UNITED STATES DEPARTMENT OF DEFENSE

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

THE ROLE OF THE COMMANDER IN THE MILITARY
JUSTICE SYSTEM: PERSPECTIVES OF RETIRED
SENIOR COMMANDERS AND FORMER OFFICERS

THURSDAY
JANUARY 30, 2014

The Panel met in the Faculty Conference Room at The George Washington University Law School, 716 20th Street, N.W., Washington, D.C., at 8:30 a.m., Hon. Barbara Jones, Chair, presiding.

PRESENT:

The Honorable Barbara Jones
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
Mai Fernandez
PRESENTERS:

General (Retired) Ann Dunwoody, U.S. Army
General (Retired) Roger Brady, U.S. Air Force
Vice Admiral (Retired) Mike Vitale, U.S. Navy*
Lieutenant General (Retired) James Campbell, U.S. Army
Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force*
Major General (Retired) Martha Rainville, U.S. Air Force*
Brigadier General (Retired) Pat Foote, U.S. Army
Rear Admiral (Retired) Marty Evans, U.S. Navy*
Rear Admiral (Retired) Harold Robinson, U.S. Navy
Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard
Captain (Retired) Lory Manning, U.S. Navy
Colonel (Retired) Paul McHale, U.S. Marine Corps*
K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration

STAFF:
Colonel Patricia Ham, RSP Staff Director
Maria Fried, Designated Federal Official
Lieutenant Colonel Kyle Green, RSP Senior Attorney

* present by teleconference
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comments from the Panel Chair</td>
<td>5</td>
</tr>
<tr>
<td>Hon. Barbara Jones</td>
<td>5</td>
</tr>
<tr>
<td>Perspectives of Retired Senior Commanders and Former Officers who</td>
<td></td>
</tr>
<tr>
<td>Endorse Changing the Role of the Commander in Military Justice Processes</td>
<td></td>
</tr>
<tr>
<td>Maj Gen Rainville, U.S. Air Force</td>
<td>10</td>
</tr>
<tr>
<td>BG Foote, U.S. Army</td>
<td>15</td>
</tr>
<tr>
<td>RDML Evans, U.S. Navy</td>
<td>22</td>
</tr>
<tr>
<td>RDML Robinson, U.S. Navy</td>
<td>28</td>
</tr>
<tr>
<td>CAPT Manning, U.S. Navy</td>
<td>37</td>
</tr>
<tr>
<td>Col McHale, U.S. Marine Corps</td>
<td>42</td>
</tr>
<tr>
<td>Ms. Krepp, U.S. Coast Guard JAG and former Chief Counsel, U.S. Maritime Administration</td>
<td>46</td>
</tr>
<tr>
<td>Panel Q &amp; A</td>
<td>52</td>
</tr>
<tr>
<td>Perspectives of Retired Senior Commanders</td>
<td></td>
</tr>
<tr>
<td>Gen Dunwoody, U.S. Army</td>
<td>96</td>
</tr>
<tr>
<td>Gen Brady, U.S. Air Force</td>
<td>102</td>
</tr>
<tr>
<td>VADM Vitale, U.S. Navy</td>
<td>108</td>
</tr>
<tr>
<td>Lt Gen Campbell, U.S. Army</td>
<td>110</td>
</tr>
<tr>
<td>Lt Gen Jodice, U.S. Air Force</td>
<td>115</td>
</tr>
<tr>
<td>RADM Baumgartner, U.S. Coast Guard</td>
<td>120</td>
</tr>
<tr>
<td>Panel Q &amp; A</td>
<td>128</td>
</tr>
<tr>
<td>Public Comment</td>
<td>200</td>
</tr>
<tr>
<td>Panel Deliberations</td>
<td>252</td>
</tr>
<tr>
<td>Role of the Commander Subcommittee</td>
<td></td>
</tr>
<tr>
<td>Report to Panel</td>
<td>327</td>
</tr>
</tbody>
</table>
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(8:46 a.m.)

MS. FRIED: Good morning, everyone.

My name is Maria Fried. I am the Designated Federal Official for the Response Systems Panel. Thank you all for coming. Thank you, Panel members for joining us.

With that, I would like to turn it over to the Staff Director for this Panel, Colonel Patty Ham.

COL HAM: Thank you, Ms. Fried.

Good morning panel members and everyone attending this meeting of the Response Systems to Adult Sexual Assault Crimes Panel.

Panel members Bryant, Fernandez and Representative Holtzman will be joining us a little bit later.

A couple of administrative notes.

C-SPAN is here today. They are not broadcasting the meeting live but they are recording it.

You are permitted to take pictures.
Please do not do so during the session, so as not to distract the presenters.

We received public comment for today's meeting from several people: Ms. Christina Thundathil, with some attachments; Ms. Melissa Davis, who requested the members receive a link to a book that she has written and the members do have that; Mr. Tim Dixon; and Ms. Sarah Zak. We also received a request from Ms. Davis, Mr. Dixon, Ms. Zak, and Ms. Jenny Lee to address the panel in the public comment period.

The members have copies of the public comments and they are also posted on the panel's website, which is found at responsesystemspanel.whs.mil at a link for today's meeting.

Madam Chair, are you ready to proceed?

JUDGE JONES: Yes, thank you. Good morning everyone. Welcome to this meeting of the Response Systems Panel to Adult Sexual
Assault.

Before we get started, I want to extend the panel's thanks and appreciation to interim Dean Greg Maggs and the George Washington University Law School for allowing the panel to use its facilities for this meeting.

As many of you may know, in addition to being a brilliant scholar and professor of law here at GW, Dean Maggs is also a Colonel in the United States Army Reserve, Judge Advocate General's Corps, who has served in many positions, including Appellate Judge.

Dean, I don't know if you are in the room at this point but thank you very much.

The panel also wants to express its thanks to Dean Hank Molinengo, who is the Assistant Dean, Administrative Affairs, as well as Ms. Natalie Fields, the Director for Conference and Event Services and her assistant, Ms. Wanda Wilder and Mr. Andrew Lawrence, Media Services Coordinator. I want
to thank all of you for helping us put this meeting together.

In the National Defense Authorization Act for Fiscal Year 2013, Congress directed the Secretary of Defense to establish the Response Systems Panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under the Uniform Code of Military Justice for the purpose of developing recommendations regarding how to improve the effectiveness of those systems.

Among many other very important and challenging tasks, Congress directed the Panel to assess the role of the commander, including initiatives to modify the current role of the commander in the military justice system.

The panel has already focused much of its efforts in this area and we will spend today discussing it as well.

In addition to the panel's efforts,
due to the vast scope of the tasks that Congress assigned to us and the short time that we have within which to accomplish our work, we have established three subcommittees. The Role of the Commander, a Subcommittee on Comparative Systems and a Subcommittee on Victim Services. It seemed the most efficient way to proceed and get as much done as we possibly could in the time that we had.

Various panel members serve on each of the subcommittees, along with subject matter experts, who were added in order to help us with our work. I serve as the Chair of the Role of the Commander Subcommittee.

At a Role of the Commander Subcommittee meeting earlier this month, the members requested to hear from retired general officers and former officers who both supported and opposed modifying the commander's authority to convene courts-martial. We heard from a number of retired officers at the Subcommittee meeting and I
believe that was held on January 9th, if my memory serves me. And there is a transcript of it. It was fully transcribed. We await getting it back in order to post it on the panel's website. Oh, I'm sorry. It is already on the panel's website, the transcript from January 9th.

We invited everyone who appeared at that Subcommittee meeting to come and testify today at the full panel meeting, which is a public meeting and many of the same retired and former officers who appeared before the Subcommittee have been able to come back and accept this invitation to present their views to the full panel.

We are also lucky today to have some additional distinguished retired officers who were not at the subcommittee meeting. Their biographies and all of the background materials provided to the panel in preparation for this meeting are available on the panel's website, as well as the public comments that
Colonel Ham just mentioned earlier that we
received in connection with today's meeting.

Having just given that background,
I would like to turn now to our presenters for
our first session this morning. And they will
speak in favor of modifying the role of the
commander in the military justice process.

As you can see, we have four
presenters who are here in person and we have
three who have joined us by phone. Let me
just start by thanking each and every one of
you for making yourselves available today.

All right, if we could, I would like
to begin with General Rainville. General, are
you there?

MAJ GEN RAINVILLE: Yes, I am. I'm
here. Good morning.

JUDGE JONES: Good morning. We
would be pleased to hear your comments.

MAJ GEN RAINVILLE: Thank you very
much. And thank you for allowing us to
participate over the phone. I regret that I
I couldn't be there in person this morning.

I am General Rainville. I served, as a brief background, on both active duty in the Air Force, the Air Force Reserve, and the National Guard. And I have 14 years of command time with nine of those as the Adjutant General of the Vermont National Guard, both Army and Air.

I firmly support placing decisions to prosecute sexual assault and other serious criminal offenses within the military legal system and moving them from outside the command chain.

I think that the decisions to prosecute or not should be based on evidence, independent of preexisting command relationships and that really our men and women deserve that fair treatment and due process that would come with that.

I strongly believe in holding commanders responsible. That is a given. But we should not confuse command responsibility
with leadership. Commanders should always be responsible for command climate. And this change, if made, would allow those commanders to focus their efforts on command business, improving the command climate, and on the warfighting abilities of their units.

Leadership, to me, is an ability to inspire others, to set a moral example, to think strategically, while focusing on mission success. I think that even since we met on the 9th of January in that panel, even more reports have come out in the paper of misbehavior, unacceptable actions by senior military officers, unfortunately, and others within the command chain. And it just points, I think, to the importance of what the subcommittee is doing and the recommendations that you will be submitting and the importance for a substantive and visible change in the structure of the military’s response.

For decades since I was in in 1979 up to the present time, the military,
Department of Defense has gone through cycles of focus on the issue of sexual harassment and sexual assault in the military. And some good actions were taken. The decisions to put emphasis on it with commanders to hold commanders responsible and to educate the men and women in the military on harassment, on acceptable behavior versus unacceptable behavior. They need to timely measure it afterward and we wanted to see the success of what we did but, low and behold, the cycle repeated itself over and over and over.

And I think that now with the changes that Senator Gillibrand has proposed in her legislation that go further than any changes that have been made before, there is a real opportunity to strike at the heart of part of the problem, and that is to change that structure, to place the decisions to prosecute with trained military legal professionals, to let commanders lead, to free them to focus on mission-readiness and
warfighting in their command climate and
inspiring and leading. And as a result, to be
able to build back that faith and confidence
in due process within the military that we
must demand of ourselves to provide for those
men and women who are serving, men and women
in all ranks and in all fields.

So, I really thank you for
addressing this. I won't repeat other things
that I had said before, except just to
emphasize that it is more important than ever
that this is seriously dealt with and that we
don't accept push back on change but really
look for ways that will actually have a strong
positive effect on these problems that keep
repeating themselves.

So thank you again for the
opportunity to talk by phone. I will be
listening in and be willing to answer any
questions when that is appropriate. Thank
you.

JUDGE JONES: Thank you very much,
1 General. I would like to turn now to General
2 Pat Foote, U.S. Army, who is with us this
3 morning.
4 BG FOOTE: Thank you very much. And
5 thank you for this opportunity to appear
6 before the panel to express --
7 JUDGE JONES: You know, I am just
8 wondering. Are the microphones on? Because
9 I can hear you but I don't know if anyone in
10 the back can.
11 RDML ROBINSON: Ma'am, we were
12 briefed that these little ones are the public
13 microphones and --
14 JUDGE JONES: Okay, great.
15 RDML ROBINSON: -- these are
16 recording.
17 JUDGE JONES: If you can't hear me,
18 put your hand up but I just wanted to make
19 sure everyone could hear you.
20 BG FOOTE: Okay, thanks.
21 JUDGE JONES: Go ahead, general.
22 BG FOOTE: I come at this from the
direction that I served on active duty for 30 years as a commissioned officer during the years of the Women's Army Corps from 1969 -- pardon me, 1959 to 1978 and through the process when the Corps was integrated into the Army mainstream over a period of four decades.

