 to trial.

12 Accused, the tone and tenor of
13 that word being hurtled at you, and stuck on
14 you, and immovable as a label, is powerful.
15 And that rush to judgement, the pre-judging of
16 individual guilt, causes us, as a society, to
17 lose sight of what our founders sought to
18 protect.

19 Through recent violent revolution
20 from the British Crown, no less, they
21 established in the sixth amendment, they
22 enshrined our right to a speedy and fair

1 trial.

2 A hundred and eighteen years ago,
3 the Supreme Court held that the principle that
4 there is a presumption of innocence in favor
5 of the accused is the undoubted law, undoubted
6 law, there's a presumption of innocence. But
7 118 years later, we still struggle with that
8 fact.

9 And too often, the court of public
10 opinion rushes to judgement, people without
11 all the facts, sometimes facilitated by
12 advocacy groups, or those with an axe to grind
13 or even with a wallet to pad.

14 But trial at any allegation, even
15 one as serious as sexual assault, can never be
16 merely an inconvenience on the way to
17 conviction and punishment. If the innocent
18 accused are convicted for a lack of defense
19 training, investigation or resources, justice
20 is not served.

21 And without public faith that the
22 justice system is fair, the system itself will

1 crumble. And it is up to us as concerned
2 citizens to help ensure that this is remedied.
3 Thank you for your time, and I look forward to
4 your questions.

5 CHAIR JONES: Thank you, Captain
6 Shinn. There were a lot of issues raised by,
7 for a lot of representatives from each of the
8 services. But I'd like to continue and hear
9 from our civilian defenders.

10 And as we hear from you, I wonder
11 if you'd begin to talk about things like how
12 many years do you need to be a defender and
13 your own resource issues in training. All
14 right, Mr. Borg.

15 MR. BORG: Thank you.

16 CHAIR JONES: Could we start with
17 you?

18 MR. BORG: Yes, I have to follow
19 that. That's really amazing. I feel like I
20 should invoke Monty Python, but now for
21 something completely different.

22 My name is Lane Borg. I'm the

1 executive director of Metropolitan Public
2 Defenders in Portland, Oregon. We're a
3 private nonprofit, but we're the primary
4 defenders in two of the three metropolitan
5 counties in Portland.

6 I have a staff of 60 lawyers, 135
7 staff total, and it's no match to Captain
8 Shinn, I have 20 in-house investigators for
9 that. We do everything you can get a court-
10 appointed lawyer for except appellate work.
11 So we do everything from civil commitments and
12 juvenile work up to capital crimes.

13 We don't divide ourselves in terms
14 of like a sexual crimes unit. We divide among
15 major felonies, minor felonies and
16 misdemeanors. And you work your way up based
17 on state guidelines for experience.

18 So if you have a bar card and
19 you're alive you can do misdemeanors, but
20 beyond that you need to have demonstrated
21 experience. So years and trials will get you
22 into minor felonies and then up into major

1 felonies where a lot of the sex crimes are.

2 But one of the reasons I was kind
3 of interested in this, thinking about this and
4 when I was invited here, is to really, you
5 know, why isn't that? I did private practice
6 for 13 years and did a lot of retained work in
7 sex crimes.

8 I suspect there's, in the civilian
9 world, more percentage or a higher percentage
10 of retained work in sex crimes, but in
11 Multnomah County we have about 1,500 pending
12 cases, as of last week, adult crimes. And of
13 those, 54 sex crimes. So only about three and
14 a half percent of the crimes. It's not a big,
15 huge percentage of our caseload.

16 And so we tend to focus more in
17 terms of the training. I mean, first of all,
18 and I counsel my friends in the prosecution,
19 I don't why they organize themselves that way.
20 I think it does damage and trauma to people to
21 make them only prosecute sex crimes or only
22 defend sex crimes. I think it's good to get

1 to do other things.

2 But as I said, we focus more on
3 training on specific things. And we've
4 actually conspired a little bit in our
5 discussions, and Mr. Porter's going to talk
6 about some training stuff. It's very similar
7 between the states.

8 So I'm going to talk about, and in
9 preparation for this was talking about some
10 trends, some new practices we're looking at in
11 our state for resolution, not just of major
12 crimes but particularly sex crimes, and that
13 is risk assessment, and trying to incorporate
14 risk assessment into dispositions.

15 So I'm going to start by telling
16 you I am not an expert in risk assessment, but
17 I think after about 18 months I'm an expert in
18 attending briefings on risk assessment and
19 what I've learned that is going to be
20 important to defense.

21 And I think this is also relevant
22 and important as I've listened today to your

1 charge, as the military has expanded sex
2 crimes into the boundary issues, the touching,
3 not just a rape or a violent assault, but it's
4 a much broader definition of what's going to
5 be brought up. That's very similar to the
6 states. The states have been dealing with
7 that and sort of sweeping up different people
8 and deciding what's going to be a sex crime
9 and then what's going to be labeled, as I'll
10 get to, I'll talk about later, sex offenders.

11 And what I've learned is that
12 we've got three, so it'll be three levels of
13 risk assessment that we've applied. Historic
14 is unstructured judgment, the sociologists
15 will tell us, which is what we've just talked
16 about. It's a gut feeling. A judge will have
17 a gut feeling about what to do or how to
18 sentence it. And that turns out to be the
19 worst risk assessment. It doesn't pan out to
20 be very well.

21 Then the next that comes in, and
22 what we're using a lot of in Oregon right now

1 is what will be considered straight actuarial.
2 So a public safety checklist, the Static-99,
3 these are validated risk assessment to predict
4 whether or not a particular person is going to
5 reoffend in a predictable period of time. One
6 year, three years, five years, I think is the
7 longest that I've seen.

8 And then what we're getting to in
9 Oregon and what we're really trying to push is
10 the concept of structured judgment. So you
11 look at the actuarial assessment and then you,
12 taking the factors that went into developing
13 that you have a discretionary authority
14 exercising judgment to deviate from that when
15 it may be warranted because one particular
16 factor may be driving the risk assessment.

17 We've noticed recently as we've
18 endeavored in this that we have a way you can
19 charge if you're 15 or older you can be
20 charged with a major felony in adult court in
21 Oregon.

22 And we've got a way -- so we

1 looked at that and we went to the public
2 safety checklist, we're seeing that they're
3 kind of off the charts. They're high risk-
4 high risk because we tend to think youth are
5 high risk. And so we've got to figure out a
6 way to account for that in the analysis.

7 But a lot of people have asked,
8 well, why would a defense attorney be
9 interested in risk assessment? Why would we
10 be talking about that? And I'll admit, I've
11 drunk the Kool-Aid a little bit. I believe
12 there's something to this. I've been to
13 enough demonstrations and sort of
14 presentations on it that I think that risk
15 assessment is something we should be looking
16 at.

17 But I also, as I said before, I've
18 never had in 30 years the experience, in
19 absence of information, a judge or a
20 prosecutor assumed that my client is low risk.
21 So if there's something that can talk to that
22 I want to engage that.

1 Also, more and more and
2 particularly in sex offenses, and I'm hearing
3 that in this presentation today that this is
4 where the military may be going or thinking
5 about going, it's the charge that determines
6 the outcome that determines everything else.

7 So what the person is convicted of
8 is going to determine what their incarceration
9 is going to be, what their conditions of
10 probation are going to be, the length of the
11 requirement to register as a sex offender and
12 the length of that. And if the prosecutor or
13 the judge is going to be interested in what
14 the level of risk is in order to be
15 comfortable with a lower level of disposition
16 we've got to pull that into the pre-
17 adjudication time period. We've got to get
18 that before we decide what the charges
19 ultimately are.

20 And I want to again emphasize,
21 this is not about someone who's asserted
22 innocence. When someone has asserted

1 innocence there's a whole process, and some of
2 the other presenters are going to talk about
3 that about how you fight that and what needs
4 to be done and what the standards are.

5 But I'm talking about using risk
6 assessment to try to change this concept of
7 just throw everybody in incarceration and make
8 them a registered sex offender for the rest of
9 their life. Because in Oregon we tried that
10 and we overshot the mark, and we've got a
11 whole class of people that cannot get jobs,
12 cannot live anywhere, and they are now going
13 to be taken care of financially and everything
14 by society. They're never really going to be
15 contributors again because they're never going
16 to have meaningful employment and those types
17 of things, or they're going to have big
18 challenges on that.

19 And the other thing that I've
20 learned in my journey through this risk
21 assessment and corrections theory is that
22 dosage matters. If you overreact to somebody

1 you can turn a low-risk offender into a high-
2 risk offender.

3 So if you react in a way to
4 overincarcerate, to oversupervise, you can
5 take someone who may have been, made a mistake
6 with some boundary issues, and after three
7 years that person's no longer going to be a
8 low risk to commit a new crime in the next
9 three years, they're going to be high risk.

10 And I was talking about one of, I
11 employ, we have a VA assistance program and so
12 I employ a former JAG officer as my VA
13 assistant and he was talking about some of
14 these ideas. And we recognized that, you
15 know, you really have that third option that
16 people have been talking about the civilian
17 doesn't have, the civilian process doesn't
18 have banishment. You know, you can be out,
19 you're not around anymore. We don't have that
20 in the civilian world. They're going to be
21 here.

22 So I keep hearing 99 percent of

1 offenders are released from prison back into
2 society. And so it really does matter, if
3 you're taking people that were low risk and
4 turning them into high risk you're doing harm.
5 You're not fixing the system, you're creating
6 a risk to an offender down the road or a
7 victimization down the road.

8 So I've become a believer in that,
9 you know, we need to do this. This is
10 happening, and finally, I guess, if no other
11 reason, Oregon has made it statutory. All
12 offenders going into supervision will go
13 through a risk assessment and then that
14 probation officer can change their conditions
15 of supervision based upon that.

16 So we've got to learn how to do
17 this. So what I've learned and what I'm
18 trying to get and we're engaging in, in Oregon
19 with defense counsel, is really teaching the
20 defense counsel what these risk assessments
21 are about. What they do and what they don't
22 do. For instance, they're very good

1 predictors for low-risk offenders at
2 predicting at who's not going to recidivate.

3 If you look at low-risk offenders
4 it's pretty high, 85 percent correct, 90
5 percent correct in some areas of who's going
6 to be, who's going to not recidivate. Not so
7 good on the medium and high-risk offenders.

8 If you look at the numbers they
9 will predict, they have false positives.
10 They'll predict that the person is going to
11 reoffend as a high-risk offender, and about 60
12 percent of the time that person does not
13 reoffend.

14 And so we've incarcerated them,
15 we've done a bunch of things to them and yet
16 when you track the history that person in fact
17 did not go out and reoffend. Risk assessment
18 is not a validated tool for length of stay.

19 That's the other thing that we get
20 concerned about is that prosecutors will say,
21 well, this person's a high-risk offender so
22 you should max them out. You should give them

1 the maximum amount of time. There's no
2 studies that support that at all. All you're
3 going to do is make them a higher risk
4 offender and keep them in prison longer and
5 spend a lot more resources. And if you think
6 you're making it better because they're given
7 a longer sentence that's a misuse of it.

8 And then as I have learned in
9 going into it, the factors like the Static-99
10 which is the most common, widely spread in
11 North America anyway, most of the validation's
12 been done in Canada, a tool for sex offenders
13 is that there's only about ten or 11 factors
14 that go into it.

15 Well, one of the factors is have
16 you lived in a stable, domestic relationship
17 for two years? Well, look around at 22-year-
18 olds, look around at folks in the military,
19 look around at, you know, with the changing
20 and emerging issues on gay marriage, look at
21 gay couples, you know, they're not going to be
22 able to score probably well on that factor,

1 and we as defense counsel in advocating for
2 that structured judgment need to know that and
3 need to understand these so that we can get
4 behind the test, look at it and say, well, was
5 that an outlier? Did that person score higher
6 on the test because of something that is not
7 really a risk factor in this person's
8 situation or is controllable, something we can
9 meet a needs on or change?

10 And so that's one of the big
11 training challenges we're engaging in as we go
12 down this road of using risk assessment to try
13 to determine who really is somebody we need to
14 be worried about and somebody who really
15 needs, you know, with some addressed needs and
16 supervision can live safely in society and not
17 be reoffending on that.

18 And I'll be glad to answer any
19 questions. Thank you.

20 CHAIR JONES: Thank you, Mr. Borg.
21 Is it Ms. Kepros?

22 MS. KEPROS: Kepros.

1 CHAIR JONES: Kepros? I see you
2 are the director of sexual litigation, so you
3 do specialize in your office, is that right?

4 MS. KEPROS: I do. My name is
5 Laurie Rose Kepros. I work for the Colorado
6 Office of the State Public Defender. We have
7 a statewide agency. Our office is in charge
8 of all the public defense through the State of
9 Colorado. We have 21 regional offices. As of
10 the 1st of January we will have over 600
11 attorneys. We are expecting to handle 134,000
12 cases in this fiscal year.

13 Just to give you some points of
14 reference to some of the military numbers, I
15 investigated overnight how many felony sex
16 cases were filed in Colorado. It looks like
17 in the last fiscal year there were about
18 2,200. So again, it's a small percentage of
19 cases, but these are cases that take a grossly
20 disproportionate share of resources. And
21 frankly, I can tell you that my prison system
22 would say the same. We have over 25 percent

1 of our prison population is there for sex
2 crimes. My probation agencies would say the
3 same. We have something like a third of their
4 resources going to supervising those people
5 who are convicted of sex crimes. So it's a
6 very complicated world when sex crimes are
7 involved, no question about it.

8 Of the cases that my agency
9 handles I can tell you that my job did not
10 exist until 2010. There was no such thing.
11 In terms of general training we have what we
12 call a boot camp program that our attorneys go
13 into. It's a seven-day intensive bring-your-
14 own-case-work-shopping-kind of a program.
15 They get that at about a year. There are
16 other shorter trainings delivered by the
17 agency on court trial skills. So they get
18 general litigation skills.

19 Similar to some of the other
20 people you're hearing from right now, we have
21 a lot of turnover. We're a public defender's
22 office. That is where people go to get some

1 experience, and sometimes unfortunately they
2 move on. So we are constantly training new
3 people and so we're very sensitive to those
4 challenges.

5 What largely drove the creation of
6 my position I believe was the State of
7 Colorado's decision in 1998 to pass something
8 called the Lifetime Supervision Act, which
9 means that for almost all felony contact sex
10 crimes the defendant is facing a life sentence
11 either on probation or in prison, depending on
12 the charge. We became very concerned about
13 the quality of representation that we were
14 providing to these defendants whose lives were
15 literally at stake and my position was created
16 to provide support, not just to people who are
17 charged with those crimes, but representation
18 on sex cases across the board.

19 I provide a service that I think
20 is most similar to the military model of
21 highly qualified expert. I no longer carry a
22 caseload. I did serve as a trial attorney for

1 over 10 years in the public defender's office.
2 I am the only public defender that I know of
3 in my state who ever had a sex offense
4 caseload. In the years 2005 and 2006 I
5 personally represented five percent of the
6 defendants in the state who were charged with
7 one of these lifetime crimes.

8 So I've spent a lot of time
9 looking at these issues, but we end up with
10 these cases being geographically disseminated
11 throughout the state. Some of our offices
12 have two or three attorneys in them. Some of
13 them have more than 50 attorneys in them. So
14 what's available in terms of support and
15 resources varies a lot. So I consult on a lot
16 of cases. I threw out that number for one
17 fiscal year of approximately 2,200 felonies.
18 I should actually correct that. It was 1,750
19 felonies. It was 2,200 total adult sex
20 filings. So that included misdemeanors that
21 were more like 400 or 500.

22 In the last three years that my

1 job has existed I have consulted on
2 approximately 1,600 cases. So I think you can
3 say I have touched 20 to 25 percent of the sex
4 cases that have been filed in the State of
5 Colorado personally. And so that is a
6 resource that I provide among the special
7 issues that I feel arise in the context of
8 sexual offense representation. And I do
9 regional training. I go out to these offices.
10 I give them a lot of this information.

11 A particular area of concern that
12 I have has to do with the use of experts in
13 these cases. We are the Government. We don't
14 just give people money because they say they
15 want to hire an expert. We expect our defense
16 counsel to understand why they would need an
17 expert. We require of them justification for
18 spending that money.

19 The difficulty is if you have
20 naïve defense counsel, they will not identify
21 those needs. They will not be able to justify
22 the appropriate resources and support for

1 their cases. I think some of the issues that
2 Mr. Borg brought up are a great example. You
3 know, we have in my state also a mandatory
4 psychosexual evaluation process for anybody
5 who is convicted of a sex crime. Well, you
6 know, knowing how to make sense of that is an
7 important skill to have and it takes a lot of
8 reading and research and training to be able
9 to do that. And knowing the nuances of
10 instruments like the static 99, it takes
11 skill.