In retirement, 23 years, I have continued to work the issues that are concerning dysfunctional policies governing how we utilize, train women in the military and also the issues of sexual harassment.

I have very reluctantly agreed and come to the conclusion that there is a problem in continuing to attempt to resolve sexual assault cases within the existing chain of command and that I do support Senator Gillibrand and her effort to take this and put it under the appropriate leader authorities external to the chain of command to handle the problems and let commanders command.

When I commanded a WAC company, a Women's Army Corps company at Fort Belvoir,
Virginia from '64 to '66, we had at that time
what I consider an old girl network that was
very effective from company commanders to
women staff advisors at Army level to the
Officer of the Director back to the training
center in how we managed, commanded our Army
women. I only had five women assigned to me.
The remainder of the women in the unit were
assigned to three separate commanders, the
post, and as students who were all billeted
together simply because of their gender. And
I was their commander.

And in this particular arrangement,
I had UCMJ authority over every one of these
women. The system worked pretty well right
there, where the chain of command to which the
women really responded was not the chain of
command that adjudicated any cases of
misbehavior with them.

In 1996, after the Aberdeen Proving
Ground scandal broke, I was recalled to active
duty by the Secretary of Army to serve as the
Vice Chair of the Senior Review Panel on
Sexual Harassment. There had been a
tremendous amount of extremely adverse
publicity concerning the events at Aberdeen
Proving Ground where a number of drill
sergeants, officers, and others were
implicated in having sexual relationships with
women in training.

When this happened, the Secretary
decided that the way to really get into the
heart of what is going on here was to have the
panel go forth into the Army and measure its
human dimension worldwide. And in the next
year, our panels, there were 40 of us, went
worldwide to 55 installations, interviewed or
focused grouped or surveyed over 35,000 troops
and family members also. And we did a lot of
wandering around wherever we were to find out
what was the command climate in which we were
operating there.

In September of 1997, the final
report was rendered and I will tell you it was
documented thoroughly. We had nine behavioral
scientists working with us to ensure that our
research documents were valid and that the
questions were valid.

So when the report came out and was
delivered to the Secretary, four major
findings occurred. Number one, yes, sexual
harassment is extant in the Army but sexual
discrimination is the larger problem.

Number two, the equal opportunity
program at Department of Army level looked
beautiful on paper. It did not work worth
anything. The soldiers did not respect it.
The soldiers did not trust it. And they felt
that if they registered a complaint of sexual
assault or whatever the complaint might be,
that they would be further victimized by their
peers or superiors for having caused this
problem in the unit.

Number three, we found that most
drill sergeants were very competent in doing
what they did and they did it well in the
And number four, we found that the major problem was failures in leadership from the very top to the very bottom from the Pentagon down to the squad at post, camp, and station. That leadership had not created the appropriate climate Army-wide to ensure that the men and women assigned to the units were treated with respect and dignity.

And this report went forward with a number of recommendations which included extending basic training one additional week, revamping the selection process for drill sergeants and instructors, changing their training. And then the other things included reinserting into the curriculum training, in the Army values, in ethics, in traditions, morality. And we also went forward with the intention of filling every vacancy in the training base where there were sergeants who should be there in the office or should be there in the units for training. We are not
there. We were involved in the Vietnam War and that took the priority.

Let's fast forward 17 years to the current time and the same problems that we identified then are identified Army-wide now. And there has been no solution offered to ensure that we can handle this under the present mechanisms that we are using.

And it is for this reason that I have felt compelled to stand and say that we need to think out of the box. We need new direction. We need creative thinking. We need not to be so married to the chain of command, which I believe in, I truly believe in, as the mechanism to command, manage, and administer to the Army in war and peace. But when you have got a weak link in that chain, then it behooves us to take that weak link out and come up with a different mechanism for handling the very complex cases of sexual assault with which we deal.

So for that reason, I support
Senator Gillibrand and I hope that we will
make a very thorough search for a better way
to ensure a better Army of the future. Thank
you.

JUDGE JONES: All right, thank you
very much, General Foote. And thank you for
all of your service.

BG FOOTE: Thank you.

JUDGE JONES: Next, we will hear
from Admiral Evans, U.S. Navy.

RDML EVANS: Thank you very much,
Judge Jones. Members of the panel, ladies and
gentlemen, thank you for inviting me to meet
with the panel today. It is an honor for this
retiree to be given the opportunity to
testify.

By way of background, I served
nearly 30 years on active duty in the United
States Navy. More than eight of those years
were as a commander of units in the United
States and overseas, ranging in size from 200
to over 6,000 personnel.
Commands included the Naval Station in San Francisco, Navy Recruiting, the George C. Marshall Center for European Security Studies in Germany and the Naval Post Graduate School. For six of those command years, I had the authority to convene general courts-martial.

I also had a one-year assignment as the Director of the Navy's Standing Committee on Military and Civilian Women in the Department of the Navy created in 1992 in the wake of the infamous Tailhook scandal. That committee's mission was to develop a strategy to change the culture and the climate of the Navy and Marine Corps to value and respect women.

We did develop a strategy, 80 specific actions, and it was implemented. It included a get tough approach to dealing with sexual assault and harassment, education for all hands and many substantive changes to systems and processes. Yet, here we are again.
addressing the same issues of leadership,
command climate, and accountability.

I also served as a presidential
appointee on the Military Academy Board of
Visitors for five years and on the Board of
the Naval Academy Foundation for nine years.

Like many Americans, I have watched
the debate about the military justice system
and the military's handling of sexual assault
cases for the past several years. From my
perspective, this has always been first and
foremost about readiness, recruiting,
training, organizing, equipping, and most
importantly leading America's finest men and
women to be ready to go into harm's way
supporting the nation's interest.

The number of incidents and
persistence of the criminal conduct compels a
new and improved approach. At least since
1992 in Tailhook, commanders have said they
get it, yet the statistics tell a different
story. When incidents of unwanted sexual
conducted are alleged to have occurred, victims
should feel confident in reporting them to
their chain of command and believe that the
system will handle a complaint seriously and
sensitively. And as important, alleged
perpetrators should also feel they will be
treated fairly in the military justice system.

As a commanding officer and
commander, I appreciated those particular
prerogatives entrusted to us in the military
justice system. I, too, believe they were
essential to the maintenance of good order and
discipline in my command. Today, I believe
some of those same prerogatives contribute to
a culture that is not in fact or perception
promoting a climate free from unwanted sexual
conduct and safeguarding the rights of both
the accused and the victim.

I applaud the most recent changes in
the military justice system. In my judgment,
they represent significant and long-needed
progress, particularly with regard to crimes
involving unwanted sexual conduct and the
seeming epidemic of sexual assault in the
military. There is no question, once again,
a full court press is on. Yet, I am not
convinced it is all that is necessary to
address the crisis, which is why I support
Senator Gillibrand's proposal.

With commanders retaining the
decision on which cases go to trial, I believe
overcoming the fact or appearance of conflict
of interest is too huge a mountain to climb.
From my own experience, it was gut-wrenching
to receive a sailor's allegation of sexual
assault by another member of the command,
particularly one who was senior and perhaps
had an excellent performance record. But it
is even more gut-wrenching to reflect on what
crimes may not have been reported because the
man or woman in my command did not believe I
would believe their side of the story or they
thought there would be retaliation.

I think I would have accepted and
perhaps even welcomed a senior JAG officer with prosecuting experience weighing the evidence and making a fact-based decision about whether to move forward with a court-martial. That would be in the best interest of both the alleged victim and the accused.

I cannot see how a commander's authority would be undermined and that she or he would somehow not be able to set the proper command climate to support the unit's mission, if cases proceeded to trial based on the strength and weaknesses of evidence.

When I was a commander in my first command assignment, I did not have general court-martial convening authority. The regional commander, a one-star admiral held that authority. My having to refer the most serious cases to him did not in any way lessen my charge and ability to lead my sailors and officers effectively and certainly, it did not absolve me of any accountability for good order and discipline and, most especially, for
accomplishing the mission.

I believe Senator Gillibrand's legislation strikes exactly the right balance between military command needs and supporting victims and accused. It is more important than ever to implement the substantive changes enacted by the NDAA but also to take this additional measure to enhance the trust and confidence in the military justice system.

Thank you again, Judge Jones and Committee for giving me the opportunity to speak with you today.

JUDGE JONES: Thank you very much, Admiral.

Now, we will hear from Admiral Robinson with the U.S. Navy.

RDML ROBINSON: Thank you very much, Your Honor and thanks to the entire panel. I have had an opportunity to read some of the record from January 8th and what you are dealing with is amazingly complex and vexing and I know we are all on the same side.
Permit this old retired chaplain of 36 years' service to reflect, not simply to 
reprise what I said at the beginning of that 
January 8th meeting, but to reflect a bit on 
the remarks that were made in the afternoon 
session following our presentation. And I do 
so as an individual with a, I think, unique 
perspective as a chaplain not ever in the 
chain of command but yet part of the chain of 
command. I have been privy to the inner 
thinking of commanders. I have been, often, 
the first to hear of an incident because 
chaplains are first responders in many cases 
when they are trusted and respected. I have 
been the source of solace and strength, I 
hope, for some of them and occasionally 
witness to the inner struggles of perpetrators 
who have come for counseling. So, something 
of a unique perspective alongside the chain of 
command.

And I bring that panel, those 
thoughts to what was said, as I said following
our presentation. The people that you heard
from in the afternoon and the people you are
going to hear from later this day are among
the finest human beings and the most
distinguished commanders you will ever have an
opportunity to hear from. I stand in awe of
some of them. And to even be addressing you
knowing that they are doing so as well amazes
me. They are the senior commanders who get
it. They understand it.

And nothing I am about to say should
indicate that no senior commander, no senior
leader gets it and understands it. But they
have also lived for 30 or more years with the
chain of command being an article of faith.
As a chaplain, I know something about how
faith and articles of faith work. And it
becomes more than simply the party line. It
becomes a whole way of thinking and a
perspective that really governs the way you
see virtually every issue in your life. That
is what faith is at its best and, sometimes,
at its worst.

However, one sees that the chain of command is not the only -- or the convening authority of the chain of command is not the only tool in the commander's toolkit. I can still remember, vaguely, back when I was a junior officer and working with company commanders in the Marine Corps. Most of my service time was with Marines. And the company commanders never had convening authority but they were still held accountable and responsible for all aspects, everything that went on in their company. They could file charges. They could fill out a charge sheet. Somebody else decided what would happen to that charge sheet. They did, by the way, have Article 15 and frequently lieutenant colonels in command of battalions did not have, certainly they didn't have general courts-martial authority but they had many tools and they were responsible for maintaining the good order and discipline, the
command climate, mission accomplishment, and
all the other aspects that we hold the command
responsible for, without the specific
convening authority, which is what we are
discussing today is convening authority.

And I would argue that convening
authority is not a necessary, especially when
we are dealing with non-military crimes, with
crimes that are felonies as part of the larger
legal system outside the military, that
convening authority is not a necessary
element, although I understand the folks you
are hearing from have operated all their life
with it and it is very hard to break out of
that thinking pattern.

I can also say that since it is a
matter of something more than the party line,
it is a matter of faith, that commanders must
have all of this authority, it becomes
difficult -- look, it becomes difficult for me
to break with the predominant thinking of the
senior leaders that I have marveled at over
the years. And that is a very difficult thing to do and it is difficult especially to do so in public.