12 Things have come up in the course
13 of other testimony before this Panel over the
14 last couple days, frankly, that I can tell you
15 as somebody who's done a lot of reading and
16 research, I disagree with some of the claims
17 that have been made about crossover, some of
18 the claims that have been made about the
19 average number of victims for whatever this
20 thing is, quote, "sex offender," close quote,
21 because it's not a homogenous thing. But, you
22 know, you need to have a lot of education and

1 training to appreciate these are even issues.

2 Certainly we have tons of cases
3 where there is no physical evidence, and that
4 can make the social science issues even more
5 complicated to tease out as people come in and
6 say, well, is this behavior consistent with
7 someone who's been sexually assaulted? And,
8 you know, boy, I really need to know a lot to
9 do an effective cross-examination on that kind
10 of topic.

11 If somebody is in a case where
12 there's physical evidence, I better know how
13 to cross-examine a SANE nurse. I better know
14 something about gynecology. I've had to learn
15 about abortion. I've had to learn about
16 hysterectomy. I'm just throwing out some, you
17 know, things that come up in practice that you
18 have to go get educated about to be effective
19 at representing your clients.

20 Above and beyond that, there are
21 the realities of things like plea bargaining,
22 sentencing, what is appropriate? One issue

1 that is really concerning to me is the
2 collateral consequences that may flow from
3 even being accused of a sex crime. In the
4 last I think just two years the United States
5 Supreme Court has recognized a specific duty
6 of defense counsel to advise clients of
7 collateral consequences, including I would
8 submit to you things like registration as a
9 sex offender, things like all the other things
10 that will happen in your life if you are
11 adjudicated for this kind of offense. In my
12 state we do include military dispositions
13 among the things that will trigger
14 registration.

15 Across the country you will find
16 from state to state to state all kinds of
17 rules, rules about whether you can photograph
18 children, rules about whether or not you can
19 go into a public library, rules about whether
20 or not people can trick or treat at your house
21 that may be triggered by some sort of contact
22 with a sexual assault allegation.

1 I can tell you if somebody were
2 accused through the military process of a sex
3 crime, even if they were never adjudicated,
4 even if there was never a court-martial, if
5 there's some record of that floating out there
6 and it is learned about by my prison system,
7 if you come into my prison for a non-sex
8 crime, for a crime like let's say theft, if
9 that's out there, it may be enough to create
10 a situation where you'll be treated as a sex
11 offender subject to mandatory sex offender
12 treatment, required to submit to full sex
13 offender conditions on parole which tend to
14 include things like absolutely no contact with
15 anyone under age 18, including your own
16 children, restrictions on access to the
17 Internet, restrictions on where you may live.
18 You know, it's a very serious consequence,
19 even aside from incarceration consequences.
20 And that could flow from something that is
21 never adjudicated even by the military.

22 So I'm very concerned about

1 defense counsel being aware of these things.

2 The other major concern I have is
3 that we see because of the desire to prosecute
4 these cases, a desire that legislators I think
5 often understandably share -- we see the
6 constitutional protections that generally are
7 made available to defendants have exceptions
8 cut into them when it comes to sexual assault
9 cases. We see rape shield laws. We see laws
10 that allow certain kinds of hearsay to come in
11 that might otherwise not in another case.

12 So we take a case that is among
13 the most serious kind of accusations that
14 someone can face and we take away some of the
15 protections that might otherwise be present
16 for them. So you need defense counsel who are
17 effectively constitutional experts who have
18 the skill and knowledge and legal ability to
19 bring constitutional challenges to some of
20 these rules that are peeling back some of the
21 protections that we are accustomed to having
22 in normal criminal defense practice. And, you

1 know, these are not minor things. These take
2 a lot of knowledge. These take a lot of hard
3 work.

4 The other thing is you've heard
5 about FETI. You heard about some of the
6 different interview techniques that have come
7 up during this panel. Those techniques change
8 all the time. I hope they're changing for the
9 better. That's a great thing if they are,
10 right? We want evidence-based practices. But
11 it also means now I have to go learn about
12 that, and I have to train my staff about that.
13 And so it's not that, oh, we've trained up
14 somebody one time and now we're done. It's
15 here's the next hot thing or here's the next
16 trend and suddenly we all need to go learn
17 about it.

18 Risk needs responsivity, which is
19 sort of the short term for what Mr. Borg was
20 talking about. Don't over-supervise low-risk
21 people. That's become kind of a buzz word in
22 the policy world that I'm in right now. And

1 so you need to go read the literature and know
2 about these things and being some
3 sophistication to the process.

4 Because one of the other realities
5 is at the end of the day well-meaning
6 prosecutors, well-meaning judges, well-meaning
7 probation officers, they may not have all the
8 relevant information themselves. And
9 especially if we are looking at systems, model
10 systems where investigators are going into the
11 process saying we are going to believe the
12 victim no matter what, well, somebody else
13 needs to be investigating what else may be
14 going on. Somebody else needs to be figuring
15 out what other concerns or considerations need
16 to be brought to bear in this situation to
17 have any shot at any kind of just results.

18 CHAIR JONES: Thank you very much,
19 Ms. Kepros.

20 Is that Ms. Muth?

21 MS. MUTH: Muth, Your Honor.

22 CHAIR JONES: Muth?

1 MS. MUTH: Thank you. My name is
2 Amy Muth. I'm from Seattle, Washington. I'm
3 in private practice, different from my
4 colleagues, but I was a public defender for
5 seven years and very proudly still identify
6 myself as being a public defender.

7 We do things differently in
8 Washington in terms of how we administer
9 public defense services. We don't have a
10 statewide agency. Rather, it sort of goes
11 county by county and there are a couple of
12 larger counties like the Spokane County Public
13 Defender's Office, Pierce County, Snohomish
14 County, Whatcom County which all have agencies
15 that contract with their county government.
16 King County, which is where Seattle is, is a
17 little bit different in that we have four non-
18 profits which contract with the government.
19 And that of course is being consolidated into
20 one or two different agencies. It's kind of
21 a mess right now. But the main way in which
22 public defense services are administered

1 throughout Washington State is through public
2 defense contracts.

3 So individuals can apply for and
4 receive a public defense contract by
5 submitting a request for proposal when the
6 appropriate times comes up with either the
7 statewide Office of Public Defense or with the
8 local county agency. In Washington we now
9 have standards that counsel needs to certify
10 and has to sign off on; every public defender
11 in the state needs to do this, which indicated
12 they're going to abide by certain standards of
13 representation. I submitted those in my
14 materials.

15 Specific to sex crime cases there
16 are minimum standards of qualifications. You
17 need to have been a lawyer for at least a
18 year. You need to have done at least one
19 felony trial and another trial with the
20 assistance of another attorney. What I would
21 say about that standard -- and I want to talk
22 more about my experience having worked for the

1 largest agency in the state, the Defender
2 Association in Seattle, what my experience was
3 in practice in terms of what the expectations
4 were for counsel. That standard is a floor.
5 It's not a ceiling.

6 My experience, both having worked
7 for a small public defense firm and having
8 worked in Seattle is that at most agencies
9 it's the typical you'll start out in district
10 court, you know, doing misdemeanors for about
11 two years, eventually move up to doing
12 felonies. And you'll start off with low-level
13 felonies. And most people usually don't start
14 taking on sex offenses until they've been in
15 practice for some time. And there are a
16 variety of reasons for that.

17 A big one is what has been touched
18 upon by this panel already. If there's one
19 thing we can drive home to you it is that the
20 consequences for these offenses are severe if
21 you are convicted. In Washington State we
22 have the Indeterminate Sentencing Review

1 Board, basically a parole board that was
2 formed by the legislature in 2006. And an
3 individual who was convicted of a sex offense
4 that is eligible for the ISRB has a minimum
5 sentencing term set by a judge. And then when
6 that person goes to prison, the Indeterminate
7 Sentencing Review Board can either parole them
8 at the time that they've served their minimum
9 term or they can have another five years set
10 and another five years up until they've served
11 the statutory maximum, which for many of these
12 cases is life. So it has resulted in a lot of
13 cases now being viewed as potential life
14 sentences.

15 So when we do trainings for this
16 and when I do trainings -- and I've spoken at
17 a number of facilities. I've done trainings
18 for a lot of the agencies throughout the
19 state. That's one thing that we need to drive
20 home to them. And I certainly echo Ms.
21 Kepros' remarks regarding how difficult and
22 the level of expertise that it takes to do

1 these cases properly.

2 It was a sex offense case, a
3 juvenile case, but the principles are the
4 same, that really led to the development of
5 having even these model indigent standards
6 that counsel needs to abide by in these cases.
7 And I think it touches very nicely upon
8 Captain Shinn's remarks regarding the duty to
9 investigate these offenses properly. And that
10 case is State v. A & J.

11 And in this case a 15-year-old kid
12 accused of a sex offense spent, according to
13 the opinion by the Washington Supreme Court in
14 its findings, defense counsel spent 55 minutes
15 total with the client before his plea hearing,
16 did no independent investigation including
17 interviewing witnesses that the client had
18 produced, made on discovery requests, filed no
19 motions, did not even review the plea
20 agreement, did not consult with experts, did
21 not inform the child that his school would
22 learn that he was a sex offender, did not

1 inform the child of the mandatory minimum
2 sentencing term and had not even used an
3 investigator during the prior contract term.

4 And I'm not at all suggesting that
5 this is the standard of practice in the
6 military, but I say this to point out the need
7 to rigorously defend and enforce the duty of
8 counsel to investigate these cases properly
9 and to make certain that they are given the
10 tools to properly investigate these cases.
11 That means having investigators available.
12 That means having training with counsel. And
13 in fact our supreme court said that even
14 counsel believed that his client was guilty,
15 he still had a duty to do some investigation
16 in this case so as to properly advise the
17 individual of the consequences of pleading
18 guilty or whether it was a good idea to do
19 that.

20 And I would also point out that
21 doing a proper investigation often has the
22 impact of reducing prosecutions because cases

1 resolve. I cannot tell you how many times I
2 have gone into a witness interview with a
3 client who has said, you know, Ms. Muth, Amy,
4 you know, I'm not guilty. I didn't do this.
5 I didn't do this. I interview the witness.
6 I have a tape recording. I play it for the
7 client. And the client hears how that witness
8 sounds and the client now has a different
9 assessment of what his case should look like.
10 Or conversely, I produce a witness for the
11 prosecution to interview and I just say, you
12 know, you've got to listen to this witness.
13 You've got some problems with your case. And
14 the prosecutor will listen and will say, you
15 know, you're right, Amy. I need to make a
16 different decision about what I need to do
17 with this case.

18 So investigating it's not only
19 what is required under the 6th Amendment. It
20 is what makes certain that justice happens in
21 these cases. These are cases that carry
22 serious consequences for individuals. There

1 are a number of competing difficult interests
2 to balance against and I just urge that based
3 on our experience in Washington this rather
4 unfortunate experience that we all learn from
5 that and that we rigorously protect and defend
6 the duty of counsel to investigate these cases
7 properly. Thank you for your remarks.

8 CHAIR JONES: Thank you.

9 MS. MUTH: Or -- sorry. Oh, yes.

10 CHAIR JONES: Mr. Porter, you're a
11 statewide trainer in New Mexico?

12 MR. PORTER: Yes, Madam Chair,
13 good afternoon, and distinguished members of
14 the Panel. I first want to say I am just
15 honored to be sitting at this table with these
16 men and women in our military service that are
17 providing blood, sweat and tears for people
18 that are accused of crime within our military
19 justice system.

20 I am the training director for the
21 State of New Mexico Public Defender
22 Department. We have 200 in-house attorneys

1 and about 120 contract attorneys and I'm
2 basically responsible that when they go in to
3 defend one of our citizens in New Mexico that
4 they are able to do that very competently.
5 And I kind of look at your role here, too,
6 because you're to be coming up with a system
7 and developing a system that is for our
8 military members. And I find it a little
9 tragically ironic that the folks that defend
10 our Constitution day in and day out, they
11 actually in the military justice system have
12 much less rights than someone would if they
13 are a civilian.

14 You know, in New Mexico if you're
15 charged with one of these crimes, you're going
16 to get 12 jurors. The prosecution has the
17 burden of proof to prove it beyond a
18 reasonable doubt to all 12 unanimously. And
19 in a military court of justice it's much less
20 and it's actually just a fraction thereof has
21 to find you responsible for something. So I
22 think what I would do is echo the concerns of

1 my counsel here is that these cases have dire
2 consequences and they have dire consequences
3 that last well after the military service,
4 especially the sex offender registration.
5 Throughout I think every state now has a
6 lifetime registration system in place or will
7 soon have one in place.

8 So as they have in Colorado, in
9 New Mexico we have seen that these cases,
10 they're the toughest cases that land on our
11 desk, right? And we have a mantra where we
12 say give me a homicide any day. Just don't
13 give me one of those sex cases, right? And of
14 course the most difficult ones are the
15 children sex cases.

16 And so we have stepped up our
17 training. And I talked to Commander King
18 earlier about the military's training, at
19 least in the Navy, and I was very impressed
20 that they do a lot of training. And just like
21 all public defense systems throughout this
22 country, there is a turnover issue, right?

1 And there is always going to be a turnover
2 issue. It's something that we have to live
3 with. I practiced in the Public Defender
4 Department in Hawaii for 10 years and now in
5 New Mexico for 10 years, and that's just part
6 of what we have to deal with.

7 So what you folks have to deal
8 with is creating a system that addresses that
9 as well. And it's really about training,
10 about setting limits of how much experience
11 and how much training counsel should have
12 before they handle these cases, because we
13 know the consequences are so great.

14 In the New Mexico Public Defender
15 Department we have very similar training to
16 what the Navy has. We have a one-week-type
17 boot camp. Then we have a year later a one-
18 week advanced trial skills workshop, two to
19 four weeks of mentoring in court before
20 anybody actually does anything on the record.
21 And then we have in-service trainings every
22 Thursday that are broadcast over the Internet

1 to all of our regional offices. And I think
2 that would be something that the Armed Forces
3 who are spread out throughout the world could
4 certainly take advantage of as well.

5 To answer your question, Madam
6 Chair, about the level of experience and my
7 experience in doing these cases for 20 years
8 now, minimally three years, and they shouldn't
9 be doing it alone for threes. And optimally
10 somebody should have five years of criminal
11 law litigation experience.

12 And then along with that
13 experience -- and we don't have to look very
14 far -- and I know maybe all of you are
15 lawyers, but I know a couple of you are. We
16 don't have to look very far for good
17 professional guidelines. The American Bar
18 Association, right? And what the military has
19 is a lot like a public defense system. That's
20 basically what it is. They have the 10 key
21 components to a successful public defense
22 system. And so I just want to kind of cover

1 what some of those are.

2 One of them is training. The
3 other one is independence. And I think that's
4 a real problem that maybe you folks can
5 address. I've learned from military counsel
6 here they don't have the subpoena power and in
7 order to actually get a subpoena you have to
8 go seek it through the government. That's not
9 the case in I think most states and in New
10 Mexico an individual attorney has the subpoena
11 power. They don't even have to go to the
12 court to issue a subpoena.

13 The other thing is the use of
14 experts and the training or experts, because
15 this is such a particularized field. This is
16 just one of the books that we have in our
17 library that we maintain, the "Atlas of Sexual
18 Assault." Anybody doing these cases needs to
19 know this book inside and out, right? Another
20 book that I didn't want to bring because it's
21 so good is "Forensic Nursing" by Virginia
22 Lynch. They need to have regular forensic

1 training about sexual assault injuries, about
2 all the studies that have been done about say
3 a SANE nurse, and I know you've probably heard
4 some testimony about SANE nurses. And most of
5 these cases now are involving SANE-type
6 testimony. Well, we have to be able to look
7 at it analytically and provide the jury with
8 a rebuttal basically to a SANE nurse's
9 testimony.

10 And getting back to the
11 independence that the military does not have
12 right now, if they want to hire an expert,
13 they have to go up a chain of command and it
14 can be denied pretty readily. If I want to
15 hire an expert in New Mexico, I hire him,
16 right? And I don't see any reason why
17 somebody who's charged with one of these
18 crimes in our military branches should have
19 any less protection and representation.

20 Let's see. The other thing I
21 would echo is the use of risk assessments.
22 And one thing that Mr. Lang said is that

1 dosage matters. And I think you may be able
2 to address mandatory sentences. And I know
3 some of you have experience in federal court
4 and how mandatory sentences really hamstring
5 judges and don't allow them to actually dose
6 out the right kind of punishment so that we
7 keep recidivism rates as low as we possibly
8 can.

9 And then the other thing is I
10 watched on the Web some of the testimony, and
11 there was a request for specialized units.
12 And we heard this morning that there's a
13 Special Victims Program within the Army
14 branch. The other branches don't have that.
15 And at first blush I think, oh, if you're
16 going to do that in the branches, then you
17 should also do it for the defense. There
18 should be specialized units for the defense.
19 But then on hindsight, we've thought about
20 doing that. And our offices have done it from
21 time to time; Colorado is doing it, but we
22 find that attorneys burn out on these cases

1 because they're so emotionally driven and the
2 impact on our clients.