So, speaking to other folks senior to myself, I know that there are many who are on the fence. They are ambivalent. They are not ready to break with the party line and not ready to do so publicly. And we have heard just a moment ago General Foote say that she does so both reluctantly but feeling compelled by the circumstances to do so. And that is very difficult for any of us.

I will remind us that just a couple of years ago several of the most senior members of leadership in the military counseled Congress in public hearings that repeal of Don't Ask, Don't Tell would be a significant burden for their branch of the Armed Forces. I say it that way because not every chief of staff or senior said that but several did that it would be a significant burden and it would be a disturbance in the
force but their branch would do it if ordered.

Yet when it actually came to it, Don't Ask, Don't Tell was repealed, did anybody notice? Life went on. And even in those branches of the service that thought they were going to be most challenged, it was like watching a predicted train wreck that all of a sudden didn't have any noise, no sound, it was a silent movie. It just didn't happen.

So, I counsel us that breaking out of what we have always known is frightening and difficult but, perhaps, necessary.

The sense was made in the afternoon session last time that we ought to wait for the changes that have been made over the last several years to take effect so that we can then calibrate and not to pile on when we don't know what the results of the most recent change is. That would be fine in a kind of academic setting but where thousands of lives are being impacted each year, thousands, tens of thousands of lives are being terribly
horribly impacted, I think it is time to
fire for effect.

We have heard that Tailhook and
Aberdeen and the litany is endless. We could
talk for hours about the number of times we
have been told this was changing. It is time
to throw, I believe that it is time to throw
everything we have at it, as reluctantly as I
am to come to that decision, which I called
the draconian response in my testimony two
weeks ago.

One that I came to, only out of the
same sense of despair that must influence, you
will recall that I referenced Charlie Brown
and Lucy and the football. And eventually,
you have got to say to Lucy, no, somebody is
going to hold the football and it is time for
somebody else to hold the football and I
believe on more than just sexual assault
cases, but on all felonies that would be
civilian crimes and so that we are not
creating courts unique to this or a court
structure unique to this issue but allowing a
wider range into those, all civilian felony
levels that are not military crimes.

      Finally, let me say that chaplains,
at our best, serve each our God but care for
the humanity of the servicemembers that we
encounter. That is our ultimate and most
precious charge, the humanity of the people we
serve with and we serve them in the most
inhumane of all possible circumstances, the
demonic domain of war.

      Just after the inhumanity of war, I
place the inhumanity of sexual abuse. It
dehumanizes all who are engaged or touched by
it. And we can't put an end to war. We have
tried. It has been part of the prophetic
message from Isaiah and Amos till today. But
we might be able to put an end to sexual abuse
and harassment of our men and women in the
Armed Forces and I hope you will succeed in
making that dream real. Thank you.

      JUDGE JONES: Thank you very much.
Captain Manning, U.S. Navy.

CAPT MANNING: Thank you, Your Honor.

Good morning and thank you for the opportunity to participate in this discussion.

My name is Lory Manning. I am a retired Navy captain and for the past 15 years, I have been Director of the Women in the Military Project at the Women's Research and Education Institute, where I am now a senior fellow.

And I would like to report that since our last gathering earlier this month, I have also acquired another senior fellow hat. I am also now Senior Policy Fellow at the Service Women's Action Network.

Before that when I was an O-5, a Navy commander, I served as Commanding Officer, Naval Telecommunications Station, Diego Garcia, in the British Indian Ocean territory, which had a 24/7 mission and a crew of 350 sailors and four soldiers. I won't explain why I had four soldiers but I did.
I had non-judicial punishment authority and convening authority for summary and special courts-martial. The Commanding Officer, Naval Support Activity, Diego Garcia, a senior Navy captain, held the general court-martial authority for the island's permanent party personnel.

So, I have first-hand understanding and experience of the authority a commander needs to execute the full responsibilities he or she has for maintaining good order and discipline, while meeting a demanding command mission.

This fall, like I think all of my fellow military people who have been convening authorities, I spent a long time thinking about the Military Justice Improvement Act and I came to the conclusion that I needed to support it and I wrote a letter to Senator Gillibrand telling her that I supported that Military Justice Improvement Act. Here is why.
First, the Military Justice Improvement Act does not impinge on or in any way diminish a commander's responsibility for good order and discipline or the means and authority a commander has to carry out that responsibility. It keeps non-judicial punishment and convening authority for summary and special court-martial-level crimes in the commander's hands and general court-martial convening authority for felony level, military crimes, such as desertion or mutiny all in the chain of command.

I am convinced that under the provisions of the Military Justice Improvement Act the commander retains all the tools he or she needs to execute his full responsibilities for the command's good order and discipline. What the Military Justice Improvement Act does is restructure the commander's role in the handling of non-military-specific felonies by placing three decisions requiring legal expertise that are today completely in the
commander's hands with little to no legal training into the hands of professional military lawyers.

These decisions are: 1) whether or not to convene a general court-martial for a felony crime; 2) the selection of the jurors, if any; and 3) the authority as first reviewer, post-court-martial to unilaterally overturn a conviction or reduce or eliminate punishment.

This restructuring in no way diminishes the commander's authority or his or her responsibilities for good order and discipline. I am repeating that like a broken record because I keep hearing in media reports at least that it does. I just don't see how it does.

When 90 percent of the men and women who are sexually assaulted in the military won't report the crime because they are convinced that not only will justice not be done but also that they will face serious
retaliation, the chain of command, and the
military justice system are broken, badly
broken.

We have been tinkering around the
edges for at least the past 22 years, since
1992's Tailhook scandal and it has gotten no
better. In just this past week, I have seen
media reports stating that neither those who
have been sexually assaulted nor, I might add,
those who have been accused of sexually
assaulting others are confident the system, as
is, can render justice. Their unease rests on
the unilateral role of the commander to
determine if there will be court-martial, to
select the juries, and to overturn
convictions. And we know commanders do that.
It has been in the news.

The Military Justice Improvement Act
has the best chance, I think, of restoring the
confidence of our troops in the military's
justice system, while keeping the authority
and the tools for maintaining good order and
justice and discipline in the commander's
hands.

So, I become more convinced every
time I think about it that this is the only
way we can go. Thank you.

JUDGE JONES: Thank you very much,
Captain.

Colonel McHale, are you on the
telephone?

COL MCRALE: I am, Judge, and good
morning to you and to the members of the
panel.

JUDGE JONES: Good morning. Please
go ahead with your remarks.

COL McHALE: Thank you, Judge. As
a former Congressman, member of the House
Armed Services Committee, Defense Department
official and Marine, my involvement with our
country's military spans almost 42 years. I
have commanded three platoons, a rifle
company, an infantry regiment, and for more
than a year was the Assistant Division
Commander of the Fourth Marine Division.

I am a former Board Member of the Naval Academy, a former Board Member at the Naval War College, and I currently serve as an adjunct professor at the Army War College.

My words cannot convey the respect and admiration I have for our men and women in uniform. Having served in the Marine Corps for over 33 years, and having served as Assistant Secretary of Defense for six more, I support Senator Gillibrand's initiative and here are my reasons.

First and foremost, an effective commander needs to focus his or her attention on the warfighting responsibilities of the command. Our commanders are superbly trained and carefully chosen to fulfill this warfighting duty. By contrast, commanders are rarely trained or prepared to exercise informed judgment regarding the weight of evidence in pending criminal matters. They are trained to prepare their troops for
The Gillibrand legislation will allow commanders to be combat leaders, while permitting military lawyers to weigh questions of evidence and potential criminality. The second issue involves due process. A good commander develops close personal and professional relationships with members of the command. For this reason, when two members of the command are placed in an adversarial relationship, accused and accuser, it is very difficult for the commander to be truly impartial. Yes, a strong and worthy commander can and should exercise objective judgment under these circumstances but commanders are human beings and there will always-lingering doubts as to the commander's impartiality regarding well-known subordinates.

And finally what I consider to be the show stopper, entrusting a commander with a decision to prosecute raises an inherent
conflict of interest. Commanders are rightly held accountable for their command climate. In that context, each court-martial referral may be seen by some as proof of poor command climate, potentially affecting a commander's own career and, thereby, deterring justified criminal referrals.

In sharp contrast, some commanders may be tempted to pursue unwarranted prosecutions by the accused to quickly distance themselves in the command from notorious criminal allegations. For example, to ensure prompt punishment of the accused Marines, an angry regimental commander during the Gulf War ordered me to complete a very complex criminal investigation within 24 hours. In either case, too soft or too lenient, the commander's decision is potentially tainted by a lack of impartiality and perhaps or even likely, self-interest.

Members of the panel, you are grappling with an incredibly important issue
of military justice. I thank you for this opportunity to present my thoughts.

JUDGE JONES: All right, thank you very much, Colonel McHale.

Our last panelist is Ms. Denise Krepp, who is a former U.S. Coast Guard JAG and former Chief Counsel for the U.S. Maritime Administration.

Ms. Krepp.

MS. KREPP: Thank you for inviting me to testify today. And thank you for having this meeting in public. It is my hope that all future panel meetings and subpanel meetings are also in public because this is a very important topic.

After the last hearing, I received a hate email. I received an email from an individual who told me that I was unpatriotic because I testified. I was flabbergasted.

I am a Coast Guard Vet. I am married to a Navy Vet. I am the daughter of two Army Vets. I am the granddaughter, I am
the niece of veterans. And to be told that I
was unpatriotic to talk about this issue was
-- it was sad and it was troubling. And it
was troubling because this is not something
that people should be hiding.

You know, as Chief Counsel at the
Maritime Administration, we faced a lot of
problems. Chief Counsel at the Maritime
Administration, I was responsible for the U.S.
Merchant Marine Academy. It is the fifth
military institution. Its graduates have a
military requirement. They either go on
active duty or they go in the reserves but
they do have a military requirement.

And the girls at our academy in 2009
and 2010 didn't trust the senior leadership.
And that is reflected in a report that came
out in 2011. They came in first and second
years trusting and by the third year they
would only trust their priests and their
rabbis. There was no trust.

We had problems. I knew about these
problems because I, again, had jurisdiction over Kings Point. And a whistle-blower came forward in the summer of 2011. The whistle-blower made allegations that based off of the information that I knew what was going on up at Kings Point were likely to be true. I asked for an IG investigation because again, my girls and boys were going to be going into the military, an environment that I already knew.

Less than 24 hours after I asked for the IG investigation, I was put in a room on speaker phone and screamed at and told by Secretary Ray LaHood that I should not have asked for the IG investigation, that I needed more supervision and how dare I look into this issue. Well, I did it because there were problems. I did it because these children that were there could have been my daughters. And I was subsequently told by then Deputy Secretary Porcari a few months later that the Secretary had lost confidence in my ability to
be Chief Counsel. And that was directly related to the IG investigation that I had asked for.

I was very proud of what I did in 2011 and I would do the same thing in 2014 because the men and women who go into our academies have to go into an environment that they can trust. And not only do they have to go into that type of environment, they have to go into the military that they can trust.

And what was very disturbing to me this week was to read in the Washington Post, we have all kind of danced around it, but let me read about it. Let's just put it on the record, talking about General Schweitzer, who said, more than hour after having the first email and after he had read that with a sitting member of Congress who has a husband and a son, he said, and I quote, he apologized for his delay saying he had masturbated three times over the past two hours after the meeting with the Congressman, who, beforehand
had said, wow, she is smoking hot.

Wow. So, we are graduating students from academies in environments that aren't good. We are putting them into a military where you have colonels, because he was a colonel at the time, who were allowed to say these things on a government email but not only was he allowed to do that, the Army let him pin on General and then put him up for promotion. Not only did they put him up but the Senate confirmed him for two stars.

So, when you ask us whether or not there is a problem with the command climate and there is a problem with the current command, my answer is yes. I saw it first-hand at Kings Point and now I am reading about it in the Washington Post. That doesn't engender trust. That doesn't say to the victim or victims to come forward. What that says is that people who do this, they are going to be protected and we can't do that. We cannot do that. Too many of us served
honorably in the military. Too many of us
have a family tradition of serving honorably.
And this type of behavior is not honorable and
it cannot continue.

There was a blog that was written in
Esquire by a Lieutenant Colonel Bateman and he
talked about manning up. Well, I think it is
time we man up and we woman up and we say we
need to make some changes because as a mother,
I can't imagine the conversation that
Representative Ellmers had with her son.

Because you know her son's
classmates read the same thing we all did in
the Washington Post and to say you are going
to go to school the next day and you are going
to get some comments. I can't imagine that.
I just can't. I can't.

And the other thing I can't imagine
is opening up the Air Force Times and looking
at the Facebook account where the Air Force IG
lamented about the resigning of another
general. If you are a victim and you have
been assaulted and you read the Air Force
Times and you look and see that post that was
by the IG, do you think you are going to trust
them? You are not going to trust them. We
have to change the culture. We have to change
the structure.

And we have to open cases that have
been closed, like LaVena Johnson's. The fact
that the military made her parents FOIA her
records so they could see how she died. It
wasn't suicide but you tell her parents they
have to FOIA. Again, if something happened to
my daughters and I was told I had to FOIA
them, FOIA the records, I can't imagine that.
I would go crazy. But we are doing that to
parents and then we are making them read the
Washington Post.

We have to change the system to
again focus on the honor of the system. The
honor is at stake. And as the committee and
the group of individuals that we have here
have the ability to bring honor back. We are
losing it. We cannot tell our young people to
go in if there is no honor. And for that,
please, I beg of you, bring it back.

JUDGE JONES: Thank you very much,

Ms. Krepp.

All right, I am now going to open
the discussion up to the panel. Are there any
comments or questions that anyone would like
to make?

PROF. HILLMAN: Judge Jones, I have

a question.

JUDGE JONES: Yes, Professor

Hillman.

PROF. HILLMAN: Thank you. Thanks
to everybody here in person, for those of you
who returned to us from the previous
subcommittee meeting and on the phone as well.
I am grateful for your willingness to come
back and to step forward on this issue that we
are wrestling with.

I have a question for you about some
other proposals that have been floated. Your
conviction that this change should be made to
remove the convening authority from the
military justice process and shift to a
military prosecutor, are you convinced that
that goes far enough? Do you think that we
should take this out of the military justice
system altogether, given the problems that you
gestured at in terms of how the military has
handled this in the past?

Sure, General Foote?

BG FOOTE: In my impression or in my
feeling is that if we do it as proposed by
Senator Gillibrand, then we will create the
environment where a trained military lawyer
will be in charge of this particular or this
incident and I do not think we should remove
it further from the military system.

At this time, I don't think that
would be warranted. I think we have to give
this a chance. I think it has a great chance
of working when you create an independent
judge or assessor of the facts to make that
decision. I think it should stay within the military system.

PROF. HILLMAN: Thank you.

RDML ROBINSON: Professor, Dean Hillman, one of the recommendations of the panel that was -- the federal panel that was convened a few years ago and reported out in 2012 was that the command itself needed to hear the adjudication of cases. And it wasn't enough for them to be fairly adjudicated but the command needed to see that worked out in public. And I am afraid that if you took it entirely out of the military system, that would be missing.

I am also concerned, you know we have a sense of trial by a jury of one's peers. And I am not convinced that the civilian population can function as peers for those who are serving in the military. It is such a different environment. And to preserve the sense of fairness for the accused, I don't think -- we try the accused by folks, their
peers or senior. So that it becomes -- that
is one of the things that just amazes me about
the case a couple of years ago where a senior
commander overturned a conviction because the
conviction was by other people in the same
branch of service, serving at his, at the
perpetrator's or the accused levels or senior,
so that the sense of fair play is provided for
the perpetrator as well. I just don't think
that as much as I love the folks back in
Centreville, Massachusetts, I am not sure that
they are ready to try a case that occurs in
Balad because you haven't been there. You
haven't done that. You can't understand it.
Or aboard ship or in a hundred other
situations. I don't know if that is helpful.

JUDGE JONES: Thank you, Admiral.

CAPT MANNING: I think that it is at
the point where the legal expertise is
required to make a decision that the break
should come and that is at, I think, when you
are dealing with a felony crime that is not
I spent many, many years at remote communication stations all over the world and never once did I actually see of or have any of the people that were at the commands I was at have to go to a general court-martial. Most of the stuff is routine things, NJP or again, also not all that often a summary or a special court-martial can handle it. And it is like keeping the children's discipline in the family or allowing the watch shift to send somebody home because they don't feel good. It is at the point, to use the medical analogy where you need the doctor, the professional to diagnose appendicitis that you shift should he go home with the flu to let's have the medical people make the decision. And I think this is analogous. It is at the point where you really need the legal expertise to properly handle a crime that it should shift to the legal system.

JUDGE JONES: Thank you. Anyone
else on the telephone?

COL McHALE: Judge Jones, this is Paul McHale.

JUDGE JONES: Yes.

COL McHALE: I had a little difficulty hearing some of the earlier speakers. I think we have some challenges with the acoustics.

But in response to the questions that you raised, let me just say that I think the Gillibrand legislation would be an enormously important and, I believe effective step toward a correction of the past abuses that gave rise to your inquiry. So, I think taking the step of passing the Gillibrand legislation would move this in the right direction.

The Gillibrand proposal, as you know, goes beyond the crime of sexual assault. It involves a number of other serious crimes under the UCMJ. And I would first want to give the Gillibrand proposal the opportunity
for full implementation before I would look at removing other crimes, including sexual assault from the UCMJ.

    I think it is important to recognize that some of these other crimes could occur in a combat environment. A combat environment is inherently brutal. It is not the place to apply standards, due process, evidentiary collection and second guessing that would, inevitably, be the case if we subjected even lawful killings in a combat environment to oversight by civilian courts.

    And so I think we need to recognize the unique character and brutality of a combat environment and retain these prosecutions under the UCMJ but bring the objectivity to the convening authority by removing that duty and assignment from the commander and placing it in the hands of a judge advocate who understands the brutality of war but who also understands far better than a commander how to weigh evidence.
RDML EVANS: This is Rear Admiral Evans. I support what Colonel Coleman [sic] has just offered. And I think that with the changes that come from the recent passage of the NDAA as well as changes from just the last couple of years, the final piece of it, if the passage of the Gillibrand legislation when it happens, I think that that really, really shores up the UCMJ, the military justice system.

I have had the experience when I was the commanding officer in San Francisco of having to refer cases that involved civilians on Treasure Island to the civilian court system and it was a totally unsatisfactory experience. There was a lack of understanding of the context, environment. There was a lack of substantial interest in prosecuting the cases by the U.S. Attorney at the time in San Francisco.

So, I have had that experience which convinces me that with the recent changes,
with the additional change that this
legislation represents, it provides the best
opportunity for a military justice system that
really does support command requirements in
the mission accomplishment.

JUDGE JONES: Are there other
questions? Yes, Colonel Cook.

COL COOK: Yes, ma'am, thank you.

And thank you all again for coming here today.

I know this is difficult. You have all
served. You have all been in that environment
and we appreciate your continuing the passion
toward servicemembers and their well-being, as
we all are trying to do up here.

One of the -- I know you all support
Senator Gillibrand's proposal. And I guess
one of the questions I am going to ask you is
right now the way the system works, a
commander who also has the authority of being
a convening authority, has got the authority
to put it to court -- what we are talking
about here is not taking them out of command
but just taking away that court piece of what
they do.

We have heard testimony from a lot
of panels and a lot of people and the way it
works right now, our understanding is that the
commander who sends a case to like a general
court-martial, which is more than a year in
jail or an officer-type case, must do so with
the advice of a senior legal advisor, whoever
that staff judge advocate is in the field.

The testimony we have heard also
shows or indicates that those decisions are
made together and, in 99 percent of the cases,
based on the -- the last panel, if I read the
testimony that was provided back in January,
that the officers that were there couldn't
think of a case where they disagreed with
their senior lawyer weighing the evidence and
considering what came out at an Article 32
investigation, which is a pre-trial type
inquiry before any general court, that they
come to the conclusion together of whether it
should proceed for trial or not.

The proposal on the table takes that convening authority away from there and puts it in a judge advocate separate from the command back in the United States someplace, arguably, to make that same decision. Well, those decisions changed. If right now it is based on the evidence in a senior judge advocate's review in-theater with the commander's input, it is coming to one conclusion. I guess my concern is I am not sure that decision will change if it is based on the evidence put someplace else.

My bigger concern, having served in the military as well for almost 23 years and being a judge advocate in both Bosnia, Baghdad, my concern is not the command authority as much as the military justice effectiveness. Because when you do have that legal advisor helping that commander and a joint decision to understand everything that is there, the thing that can happen quickly is
you have access to the witnesses. If the
combat environment is at a stage where that
case can proceed in-theater, it does.

I can think of a case where we had
a new division rotate in, a servicemember
assaulted another servicemember by brandishing
a weapon that they are carrying all of a
sudden for the first time. That happened on
a Friday night. By Monday there was a judge
from Germany who flew into Bosnia that tried
the case and he left. Swift justice. The
defense waived all their timeliness and things
like that and the case was resolved and the
message that was sent to everybody else was
good order and discipline. That can happen
quickly in that type of procedure.

This proposal moves it to someplace
in the United States. And now somebody who
needs access to the witnesses, needs the
evidence, the delays in the effectiveness is
what my concerns become at that point and I am
not sure the decisions become any differently
since the judge advocate is such a key role as it is now.

So, I would appreciate your input or your insights into that particular piece.

CAPT MANNING: I would recommend to anybody on the panel who hasn't read it an article in Army Lawyer by Major Frank Rosenblatt called "Military Justice in a Deployed Environment." What he does is look at the statistics of what went on in Iraq and Afghanistan, vis-a-vis violations of the UCMJ in the first four or five years because that is what he could get the data for. What he found is most often, for some of the reasons you mentioned, witnesses, the perishability of evidence, nothing was done. Nothing. Because the commanders just didn't have the time, even locally, with the authority locally, to gather up the evidence. Witnesses came and went. So, for most of the things that happened in the first four or five years of a major crime nature, no action was taken. And when it was,
it was usually the witnesses and things were
sent back to the U.S., where it was actually
handled because they had the time to have a
nice, leisurely court-martial.

So, I don't know -- we haven't
really been holding general courts-martial in
Iraq and Afghanistan.

COL COOK: And one point I will let
you know on that one. There is also another
Army Lawyer article that responded to Major
Rosenblatt -- I think it was major at the
time.

CAPT MANNING: It is major.

COL COOK: Okay -- to Major
Rosenblatt showing how there are cases that
are there. And having served in Baghdad and
having served in Bosnia as the Staff Judge
Advocate for combat divisions, I know that
they do happen.

Again, you are right, though,
initially if the conditions don't allow it,
then that may not be the place for it and you
send it back to your rear detachment.

CAPT MANNING: And I would respond that he was looking at the first three to four years only. And you are correct, there have been courts-martial since then but the actual active combat in those first three or four years.

So, I think that is something we need to look at, whether we can actually have the military justice system as it functions today in an active combat.