3 Lastly, that brings up the issue
4 of vicarious trauma that we do trainings on
5 and that I would encourage you folks to
6 include for all of the prosecutors and all of
7 the defense counsel that deal with these cases
8 that are so emotionally charged that they need
9 training on vicarious trauma and the impact
10 that it has on their lives and what they take
11 back to their families.

12 That's all the comments I have for
13 now.

14 CHAIR JONES: Thank you, Mr.
15 Porter.

16 We'll hear now from Mr. Whitehead.
17 And you're in the Public Defender's in D.C.?

18 MR. WHITEHEAD: Yes. Yes, ma'am.
19 Good afternoon to everybody.

20 I certainly will echo everything
21 that has been already said, but I don't want
22 to retread a lot of those things. But as far

1 as the D.C. Public Defender Service is
2 involved, I'm a supervising attorney there.
3 I've been there for nine years. We have a lot
4 of training. I think we end up training a lot
5 of the Criminal Justice Act attorneys that are
6 also in D.C. that take court-appointed cases
7 and we train across the country sometimes.

8 As far as how we progress, we
9 start out as juvenile lawyers. Typically our
10 attorneys are straight out of law school, or
11 had just clerked from local or federal judges,
12 or have very little litigation experience. We
13 don't have a lot of laterals that come
14 through. So when we do have lawyers, they
15 have a lot of energy. We put them through a
16 10-week training involving substantive
17 training as well as skills that culminates in
18 kind of a mock trial with judges at the end.
19 And then they start picking up juvenile cases.

20 With the juvenile cases you range
21 from having your misdemeanors all the way up
22 to your juvenile homicides and sexual assault

1 cases. And all of this kind of progresses
2 because of the consequences involved or lack
3 thereof, because with juvenile cases they're
4 bench trials with rehabilitation being in mind
5 sort of where the most that you could get is
6 commitment to the age of 21.

7 After that year of juvenile court
8 that attorney will then go into adult court
9 handling felonies, mostly guns and drugs, kind
10 of your minor felony cases. Once you've done
11 that for about a year or so, at least getting
12 -- I think they want at least a couple of
13 trials, solo jury trials, some co-counsels,
14 then you'll progress to the more serious
15 felonies involving mandatory minimum
16 sentencings; your armed robberies, your armed
17 car jackings, things of that nature.

18 And after around five years,
19 mostly about six or seven years, then you'll
20 go into your felony 1 practice, which we don't
21 have a specific practice for sex offenses, but
22 where I'm at we do sex offenses; your rape

1 cases, your assaults with intent to kill and
2 your homicides. So those three are the three
3 specific types of cases that you'll handle as
4 your most senior lawyers there.

5 I mean we train more generally and
6 try to raise a lawyer that can practice pretty
7 much any type of case, so we don't
8 specifically have kind of a week-long sex
9 offense training like some of the other places
10 may have or a specific sex offense director.
11 But what we will have are trial practice
12 groups, where we're a pretty tight knit, I
13 would say, family of lawyers there.

14 And right now we have around 47
15 trial lawyers, 16 or which are in the felony
16 1 group. And we're all in the same office, so
17 we're not a statewide. We're a district where
18 we're in one particular place. And so we're
19 in constant communication with each other so
20 that we could talk about our specific cases
21 with other lawyers that may have information
22 that we may not as a single person. So what

1 makes us unique I think is the fact that we
2 have all these resources in one base place.
3 So we have our trial lawyers.

4 And we're not the smartest in the
5 world, so we have an appellate division. We
6 have our special litigation division that will
7 deal with overarching themes such as Brady
8 information or withholding of exculpatory
9 information from the defense. We have a
10 parole division, community defender division
11 that deal with institutional issues, whether
12 or not it's with BOP or within the Department
13 of Corrections with our specific clients. We
14 have social workers that will help out and
15 kind of deal with this risk assessment and
16 help out with the different things that our
17 clients are going through to present
18 mitigation at the end of the day.

19 And of course we have
20 investigations. I mean it's surprising to
21 hear about the lack of investigators involved
22 when we're trying to uphold the Constitution

1 here and try to give our clients the utmost in
2 representation and being zealous. But as far
3 as investigators are concerned, some lawyers
4 share an investigator with just one other
5 lawyer or some have their own specific
6 investigator. And I was lucky enough to have
7 my own specific investigator for awhile. I
8 share one now.

9 But it makes it much easier in
10 terms of being able to defend our clients
11 finding out that you could throw away all your
12 kind of subjective beliefs about your client's
13 guilt or innocence and then you do
14 investigation and you investigate no matter
15 how much bad evidence there seemingly is. You
16 find out that there are some things --
17 sometimes complainants do not tell the truth.

18 So, you know, one word I kind of
19 bristle at when I hear it all the time from I
20 guess panels that are supposedly objective is
21 the word "victim." When we talk about pre-
22 trial matters that have not resulted in

1 conviction or that have not resulted in the
2 guilty plea, we deal with complainants,
3 because a lot of times we understand that
4 alleged victims aren't victims at all when we
5 investigate and even the government finds out
6 before we do that things have been made up.
7 So I think that just reemphasizes the
8 importance of having investigators and having
9 all the different aspects of the case, whether
10 or not it's legal or on the field, done in
11 order to have a decent -- not only a decent,
12 but a zealous defense.

13 I mean I think the rest of the
14 things that I have to say would pretty much
15 echo what the other counsel -- whether or not
16 it's having access to experts with DNA, with
17 SANE nurses. Our office has those resources
18 so that we don't have to talk to other
19 individuals in order to justify or get
20 vouchers from the court. We just do that in
21 house. And if the particular lawyer does not
22 know how to talk about getting an expert, we

1 have other lawyers that are there that can
2 figure out why we would need one. So I think
3 that the fact that we have such a close-knit
4 group of people that have resources so readily
5 available is one thing that helps us stand out
6 and help our clients to the utmost. Thank
7 you.

8 CHAIR JONES: Thank you very much,
9 Mr. Whitehead.

10 Do we have any additional
11 questions or comments from the Panel? Beth?

12 MEMBER HILLMAN: Just a question
13 first. Thank you all for bringing this
14 perspective to us. We get pulled in many
15 directions and it's very compelling to have
16 that many of you in front of us right now all
17 the way across, and I appreciate everybody's
18 comments.

19 You reminded me, Mr. Whitehead, of
20 a question I wanted to ask those of you who
21 have a perspective on this, and that's about
22 the limits of appellate review for those

1 convicted at court-martial.

2 For our judge advocates, your
3 perspectives on that, and if you find that's
4 a significant limit on your ability or the
5 appellate division's ability to represent your
6 clients down the road. And your reaction to
7 it, too.

8 CAPTAIN SHINN: I always have an
9 opinion.

10 (Laughter.)

11 CAPTAIN SHINN: First my personal
12 opinion, ma'am, to answer your question, is I
13 think that much like our civilian accused,
14 right to appeal to the supreme court should be
15 available to our service members.

16 Second, the non-jurisdictional
17 cases, the cases that don't trigger Article 66
18 appeal, those are silent.

19 MEMBER HILLMAN: Which can you
20 just explain for us?

21 CAPTAIN SHINN: Oh, absolutely.

22 MEMBER HILLMAN: I don't know if

1 all our civilian counsel know.

2 CAPTAIN SHINN: Yes. So within
3 the cases there's a subset of cases that don't
4 trigger automatic appellate review. Those
5 cases are ones that do not receive a
6 discharge or do not receive a sentence of a
7 year or more confinement.

8 So if your client does not receive
9 that, then your case does not go up on appeal.
10 You have a limited review by a judge advocate
11 there within the local shop.

12 What this does is if you are
13 accused of a 120 and you get six months
14 confinement, or let's say 30 days confinement,
15 which is within the range of possible
16 punishments, and you serve your confinement
17 and you're administratively discharged, that
18 conviction now triggers sex offender
19 registration, all the collateral consequences,
20 but does not trigger appellate review. And
21 that is a huge gap for Lance Corporal Smith,
22 PFC Jones, Sergeant Whomever. And it

1 desperately needs to be fixed.

2 MR. BORG: I guess the comment I'd
3 make is a corollary we have in Oregon is that
4 the Department of Justice does the appeals,
5 and the state would love to just eliminate
6 appeals. Let's not have any appeals at all.
7 And we did this determinate sentencing. We
8 call it Measure 11. So 15 years and up on
9 certain crimes. You get automatically an
10 adult court, long determinate sentences. And
11 one of the effects it's had on it is that it's
12 really put all the discretion in the
13 prosecutor's office. And so if you plead
14 guilty, you eliminate the right to appeal say
15 bad police conduct or any challenge to what
16 brought your case about.

17 And on the other end of it; and I
18 believe in treatment, we embrace treatment
19 courts, drug courts, all these other things,
20 but we're really lowering the bar to police
21 conduct. We're really, you know -- you know,
22 cynically one of my colleagues at the state

1 office is saying, you know, at what point are
2 we just going to start rounding people up
3 because we got seats in drug court, you know?
4 We only have 150 and we have 200 places.
5 Let's start arresting people to get them into
6 drug court.

7 But that's the concern I guess
8 that I would have. And it is a limiting of
9 appeal because you don't get to challenge it
10 to get these benefits either of treatment
11 court or on the other end, if they threaten
12 you with such a huge hammer that you don't
13 want to risk, you know, the 15 years or 20
14 years and you'll take a plea deal to something
15 else.

16 We've tried to correct for that in
17 Oregon by really having a concept of a
18 conditional plea where you can raise and file
19 your motions, challenge the 4th Amendment
20 issues and then enter a conditional plea that,
21 you know, doesn't require a fact trial but
22 preserves your right to appeal the search

1 issues.

2 CAPTAIN SHINN: Ma'am, if I could
3 respond just -- I missed a section of that.
4 Another piece of that puzzle, especially with
5 recent proposed legislation removing the
6 Article 60 power from the convening
7 authority's action, without having a robust
8 appellate review, if we're going to remove the
9 convening authority's ability to set aside the
10 findings, that removes now some of the
11 protection that those lower-level offenses had
12 by having just a judge advocate review.

13 And the analogy is a stack of
14 cards. And the military justice system has
15 been set up over the past -- the number
16 escapes me, but over the years, 50 or 60
17 years, carefully and through a process of
18 trial and error. And it's interwoven. And so
19 by removing the convening authority's power
20 through Article 60, there needs to be a
21 separate balance put on the scale through
22 appellate reviews. Thank you, ma'am.

1 CHAIR JONES: Liz?

2 MEMBER HOLTZMAN: I want to thank
3 all the panel members for very important
4 testimony. It's a perspective that we need to
5 have and appreciate the travel and the
6 articulateness of what we've heard.

7 I want to turn to the military and
8 try to explore this issue a little bit more
9 about expert witnesses and subpoenas.

10 Can you explain to me who is
11 reviewing your request for the subpoena and
12 what does this do in terms of revealing
13 defense strategy, confidential information?
14 I'm not familiar with this system. I'm
15 getting a little bit more information now, but
16 I'm still relatively ignorant about it. So
17 I'd like to understand from your point of view
18 how it works and what the problems are with
19 the injustices, if there is one, and what the
20 difficulties are that you see in terms of
21 providing proper defense.

22 LIEUTENANT COLONEL PITVOREC: Yes,

1 ma'am. For the defense if you were to request
2 an expert witness, you have to make a written
3 request that goes through the trial counsel,
4 so the prosecutor in this case, that includes
5 in detail why you need the expert. You don't
6 necessarily have to reveal the theory of your
7 case, but if you do not, it is likely that
8 your request will not be approved. So it goes
9 through the trial counsel to the convening
10 authority.

11 MEMBER HOLTZMAN: Wait. Does the
12 trial counsel have to approve it?

13 LIEUTENANT COLONEL PITVOREC: No.
14 No, ma'am. The trial counsel then forwards
15 that request through the staff judge advocate
16 to the convening authority for approval.

17 MEMBER HOLTZMAN: Yes.

18 LIEUTENANT COLONEL PITVOREC:
19 However, in practice if you do not lay out
20 your theory of the case which requires the
21 expert, it is unlikely that it would be
22 approved, and often is not approved anyway.

1 Often we have go to the military judge in
2 order to have the expert appointed, because
3 the military judge can do that.

4 MEMBER HOLTZMAN: Okay. So you
5 have an alternative if you don't use this
6 system going through the --

7 LIEUTENANT COLONEL PITVOREC: No,
8 ma'am.

9 MEMBER HOLTZMAN: -- trial
10 counsel?

11 LIEUTENANT COLONEL PITVOREC: No,
12 ma'am.

13 MEMBER HOLTZMAN: The prosecutor?

14 LIEUTENANT COLONEL PITVOREC: Your
15 request has to be denied first by the
16 convening authority --

17 MEMBER HOLTZMAN: Oh, okay.

18 LIEUTENANT COLONEL PITVOREC: --
19 before you can go to the military judge to ask
20 for a motion to compel the appointment of an
21 expert.

22 MEMBER HOLTZMAN: And what's the

1 point of having this go through the trial
2 prosecutor? Is there a reason for this?

3 COMMANDER KING: That's a great
4 question, ma'am.

5 (Laughter.)

6 COMMANDER KING: That's a great
7 question.

8 MEMBER HILLMAN: There is no
9 court. There's, as yet, no court yet to be
10 petitioned. This is a part of the ad-hoc
11 nature of the --

12 MEMBER HOLTZMAN: I understand
13 that, but it could go directly to the staff
14 advocate, couldn't it, without going to the
15 trial counsel?

16 LIEUTENANT COLONEL PITVOREC:
17 Well, generally speaking, ma'am, the trial
18 counsel works for the staff judge advocate.
19 So while the staff judge advocate is supposed
20 to be --

21 MEMBER HOLTZMAN: Neutral.

22 LIEUTENANT COLONEL PITVOREC: --

1 neutral. Often that is not the case.

2 COMMANDER KING: And, ma'am,
3 there's no requirement that it go to the trial
4 counsel first under the rules for court-
5 martial, but practically, effectively, what
6 will happen is if you send it straight up to
7 the SJA, the SJA will say, what does the
8 Government think about this request? So it
9 will have to go back to the trial counsel
10 before most SJAs will even advise the
11 convening authority on whether or not they
12 should do it.

13 And I should point out, ma'am,
14 that that also applies to just our basic
15 witnesses, not just expert consultant and
16 expert witnesses. But if we have alibi
17 witnesses, or any other type of basic fact
18 witness that we want to bring to a court-
19 martial and they need to be provided funds to
20 travel, we have to submit that request to the
21 trial counsel and tell the trial counsel why
22 we want that witness to testify, a synopsis of

1 that witness' testimony. And the trial
2 counsel does approve or deny that. And then
3 if they disapprove it, we go up to the
4 military judge and ask the military judge to
5 order that those witnesses be provided.

6 MEMBER HOLTZMAN: Okay. Just to
7 clarify something, in response to my question,
8 I was told that the trial counsel, trial
9 counsel prosecutor doesn't have to make a
10 recommendation. But I just heard from you
11 that the staff judge advocate is going to say,
12 well, what does the Government think about
13 this?

14 COMMANDER KING: Yes, ma'am.

15 MEMBER HOLTZMAN: Which means that
16 they are going to ask for his or her opinion.

17 COMMANDER KING: In practice,
18 absolutely, every time.

19 MEMBER HOLTZMAN: In practice
20 that's the case?

21 COMMANDER KING: Yes, ma'am.

22 MEMBER HOLTZMAN: Do you think

1 that's a fair system?

2 COMMANDER KING: I don't. And I
3 don't think --

4 MEMBER HOLTZMAN: Can you give any
5 examples of how you think it's affected your
6 ability to provide an adequate defense?

7 CAPTAIN SHINN: I can.

8 (Laughter.)

9 CAPTAIN SHINN: I just finished up
10 a case at Parris Island; and this is an
11 anecdotal evidence, but I requested witnesses
12 that I had interviewed. I had spent
13 significant time doing witness interviews,
14 submitted a witness request for each one of
15 these witnesses that was relevant, necessary
16 and material to the defense of my client. I
17 submitted that witness request in accordance
18 with the trial guidelines and whatnot. All
19 but three were denied. Then went through the
20 motions practice and then got some more
21 approved, but not all of them.

22 MEMBER HOLTZMAN: From whom, the

1 judge?

2 CAPTAIN SHINN: By the judge.
3 Then coming up on -- I get the witness list
4 from the Government. And so I call the
5 witness list, doing my due diligence. One of
6 them was a sergeant major. I talked to the
7 sergeant major, Sergeant Major Brown. She had
8 never spoken to the trial counsel. She had
9 already gotten orders. She had already been
10 approved and gotten funding to travel down for
11 the trial, but had never spoken to the trial
12 counsel. So I had to go through all of this
13 rigmarole, for lack of a better word. I can
14 think of much better words actually.

15 (Laughter.)

16 CAPTAIN SHINN: And yet the trial
17 counsel can just make a request without
18 actually ever speaking to the witness and
19 getting approved.

20 COMMANDER KING: And they
21 certainly don't tell us why they want their
22 witnesses to show up for trial.

1 CAPTAIN SHINN: Right. Absolutely
2 right.

3 MEMBER HOLTZMAN: Okay. But your
4 example didn't really tell me how this
5 inhibited your ability to defend your client.

6 CAPTAIN SHINN: Well, in this
7 situation --

8 MEMBER HOLTZMAN: That's what I
9 was asking about.

10 CAPTAIN SHINN: -- I was not able
11 -- I had four witnesses that paid their own
12 way from Bronx, New York to South Carolina and
13 whatnot. They were able to fund their own
14 travel to come down to testify on my client's
15 behalf. Had they not been financially stable
16 enough to do that, they would not have been
17 able to do that.

18 MEMBER HOLTZMAN: And would that
19 have affected your case?

20 CAPTAIN SHINN: We would not have
21 been able to put on that testimony and my
22 client would not have gotten the outcome that

1 he did.

2 MEMBER HOLTZMAN: Which was? An
3 acquittal?

4 CAPTAIN SHINN: Well, I --

5 CAPTAIN HOLTZMAN: No? Okay.

6 Well, if you can't --

7 CAPTAIN SHINN: We got a very good
8 outcome, ma'am.

9 MEMBER HOLTZMAN: Okay. Does
10 anybody else want to talk about this problem
11 with --

12 COMMANDER KING: Ma'am, I had --

13 MEMBER HOLTZMAN: -- subpoenas
14 or --

15 COMMANDER KING: Yes.

16 MEMBER HOLTZMAN: -- expert
17 witnesses? Please?

18 COMMANDER KING: There's been a
19 few occasions in my career where I've wanted
20 witnesses, and oftentimes when you go through
21 the process that we have available to us that
22 we're mandated to use, the information gets to

1 the potential witness through the Government.
2 And it will go through the Government and it
3 will be handed down that this witness needs to
4 testify at trial. So it will be handed down
5 through the chain of command. Once the trial
6 counsel received the witness requests in the
7 case that I'm thinking of, he then went out to
8 the witness' chain of command, informed the
9 witness' chain of command that this witness
10 was going to be requested by the defense.

11 The chain of command -- and
12 certainly I don't allege the trial counsel was
13 involved in this, but the chain of command --
14 after I had talked to the witness, the chain
15 of command had leaned on the witness and said,
16 look, we're going to sea. We need you here.
17 Do you really need to testify, et cetera? And
18 then the next thing I heard back, the witness
19 didn't want to come, didn't want to testify.
20 So we had to litigate that, force the judge to
21 force the witness to come, litigate the
22 unlawful command influence of that whole

1 situation.

2 Whereas, if I would have just had
3 my own budget and my own -- the ability to
4 bring that witness without all of that, I
5 would have gone through the chain of command
6 to make sure that they understood that their
7 sailor was going to be gone for a little
8 while. But it wouldn't have been a matter of
9 the chain of command talking to the witness
10 about do you want to testify, do you want to
11 go do this, because they would never have
12 known about it until I was ready to give them
13 money to fly that individual out to testify at
14 my trial.

15 So that's an area where -- in that
16 case, as well, we won and it didn't impact our
17 defense, but the fight that we had to go
18 through to do that could have turned out very
19 differently and could have impacted the
20 defense.

21 LIEUTENANT COLONEL KU: Ma'am, if
22 I can add an additional aspect, it's the -- a

1 lot of them have mentioned that we can go to
2 the judge and ask the judge to force the
3 Government to give us the expert that we want
4 and the witnesses that we want. But an
5 important aspect of preparation, it's the
6 pretrial preparation before a case gets
7 referred to trial. And the judge doesn't step
8 in until a case has been referred to trial.

9 And some of the -- and I'm sorry,
10 I can't remember your name. She mentioned the
11 sexual assault in terms of all the importance
12 of a SANE -- how do we cross-examine a SANE
13 nurse? And all of that the defense counsel
14 can't approach a witness, an expert witness to
15 even discuss that pretrial. Because at that
16 point we don't have a judge to go to, to say,
17 Your Honor, I need a witness for these
18 reasons. We have to go to the convening
19 authority and then we have to go through of
20 course experience of problems that you have
21 already heard. So that's another -- it's an
22 example of just a waste of traditional

1 resources that we can't -- we don't even have
2 the ability to go to a judge until the court
3 has been convened.

4 COLONEL HAM: You served as a
5 military judge, Lieutenant Colonel Ku?

6 LIEUTENANT COLONEL KU: Yes,
7 ma'am. Yes, ma'am.

8 COMMANDER KING: Which impacts the
9 speedy trial, I would argue. The Government
10 is able to use consultant and expert
11 witnesses, essentially from preferral. But if
12 the defense asks for an expert consultant, as
13 the colonel just pointed out, we have to wait
14 until it's referred to trial and there's a
15 judge. We can't use a consultant prior to
16 that unless we can convince the convening
17 authority to give us one.

18 If the convening authority says no
19 to that consultant, then we have to either go
20 to the family, to seek the family to fund that
21 expert, which we often do, or we have to wait
22 until the military judge is assigned, the case

1 is referred and the military judge takes
2 control of the case. Well guess what? Now
3 the clock's ticking and now all of the delay
4 from that point on has to be taken as defense
5 delay, which is subtracted from the 120-day
6 clock you heard the colonel talk about
7 earlier, because now we've got to wait so we
8 can do our consulting and our investigation
9 because we have to wait for a judge.

10 MEMBER HOLTZMAN: Okay. Thank you
11 very much.

12 CHAIR JONES: Anything further?

13 (No audible response.)

14 CHAIR JONES: Thanks very, very
15 much. It was terrific. Very important for us
16 to know. Thank you.

17 All right, ladies and gentlemen.
18 I think we're going to move right to our next
19 panel. Ladies and gentlemen, could I have our
20 next panel come up?

21 (Whereupon, at 4:12 p.m., the
22 above-entitled matter went off the record

1 until 4:23 p.m.)

2 MEMBER HILLMAN: Maybe we'll go
3 ahead and get started. Thanks to everybody
4 for your tenacity in addressing these issues
5 over the course of these two days and for
6 everybody on our final panel of the day to
7 compare --

8 COLONEL HAM: Please take your
9 seats.

10 MEMBER HILLMAN: -- thank you --
11 military and civilian prosecutors. I imagine
12 we'll just go from left to right here. So,
13 Colonel Christensen, if you want to kick it
14 off for us.

15 COLONEL CHRISTENSEN: Sure. Thank
16 you. I'd like to first say that General
17 Harding has been very dedicated to making sure
18 that we have the resources and manning to
19 properly prosecute cases in the Air Force.
20 Last April of 2012 he established a special
21 victim's unit within our Senior Trial Counsel
22 Program, and since its inception we've had a

1 75 percent conviction rate in Article 120
2 cases with special victims prosecutors.

3 He has made sure that we reach
4 out to local and civilian communities to get
5 their best practices. Approximately three
6 weeks ago, my deputy and I spent a week with
7 the Boulder County DA's office. They have a
8 reputation as being very good at prosecuting
9 sexual assaults to see what works, what
10 they're doing well and what we can incorporate
11 in our system.

12 I think one of the great things
13 that they have is a continuity among their
14 prosecutors. They'll have a long time at the
15 DA's office, and a long time in their special
16 victims prosecution, something that General
17 Harding has been supporting. We have been
18 able to keep our prosecutors longer. I'm
19 going into my fourth year as the Chief
20 Prosecutor of the Air Force. We also make
21 sure we get the training that we need within
22 the military, within Air Force courses and

1 within our sister services' courses.

2 My special victim unit is made up
3 of 10 very dedicated prosecutors who have
4 demonstrated that they have the ability to try
5 our toughest cases. All of them have come
6 from at least one assignment prior to becoming
7 special victims prosecutors. And once they
8 become a senior trial counsel, they have to
9 demonstrate that they can excel for at least
10 a year before they're entitled to become
11 special victims prosecutors.

12 The feedback I get from the
13 victims of cases that our special victims
14 prosecutors work on is very positive. They
15 feel like they have someone that's advocating
16 for them, who believes in them and believes in
17 seeking justice. And having talked to each
18 one of my special victims prosecutors, they
19 really are seeking justice. They see it as a
20 badge of honor to be a special victims
21 prosecutor. Those who are not yet on it start
22 to wonder what's wrong with them because they

1 haven't been picked yet. It is something that
2 is seen as a very big positive for them in
3 their career. General Harding has, I think,
4 done everything he can as the Judge Advocate
5 General to ensure that we have the resources
6 for training to make sure that they are the
7 best that they can be.

8 The training established a
9 specific special victims prosecutor course
10 held each year at Maxwell, in July, in which
11 we bring in six of my senior trial counsel
12 that are not yet a special victims prosecutors
13 to give them the advance training they need
14 for sexual assault cases.

15 Now obviously, it is always best
16 if we have people with experience, and I think
17 General Harding has looked at the possibility
18 of coming up with a career track so that we
19 can get more litigation experience in there,
20 something I personally support very much. In
21 my career I've done over 250 courts as a
22 defense counsel, trial counsel and a military

1 judge. And I think experience is invaluable,
2 making sure you have the right people
3 prosecuting sexual assault cases.

4 As you all know, sexual assault
5 cases are unique. Dealing with the victim
6 dynamics is unique, and the ability to do that
7 can only come from experience. So I know that
8 General Harding and the entire Air Force is
9 dedicated to making sure we have the right
10 people in those positions.

11 Each one of my special victims prosecutors and
12 senior trial counsel is handpicked from a pool
13 of hundreds. It is a very elite unit and I
14 believe we're doing a great job at prosecuting
15 sexual assault.

16 CHAIR JONES: Thank you. Captain
17 McCleary?

18 CAPTAIN MCCLEARY: Good afternoon,
19 ma'am. Yes, my name is Steve McCleary. I'm
20 currently the executive assistant to our Judge
21 Advocate General, but part of my duties are:
22 I oversee the training of both our military

1 and civilian lawyers, and in a previous
2 assignment I was the chief of our Office of
3 Military Justice.

4 And I think maybe the easiest
5 civilian analogy for, like the Coast Guard
6 sitting here with the other services is if you
7 kind of view the other services, particularly
8 like the Army, the Navy and the Air Force as
9 large metropolitan jurisdictions, we're kind
10 of a small rural one, just because we're very
11 small. We have a relatively small number of
12 cases. We train with the other services,
13 particularly the Navy. We get a lot of
14 support from them from the programs that they
15 develop.

16 We rely very heavily on the Navy
17 and the Army Trial Counsel Assistance Program
18 to assist our folks. But one of the big
19 challenges that we face is experience. When
20 you only put on 11 trials, service-wide, in a
21 year, you're not going to have very many
22 people with an extensive amount of trial

1 experience.

2 And then another challenge that we
3 face that is somewhat different, other than
4 perhaps, in the Marine Corps, is that we are
5 expected to serve line assignments. I've
6 spent about half my career in line
7 assignments, including command cadre
8 assignments. And so most of us are always in
9 and out of legal assignments. So we're not
10 constantly practicing law, which also then
11 diminishes the opportunity that a lot of us
12 have to develop trial experience. You know,
13 how do we deal with that? Mostly by trying to
14 take advantage of what opportunities there are
15 with the other Armed Forces and to take
16 advantage of what opportunities there are to
17 train with civilians.

18 We regularly send folks through
19 the NDAA courses dealing with sexual assault
20 and we have -- particularly where we have
21 legal offices around the country several of
22 them have established relationships with local

1 prosecutors so that they can get some
2 interaction and learn some, you know, trial
3 skills and particularly specific trial skills
4 associated with sexual assault that we would
5 have a hard time generating on our own, simply
6 because we don't have the volume in order to
7 generate a high level of expertise.

8 CHAIR JONES: Thank you.

9 LIEUTENANT COLONEL MORSE:

10 Honorable Jones, members of the Panel, good
11 afternoon. Thank you for the opportunity to
12 share with you today, hopefully about seven-
13 and-a-half minutes.

14 My name is Lieutenant Colonel Jay
15 Morse. I'm the chief of the Army's Trial
16 Counsel Assistance Program. We're based at
17 Fort Belvoir, Virginia. TCAP is composed of
18 five captain training officers, a lieutenant
19 colonel deputy, and myself. We also have two
20 highly-qualified experts. They're two
21 civilians who have more than 30 years of
22 prosecution experience between the two of

1 them. Additionally, I supervise the Army's 23
2 special victim prosecutors. I'll speak more
3 about them later, but they focus specifically
4 on prosecuting cases involving sexual assault,
5 domestic violence, and those cases where
6 children are victims.

7 This afternoon I want to speak on
8 four topics. One is how we train prosecutors,
9 or trial counsel, as we call them, the Special
10 Victim Prosecutor Program, the development of
11 complex cases and then challenges and how
12 we've overcome them.

13 First on training trial counsel.
14 Where the basic course provides basic
15 instruction to all new judge advocates, TCAP
16 provides focused instruction once a judge
17 advocate is appointed as a prosecutor or
18 trial counsel. Within the first six months of
19 that officer assuming duties he's to attend
20 the five-day new prosecutor course. The first
21 two-and-a-half of those days are spent on
22 basic prosecution, basic instruction. The

1 second two-and-a-half days are called
2 essential strategies for sexual assault
3 prosecution where we focus on the nuanced
4 aspects of prosecuting sexual assault.

5 TCAP continues throughout that
6 prosecutor's tenure to provide assistance. We
7 have a 24-hour-a-day, 7-day-a-week help line
8 that at any given time all 5 of my training
9 officers, the deputy, myself and the two HQEs
10 are responsive to. We have training
11 opportunities throughout the year on diverse
12 topics. We have outreaches to individual
13 installations where we provide in-depth
14 personalized experience to individual trial
15 counsel and actually help out on specific
16 cases. And we do provide direct assistance
17 where I will actually provide a counsel to an
18 installation to be detailed to a specific case
19 when requested by a staff judge advocate.

20 Our training is nested with the
21 instruction provided by the legal center and
22 school. We augment our instruction using

1 experts from the civilian community. We do
2 that on a regular basis. The overall training
3 plan is designed to build on both the
4 experience of the individual attorney and the
5 expertise found throughout the JAG Corps. Our
6 goal is that we build expert practitioners.
7 So those new trial counsel we have, the goal
8 is that we will go on to be experienced and
9 capable defense counsel, chiefs of military
10 justice, hopefully future special victim
11 prosecutors, deputy staff judge advocates and
12 staff judge advocates.

13 I'll talk for a minute about the
14 Special Victim Prosecutor Program. SVPs are
15 experienced hand selected litigators who again
16 focus on those cases involving special
17 victims. They're selected at the Department
18 of the Army level by our Personnel Plans and
19 Training Office, and that's done in
20 conjunction with me personally for each SVP.

21 The program has been in place
22 since 2009. We have 23 SVPs that are

1 currently located at 21 installations
2 throughout the world. They have regional
3 jurisdiction so they may have more than one
4 installation that falls within their purview,
5 but I also have the authority from the TJAG to
6 shift those resources wherever they're needed.
7 So if I have a particularly challenging case,
8 or an SVP who has a lighter case load, or one
9 is simply better, I can shift him or her to
10 help out in another region.

11 They have a secondary mission to
12 assist in the development of a Sexual Assault
13 and Family Violence Training Program that's
14 both for investigators and for junior trial
15 counsel within the region. This is done with
16 the support of the local commander and there's
17 actual training that involves commanders,
18 first-line supervisors, mental health
19 professionals, victim care advocates and
20 frequently civilian professionals in all
21 facets of service.

22 The litigation experience is

1 essentially in assessing these new SVPs. I've
2 found that it's crucial that the SVPs have
3 really advanced interpersonal skills as well.
4 They have to be able to expertly train and
5 mentor a young attorney, direct investigators,
6 coordinate victim care with a victim advocate,
7 advise the staff judge advocate, work with the
8 chief of military justice while simultaneously
9 preparing for trial. On top of that, what we
10 really have them focus on is developing a
11 trusting relationship with the victim so that
12 she not only understands, or he understands
13 the significant emotional event that is a
14 court-martial, but is an able participant to
15 achieve justice.

16 Within the first six months of
17 assuming duties an SVP spends two weeks with
18 a civilian special victim unit. My preference
19 is that they get a meaningful experience, so
20 we've sent them everywhere from Dallas to
21 Manhattan to Honolulu to even jurisdictions
22 that abut military installations. They attend

1 a two-week sexual assault trial advocacy
2 course. They attend a three-day training
3 event with all the other 22 special victim
4 prosecutors and with my officers at TCAP.