COL COOK: And just one point to that. My own experience, when I was the Staff Judge Advocate for the First Cavalry Division, it was during the surge in Iraq, where we went there, we were increasing hostilities and we did try cases. And I am not disagreeing that change is needed. I am just asking would a change of just pulling that SJA's input into a commander as it is on the site and then putting in the rear, change the assessment of evidence? And I welcome the input.
CAPT MANNING: I would say one more thing to answer that point. When I was a commanding officer, we had no JAGs on Diego Garcia. The problem isn't that, for the most part, that the SJA and the convening authority probably do work well together but as it is today, the commanding authority does not have to take that lawyer advice and that is where I think the distrust comes in. So, I think we need to deal with that problem.

RDML ROBINSON: Can I suggest to you, Colonel, you will recall most -- I said in my earlier remarks, most commanders are beginning to get it. Some of them have always gotten it, understood the issue. And the fact that 99 percent of the time the JAG's recommendation is taken by the commander is welcome but not surprising news to me. My concern is that we permit the other one percent to exist and exist in some of the most flagrant situations and there is no structural response to it.
And I won't go through all of the cases but the Army is coming now to understand, as other branches have already understood and will understand, that there is a level of toxicity in the leadership for some leaders, not for all. The men and women I have served with at senior level are, not only are they the people that would take me to war but I would go to war willingly with them. I trusted them with my very life and the life of the people I work with. But there are exceptions. We have all seen exceptions. And the fact that those exceptions are tolerated by the system --

Now, I would hope that removing this authority for convening the general court-martial from the chain of command wouldn't necessarily send it back to CONUS on all occasions, just as you were able with Baghdad to convene court-martial. What would make this different?

I don't know how it would be
implemented. Thankfully, as a chaplain, I
don't have to worry about that. You do as a
JAG. But our military is capable of amazing
thinking and ingenuity. And to find some way
to do this proximate to where it occurred is
important.

By the way, that also speaks to the
earlier question about taking it out of the
military structure entirely. How do you
investigate? How do you send a civilian
investigator?

But back to what I had said in
response to that as well, the command needs to
see the adjudication and needs to see the
result. So, I would hope that Senator
Gillibrand's, I think, modest recommendation
would be accepted and then implemented without
it being sent back into some black hole back
in the United States where no one would ever
know what really happened. I don't think that
is fair to the accused or to the survivors.

MS. KREPP: And Colonel, if I can
add, in my role at the Maritime Administration, I wore many hats. Some days I was the Chief Counsel. Some days I was the Deputy Administrator. Some days I was the Administrator. And depending on what day, really, was how I thought. I mean, if I was the Chief Counsel, then I was advising somebody on legal issues and that other person had the final say.

When I was the Deputy or I was the Acting, I took my hat off and I had somebody else providing me with legal information. And that legal information was part of many other considerations that I took into account.

So by leaving it with the lawyers, you leave it with the evidence and you take out other factors that, quite frankly, shouldn't be considered when you are dealing with this type of issue. There shouldn't be political issues. There shouldn't be I know his family; I know her family. Those types of issues should be taken out. Leave it with the
evidence.

BG DUNN: But I think we have also had a considerable amount of testimony in front of this panel about just the reverse, where a lawyer may look at the evidence and say I have got my won/lost record to protect and I am not sure how this is going to go. And a commander has said to the lawyer, no, this case needs to go to trial. It is important. It has an impact on the unit. It has an impact on good order and discipline. That case needs to go to court, whether ultimately there is a conviction or not, it needs to go to court because it is a critical case and it has a critical impact on good order and discipline. It can go both ways.

RDML ROBINSON: General, I would wonder how many of that second genre of cases where the commander said no, it has got to go to court, had to do with this issue. Because I think this issue may be the blind side of the difficult vision for many of the
commanders.

And I have seen commanders who have been put on other issues a high level of moral rectitude appropriately wanting people tried and appropriately convicted who just didn't get this issue. Which, by the way, they might have gotten it as it applies to the E-3 and E-4 to the very young people in the community but not understood it as it applied to predators at the O-4 or O-5 predator level, which were more people they knew better and were more collegial with.

So yes, it cuts both ways but take your best shot after 50 years. The other way didn't work.

BG DUNN: You know I think, too, that everybody who serves has their own experiences with that. And certainly, I spent 28 years and five months in the legal field and there were many cases like that of all sorts and certainly, of sexual assault where commanders were -- I mean a good commander is
a good commander and is committed to good
order and discipline in their unit and is,
sometimes, more forceful in terms of pushing
cases through than a lawyer might be when the
evidence is one of these classic cases that we
have, like sexual assault where you only have
two witnesses.

RDML ROBINSON: Which is why I was
so reluctant. A good commander is a good
commander and you are hearing from great, not
just good but great. I mean these are the
people that made three and four stars. This
is a very rarified group you are hearing from
and they are not just good commanders. They
are great commanders.

So, how about all the ones that
didn't reach that level and the fact that the
system didn't do anything about all the
others? I know it takes a long time to turn
an aircraft carrier. Not all my days were
with the Marines. But you don't need the
entire ocean to do it either.
JUDGE JONES: Can I reorient this a little bit and ask why do we have, I am assuming from your support of the Gillibrand bill, so much confidence in the results that we are going to get from the O-6s, who are JAG officers, who will become the body of convening authorities who will be separate from the chain of command?

We have discussed it and we know we have JAG officers now who are the staff officer and explain to the commander what the legal issues are with respect to probable cause, with respect to jurisdiction, et cetera and writes an actual report. And then we have the commander, the convening authority, I should say, making the decision.

What do we think? Do we think that this body of new convening authorities are going to be making different decisions? Are they going to have all the information they actually need to make a decision based on the evidence, if they are separated from the
location and the command that is involved? I just wonder where does the confidence come from that this is going to be a better way to make these decisions?

RDML ROBINSON: Your Honor, I am an old guy, so I come from the --

JUDGE JONES: I'm an old girl.

(Laughter.)

RDML ROBINSON: This isn't the confessional, ma'am.

(Laughter.)

RDML ROBINSON: I come from the Powell era where you go into a situation with overwhelming force, not with the minimal required. I mean that was part of the Powell Doctrine is that you go into a situation with overwhelming force. And part of what I said two weeks ago was we need something dramatic. We need something that will get the attention of the system at large. This is a dramatic kind of change. It is perfect? Probably not. But nothing has shaken the system in the 50
years that this has gone on. We have heard
time and again good officers, great officers.

And by the way, I said last time, I
believe the chain of command, if it really had
understood this, would have been and should be
the most effective means for change, that it
can exercise the kind of control no civilian
can imagine within the context of that command
but they haven't gotten it.

And so, this is almost the wakeup
call theory that I am giving you that they
need to get it. And I had said for five years
that it should be implemented with the ability
to test the waters to see how it is going, but
there is no way to know. As I said before,
you take your best shot. Our best shots until
now haven't worked. Let's try a different
technique. And it is frustration we hear.
That is reticence. That is what General Foote
called reluctance in being compelled. It is
just not working the way it is now.

BG FOOTE: Judge Jones?
JUDGE JONES: Yes?

BG FOOTE: When I look at it from my point of view, spending over 50 years of my life within the profession actually on active duty and then 23 in retirement, and almost every week having these issues on my plate before some study group, some audience, some task force, to talk about, and going back year after year, after year, after year and the same problems are there and they haven't improved. Since the senior review panel in 1996-97, there have been 17 or 18 other studies, task force, panels, looking at the same thing and nothing happens.

So to me, one of the great, great virtues of Senator Gillibrand's legislation is that at least we think objectivity at a level not seen before will be introduced in the process by taking out of the chain of command the responsibility for adjudication. We get new eyes, a new approach to look at this. But I also would expect these individuals, these
lawyers to be highly skilled, highly
experienced in handling such cases.

        RDML ROBINSON: Specifically trained

        in that area.

        BG FOOTE: Specifically trained in

        that area. Give it a chance. If this doesn't
work, then back to the drawing board again.

But at least we will have introduced new
thought, new action, a new direction because
the old direction is a road that leads to
nowhere.

        MS. KREPP: Ma'am, a lot of this
goes back to honor. You know I was amazed by
the response that my friends in the veteran
community had towards this article. They were
appalled. And the reason they were appalled
is it was because people were calling them up
and saying, so did you sexually harass
somebody? Did you know somebody who did this?

There is a perception out there right now that
the military is out of control. This is a
military that we all served in honorably. And
to continue to allow this perception to persist, it is not good. It is just -- you just can't do this. You are not going to attract the best and the brightest if people believe that if you go into the military that you are going to be sexually assaulted and when you are sexually assaulted, nothing is going to happen.

The system isn't working. We have got to fix it. Again, we have got to focus on the honor of the institution and the honor of the men and the women that are in it.

BG FOOTE: Can I give you one small example of a case that was miserably mishandled?

Back when I was a commander at the WAC Detachment at Fort Belvoir, I had assigned to my unit a chaplain, who was really the chaplain for the hospital, to be the man who my troops would go to if they wanted to discuss matters of religion, the heart, problems, whatever. And I had him as my
battalion chaplain.

I had several young women with emotional problems, problems of the heart, who would need to see a chaplain. I referred them over to him, one by one. And that went on for about two months.

Finally, a young woman who had been to see this chaplain came with her fiancé to see me during commander's open house to tell me that as soon as she went in the chaplain's office, he shut the door and began fondling her, kissing her, and saying if you report this, no one will believe you anyhow because I am a major and you are a private. And that this was going on and that I was part of the group that sent somebody over to deal with a predator such as this just drove me crazy.

I went right to the brigade chaplain, reported it. He went to the chief of chaplains to report it. Overnight, this chaplain was moved. Nothing happened within the command. He showed up later in Europe
doing the very same thing and finally, he got
nailed there. But the problem was passed on
with no action whatsoever.

So that really puts a taste in your
mind about the efficiency and effectiveness of
the system that knows what to do but doesn't
do because it doesn't want to embarrass
itself. That is wrong. We have got to have
objectivity.

RDML EVANS: Your Honor, may I add
a comment as well, please?

JUDGE JONES: Sure. I'm sorry, who
is speaking? I just wanted you to identify
yourself. Sorry.

RDML EVANS: I'm sorry. It is Rear
Admiral Evans.

JUDGE JONES: Thank you.

RDML EVANS: I had great confidence
in the senior members of the Judge Advocate
General Corps, based on my experience working
with them on various issues when I was in
command. And I think that the advice that I
received from them was extremely helpful in
making some of the most challenging decisions
I had to make.

The reason, though, that I support
Senator Gillibrand's legislation is because I
think it addresses more than the other changes
that have been made, that inherent conflict of
interest issue.

I can recall having an allegation
come to me about a very senior member of my
command by quite a junior member. And it was
one of the most gut-wrenching situations that
I ever encountered because I had to evaluate,
to make that choice between whether this
senior person could possibly have behaved in
the way that seemed so totally
uncharacteristic and this allegation by a very
junior member of the command whose record was,
frankly, a little bit questionable. That was
an experience for me as I had to try to pull
out the pieces that were fact-based versus the
personality circumstances, if you will.
And so I have always thought that one of the key reasons why, and I understand from the surveys, the key reasons why people, men and women, don't report is because they believe that somebody else will be believed before they will be believed, despite whatever evidence is presented. And so for that reason, I think that a piece of shoring up the trust and confidence in the military justice system is to reduce, eliminate that specific conflict of interest.

I don't think those young sailors that were in my command had any sense of the fact that a judge advocate general had advised me in all of these things. That is not in their sort of consciousness, if you will.

I think that the legislation gives us an opportunity to say that that commander is not going to be able to make decisions based on the personalities, that it will be fact-based and evidence-based. And I think it also is important from the perspective of the
victim. How many times have we heard people say well, the only reason that I would have prosecuted was because of the PC environment, because the commanders had to do it?

So, I have heard from the alleged victims -- I mean the alleged perpetrators of various crimes that they, too, were victims of something other than a fact-based decision process.