5 They attend that five-day training
6 course I spoke about that's designed for our
7 junior prosecutors. In addition, they can
8 attend a career prosecutor course run by the
9 National District Attorneys Association.
10 Throughout their tenure they do attend
11 recurring both civilian and military training,
12 frankly, as they request it. I'd rather have
13 them get more training than less.

14 I next want to talk about the
15 development of a complex case. Though we
16 don't have a specific definition of what makes
17 a case complex, I am confident when I say that
18 just about every case these guys touch is
19 absolutely within the definition of that term.

20 Most of our cases include both
21 young offenders and young victims, both of
22 whom are junior in rank. The offender and

1 victim typically know one another. They often
2 even have a preexisting sexual relationship.
3 Alcohol is routinely involved. Victims are
4 frequently reluctant to report, not because of
5 fear of reprisal from commanders or fear that
6 the command won't do something, but out of a
7 concern for their loss of privacy and I
8 believe how reporting that sexual assault will
9 affect their ability to interact with his or
10 her peers on a daily basis.

11 I think it's important to
12 understand the social dynamic at play in our
13 cases as opposed to a case that might happen
14 in the civilian contract. A victim, an
15 offender, witnesses, they all frequently know
16 one another. They even work together. All of
17 this can contribute to a victim's reluctance
18 to immediately report. So as a result there's
19 often limited, sometimes no physical evidence.
20 Clothes and bedding are washed. Memories are
21 clouded. Time has eliminated the usefulness
22 of blood or urine samples. So oftentimes the

1 pivotal issue at trial boils down to simply
2 whether or not there was consent in a
3 particular case.

4 So this is a significant
5 challenge. The way we overcome it is through
6 a multi-disciplinary approach. I want to talk
7 briefly about the SVP's relationship with CID
8 or our detectives, with the victim care
9 professionals, with my office at TCAP and our
10 highly-qualified experts, and even the other
11 22 special victim prosecutors.

12 So first, each SVP has a close
13 working relationship with his local or her
14 local sexual assault investigator. In many
15 cases they're actually located in the very
16 same office. TJAG's guidance to ever staff
17 judge advocate is that you will immediately
18 report any sexual assault offense to the
19 special victim prosecutor. Because of that
20 close working relationship with the prosecutor
21 and the detectives frequently, almost always,
22 the SVP knows about it even before the staff

1 judge advocate does.

2 Second, each SVP has a close
3 working relationship with the local victim
4 care professionals. We instruct each SVP and
5 each SVP instructs each trial counsel that
6 your initial meeting with any victim is simply
7 to inform them of the process and ensure that
8 they understand the resources that are
9 available to him or her.

10 Third, each SVP has a close
11 relationship with TCAP. I talk to them,
12 either email or over a shared website,
13 frankly, almost weekly for sure, and also with
14 our highly-qualified experts. Last year each
15 of those HQEs spent more than 80 percent of
16 their time of the calendar year, not the work
17 year, the calendar year away from their home
18 at a specific installation working with
19 specific SVPs on individual cases.

20 Fourth, the SVPs communicate with
21 each other on a daily basis. We use a common
22 website where SVPs post questions and other

1 requests for assistance. They share
2 successful motions and tactics both in
3 preparation for and actually at trial,
4 recommend experts for use in cases with
5 similar issues. Or if they see that there's
6 an expert on a defense witness list, they'll
7 see if anyone else has experience with that
8 expert, and then share lessons learned and
9 best practices after each court-martial.

10 Lastly, the Judge Advocate General
11 has recently directed the implementation of 23
12 special victim non-commissioned officers,
13 trained paralegals who will be assigned to
14 work personally for each one of those special
15 victim prosecutors. They're actually
16 undergoing initial training right now from my
17 office at Fort Belvoir, Virginia.

18 In summation, preventing sexual
19 assault and domestic violence and prosecuting
20 these complex crimes, whether they occur in
21 the civilian or in the military community, is
22 a difficult task requiring time, resources and

1 expertise, but the SVP Program has proven over
2 the last four years to be a significant step
3 towards success.

4 Thank you for this opportunity to
5 share how proud I am of both TCAP and the
6 special victim prosecutors and I look forward
7 to answering any questions. Thank you.

8 CHAIR JONES: Thank you, Colonel
9 Morse.

10 Commander -- is it Rugh?

11 COMMANDER RUGH: Yes, ma'am, Rugh.
12 Everyone, good afternoon. Again, my name is
13 Commander Aaron Rugh. I'm the current
14 director of the Navy TCAP. I'm also a member
15 of the Military Justice Litigation Career
16 Track, which means that the majority of my
17 last 16 years have been in litigation billets.
18 Before this job I was a military judge.
19 Before that I was a defense counsel. I'll
20 leave this job and move onto some other kind
21 of litigation job.

22 I feel a little bit like I'm the

1 last kid on Santa's lap. All the really good
2 stuff today has already been mentioned, so
3 I'll keep my comments relatively short.

4 The training of effective
5 litigators takes both actual training and
6 experience. We are a young law firm. Most of
7 us can retire 20. All of us most retire by
8 30. More than half of our members will be in
9 the first 10 years of their lives as a lawyer.
10 And so just by the nature of our businesses
11 we'll always be on the short end when it comes
12 to experience. We make up for that in
13 training. We probably do more training than
14 any other group of lawyers on the planet.

15 And that's I guess my plug for
16 right now. If I were to ask for something for
17 Christmas, cash is always nice. Training is
18 expensive. It costs a lot of money for us to
19 substitute experience with training. It costs
20 money for us to send our defense counsel and
21 prosecutors out to exceptional courses. It
22 costs a lot to bring outside instructors and

1 experts in to teach our courses. We try to
2 send nearly all of our litigation track
3 specialists to get their LL.M.s for civilian
4 institutions and litigation or trial advocacy.
5 And that all costs money.

6 And so in a time when money is
7 particularly tight, it is my opinion that the
8 tooth you get for the tail on spending money
9 for training for our prosecutors and defense
10 counsel is exceptionally worth the value.

11 COLONEL HAM: Commander, could you
12 tell us what your training budget is for TCAP,
13 and is it a separate budget for all other
14 prosecutors? Does TCAP have its own?

15 COMMANDER RUGH: Yes, ma'am.
16 Well, we don't --

17 COLONEL HAM: And each of the
18 services is the same?

19 COMMANDER RUGH: Yes, ma'am. We
20 don't personally have a budget. TCAP doesn't
21 have a budget by itself. So and our budgets
22 actually come from lots of different budgets.

1 The Marine TCAP, Navy TCAP, Navy DCAP And
2 Marine DCAP get together quarterly with
3 Captain Crow and some of our assistant Judge
4 Advocate Generals to talk about the litigation
5 training for the quarter and for the coming
6 year. We work really hard to try to divide
7 the money that we do have equally amongst the
8 defense and prosecution in the Marine and the
9 Navy.

10 Some of that money comes from
11 centrally-managed funds at our Naval Justice
12 School, our central school house. Some of
13 that money comes -- in the past has come from
14 DoD SAPRO or DoN SAPRO, although this last
15 year we didn't any of that. To try to offset
16 that we beg, borrow and steal; we do steal I
17 guess, from here and there to try to put
18 together budgets.

19 It's surprising though how far
20 just a little bit of money could go. I think
21 with just \$300,000 in a year you can do a lot
22 of training. You can do a lot of valuable

1 training.

2 COLONEL HAM: So you don't have
3 fenced off sexual assault prosecution training
4 funds?

5 COMMANDER RUGH: What's that,
6 ma'am?

7 COLONEL HAM: You don't have
8 fenced off sexual assault prosecution training
9 funds?

10 COMMANDER RUGH: We do not, ma'am.

11 COLONEL HAM: Do you, Colonel
12 Morse?

13 LIEUTENANT COLONEL MORSE: Ma'am,
14 we do. It's not purely a TCAP budget. We
15 have a budget of about \$3 million a year.
16 That includes civilian pay for our HQEs. It
17 pays for all training for every prosecutor at
18 whatever installation. So the cost of the
19 individual unit at Fort Bragg, North Carolina
20 is nothing. We pay to bring those officers to
21 us to train them. That does include some
22 joint training with the Defense Counsel

1 Assistance Program as well.

2 COMMANDER RUGH: All right. So my
3 summation of my one point here is that as you
4 develop your recommendations, don't forget the
5 strength or the importance of training to
6 offset the lack of experience within our
7 divisions. Thank you very much.

8 CHAIR JONES: Thank you. Major
9 Sameit?

10 MAJOR SAMEIT: Yes, ma'am. Panel
11 members, thank you for giving me this
12 opportunity to speak. Major Mark Sameit. I
13 am the branch head for Trial Counsel
14 Assistance Program. We fall within Judge
15 Advocate Division working for General Ary, the
16 SJA, the commandant of the Marine Corps.

17 We're viewed as an augment to the
18 2012 reorganization of the legal services
19 within the Marine Corps. Being the Marine
20 Corps model, we've pushed the majority of our
21 assets down to the four L triple Ss. We have
22 two HQEs, one on the East Coast, one of the

1 West Coast. We currently don't have an HQE
2 within TCAP. It is manned by myself and my
3 deputy, Captain Brian Magee. We are a
4 Reachback Act resource and we frequently
5 receive phone calls, approximately 5 to 10 a
6 week, from prosecutors in the field.

7 Additionally, that's our primary
8 mission along with receiving inquiries and
9 maintaining a website for prosecutors, sharing
10 motions and best practices throughout the
11 Marine Corps.

12 Our secondary mission is to
13 actually go out and do the training. In
14 conjunction with Commander Rugh, we put on two
15 trial counsel orientation courses every year
16 trying to get every prosecutor within their
17 first six months to a trial counsel
18 orientation course.

19 Additionally, we put on three
20 prosecuting sexual assault courses. Two are
21 put on specifically just for the Marine Corps.
22 And we put every single Marine trial counsel

1 through these prosecuting sexual assault
2 courses including a mix of experts,
3 toxicologists, DNA, forensic psychologists.
4 With the turnover at the Marine Corps, even if
5 you run this course every single year, you're
6 going to have 60 percent new trial counsel in
7 this course every single year with as quickly
8 as we turn over.

9 It's also taught by the regional
10 trial counsel and the senior trial counsel who
11 are going to be instructing courses to ensure
12 that those students are putting their best
13 practices, their best effort forward when it
14 gets to the advocacy part of that course.

15 Additionally, we run monthly
16 conference calls with all those regional trial
17 counsel to talk about best practices within
18 the Marine Corps and share it and push down
19 these best practices throughout.

20 And finally, we do work with NDAA,
21 as well as fellow TCAPs to find best practices
22 throughout the services and share them

1 throughout the Marine Corps. And I'll keep my
2 comments brief at that.

3 CHAIR JONES: Thank you very much.
4 It's my pleasure now to introduce Martha
5 Bashford, and it's my pleasure because we
6 served together, worked together in the
7 Manhattan District Attorney's Office. I was
8 there nine years. But, Ms. Bashford, I think
9 you'll tell us you were there a lot longer and
10 are still in the sex crimes unit. So we'd be
11 delighted to hear from you.

12 MS. BASHFORD: Thank you. I'm
13 Martha Bashford. I'm Chief of the Manhattan
14 Sex Crimes Unit. I've been in the office 34
15 years since graduating from law school, and
16 have been prosecuting sex crimes for 30 of
17 those 34 years.

18 I want to preface my remarks by
19 saying all I have to do is prosecute sex
20 crimes in Manhattan. I don't have to field a
21 cohesive, worldwide fighting force as the
22 military has to, and do everything else at the

1 same time.

2 My office had the first Sex Crimes
3 Unit in the country formed about 40 years ago.
4 Talking about continuity, I am only the fourth
5 chief of that unit.

6 People stay in it a long time.
7 Yesterday I heard, and again today that the
8 Air Force has ten, I may have the terminology
9 wrong, senior trial counsel devoted to
10 prosecuting sex crimes, and the Army has 23.
11 That's worldwide.

12 I have 60, just for Manhattan, and
13 I could add ten more when I get home tomorrow,
14 but I simply cannot supervise that many people
15 effectively. People are lined up wanting to
16 come to sex crimes. I don't see them burning
17 out.

18 Our Sex Crimes DAs do also handle
19 other felony types of cases, but nobody who's
20 not in sex crime handles sex crimes. To get
21 in, you have to interview with me and my two
22 deputies. You have to bring a portfolio of

1 what trials you have done.

2 The very, very minimal amount of
3 experience is three years, and normally our
4 entry level is at five or six years of
5 prosecuting statements.

6 I want to know how many statements
7 you've taken from defendants, how many search
8 warrants have you done, how many DNA cases
9 have you put on, how many fingerprint experts
10 have you put on, how many defendants have you
11 cross-examined, how many jury trials have you
12 had, how many judge trials you've had.

13 We provide ongoing substantive
14 training. For our new people, we do the
15 sexual assault laws, evidentiary rules
16 specific to sex crimes. But we also continue
17 to train our most senior people. We bring in
18 outside speakers. We just did a training on
19 adolescent interview techniques.

20 We require an attempt to take a
21 videotaped statement from every defendant in
22 a sex crime, no matter how serious the crime

1 is or how minor. Which means we try to take
2 videotaped statements from defendants accused
3 of forcible touching, grabbing somebody
4 through the clothing out on the street. We
5 will try to take a statement from that.

6 Many of those statements are done
7 in our own office post-arrest. Sometimes we
8 go up to the precinct to take statements. I
9 did one two weeks ago at three o'clock in the
10 morning. ADAs must be at all lineups. I want
11 to make sure that they are conducted with
12 adherence to the highest structures.

13 When a new person starts in Sex
14 Crimes, all of their initial witness
15 interviews are supervised by me or one of my
16 deputies. If they go into the grand jury and
17 we have a non-hearsay grand jury state. So in
18 order to get an indictment, the complainant
19 must testify in front of a grand jury.

20 We will go in on the first of
21 those, first few of those presentations. No
22 matter how long you've been in Sex Crimes, and

1 I have people who have been in Sex Crimes for
2 20 years, if a defendant is testifying in the
3 grand jury, one of us will go in and accompany
4 them at that point.

5 One of us will sit in on every
6 single felony trial, no matter how senior the
7 person is. We have another rule that if you
8 are conducting an interview of a complainant,
9 you must have another witness present. You
10 can't do that alone.

11 We have a very close working
12 relationship with our police department, and
13 we're notified pretty much immediately of
14 every stranger sexual assault in Manhattan.
15 Either I or one of my two deputies gets a
16 phone call from the supervising commander.

17 We also get notified, probably not
18 as immediately, on all intimate partner cases
19 and acquaintance cases. I just want to take
20 a moment. I hate the term "acquaintance
21 cases," because it covers such a gamut. So if
22 the superintendent that you've known for 25

1 years sexually assaults you, that's an
2 acquaintance.

3 If you met the guy this night at
4 the club and you think his name is Ty, that's
5 an acquaintance case. I think those are very
6 different. So I've started trying to break
7 that down into acquaintance and what I call
8 semi-strangers, because I think to say an
9 acquaintance covers too much ground.

10 We start with our cases pre-arrest
11 wherever possible, interviewing witnesses,
12 interviewing complainants before an arrest has
13 even been made. One of the techniques we use
14 extensively in acquaintance cases, intimate
15 partner cases and sometimes semi-stranger
16 cases, if there's contact information, is a
17 controlled call.

18 It can be arranged by the police
19 department, or it can be arranged by my
20 office. By the way, I have six full-time
21 investigators assigned just to Sex Crimes.
22 Some of them are retired police department

1 from Special Victims; some of them are not.

2 A controlled call is invaluable in
3 prosecuting these cases, and it's not just
4 invaluable for prosecuting the cases.
5 Sometimes, by listening to the controlled
6 call, we actually wind up exonerating the
7 party who's been accused.

8 We try to do this as very open-
9 ended as possible. We do not want somebody on
10 the phone saying "Why did you rape me last
11 night?" That's going to get a hangup. What
12 we try to do is, "What happened?", "I was so
13 out of it", "I don't really remember much.",
14 "Why do I have all these bruises, you know?",
15 "Did you wear a condom?" "How come everything
16 changed so quickly?", things of that nature,
17 and we listen to what people say.

18 But we have to be aware, because
19 I'm old, the way people communicate is
20 changing, and I'm sure you see that with the
21 younger members of the military. People don't
22 talk on the phone.

1 They text. They text, they IM,
2 they do chats, and although I much prefer a
3 phone call because I get to hear the tenor of
4 the voices, people say I've never talked to
5 this person in my life on the telephone. So
6 we monitor and take pictures of every text
7 that goes by, or we monitor the chats.

8 The importance of having our own
9 investigators is not only can we supplement
10 the work that the police department does, but
11 we can completely supplant it if necessary.
12 That's rarely necessary. But we do have a
13 hotline. We do take calls directly, where
14 somebody for whatever reason doesn't want the
15 police to know about their complaint.

16 We can do the entire
17 investigation, including an arrest, with our
18 investigators. They're also very important to
19 supplant the police investigation when an
20 arrest has been made on the street by patrol,
21 and we haven't had the benefit of using
22 detectives to thoroughly investigate.

1 If it's a right there on the
2 street arrest, our investigators will go out,
3 pull such things as pull video, interview
4 witnesses, canvass and take over, because a
5 patrol officer, after he's made the arrest and
6 filed the paper work, is going back out on
7 patrol, and not going to be around to do the
8 work that needs to be done.

9 I personally, we call it
10 "scrubbing." I scrub every case that comes
11 through my office, whether it's a misdemeanor
12 or a felony. Which means on a daily basis, I
13 review every single arrest, one to make sure
14 that the case has not been misclassified as a
15 misdemeanor when it's really a felony.

16 Sometimes, I hate to say it, but
17 there is a push to keep your numbers low, and
18 when there's a push to keep numbers low,
19 occasionally things that really should be
20 felonies get characterized as misdemeanors.
21 Sometimes it's done because the person making
22 the arrest doesn't have the knowledge of the

1 penal code.

2 So I look at every single case. I
3 make sure they're assigned to the appropriate
4 person, and I will establish an investigative
5 plan on everything that comes through.

6 In addition to our investigators,
7 we have four paralegals assigned to our unit.
8 They are right out of college, and it's a two-
9 year commitment, and at the moment we have two
10 from Harvard, one from Georgetown, one from
11 Columbia. They're amazing. They do the work
12 of several attorneys.

13 Every plea offer on every case is
14 set by me or my deputies to ensure consistency
15 across the office. I want to make sure that
16 if you are similarly situated and charged with
17 a similar crime, that you get similar
18 treatment.

19 If there's going to be any
20 deviation from that offer, if circumstances
21 change, the assistant has to come back to me
22 or my deputy for approval to change the offer.

1 We have a computer system that allows us to
2 track our cases, not necessarily the most
3 efficient way.

4 But I can tell you year-to-date,
5 as of yesterday, we have 584 cases that have
6 been referred to us. It's a little hard,
7 because once a case has pled guilty or been
8 convicted, it pops out of our system. So I
9 can only tell you as of today, we have 132
10 pending indictments. Those are felony
11 charges.

12 We have 88 felonies awaiting grand
13 jury action, disposition or possible
14 dismissal, depending on how the investigation
15 proceeds, and we have 262 misdemeanors. I
16 want to say a brief word about colleges,
17 because that came up yesterday.

18 We have a lot of colleges in
19 Manhattan, from very small institutions to
20 worldwide institutions, and they are not
21 reporting sexual assaults to the police
22 department. They are not reporting them to

1 our office.

2 Yesterday, the New York Post ran
3 an exposé about one university's 100 percent
4 non-reporting rate in 2003. Do we get cases
5 where the complainant is a college student?
6 Yes, of course we do. But that status is
7 usually incidental to the crime. It does not
8 usually happen on a university campus.

9 Anecdotally, we have heard that
10 students are actively discouraged from going
11 to the police by the advocates, the campus-
12 based advocates, or they think that reporting
13 to the campus police engenders a police
14 report. No disrespect to campus police, NYPD
15 can do a much better job of investigating.
16 They have more resources.

17 The other thing that's hugely
18 important, without a police report or without
19 a report to my office, well of course you can
20 get medical treatment and a sexual assault kit
21 done. Our lab will not analyze it. They
22 cannot analyze a kit that does not have some

1 sort of report to authorities.

2 Next month, my office is
3 inaugurating a Family Justice Center which, if
4 you're not familiar with the term "under one
5 roof," we will have a variety of social
6 service providers on one half of the floor.
7 On the other half, we will have sex crimes,
8 DV, child abuse, human trafficking, which is
9 under my supervision in Sex Crimes, which is
10 most places have that in Rackets. We keep it
11 in Sex Crimes. We think it's sex crimes-
12 related, and elder abuse, all in contiguous
13 offices.

14 What we find is somebody comes in
15 with a domestic violence complaint, and we
16 find out that they've been -- it's an intimate
17 partner sexual assault case as well. Somebody
18 comes in with a black eye and says "My
19 boyfriend hit me," we find out that they're
20 really being trafficked, and the boyfriend is
21 really a pimp.

22 Child abuse is interrelated with

1 all of these things, and we think having this
2 altogether will really facilitate working in
3 a much more efficient way, and making
4 prosecutions easier.

5 We also handle child pornography
6 cases, because child pornography cases can
7 often lead to child victims. I was very
8 heartened by the statistic I heard yesterday,
9 that 52 percent of lawyers report hands-on
10 female child molestation, because we also
11 handle what is colloquially referred to as
12 "upskirting cases," unlawful surveillance.

13 In the summer, there's a epidemic
14 of people on subway escalators or subway
15 stairs filming under women's skirts. It's a
16 felony, and we take those very seriously.

17 I just want to briefly touch on
18 another theme I heard yesterday, what to do
19 with the reluctant complainant, and my answer
20 is it depends. It depends what the crime is,
21 it depends the status of the case. If on DV
22 case, did the victim have a twisted arm or was

1 she knifed in the stomach? It makes a
2 difference in what we're going to do if
3 somebody doesn't want to go forward.

4 Is there a danger to the wider
5 community? Has the defendant been
6 incarcerated for a year awaiting trial? And
7 statutory rape. I know Rebecca Campbell,
8 who's been mentioned from Michigan, believes
9 that you do more harm to people who don't want
10 to prosecute than by prosecuting.

11 I disagree with her on that, on
12 statutory cases, because I can't allow a 13 or
13 a 14 year-old to make these decisions. We
14 don't allow them to consent to sexual
15 intercourse. I can't allow them to say I
16 don't want to prosecute my boyfriend who's 32
17 years old.

18 What we do do in those cases is
19 say why don't you go into the grand jury and
20 tell the grand jury how much you love this
21 guy, and how much you really want to be with
22 him, and that seems to be fairly effective.

1 They go in and say "I really, really love
2 him," you know, and you bring out, you know,
3 what's the nature of your relationship?

4 Has he ever taken you to a movie?
5 No. Has he ever taken you out to dinner? No.
6 But they've had a chance to say how much they
7 love him.

8 We started out in human
9 trafficking and domestic violence cases with
10 the assumption that our victim is not going to
11 be around at the time of the trial. Maybe
12 we'll be pleasantly surprised. But we start
13 from day one with that assumption.

14 So with human trafficking, we've
15 moved into wire tapping; we've moved into
16 tracking the money. I now find myself
17 approving money laundering indictments, of
18 which I knew nothing until about six months
19 ago. But that's been very effective.

20 On the DV front, we have a
21 professional photographer who takes
22 professional photographs. We're not left with

1 -- it's probably not Polaroids anymore, but
2 even blurry Instagram camera things from the
3 hospital that never -- you can never tell what
4 is this. It's supposed to be a bruise. It
5 looks like absolutely nothing.

6 Manhattan is blessed or cursed,
7 depending on your civil liberties take, I
8 guess, with lots and lots of video
9 surveillance, both private and government. We
10 track that, and that is often very key to
11 either solving, proving a case or exonerating
12 a suspect.

13 Our lab, I know I'm jumping around
14 a little bit, but different things that came
15 up. Our lab analyzes every single kit that
16 has been released to law enforcement, which I
17 think is very are across the country. We
18 don't care if it's an intimate partner. We
19 don't care if it's an acquaintance. We will
20 analyze every single one of them, not just
21 stranger cases.

22 We work in collaboration with the

1 wider community, which I think is something
2 that the military could benefit from doing.
3 I help -- host a monthly sexual assault task
4 force meeting, in which I bring my senior
5 people, senior PD, Special Victims people,
6 advocates, hospital personnel and external
7 advocacy organizations around a large table,
8 and we talk for about two hours.

9 That way, we can nip any problems
10 in the bud. If police are being rude to
11 victims in the hospital, we can deal with it
12 on a monthly basis. The other person that we
13 have invited is the head of New York City's
14 Nightlife Association, dealing with night
15 clubs, and that's very important.

16 Alcohol is a huge problem. I just
17 can't stress that enough, and the nature of
18 drinking has changed, certainly since I was
19 young and used to go out and have some fun.
20 It's categorically different than it used to
21 be.

22 People are binge drinking, bars

1 have bottle service, so there's nobody
2 monitoring, once you sell the bottle, how much
3 any individual is consuming. People are pre-
4 gaming, getting halfway drunk before they go
5 out.

6 It's not unusual for us to
7 interview a young woman who says she had 11 or
8 12 vodka sodas in one night, and then move to
9 -- what's that's green stuff, Jagermeister
10 shots.

11 It's inconceivable. If you walk
12 around a college campus on a Monday morning,
13 you'll listen to the men and the women talking
14 about how they got wasted, how they blacked
15 out. People report multiple alcoholic
16 blackouts, and this is while they're still in
17 college.

18 We have to change that culture.
19 We just have to do something about changing
20 that culture, and I want to say this is not
21 blaming the victim. Nobody should be
22 victimized when they're incapacitated.

1 But we do tell people watch out
2 for your purse. We tell people watch out for
3 your -- don't leave your phone on a bar. We
4 tell people if you're jogging, don't have
5 headphones blasting really loud, because you
6 can't hear something.

7 I think we should be saying you've
8 got to be careful about overdrinking, because
9 it makes you vulnerable to falling on the
10 subway tracks. It makes you vulnerable to
11 being hit by a car. It makes you vulnerable
12 to being robbed, and it makes you vulnerable
13 to being sexually assaulted.

14 So we have rolled out, just last
15 month, a new training program with Nightlife,
16 and we're going to the nightclubs. We're
17 going to the bars with this program, and we're
18 trying to train the security and the bouncers
19 of various things to do.

20 We have found that friends put
21 somebody in a car, a cab to take somebody home
22 who's incapacitated, and they think they're

1 doing them a service. Well, the cab driver,
2 we have found, is the attacker.

3 So we're encouraging the bouncers
4 and the security, if you put somebody in a
5 car, take a picture of the license plate.
6 Take a picture of the guy.

7 We're encouraging, training them
8 what do you do if somebody comes up and says
9 "I was just sexually assaulted in the bathroom
10 downstairs." How do you establish a minimal
11 crime scene? How do you get help, and we're
12 hoping that that will make a big difference.

13 One of our big problems, though,
14 is I wish I had the rules that the Army has
15 about incapacitation, because under New York
16 law, you are only incapacitated if you
17 involuntarily, involuntarily ingest alcohol or
18 drugs. That's not our problem.

19 People are voluntarily ingesting
20 huge amounts of it, and we have a typical case
21 will be the last thing I remember was walking
22 into the club, and then I woke up with my

1 clothes off in a strange place the next day.
2 I don't remember anything.

3 We have to show, in order to go
4 forward, that they were either unconscious or
5 asleep. If they don't remember anything from
6 walking into the club, but we have video that
7 shows them dancing in the club, walking out on
8 the street, walking up the stairs with
9 somebody, some stranger, I cannot prosecute
10 that case.

11 I cannot show, because they can't
12 remember whether they were simply in an
13 alcoholic blackout or unconscious or asleep.
14 I cannot prove that, and I have to turn these
15 cases away. It doesn't fit our laws.

16 The last thing I just want to say
17 is when we decline a case, when we investigate
18 a case and decide we do not have enough
19 evidence to go forward, we try always to bring
20 the complainant in for a face-to-face
21 interview, where we explain the results of our
22 investigation. We explain the relevant

1 statutes, and we try to explain why we can't
2 go forward.

3 Many times, people agree with our
4 assessment. Sometimes they do not. We do
5 have counselors on staff who partly are
6 trained for dealing with people's
7 disappointment in the system, that they may
8 feel that the system has failed them, and
9 given the status of some of our laws,
10 sometimes we do fail them.

11 But we try to be as transparent
12 about it as possible, and explain our thinking
13 process and explain the statutes, which I
14 think is very valuable to people to understand
15 what really happened to their case.

16 I could talk about this for hours,
17 but it is late. I thank you very much for
18 inviting me here, and if I can ever be of any
19 service to anybody, I would be more than happy
20 to. Thank you so much.

21 JUDGE JONES: Thank you, Ms.
22 Bashford. Ms. Higashi, one of the few U.S.

1 Attorney's offices that because you're in D.C.
2 actually has a Sex Crimes docket. We'd be
3 pleased to hear from you.

4 MS. HIGASHI: That's right. Thank
5 you very much. Thanks for inviting me. I'm
6 happy to share my experience with you all.

7 I am chief of the Sex Offense and
8 Domestic Violence Section at the U.S.
9 Attorney's Office, and as Her Honor just
10 pointed out, we are very unique in the U.S.
11 Attorney's Office in D.C., by serving not only
12 as the U.S. Attorney, but we also serve as the
13 local DA.

14 My section is also unique among
15 the criminal prosecutor's sections in the
16 office, because it is a hybrid section. My
17 section prosecutes, investigates and
18 prosecutes all cases involving sexual assault,
19 domestic violence, child abuse, stalking,
20 human trafficking, child exploitation, like
21 online child exploitation, and violations of
22 the local and the federal sex offender

1 registration laws.

2 We prosecute cases wherever they
3 are best prosecuted, whether it's in the local
4 Superior Court or the federal court. So we
5 don't have to shop a local case to another
6 prosecutor. If we believe it would make a
7 good federal prosecution, it stays with the
8 same prosecutor, and charges just get filed in
9 federal court.

10 So I have been with the U.S.
11 Attorney's Office for over 19 years, and I
12 have spent most of those 19 years prosecuting
13 sexual assaults and domestic violence. If I
14 could leave you with two concrete pieces of
15 advice about how to structure what I think is
16 the ideal sexual assault unit in a
17 prosecutor's office, the first piece of advice
18 would be to treat sexual assaults as the
19 highly specialized and continually evolving
20 field that I believe that it is.

21 The second concrete piece of
22 advice is to co-locate your prosecutors with

1 victim advocates. The victim advocates that
2 we have in my section are not victim witness
3 coordinators, who are common to other U.S.
4 Attorney's Offices.

5 They are social workers. They
6 come into our office with sometimes decades of
7 experience working with domestic violence
8 victims or sexual assault victims, running
9 shelters. They are really, really invaluable.
10 They're co-located with us and they are fully
11 a part of the prosecution team, and they are
12 some of the people who have taught us, as
13 prosecutors, the most about working with
14 vulnerable victims.

15 The Sex Offense and Domestic
16 Violence Section, my section in the office,
17 has about 60 people in it. 35 of them are
18 prosecutors. Then we have 12 specialized
19 advocates who are dedicated just to these type
20 of cases, domestic violence, child abuse,
21 sexual assault, and then we have 12 to 13
22 support staff members.

1 My section, in terms of the
2 prosecutors, is a three-tiered section. So we
3 handle all of those specialized types of
4 cases, from the most minor misdemeanors, all
5 the way to the most serious cases. In my
6 office, when you start out as a prosecutor,
7 you're required to spend your first few years
8 going through various rotations, to develop
9 different skills, and to learn how to
10 investigate and prosecute different types of
11 cases.

12 Your training in the office
13 usually starts out with a stint of between six
14 and nine months in the appellate division.
15 After that, you're sent to one of the
16 misdemeanor sections, and my section is one of
17 the misdemeanor sections.

18 We have a group of anywhere
19 between 12 and 16 misdemeanor level domestic
20 violence prosecutors. So we start early on,
21 and even at that early level, we will only
22 take people who express an interest in working

1 these types of cases.

2 If someone does not have an
3 interest or for some reason feels that they
4 cannot work on domestic violence cases, they
5 get sent to the General Misdemeanor section,
6 where they prosecute misdemeanor theft cases,
7 misdemeanor simple assault cases, shoplifting
8 cases, things like that.

9 The Misdemeanor Section in my --
10 the misdemeanor unit of my section is a very
11 important training ground. Like I said, I
12 have about 12 to 16 prosecutors, and they
13 start out in the general three-week basic
14 training program. It's a basic trial advocacy
15 training program, and then after that, they
16 get section-specific training for domestic
17 violence.

18 After those people have about four
19 to six months of experience trying misdemeanor
20 domestic violence bench trials, we chose two
21 who -- out of the people who express an
22 interest, I always get more people who are

1 interested than we can take.

2 But out of the people who express
3 an interest in staying an additional anywhere
4 between two to six months in my section doing
5 misdemeanor sexual assaults and misdemeanor
6 child abuse, we interview those people, and
7 choose two of them.

8 So after getting about maybe 30
9 bench trials doing domestic violence cases, we
10 choose two people to handle a smaller caseload
11 of misdemeanor sexual assault cases, and those
12 people have a reduced caseload of between 50
13 and 75 cases, and they end up getting
14 approximately 15 to 20 bench trials, sexual
15 assault bench trials.