And so I think it is really important to put this piece at this time into the puzzle of why the military justice system has not been as effective as we would have hoped over the past years.

Thank you.

COL McHALE: Judge Jones?

JUDGE JONES: Yes, go ahead.

COL McHALE: This is Paul McHale. If I could just make a brief comment.

JUDGE JONES: Sure.

COL McHALE: My confidence in the Gillibrand proposal is the result of my belief
that we are much more likely to get an
objective and professional assessment of the
evidence from the judge advocate, as opposed
to the commander. And I think it is important
to recognize that a commander has enormous
responsibility to the command, going well
beyond issues of due process to the accused in
a particular case.

Once the allegations are on the
front page of the Army Times or the Navy
Times, the New York Times or the Washington
Post, that commander is going to be looking
not only at the guilt or innocence
potentially of the accused but the overall
impact of the allegations upon the command
climate for which he or she is responsible.

And I hadn't thought about this
earlier but in all sincerity, I recommend the
re-reading of Herman Melville's Billy Budd.

The commander is going to be worried
about the unit. A question was raised earlier
about a judge advocate who might be reticent
about taking a case on to trial but a commander who feels that there is a need to take the case to trial. Well, that need may be derived from concerns on the part of the commander that go well beyond the evidence, the guilt or innocence of the accused. And in my judgment, no case should go forward to trial because of those other considerations, in the absence of evidence of criminality.

And so I think that the commander should worry about the unit. The command climate, the leadership tools available to him or to her in preparing for the warfighting mission of the command. But you are much more likely to get an objective assessment walking away from the precedent of Billy Budd by having a staff judge advocate at some distance from the surrounding issues, looking solely at the quantum of evidence and making a determination from a professional standpoint as to whether or not that evidence justifies the prosecution.
JUDGE JONES: Yes?

MAJ GEN RAINVILLE: Your Honor, this is General Rainville.

JUDGE JONES: All right, General, go ahead.

MAJ GEN RAINVILLE: Thank you. I'm sorry, it is difficult for me to hear who is talking other than you and those on the phone. I just wanted to add just a couple of comments to the last few speakers.

And I think it is good, as was said earlier, to remind ourselves that most commanders have a good relationship with their judge advocate. Most commanders really try their best to do it right and to weigh evidence and make the best calls they can.

But we are here today because there are enough that are having trouble with that for whatever reason. And I really think the Gillibrand changes are necessary from a commander's point of view, not some attorney's or anyone else's, but from a commander's point
of view, that they are necessary to do a couple of important things. And one is to take out of the equation those inherent preexisting relationships that commanders have and that their staff judge advocates would have either with each other or with those in their command that are the accused or the accusers and allow the investigation to provide evidence in fact to an independent military counsel and I think the military counsel is important.

The other piece of this is important and that is that to supporting due process and not only in fact but the perception of due process among all the men and women in uniform. We are dealing with those who have reported and we are talking about the evidence and who is best to weigh evidence and who should decide it should go forward. But what about all of those who aren't reporting because they believe that they won't have due process, that they won't be listened to?
So, I think that the change, the concrete change to take it out of the chain of command addresses all of these issues. And it leaves it with the military system, where it belongs but it puts it in a system that should be in fact and will be received as fair in providing due process.

And I don't assume in any way that the senior judge advocates that will be hearing this would have to be in the United States or in any particular physical location to be able to do their job. And I also wouldn't assume that the commander in the chain would not have any input. I would hope that a good system would include input from those commanders so that they can provide information on unique circumstances or context that is important for a good decision whether to go forward or not.

So, I would just say that while it is good to realize we have a lot of great commanders doing the right thing, we are
really here today because we have some that
aren't and because of a strong perception
among our men and women that there isn't due
process and there might be retaliation and
that would make them hesitate to report a
serious crime and to have that taken care of.
And I think that our military readiness, our
reputation as a profession, really is at
stake.

Thank you.

JUDGE JONES: Thank you. Yes,
Admiral.

RDML ROBINSON: General Foote, by
raising the issue of the specific chaplain,
that reminded me of something I have long
since wanted to forget that describes how it
is that the non-objective, the emotional gets
involved.

I was at flag rank at a time when an
individual, an O-6, chaplain -- an O-5
chaplain -- I'm sorry -- was discovered or
charged with being a predator and it had been,
it seemed -- he is now convicted -- so we can
say has been convicted of having been a
predator for many years.

But in the run up to the actual
trial and during the investigative process,
the emotions were wild on both sides. On the
one side saying, that is a chaplain, the one
person who should never be doing that, the one
person that should always -- everybody should
know better but I am just characterizing the
kind of responses. This guy has got to be
made an example of. I heard that.

On the other side, it was, no, he's
a good guy. This can't be right. I can't
believe it. He has been too good to my
family.

The range of emotion was so wide and
so disparate, and so dependent on prior either
relationships with the chaplain or with
preconceptions of the role of chaplains and
the like, that it was really disparaging to me
that we couldn't bring in some more rational
judgment. Eventually that was brought in. Eventually that played out appropriately. There is no playing out well in this kind of a situation. And the man is currently serving time in a federal penitentiary. And that was finally reached.

But the sense of emotion is so overwhelming for people, not just with chaplains but in other cases. We saw this in the case in Italy. He is just a good guy. He is a great pilot. We really need him in the command because I know him and I know his family. That just doesn't work or it hasn't worked. It hasn't always worked. Let me keep couching that.

JUDGE JONES: Any other comments or questions?

MS. KREPP: Judge, if I may?

JUDGE JONES: Yes.

MS. KREPP: I would just like to remind people that as lawyers, we are held to a higher responsibility.
JUDGE JONES: I'm sorry, I can't hear you, Ms. Krepp.

MS. KREPP: As lawyers, we are held to a higher duty. Not only are we responsible as military officers but we also have our bar license at risk. And that, I believe, adds an extra layer and provides us with I wouldn't say security but it helps ensure that we take the right steps. Because again, we are taught as 1Ls, 2Ls, and 3Ls to follow the law. We are also taught that if we don't, and if we have problems and we let things slide, that we can be brought up on charges ourselves. We can be disbarred if we do not act ethically. That is not the same standard at times that has been put on commanding officers because most of the times they are not lawyers. But as lawyers, we have that responsibility.

Not only do we have that responsibility but I would like to go back to one of the issues dealing with evidence and how can we assure if the lawyers are in
charge, that they will get the evidence.

Well, if you are in charge, you get that
information. That is the CO that says this is
the lawyer. He is in charge. Give him the
evidence. Now, if you are about to tell me
that a commanding officer can't ensure that
the lawyer can get evidence in that
circumstance, then how are we going to be sure
that the lawyer is currently getting all the
evidence that he or she needs right now?

JUDGE JONES: Thank you very much.

Unless there are any further comments or
questions, then I think we can adjourn or take
a five-minute break until the next panel.

(Whereupon, the above-entitled
matter went off the record at 10:29
a.m. and resumed at 10:41 a.m.)

JUDGE JONES: We are now going to
move to the second panel of the morning, which
are the perspectives of retired senior
commanders, additional senior commanders from
those we just heard.
And I would like to begin with

General Dunwoody, U.S. Army.

GEN DUNWOODY: Good morning, Madam Chair and distinguished panel members. I want
to thank all of you first for committing your
time and energy dealing with the business at
hand.

I retired from the Army in October
of 2012, after serving nearly 38 years; 16 of
those years as a commander at every level in
our Army. I have seen a lot. I have learned
a great deal. And I hope that my thoughts
merit your consideration as you finalize your
recommendations.

I know my comments today will put me
at odds with many of my friends and many folks
whose opinion I respect and admire but I am
here today because I have spent my life trying
to do the right thing for the right reason;
not the popular thing, the right thing.

I have also spent a career in the
Army with outstanding military leaders who
also spent their lives trying to do the right thing for the right reasons. Leaders who lived the Warrior Ethos, lived the Soldier's Creed, and leaders who believed in this profession of selfless service.

It is very disturbing to read the headlines and the allegations about leaders in our profession who have not lived up to the standards in the ethos of the profession. But what you don't read about because it is not newsworthy, is about the thousands of quiet professionals who live the Warrior Ethos every day and make incredible sacrifices every day because they believe in what they are doing and they believe in this institution.

I came into the Army right after the end of the Vietnam War. Our country was war weary and our Congress was looking for a peace dividend. So resources for our military training were seriously lacking. There were significant drug and alcohol problems, racial tensions. Running high in misconduct was a
serious problem. We still had draftees who hated being in the Army and we had under-educated non-high school graduates who wouldn't qualify for service today.

Looking back, that post-Vietnam Army, we now refer to it as the broken or hollow Army. It wasn't a fun time to start an Army career but it ended up being an exciting and professionally rewarding experience.

We transitioned to an all-voluntary force when people said we couldn't. We transitioned women into the regular Army when people said we shouldn't. And we rebuilt our Army almost from ashes through hard work and complete belief and trust in the chain of command. We didn't wring our hands. We rolled up our sleeves and we got after it.

I grew up in an Army where the chain of command was a trusted chain of command. The chain of command was responsible for creating positive command climate, providing good order and discipline for all men and
women and their families and rewarding good 
behavior while disciplining bad behavior. And 
I believe only the chain of command can fix 
this problem. Only the chain of command can 
lead us out of this problem and restore faith. 

In the Army, we expect commanders to 
be accountable for doing what is right. I 
have seen a list of reasons why commanders 
need to be taken out of the loop. They can't 
be fair. They can't see through conflict of 
interest. They are not technically competent 
in legal matters. These commanders, men and 
women, are hand-picked or board-selected 
because they are stand-out leaders. 

I don't know how we can expect and 
trust our commanders to train our sons and 
daughters to fight and win our nation's war 
and yet not trust them to provide and 
establish a command climate that provides each 
and every soldier a safe working environment 
when we are soldiers, men and women, work 
together as comrades.
During my almost four decades of service in the Army, I have seen the military overcome many adversities but it has never been done by divesting its leadership responsibilities. It is done by holding the leadership accountable. Let's hold the commanders responsible to lead us out of this crisis.

The easier thing to do is take them out of the food chain. What will that do, cover up weaker leaders who can't make the tough choices? I don't believe taking the commander out of the loop will do anything except create greater distrust between the leader and the led.

The great work done by Senator Gillibrand and Senator McCaskill, as evidenced by the over 30 additions to the recent NDAA legislation governing sexual assault, is historic in and of itself. The checks and balances these additions bring will certainly eliminate a lot of the challenges we are
facing today.

   I know the Army is fully supportive
of these initiatives and, quite frankly, was
included in the drafting of this legislation.
I truly believe our leaders get it and I think
we are already seeing the positive effects.

   I fully support Senator McCaskill's
position on this issue. We can either trust
our commanders and leaders to do the right
thing or not. Like most societal issues,
sexual assault is more than a military issue.
It is an issue on our campuses as well as in
our business and our industries.

   I urge you to let the military chain
of command lead us out of this crisis, as they
have every other crisis throughout history.

   Thank you. I look forward to your
questions.

JUDGE JONES: Thank you, General.

General Brady, --

GEN BRADY: Yes, ma'am.

GEN BRADY: Thank you. First of all, thank you very much for this opportunity. Thank you, even more importantly, for your focus on this issue.

First of all, I would certainly echo all of the comments that General Ann Dunwoody just gave you, a colleague that I was proud to serve with a number of years ago. She is much younger than I but I retired in 2011 as the Commander, U.S. Air Forces Europe, after 41 years.

Like Ann, I served actually a little before she did, I served in Vietnam and I saw what actually were race riots in our Air Force in a couple of places. I saw problems that we had dealing with coming to grips with the realities of race, gender equality, but we worked ourselves through that and we educated ourselves along the way a great deal.