16 In D.C., there are a number of
17 cases that we prosecute at the misdemeanor
18 level, that are not just sexual touching
19 cases. So there are cases that we will
20 prosecute that involve much more serious
21 behavior, but there are cases that we evaluate
22 as cases that will have a better chance of

1 getting a conviction, charging a sexual act
2 where the defendant knew or should have known
3 he engaged in the sexual act with the victim,
4 without her permission, and there's no right
5 to a jury trial because the maximum penalty
6 for those offenses is 180 days.

7 So our misdemeanor sexual abuse
8 prosecutors get a good amount of experience.
9 After that, they do have to go on and they
10 rotate into other sections of the office,
11 where they learn how to conduct jury trials,
12 and they start out with the easier ones, the
13 drug possession, gun possession cases where
14 the majority of their witnesses are law
15 enforcement witnesses.

16 They go through other rotations
17 and then they can elect to make a preference
18 to come back to my section in the mid-level,
19 and that mid-level of prosecutors I have seven
20 of them, and they do the most serious domestic
21 violence felony cases and felony child abuse
22 case, with the exception of infant abuse

1 cases, which are handled by my most senior
2 AUSAs.

3 So I get some of those people who
4 got experience working with vulnerable
5 victims, with a lot of bench trials in
6 domestic violence and sexual assault cases
7 coming back, doing felony domestic violence
8 cases, felony child abuse cases.

9 They then go on and do other
10 rotations in the office. My senior level of
11 prosecutors, I have 15 of them, and those are
12 the people who do the felony sexual assaults
13 in Superior Court, and they also prosecute the
14 child exploitation cases in federal court.

15 Similar to what Martha just said,
16 we have the same type of system where in order
17 to get into that unit, people have to wait for
18 a vacancy. They have to apply. We review
19 their experience, we review their experience
20 similar to what Martha said with DNA, with
21 vulnerable victims. How many children have
22 you put on the stand? How many sexual assault

1 victims have you worked with?

2 And we interview them also,
3 though, to make sure that they really
4 understand what prosecuting sexual assaults is
5 all about. We are able to weed out people who
6 say they want to be a sex offense prosecutor
7 because they're really moved by a trial that
8 they saw, that another AUSA tried, where it
9 involved an abduction at gunpoint and a
10 violent rape by a convicted sex offender of a
11 woman walking home from work.

12 We are looking for people who are
13 suited for what most, what we know most sexual
14 assaults involve, which are a defendant and a
15 victim who are acquainted with each other in
16 some way. Whether it's someone, workplace
17 acquaintances, as Martha mentioned, or we call
18 them brief encounters, semi-strangers, brief
19 encounters.

20 So we really need people who -- so
21 that goes back to the specialized unit. You
22 need to get people who are suited for the

1 work. Not just people who volunteer for it,
2 but people who are really suited for it.
3 There are some people who are fabulous
4 homicide prosecutors in our office, who we
5 have not chosen for senior sex offense
6 prosecutors, because we believe they're not
7 the best suited for it.

8 So we want people to understand
9 what the work is about. We want people who
10 are committed to the continual learning
11 process, especially with scientific subject
12 matter that a lot of lawyers tend to shy away
13 from. So DNA, the medical aspects of sexual
14 assault, the neurobiology of trauma, computer
15 and cell phone forensics, which is now present
16 in almost every one of our cases.

17 And most of all, we need people
18 who are committed to doing the extremely
19 challenging work of day-in and day-out working
20 with victims in cases that are very, very
21 challenging, and people who are going to be
22 just as satisfied and just as rewarded,

1 putting the same amount of time and energy
2 into a case that may end up, after an
3 exhaustive investigation, not in a
4 prosecution.

5 For a lot of prosecutors, they
6 don't want to do that. They want to work on
7 cases that are all going to be prosecuted,
8 that are all going to go to trial, and to be
9 a successful and fulfilled sex offense
10 prosecutor, you have to be committed to
11 victims in cases that look weak initially and
12 turn out to be weak, or cases that look weak
13 initially and turn out to be great, strong
14 cases, and then cases that look strong
15 initially and end up being strong.

16 So I can't stress enough about why
17 this three-tiered structure is so important to
18 us, because learning to work with vulnerable
19 victims and developing the skill that you need
20 in order to earn a victim's trust, to get a
21 full disclosure, and we know that most
22 disclosures in sexual assaults are

1 progressive, and they take a long time and it
2 takes a huge investment of mental energy and
3 physical time, to develop that relationship
4 with the victim.

5 It takes a lot of skill to get a
6 full, complete and truthful disclosure, such
7 that you have a strong prosecutable case, and
8 that you can gather all of the corroborating
9 evidence that you need. It's more than a
10 matter of being personable; it's more than a
11 matter of having a canned speech, that the
12 truth is important; I'm not going to judge
13 you.

14 It's a skill that takes a long
15 time to develop. So that's why we so believe
16 in this. My division chief, my supervisor,
17 calls it "the farm team system" that we have
18 in my section. So the senior sex offense
19 prosecutors generally have about three or more
20 years by the time they apply.

21 They also have to make a
22 commitment to stay in the section for at least

1 two years. They won't be considered for the
2 Federal White Collar Section or whatever, or
3 National Security, if they are within the two
4 years in my section, and I really don't have
5 a problem with that though.

6 I have, as Martha said, people
7 that are lining up waiting for people to
8 retire or whatever. So, and I would, of
9 course, love more people. But our office has
10 the same kinds of resource restraints that a
11 lot of prosecutors' offices have.

12 As for training, we have a lot of
13 in-house training. We have outside
14 conferences. It's really important that our
15 office maintain its commitment, and it's been
16 increasingly difficult with sequestration and
17 reduced budget.

18 But it's really important to me
19 that our office maintain our commitment to
20 sending people from my section, and we are
21 more fortunate than the other sections, to get
22 people sent to some national conferences every

1 year.

2 Another great way that we have
3 found to get high quality training for our
4 people is to partner up with the other members
5 of the Sexual Assault Response Team. So it
6 sounds like it's similar to your task force
7 that you have. We have a Sexual Assault
8 Response Team, and it's all the different
9 agencies, the SANE Program and the NGOs that
10 provide the advocates, the police departments,
11 my office and the Mayor's Office of Victim
12 Services is part of that.

13 So through that office, we have
14 been able to bring in very high quality
15 training. So some of the types of trainings
16 that I think are essential for a good sex
17 offense unit in a prosecutor's office, of
18 course, are multidisciplinary training, really
19 understanding disclosures in sexual assaults,
20 interviewing victims.

21 This year, we were able to bring
22 Dr. Campbell from Michigan to our SARC for a

1 two-day training conference, and she repeated
2 her training, her multi-hour training.

3 She repeated it twice, so that
4 police and prosecutors working different
5 shifts, or prosecutors who had to be in court
6 during one session, would be able to go to the
7 other session. She had one in the morning and
8 one that started late in the afternoon and
9 went into the evening.

10 That's mandatory. It was
11 mandatory for all the sex detectives. It's
12 mandatory for AUSAs in my office. The SARC is
13 bringing in Russ Strand to train people on the
14 FETI interviewing methods. It's important
15 that all sexual assault attorneys get
16 training, continual training from the sexual
17 assault nurses, and we have a wonderful doctor
18 who is the medical director for the sexual
19 assault nurses.

20 The Sexual Assault Nurse Program
21 offers very frequent training for us, training
22 on DNA evidence, training on digital evidence.

1 That is critical, as Martha mentioned, and in
2 terms of resources, our office has
3 investigators, in-house investigators. We
4 fought for years to get these investigators,
5 who supplement the work of the MPD detectives.
6 There are eight of them who are devoted just
7 to the street crimes or the Superior Court
8 Division cases in my office.

9 There are none of them that are
10 exclusively assigned to my section, but they
11 do get a lot of work from my section. There's
12 also one investigator in our office who is
13 solely a computer forensic examiner. That's
14 critical, because otherwise we would be
15 relying on the FBI, which has limited
16 resources and violent crimes are not as high
17 a priority these days. So that's real
18 critical.

19 What else? Secondary trauma is
20 very, very important. We definitely want
21 people to remain healthy. We don't want
22 burnout. Luckily, we don't have burnout

1 problems, but it is very important to train on
2 secondary trauma.

3 Sex offender registration, DNA
4 collection, specialized supervised release,
5 crime victims rights laws, and then we have
6 all sorts of different types of special cases
7 that we have small trainings on like cold hit
8 cases, doctor-patient cases, jail cases, human
9 traffickings, things like that.

10 As far as supervision, it's also,
11 of course, critical, because a lot of the
12 skill development, as I keep saying over and
13 over, really takes a lot of time. So I'm the
14 chief of the section. There are two deputy
15 chiefs who have a tremendous amount of
16 experience.

17 We conduct a pre-trial conference
18 before every felony trial, and we observe
19 every felony trial and give support during the
20 trial, and then feedback after the trial. All
21 plea offers must be approved by supervisors,
22 and all counteroffers.

1 One thing that Martha said about
2 college students that made me think about our
3 SARC. One of the things that -- really
4 wonderful things that came out of the SARC
5 this year, we've had similar problems with the
6 colleges in our area, instructing the students
7 to report sexual assault first to the campus
8 police and then they will, in certain cases --
9 it seems to happen faster when the offender is
10 not part of the campus community, they will
11 facilitate a 911 call.

12 But one of the grants that came
13 out of the Mayor's Office of Victim Services
14 funded the development of an app that they
15 call U, capital "U Ask." So it's available to
16 anyone; anyone can download it. But it's
17 geared towards college students, and it's an
18 app that provides not only tremendous
19 information on sexual assault awareness and
20 resources, but it also has very practical
21 applications.

22 So there is a direct link. You

1 can just press one button if you want to go to
2 the hospital and get a sexual assault exam,
3 and you want a free ride. Press one button
4 and a car will show up.

5 JUDGE JONES: Ms. Higashi, I'm
6 totally overwhelmed by the amount of programs
7 and the wonderful things you're doing in your
8 office. I'd like to move on to Mr. Montgomery
9 now, if I could. Mr. Montgomery. You're the
10 county attorney in Maricopa County?

11 MR. MONTGOMERY: That's correct.
12 I'm the elected county attorney. They're
13 known as the district attorney in other
14 jurisdictions.

15 Well good evening. Based on what
16 I have heard over the entirety of the day and
17 from my fellow prosecutors in and out of
18 uniform, I'm going to jettison my prepared
19 remarks, though I understand they'll be
20 available for you, and I want to hit on a few
21 areas.

22 I also want to take advantage of

1 the fact that because I'm not in uniform and
2 I'm an elected official, I have a little bit
3 more freedom in what I can say.

4 To start with, a little bit more
5 about my background. I serve four million
6 people in Maricopa County, and we have over
7 9,200 square miles. So we're the fourth
8 largest in population, 15th largest in size.

9 I've worked in the office as a
10 line prosecutor before leading it, starting in
11 November of 2010. But before going to law
12 school, after working in Silicon Valley a
13 couple of years, and even preceding that, I
14 was an active duty Army officer for six and a
15 half years.

16 I received my commission from West
17 Point in 1989. My first duty station was at
18 Fort Hood, meaning I am very familiar with 6th
19 Street and Trinity here in Austin. I was a
20 tank platoon leader. I deployed with the 1st
21 Cavalry Division in support of Operations
22 Desert Shield and Desert Storm, during which

1 I got to be an Article 32 investigator.

2 Subsequent to that, returning
3 stateside, I later testified at a court-
4 martial on behalf of a soldier who had
5 previously been in my platoon. Later on, my
6 second assignment at Fort Bliss in El Paso, I
7 was a cavalry troop commander with the 3rd
8 ACR, where I had responsibility for imposing
9 non-judicial punishment, as well as
10 participating in administrative separations
11 and the court-martial of one of my soldiers.

12 So some of what I'll share is also
13 going to be informed by that military
14 experience. Now admittedly, I left active
15 duty in 1995. But again, after sitting
16 through what I've seen here today, it's nice
17 to know that some things never change.

18 With respect to what it is that I
19 think the panel's looking at in general, and
20 what we try to do in the civilian community
21 with respect to responding to sex assault
22 defenses in general, we want to encourage

1 reporting.

2 Much as the military has tried to
3 deal with the differences between a survey on
4 victimization and the numbers that they
5 actually have of reports, I deal with the same
6 thing in my office.

7 I have UCR reports that give me a
8 view of what I know we're dealing with in
9 terms of reported crime, but then I'll read a
10 victimization survey that would suggest that
11 I have three times as many offenses, sexual
12 assault or otherwise, as what I'm dealing
13 with.

14 But in carrying out the
15 prosecution function, I can only prosecute the
16 crimes that law enforcement submits to me,
17 that results from somebody reporting them. So
18 we want to improve that reporting.

19 We want to improve awareness
20 generally among potential victims, as well as
21 among potential offenders about the nature of
22 the crimes that we have in statute in Arizona,

1 to try to preclude people from being victims
2 or perpetrators in the first place.

3 We want to improve the scope and
4 thoroughness of investigations, so that we can
5 make better decisions at the prosecution end
6 for charging, and that goes to whether to
7 clear somebody or to go forward with a charge
8 and the appropriate one.

9 It's at that point too where, you
10 know, I got to hear some of the standard
11 defense shibboleth about prosecutors. It's
12 our job to make sure that we seek justice in
13 each and every case. I love the quote from
14 the 1935 case of Berger v. United States, in
15 which it specifically states that prosecutors
16 are in a peculiar and very definite sense the
17 servant of the law, the twofold aim of which
18 is that guilt shall not escape or innocence
19 suffer, because we want to have successful
20 prosecutions with just outcomes, where that's
21 what is called for.

22 In order to do that in my office,

1 I'm organized with a specific Sex Crimes
2 Bureau, as some of my fellow prosecutors have
3 already discussed, and prosecutors in that
4 unit average anywhere from three to 17 years.
5 At any given time, we may have upwards of 20
6 prosecutors, including a supervisor, about
7 four to five paralegals with a similar number
8 of legal support specialists.

9 On an annual average over the last
10 three years, they're handling about 230 sex
11 assault cases and they're handling about 400
12 sex abuse cases, sex assault being the
13 penetrative crimes, and sex abuse being the
14 non-penetrative crimes.

15 We have about a 90 percent average
16 conviction rate for the sex assault cases,
17 about an 86 percent conviction rate for sex
18 abuse. Here's how I define my conviction
19 rate. Those are the number of guilty
20 resolutions by trial or by plea, divided by
21 the number of charged cases.

22 I never want to be in a position

1 where I feel, and I certainly hope this panel
2 never makes a recommendation that puts
3 military prosecutors in a position where they
4 feel they must charge, they must prosecute,
5 because the number of submittals is going to
6 be the overall denominator.

7 There are times when people report
8 that the evidence just isn't there. Overall
9 office wide, our conviction rates exceed 93
10 percent. Our charging rate overall is 75
11 percent, and then focusing on that, and not
12 every case that gets submitted can be charged,
13 our charging rate for sex assault cases is
14 about 45 percent. Sex abuse cases is about
15 the same.

16 The reason for that is we
17 encourage our police departments that wherever
18 they have evidence that there was a sexual
19 act, submit it.

20 We'll review it. It's up to us to
21 look at the evidence that may relate to issues
22 involving consent or with respect to any of

1 the other evidentiary issues, that I think
2 Colonel Morse from the Army mentioned earlier.

3 We see a lot of the same thing
4 within my County, and I should point out too,
5 we have Arizona State University in Tempe. So
6 we have that environment. I also have Luke
7 Air Force Base out in Glendale. We work a lot
8 with the Judge Advocate General officers
9 there.

10 And as quick note too, I will
11 generally retain cases for prosecution if I
12 have a civilian victim. Why? Victims in
13 Arizona have constitutional rights. They
14 don't have the same thing within the military
15 justice system, let alone within the federal
16 criminal justice system.

17 So if I'm concerned about the
18 nature of the harm caused and I want to make
19 sure those rights are protected, I'll
20 prosecute in my system. Additionally, what I
21 have to work with, because victims in Arizona
22 have constitutional rights, I have a Victims

1 Services Division staffed with about 50 victim
2 advocates, all of whom are required to have a
3 Bachelor's degree, many with a social services
4 background.

5 They assist prosecutors in making
6 sure that victims stay informed, court dates,
7 what's the status of the case, what's the next
8 hearing going to be, answering questions in
9 general about the criminal justice system, and
10 then relaying information from the victim to
11 the prosecutor and back and forth.

12 I also have within my Appeals
13 Bureau an attorney specifically assigned to
14 deal with victims rights litigation issues.
15 They will train my prosecutors in victims
16 rights issues, they will appear in court and
17 advocate for specific issues addressing
18 victims rights, and they will also then take
19 up appellate action if they need to.

20 Victims in Arizona, in order to
21 enforce their rights, have standing in court
22 and have standing to challenge issues that

1 affect their rights in courts of appeal.