I have commanded at group wing and major command level in both the Air Force and the Joint arena and have seen a lot in those
years.

As the Director of Personnel for the U.S. Air Force in the 2004 to 2008 period, we went through yet another what seemed to be a surge in sexual assault activity and I was responsible for the Air Force's response to that. And that is when we first began the training that I am sure is much improved now from what we did. And we trained SARC's, a sexual response -- Sexual Assault Response Coordinators and began that.

It was a challenging time and I can remember very specifically briefing our Corona, which is the Air Force Senior Leadership Council, as a three-star, briefed all the four-stars. And it was, as you might expect, a room of white males, 55-year-old white males.

I showed a film that we had made that depicted a sexual assault. And I thought I was going to get thrown out of the room. There were those who didn't believe it. There
were those who could not believe that airmen would do that sort of thing and didn't like the idea of seeing an airman in uniform doing that sort of thing.

I know we have come a long way just in my personal experience with that.

I served as a senior member of a court-martial panel who took a very senior colonel to court on a sexual assault case in about 1995. In 1995, we really didn't know what sexual assault was. We ended up convicting this individual, probably it was the right decision probably for maybe for the wrong reason because we didn't really know what sexual assault was. I know now that it was sexual assault. We did convict and we did send him to jail. Because inherently, we knew something really bad had happened and the evidence supported that.

We have made great progress in this.

Have we made enough? No. We are appalled by, as you are appalled by, as Senator Gillibrand,
and Senator McCaskill, and all decent people
are appalled by this in our force. The
question is, what is the solution to it.

Command authority and the command
environment is a difficult thing, sometimes,
to describe. Good order and discipline is
very difficult to describe and particularly so
to those who have, perhaps, not had the
opportunity to be a part of it.

But I want to make just two
comments. I listened to the former panel a
few moments ago and there were two things that
were said that struck me. First of all,
someone said we are here today because a few
commanders don't do the right thing. And that
is absolutely true. There are a few. But I
would also say there is nothing, there is no
process in our society that is easier to
execute than removing a commander. That
person's superior only has to say: I have lost
confidence in your ability to command this
organization. That's it. That is 100 percent
of the due process. And we need to exercise
that where it is appropriate.

Another comment that is made
sometimes is that this is such an emotionally
charged event when this happens -- and it is,
trust me -- particularly when you have a
formerly trusted individual who is accused of
this sort of thing. It is a very emotional
thing. It is very difficult.

But it is not that difficult.

Commanders are not just technicians. If
commanders cannot make that judgment, they are
really not commanders. That is what
commanders do. There are captains. I had
captains working for me that were better
technicians than I was. I was there for gray
hair and judgment. And if I didn't have that
kind of judgment, then I am not qualified to
be a commander because command is about
judgment more than anything else.

The point is being made occasionally
also that lawyers have responsibility, our
lawyers, our attorneys, have responsibility as military officers and all of the ethos and the values that go with that. Plus, they are officers of the court. Therefore, as this narrative goes, therefore, they are better prepared, better technically prepared to make those kinds of judgments. My response to that would be, that is exactly right and those are the people that work for us and are giving us the advice, the technical advice that we need, that perhaps we don't have. We have lots of people who advise us, who have more technical advice, more technical expertise than we do. Lawyers are just one of them.

But to carve that out and to move that to some independent body, I think would have two results, neither of which is good. One, it destroys the confidence of people in the chain of command that are responsible for not just mission accomplishment but for their well-being, every aspect of their well-being.

And second, it would not get the
result that we all want. This is not a situation, this is not a contest of advocates and their attorneys against the chain of command and their attorneys. This is about what is the right thing to do for the people who serve.

And I fully believe that the chain of command, flawed as some of us are, is the best opportunity to ensure that we continue to have mission success, to make sure that we take care of people who are victims, and that we bring justice to the perpetrators.

Thank you very much.

JUDGE JONES: Thank you, General.

Admiral Vitale, U.S. -- oh, you are on the phone.

VADM VITALE: Can you hear me now?

JUDGE JONES: I am talking to the phone now. Sorry. Go ahead.

VADM VITALE: Okay, can you hear me, ma'am?

JUDGE JONES: I can, thank you.
VADM VITALE: All right. Well, thank you very much for this opportunity. I have the opportune pleasure to be able to call you from warm Hawaii this morning.

I retired two years ago in February of 2012, after serving three years with the Commander Navy Installations Command, which was responsible for all of the base operations of the Navy 70 bases worldwide. So, I have had an opportunity to be involved in the many improvements and focus that the Navy has put on sexual assault and prevention for the last five years.

I know and have heard a lot of the testimony that has been going on so I won't spend a lot of time, other than to say simply put, given the fact that we have done a tremendous amount and while I appreciate and understand that there is a lot of good intentions here with this new legislation, I believe it is premature.

I believe that many of the changes
and improvements that the services, in
particular the Navy, have put into place need
run time before we would take something as
seriously as affecting the chain of command
and the commander's authority to execute good
order and discipline and be responsible for
the mission of his command.

So with that, I will pass to the
next and await your questions.

JUDGE JONES: All right, thank you.

General Campbell.

LTG CAMPBELL: Good morning.

JUDGE JONES: Good morning.

LTG CAMPBELL: Good morning to you
all. My name is Jim Campbell and I think I
might be the old timer here. I retired in
March of 2008, after having had the honor to
serve our country as a soldier for nearly 37
years. I commanded at the company, the
battalion, the brigade, the division, and the
Army level and I fulfilled my responsibilities
as a summary, special, and general court-
martial convening authority along the way.

Starting with my pre-commissioning

training in ROTC and at each step as I
progressed through the ranks and took on
greater responsibility, I was trained on the
Uniform Code of Military Justice and the legal
tools that were available to me to ensure good
order and discipline. I was also trained on
and employed the tools to meet the needs of
victims while employing also the rights of the
accused. Finally, I was also blessed to serve
side-by-side by extremely talented and
professional staff judge advocates. These men
and women not only knew their business inside
out but they provided me the very best legal
advice, sometimes when that advice ran counter
to what I was thinking at the time.

I would like to thank each of you on
this panel for your selfless service and
commitment and your willingness to tackle a
very tough issue facing our military. And I
also thank you for taking the time to listen
to those of us who were fortunate enough to lead America's most treasured resource, and that is our sons and daughters in uniform.

I applaud the passion and the general concern of all members of Congress and the Defense Department to thoroughly examine the investigation, prosecution, and adjudication of the sexual assault cases and place the highest possible priority on eliminating it from our ranks.

Sexual assault is really an insider threat that undermines the readiness of a unit and, as our Army Chief of Staff, General Odierno has said, betrays a sacred trust at a number of different levels: soldiers' trust in one another, trust in their leaders, and trust between our Army and the American public.

A commander is responsible and accountable for all his or her unit does or fails to do. Men and women within that command look to their commander and their...
chain of command to train them, to care for
them, and to maintain a command climate in
which they can grow personally and
professionally. Good order and discipline in
a unit is non-negotiable. It is the
foundation of the unit.

My experiences have been that each
time our Army has faced a huge problem, a huge
challenge, it has been the commander and the
chain of command who have not only been
integral to a solution but are in the lead
each step in the process to the resolve the
problem.

I am, therefore, strongly opposed to
the proposed legislation that would remove the
commander from making the decision to try
sexual assault cases and other major criminal
cases.

A commander's responsibility to
maintain good order and discipline is, quite
frankly, a fulltime proposition. It cannot be
addressed like an on/off switch in which the
commander is fully engaged and focused in
certain areas that maintain good order and
discipline but is forced to the sidelines in
other areas. It will not work. Every soldier
in that unit must know and have confidence in
their commander that he or she is calling the
shots and not standing on the sidelines,
particularly when it comes to sexual assault
cases. To take the commander out of that role
will erode his or her authority and
credibility with subordinate leaders and
soldiers. The most effective way to
dramatically reduce sexual assault in our
ranks is by holding the commander in the chain
of command more accountable, not removing them
from this process and forcing them to the
sidelines. They must be front and center,
fully engaged and demonstrate in every deed
and word that we will not stand for this
behavior.

I thank you once again for including
me today and I look forward to your questions.
JUDGE JONES: Thank you, General Campbell.

General Jodice.

LT GEN JODICE: Good morning. This is Ralph Jodice.

JUDGE JONES: Thank you.

LT GEN JODICE: Thank you for including me in this very important discussion. I'm sorry I didn't make it there in person. Of all places, I got stuck in Maxwell Air Force Base, Montgomery, Alabama, due to ice and snow.

I echo much of what has been said by previous flag officers in regard to this issue and I am completely in favor of retaining UCMJ courts-martial convening authority in the hands of the very capable and competent commanders.

Last summer, I retired from the United States Air Force after 36 and a half years. During that time, I had the honor and privilege to serve and lead our nation's
treasured sons and daughters and those of our Allies, partners and friends, as a commander six different times. Those levels of command were at squadron, at group level, as a wing commander. I was the commander for the European NATO Pilot Training Program. And NATO's Pilot Training Program was, at that time, comprised of 13 different nations.

As the Commander of the Air Force District of Washington, a major command equivalent, I held court-martial convening authority during an atrocity. I did have to remove a commander not for a sexual assault reason but it's a painstaking process.

My last assignment in the last three and a half years was a NATO commander for NATO's Allied Air Command in Izmir, Turkey, an Air Force equivalent. And during that time period, I spent several months as NATO's Combined Forces Component Commander in 2011 for its operation known as Operation Unified Protector.
During those three commands in the international setting, and I will throw in another position, a fourth position as our Defense Attaché in Beijing, China, there still are very stark differences in commanders from different countries to carry out their mission or how they were allowed to take care of their mission and their people. From these experiences, many saw the United States military system for accountability, responsibility, and good order and discipline as a model to follow.

As the Commander of the Euro NATO Joint Jet Pilot Training Program, I did have to conduct a commander to write an investigation who had an inappropriate relationship in my number two in command who was a German colonel. I did not have a vice commander but he was my officer commander. Many times he said to me, we don't put in the amount of effort, the amount of time to go through such an investigation. And in my
experiences in the international environment,
our allies, partners and friends, may continue
to strive throughout military just like the
United States.

At all levels of command, I firmly
believe and I think all commanders take it
very seriously, that is the mantle of command
to responsibility for every issue in every
aspect of the unit. As a commander, I firmly
believe in assertive leadership. People
needing it, do not work for the commander.
The commander works for the people.

As commander, I believe a commander
has three important responsibilities to the
mission, the unit, and the people. They are
first to provide direction, guide them in what
to do, let them figure out the "how" part.

Two, enforce the standards. In the
United States Air Force, we have Air Force
instructions for just about everything, such
things as dress and appearance, maintenance of
aircraft, zero tolerance for sexual assaults.
There can never be double standards in the United States military. Everyone has to be held accountable and I believe that if commanders do that, if they can do that and continue to do that across the board, because they can enforce all the standards.

And third, commanders need to make the difficult decisions to keep their responsibility to decide any and every issue. And taking that responsibility to continue to seek counsel from their lead one advisors, their JAGs, maybe an operations officer, a deputy commander or a vice commander, to a command chief and probably trusted other commanders to help guide them. But in the end, it is the commander who makes those difficult decisions, based on the facts that they have.

If you take UCMJ and courts-martial convening authority away from commanders, you not only take away two of the three items I just mentioned, I believe you take away their
authority to enforce standards and I believe you take away their ability to make the difficult decisions. He or she no longer has that responsibility to serve his or her people and no longer serve as a leader. Mission effectiveness and taking care of people, some of whom are victims, will negatively be affected. As General Dunwoody said, I am a firm believer in you have to do the right thing. You have to do the right things right and you have to do those right things right for the right reasons.