2 As far as special programs go that
3 address the area of sex assault cases, my
4 prosecutors in the Sex Crimes Bureau over
5 their first year must go through a standard
6 protocol of training. The same too for
7 investigators within Maricopa County and any
8 one of the 26 different municipal agencies,
9 and what I've done lately is we conduct joint
10 training for them. Same basic subject matter
11 that they have to go through, in order to make
12 sure that everybody is on the same page, so we
13 don't have different standards and we don't
14 have different vernacular.

15 That also helps to give me a good
16 audience when I bring in national experts. We
17 cover a number of different areas, as has
18 already been mentioned. I'll highlight a few.
19 Forensic interviews, confrontation calls, the
20 dealing with forensic analysis of evidence, in
21 particular DNA. But that also goes for social
22 media, texts, Facebook, offender profiles and

1 victimology.

2 Prosecutors need to learn up front
3 that there is as many different responses to
4 the trauma of a sexual assault as there are
5 victims. The one person who presents with a
6 stereotypical stress-related trauma may not be
7 the same as the next person, who is rather
8 stoic.

9 Neither one of those responses is
10 necessarily indicative of how successful that
11 case might ultimately be. We also utilize
12 Family Advocacy Centers. There are six within
13 Maricopa County alone, where multi-
14 disciplinary teams will come together to help
15 investigate, provide medical care, counseling
16 services and service referrals for victims of
17 sexual assault.

18 Now mind you, I'm focusing on sex
19 assault, but this really encompasses both
20 adult and child victims, and the whole gamut
21 of sex offenses.

22 Additionally, we have a peer

1 support program for prosecutors. I want my
2 prosecutors to have 20 year careers, and to be
3 healthy and happy inside and outside of the
4 office, and we found for some prosecutors,
5 based upon the subject matter of sex offenses
6 that they've prosecuted for a number of years,
7 they start to burn out.

8 I don't want them to do that.
9 I've even utilized the national expert Dr. Gil
10 Martin, who deals a lot with law enforcement
11 agencies for officers having to deal with the
12 stress of being in that environment day-in and
13 day-out. Prosecutors are in that environment
14 too, and so we've begun that.

15 I would make one, a couple of
16 particular recommendations on behalf of our
17 nation's military. One, I would ask the panel
18 to recommend specific rights for victims of
19 crime in military justice proceedings, that
20 would ensure, just as in Arizona, that they
21 would have a right to be free from
22 intimidation, harassment or abuse.

1 We have rape shield laws, because
2 some defense attorneys abused the ability to
3 advocate zealously for their clients, and used
4 it as an excuse for unethical conduct.
5 Victims should also be treated with fairness,
6 dignity and respect throughout criminal
7 justice proceedings.

8 They should have a right to be
9 heard on release conditions at the time of
10 entry of a plea, and at sentencing. They
11 should have a right to be present whenever a
12 defendant has a right to be present, and there
13 are many more rights within Arizona's
14 constitution that should be considered.

15 Having said that though, here's an
16 important caveat. Do not civilianize the
17 military's justice system. It's different for
18 a reason. You do not have a right to be in
19 the military. It is an honor to serve. But
20 if you cannot conform your conduct to
21 contribute to the mission of your unit, and to
22 support fellow soldiers, airmen, sailors,

1 marines, Coastguardsmen, then you should not
2 be there.

3 How you wind up being sent from
4 that service assignment can differ based upon
5 what your conduct was. But not every right
6 that a civilian defendant has within the
7 civilian justice system is necessarily
8 something that needs to be present within the
9 military's justice system.

10 The fact that cases involving
11 sexual assault need to be focused on doesn't
12 reflect that the military's justice system
13 overall is broken. Are there areas to
14 improve? Certainly.

15 One other specific recommendation
16 I would make too is do not remove commanders
17 from their responsibility to ensure that
18 justice and discipline are being served in
19 these cases. Commanders are responsible for
20 everything that happens and does not happen
21 within their area of responsibility,
22 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
9 courts-martial where they shouldn't, relieve
10 them. But don't relieve them of their
11 responsibility in the first place. I'd be
12 happy to take any of your questions.

13 JUDGE JONES: Thank you, Mr.
14 Montgomery. Ms. Patrick. You're San Diego
15 District Attorney's Office?

16 MS. PATRICK: Yes. Thank you very
17 much. Yes, I have the distinction, I believe,
18 of being the last speaker of the day.

19 JUDGE JONES: I was going to say
20 that but --

21 MS. PATRICK: But as my colleague
22 Bill Montgomery reminds me, prosecutors like

1 to have the last word. So I'm right at home.

2 I am a prosecutor in San Diego
3 County, a sex crimes prosecutor. However, I
4 began my career as a deputy public defender.
5 So I very much sympathize with much of the
6 sentiments I've heard expressed by the last
7 panel.

8 I also, for my doctoral
9 dissertation for my Ph.D., I chose the topic
10 of how sexual predators use the psychology of
11 attraction to lure victims. So with all of
12 the years of research I did in preparing that,
13 I also got myself up to speed on the
14 investigative arm, and how we can prevent and,
15 as the saying goes, to catch a predator when
16 we're out in the community.

17 So it's a training issue that I
18 also bring to my combined 20 years of
19 experience trying cases on both sides.
20 Currently in San Diego County, I am in charge
21 of the SVP unit. However, unlike what it
22 stands for in my colleague's jurisdiction,

1 it's not Special Victim Prosecutors; it's
2 Sexually Violent Predators.

3 And in San Diego County, we have
4 three million people, 300 prosecutors, and
5 most of my time is spent on these kinds of
6 cases. The ones that we seek to civilly
7 commit after they've served their prison term,
8 because they have a qualifying mental disorder
9 that renders them, and I'm paraphrasing, too
10 dangerous to be out in the community, too high
11 of a risk, too not in control of their
12 behavior.

13 So because it's late in the day,
14 I've really streamlined my remarks, and I'm
15 going to hit upon some of what we have found
16 have been the best practices in a couple of
17 different areas.

18 What I think distinguishes my
19 jurisdiction in several interesting points
20 relevant to both investigating, detecting and
21 prosecuting sexual assault cases, the first
22 thing is that we are a convention city. Like

1 some of the other jurisdictions that are
2 represented, we have a lot of people that
3 travel there on business trips.

4 So we have a lot of -- and I also
5 dislike the term "acquaintance rape." What
6 does that mean? I will say rape by known
7 perpetrators, sexual assault by known
8 perpetrators, that occur during convention
9 business. Thankfully, we also have a lot of
10 surveillance footage in all the bars and
11 restaurants in the areas of San Diego County.

12 But that also puts us as
13 prosecutors in the often untenable position of
14 confronting a victim with, or a complaining
15 witness, someone who is now stating that she's
16 been sexually assaulted, confronting her with
17 what we have on tape.

18 We have cameras not only in
19 establishments, but also even between
20 buildings. So we're also able to catch
21 portions of some of the stranger rapes.

22 So we're also distinguished by our

1 proximity to the Mexican border. That
2 requires us to move very quickly when an
3 assault is committed. We don't have a lot of
4 time before we worry about people fleeing the
5 jurisdiction. That's not only the suspects,
6 but also the complaining witnesses and also
7 the other witnesses.

8 We try to get, you know, cell
9 phones as quickly as we can, so when we're
10 looking at all those selfies that have been
11 taken the night in question, we're able to
12 identify who else may have been there, and may
13 have -- may be able to provide good testimony
14 for us. So we have to move very quickly
15 because of our proximity to Mexico.

16 We also have lots of universities
17 like New York, so we have a large presence on
18 college campuses, of people that are very
19 interested in doing what we can to identify
20 how we can stop these assaults to begin with,
21 and that's an educational component that I'll
22 talk about in just a minute.

1 Our crimes are very victim-
2 focused, and so when we talk about training to
3 be in the unit or even to be part of law
4 enforcement, it's got to contain that sort of
5 factor of why are these cases so different?
6 You know, we've got a lot of different crimes
7 that focus on what did the suspect do?

8 But unfortunately, it's
9 challenging that a lot of our cases focus on
10 what did the complaining witness do, and
11 they're focused on that from the beginning.
12 You know, I've heard for 20 years my victims
13 say well, I feel like I'm the one on trial.

14 And in a lot of cases, she is in
15 some facets of the law that allow everyone to
16 look at, you know, what led up to the crime.
17 All of what's been discussed both today and
18 yesterday actually is a big part of the case.

19 But another part of it is we also,
20 right from the beginning, have found it to be
21 a best practice to look at what category of
22 offender are we dealing with, right from the

1 beginning. Are we dealing with a true
2 predator that is hiding out between two
3 buildings down, you know, in what we call the
4 "Gas Lamp Quarter," if any of you have ever
5 been to San Diego, a highly populated string
6 of bars and restaurants.

7 Do we have one category of
8 offender that really is a predator and is
9 going to wait there and try to find someone
10 vulnerable with her headphones on or too much
11 to drink and attack? Or is it somebody who
12 we'll call an opportunistic kind of offender,
13 the kind that can be rehabilitated?

14 Maybe somebody that's watched, you
15 know, too many of these movies, where they
16 talk about well just wait 'til she has too
17 many drinks and then maybe you can get
18 together. Is it one of these kinds of people
19 that maybe is, you know, guilty of an
20 intoxication rape, that could be prevented by
21 best practices, maybe you know, messages
22 getting out there by peers.

1 Maybe not so much by supervisors,
2 but by one of the things we've really found
3 has caught on in college campuses is having a
4 message come from within. You know, maybe
5 having sexual assaults be on the way to being
6 viewed as a shameful act, as we view drunk
7 driving in a lot of our jurisdictions, not as
8 something cool, not as something to brag about
9 the next day, but something to be ashamed of.

10 So there's this big educational
11 component that maybe is present in a type of
12 opportunistic offender, that isn't present in
13 a predatory offender. So this is something
14 else that we try to look at right from the
15 beginning.

16 And along those lines, we also,
17 you know, victims advocates has been discussed
18 by my colleague, Ms. Higashi, and that is one
19 of the things we talk about a lot, because
20 sometimes we find, and this is certainly not
21 unique to my jurisdiction, that we might be
22 working at cross-purposes with victim

1 advocates, who have a role that's very
2 different to ours.

3 In California, and I know this is
4 again, other jurisdictions deal with this as
5 well, if we use internal victim advocates and
6 they talk too much about the case with the
7 complaining witnesses, we're generating
8 statements that then have to be disclosed to
9 the other side.

10 Whereas with external victim
11 advocates, they're protected by evidentiary
12 privileges. So they can have totally separate
13 conversations that don't then become a part of
14 the prosecution team.

15 But regardless of which category
16 our victim advocates fall under, we have found
17 that it is so much easier to conduct an
18 investigation when we really think those
19 issues through before we even have anybody
20 speak to the victim, to see who is going to
21 have a better chance at giving her the support
22 that she needs, and also not accidentally

1 creating and generating statements that we're
2 going to have to turn over.

3 So these are all things to think
4 about quickly. Because we're so close to
5 Mexico, we try to act as quick as we can, in
6 order to get the evidence we need before we
7 lose anything. That includes, by the way,
8 those valuable text messages that we all know
9 how quickly those are erased, if we don't get
10 the phone right away.

11 And that's if we can even get the
12 cooperation of the phone companies. So as
13 quickly -- we even sometimes need to take
14 screen shots if we have to, to have a law
15 enforcement officer testify before we lose
16 that kind of evidence.

17 So the investigative arm of it is
18 what I'm going to talk about next, and I
19 really am going to be brief in my remarks
20 here. I'm going to hit on what I've not heard
21 discussed, in order to not corroborate
22 anything that's already been so eloquently

1 stated.

2 We, as with every other
3 jurisdiction, are short. We're short
4 investigators. That's both internally and
5 externally, and we have the same kind of
6 issues that I know other agencies face, where
7 different arms of law enforcement are pointing
8 fingers and saying "Well, I think that's your
9 job, because we're short-staffed," and of
10 course the direction the finger's pointing,
11 they're short-staffed too.

12 What we don't want to have is the
13 complaining witnesses suffer because everyone
14 is short-staffed, because a lot of these both
15 young women and men that are victims in our
16 cases, they rely very heavily on us and on law
17 enforcement.

18 Sometimes they even feel far more
19 comfortable disclosing to us than they do
20 maybe to victim advocates and agencies that
21 they're not connected with. And that sort of
22 bleeds into the next issue, is do we draw

1 internally from -- and I know that's something
2 that's very near and dear to the heart of the
3 military, is do we draw and do these
4 investigations all internally?

5 What we have found as just some of
6 the challenges that are involved, is our
7 agency, to use it as an example, is like a
8 family. It's not only a career; it's also a
9 family.

10 So when we have a crime where the
11 victim is somebody in the DA's office, we
12 choose to have another agency review it,
13 because a lot of our victims have stated not
14 only are they afraid that whatever they say
15 might be used against them, might embarrass
16 them, they may not be as forthcoming, but they
17 also worry about getting another member of the
18 family in trouble.

19 And it's a close-knit community.
20 I know we've got three million people in my
21 jurisdiction, but you'd be amazed how close-
22 knit the legal community is and the law

1 enforcement community is. So we have the
2 attorney general's office prosecute.

3 Even then, you know, we still have
4 the issue of we're just so close, it seems
5 like that there's a candor issue, there's an
6 embarrassment factor and there's a guilt
7 factor. The 911 tape we heard earlier today
8 is just an excellent example of even though
9 you of course know the victim knows she's not
10 to blame, there's still this reluctance that
11 might come about when you're prosecuting
12 somebody, or complaining about the conduct of
13 somebody that's in the same community.

14 I'm going to sort of end with jury
15 selection and technology, just very briefly.
16 I could talk all day on technology.
17 Obviously, I won't. I'm last and I know, you
18 know, it is evening now, right? It's no
19 longer good afternoon but good evening.

20 Let me just say technology has
21 raised some challenges in the last year that
22 are changing daily. They change daily in

1 terms of how do we use what we can get.
2 Facebook is a great example. That has changed
3 the face -- no pun intended -- of
4 investigations, hasn't it?

5 You know, we want to not only use
6 it as the great investigative tool that it is,
7 but we want to do it without violating ethics
8 rules. One of the other distinctions I've had
9 in California is I'm the immediate past chair
10 of the California State Bar Ethics Committee,
11 Legal Ethics Committee.

12 So we are on the front burner of
13 investigating. How can we use this great new
14 technology in a fashion that doesn't result in
15 us losing the evidence, because we've cut
16 corners ethically, or putting ourselves at
17 risk at being prosecuted for doing something
18 that's unethical.

19 So for example, we know that we
20 can't misrepresent our identity online. We
21 know that we can't friend people that are
22 represented parties, even if they're

1 witnesses.

2 And when we're picking a jury,
3 there's a new New York opinion that just came
4 out last year that says when we're
5 investigating potential jurors, which we can
6 do if it is, you know, public record, public
7 knowledge, we now, according to one ethics
8 opinion, should not be using technology that
9 will let the prospective know that we've
10 looked.

11 Which the whole point of all of
12 this is not to say that we have all the
13 answers to the questions, but that we need to
14 be savvy and aware and on the cutting edge of
15 all of the ethical rules as law enforcement
16 and as prosecutors that apply to us, that by
17 the way those rules apply to the defense bar
18 as well.

19 We just have to make sure that we
20 use technology as the great tool that it is,
21 without stepping in these land mines that it
22 is now exposed, because we may not even know

1 how easy it is to make accidental contact with
2 others in the system.

3 And really in summation, I know
4 the panel may have some questions, you know,
5 let me just say that, you know, these last two
6 days we've heard of so many new ways that we
7 can consider technology has also made it
8 incumbent upon us, that as we consider all of
9 these new ideas, technology has given us a way
10 to do it faster and more efficiently, but also
11 has created just some issues to be aware of,
12 to make sure that we also do these things
13 ethically.

14 So these are some of the best
15 practices from sunny San Diego. I couldn't
16 bring the weather, but hopefully I can share
17 some of the wisdom. Thank you so much.

18 JUDGE JONES: Thank you. Any
19 questions? Any questions?

20 (No response.)

21 JUDGE JONES: Well, I think we've
22 had an abundance of riches, particularly in

1 our last panel tonight. So thank you very,
2 very much for waiting all day.

3 I know some of you have been here
4 both days, so we thank you for your interest
5 as well, in addition to your contribution. So
6 I will say good evening. Thanks a lot.

7 (Whereupon, the above-entitled
8 matter went off the record at 5:56 p.m. and
9 resumed at 6:23 p.m.)

10 JUDGE JONES: So the panel members
11 have reviewed a summary of today's proceedings
12 and we've agreed that it's accurate, and Mr.
13 Sprance, would you close the meeting now?

14 MR. SPRANCE: Yes ma'am. This
15 meeting of the Response Systems Panel is
16 closed.

17 (Whereupon, at 6:24 p.m., the
18 meeting was adjourned.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual
Assault Crimes Panel Meeting

Before: US DOD

Date: 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

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