Thank you. I look forward to your questions.

JUDGE JONES: Thank you, General.

And now we will turn to Admiral Baumgartner, U.S. Coast Guard.

RADM BAUMGARTNER: Well, good morning. And I appreciate the opportunity to appear here today.

I have recently retired after 33 years in the United States Coast Guard. It
was my distinct privilege to have the last
time that I wore my uniform in active duty was
to appear in an informal session before this
same panel.

In many ways, there is a lot of
symmetry to that. I entered the Coast Guard
Academy with the first class of women.
Throughout my then, if you add that time, 37
years in the Coast Guard uniform, I have
observed many things, many classmates from the
academy. And I found out many years later on
many things have happened to them early on in
their career, the difficulties that they went
through.

I am also a father with daughters
that are in college. I also have a lot of
other informal experiences and information
from many other women who went through
difficulties, sexual assault, rapes and so
forth that took many different paths to deal
with those particular situations throughout
their lifetimes.
I have a little bit of unique background from everyone else in this particular panel. I started out on ships, commanded a couple of ships, then went to law school in mid-career. I did not stay in the legal program. The Coast Guard is a little bit different but I was, I have been a defense counsel in sexual assault cases, trial counsel, staff judge advocate, commander, and judge advocate general dealing with sexual assault cases, the whole range of the process.

From my viewpoint and my experience, first I would say that I agree with much of what the rest of my panel members have said here about the importance of the chain of command, the integrity of commanders and their ability and their responsibility to do the right things the right way at the right time for the right reasons. I won't repeat any of those things.

I will, though, add something that I think is very important from my point of
view, is very easily lost but is, perhaps,
more important than most of the things that
are talked about. When we look at the purpose
of sexual assault response systems, when we
look at the purpose of a trial of an accused
sexual assaulter, we have to remember that it
is not just that individual case that it is
important. What I see as our overall goal and
our overall objective is the United States
military and, ideally, United States society
in which women can feel safe, supported, part
of the community. If they are attacked or
assaulted, they know that their environment,
their community, their unit, whatever it is,
will rally around them and not the accuser --
I'm sorry -- not the accused; where they know
that they have opportunities to advance; where
they know that this particular issue will not
be a potential stumbling block for them.

Frankly, in my experience, I have
seen it be a tremendous stumbling block and I
have seen women that have had to have dealt
with the issue: Do I report? What are the implications if I go forward? If I get a conviction, what then happens? How does my unit react to me as an accuser? What does that mean for my long-term career?

Frankly, early on in this business, I saw most women that came forward, their careers did not survive the process. And much of that had to do with the environment in the units and how people identified either with them or with their accuser. In the last five to ten years, I have seen changes there.

Now, when we look at how we deal with court-martials, I can tell you that from my experience, people identify. They identify with the victim. They identify with the accused. One of our best tools to make an impact on this issue is to change the environment in our units and to make sure that the men and women in our units identify with the victim, not with the accused.

The current system we have, we have
a great tool, if we do it right and I think we are on the road to do doing it right, to reinforce that. The people in our units, small, medium, large, whatever, look to their commanders to lead them through mortally dangerous situations, to lead them through stormy seas, to do a host of other things. They place great implicit trust in them. They also will place trust in them if they are the ones that are convening and leading the judicial process against accused, against the people that are assaulting.

If we remove and we have a different convening authority that is no longer part of that command, no longer part of the people that they trust their lives, but is something else outside of that that is driving this process, I believe that one of the results that you are going to have is that inside those units they are going to start to identify more with the assaulter than with the victim because now the organization that is
supporting the victim is some outside entity. It is not part of their chain of command. It is not the people that they trust with their lives in every other situation. It is something else.

I have seen this happen in other context. The more you have outside entities come in and driving that, the more people identify with the accused.

In my experience, when we have civilian authorities prosecute a sexual assault against a military member, you are much more likely to find the unit identify with the accused. In fact, they almost always identify with the accused because it is an outside entity. They don't know them. They don't know who it is but they know the accused, especially if the victim is not part of that same unit. And that is a tremendous challenge for us.

I have even seen it in cases where we went through the process and could not move
actually to a trial step, because of one reason or another we have moved over to the civilian authorities and you find a vastly different result.

                               Just to kind of put this again in context, our best way to make sure that our women in the military today can be safe, secure, have great careers, is to ruin the environment in our military for potential assailters. The best way to do that, I think, is maintain the convening authority responsibility within the chain of command, we need to support that. We need to beef that up. Some of the recent changes that require extra diligence in reviewing these cases are what we need. We need more education and we need more training but we have an opportunity in the military that we don't have in the rest of their society. We control major aspects -- well most aspects of the lives of the men and women in our units. That is not the case on a college campus. And I think you will find,
if you actually did studies, you would find that college campuses are much worse right now than in the military and they have a much, much bigger challenge on college campuses to change the environment. They don't control most of the aspects of those students. It is an outside entity taking action. You will find out, I think, by and large that most people end up or most men end up identifying more with the accuser than with the victim in those situations on a college campus. I can't say for sure. I have not done the research so that is my speculation from talking to my associates, my world of work, my contacts and so forth.

But we do have that unique opportunity in the military to really change the total environment. As we look at what we are going to do with prosecutions, I believe that that needs to be front and center of everything we think about. Yes, we can make an individual prosecution better by changing,
by bringing in some other system but what will
that do to everything else? What does that do
to that woman's career as she goes forward,
even if there is a conviction? What does it
do to the viewpoint of those people in the
unit?

I think that if we are not careful
here, we could actually undermine many of the
other programs that we are doing in the
military right now to change attitudes towards
sexual assault.

I would be happy to take questions
about this later on but I do think it is
vitally important for us to look at it this
way. Think of the psychology of units with
unit cohesion, how outside influences, how
those are perceived and how they will respond
to those particular aspects.

Thank you very much for your time.

JUDGE JONES: Thank you, Admiral.

I would like to open up the panel for
questions. Jim?
VADM HOUCK: Good morning and thank you for being here with us. This issue was broached in the previous panel and we had several distinguished retired officers raise this point and I wanted to explore it with you all a little bit more. And by the way, for those on the phone, this is Vice Admiral Houck.

The issue is a commander's ability to make an objective decision. And sometimes through the course of our panel discussions, it has acquired sort of informally the title of conflict of interest. And it seems to manifest itself as a concern in two different ways. The first way being that a commander cannot make an objective decision about people whom he or she knows. If the commander has a personal knowledge of life and has been exposed to the alleged victim or the alleged accused, that a commander cannot make an objective decision, that the decision process will be flawed. That is kind of Part 1 of
Part 2 is different but it is also considered to be a conflict of interest by some which is that if you are a commander today and you are charged with maintaining a good and healthy command climate, that you have a conflict of interest if you then raise charges against a member of your command. In other words, you have an incentive to not do that because it will reflect poorly on you if you make this kind of referral decision about an allegation.

So for those two reasons, either you know the people too well or it will reflect badly on you and your command and your leadership if you call out a problem and refer charges that there is a conflict of interest.

Can I invite any of you to speak to either of those two? The first one seems to get a little bit more attention but I think they are both kind of out there and I would just ask any of you to speak to that.
LT GEN JODICE: Admiral, this is Ralph Jodice from on the phone. If I could tackle that one first.

JUDGE JONES: Thank you.

VADM HOUCK: Please.

LT GEN JODICE: Admiral, as I mentioned, when I was the commander of the Air Force District of Washington, I had to remove a commander. And I won't get into who or all the details. I will say it was not for a sexual reason, sexual assault reason. It had to do with leadership.

And I knew that commander fairly well. We had been together for nearly a year, actually for over a year. And when the information first came to me via an anonymous IG complaint, it was followed three or four days later by a second IG complaint. And so I took those very seriously. I launched a commander-directed investigation and it was hard. It was extremely difficult. The unit obviously knew about it at my level. His unit
knew about it because many were interviewed
for that investigation.

And as I went through the process to
make a decision and the report was presented
to me, I will tell you that that was not an
easy decision. It was one of the hardest
decisions I have ever had to make in my Air
Force career. But I didn't shy away from it
at all. I didn't shy away from it because it
was another commander or because I knew the
individual and because the individual had, at
the time, a potentially long-term promising
career. I tackled it. I sought the advice of
my JAG, my legal advisor. I sought the advice
of my vice commander, a few other trusty
commanders, my command chief. And that
decision process, I didn't rush through it and
I tossed and turned with it with a lot of
effort, sleepless nights and everything. And
in the end, I made a decision because, as
General Brady had said, I lost faith, trust
and confidence in his ability to command. And
it didn't make any difference that I knew the
individual, that we have been together, had
seemed to be very effective. But when those
allegations were substantiated on some of the
things that he had done, there was no question
that that was the right decision to do. And
I think that the command climate like I said,
yes, it was difficult on that wing when the
commander was removed. But and some obviously
don't know the full context of what had
occurred in that situation but I had others,
after the fact, say you did the right thing.
That was exactly what needed to happen. It
should have probably been brought to the
attention of others sooner.

So my short answer to the Admiral is
that commanders can be objective. They are.
They take all those things into account. They
wrestle with them day in and day out and it
comes down to like many have said, it is what
do we need for good order and discipline in
the overall unit. And so, I believe that
commanders can be objective and that is an
exact example of how I was able to do that in
a very difficult situation.

Thank you.

VADM HOUCK: Thank you, sir.

GEN BRADY: Admiral Houck, thank
you, first of all, for that question because
I know it is something that has been brought
up. The conflict of interest issue has been
brought up a number of times and it is a valid
question.

It is a valid question because
occasionally, I think rarely, frankly, but
occasionally commanders flunk that test.

Command 101 is do the right thing.
We are taught from the beginning. Every
service says it differently. The Air Force
calls it service before self. All the other
services have a similar phrase that conveys
the same idea. But commanders are the
guardians of that value. And it means that
nobody is bigger than the team. Nobody is
bigger than the mission, including the
commander.

So as regards an individual that you
have known and like Ralph Jodice said, I had
the same experience. We had to remove a
general officer who worked for me, my direct
report, whom I had known for more than 20
years. I was his friend.

We need to distinguish between the
uncomfortable and the difficult. What was
right was easy. That is not a difficult
decision. It is uncomfortable. But refer to
my first statement, Command 101 is do the
right thing. And I think most commanders
understand that. If you are a commander, you
have to understand that.

As regards to command climate,
Admiral Houck, I appreciate the comment you
made. I would turn it on its head and say you
are more likely to do more damage to the
command and your career, if that is important
to you, if you don't take action because there
is nothing more devastating to a command
climate than lowering your standards.

VADM HOUCK: Did you ever -- did any
of you ever look unfavorably on a subordinate
commander who referred a case to trial because
that was indicative of a bad climate in their
unit?

GEN BRADY: No, I can't recall doing
that. No.

RADM BAUMGARTNER: No, sir.

GEN DUNWOODY: No, I would say I
have not either. I think all inquiries need
to be looked at. And the stats are not
important. What's important is your role as
a commander, which is about leadership and
command is a privilege. And with the command
authority comes responsibilities and
accountability and that is what soldiers, men
and women and their families look to the
commander for.

And similar to General Brady, I have
also had to relieve commanders for command
climate. But I can assure you, as General Brady said, the cost of not doing the right thing is much more damaging than doing the right thing. Soldiers are looking to you to see what action you take both in rewarding good soldiers or disciplining poor performance and not disciplining poor performance, it is not invisible on them. And all that does is demoralize soldiers who are working hard not be rewarded and seeing those who are not being disciplined not being taken care of.

And in order to establish that good order and discipline, the good commander, the leadership does both. And they establish and your soldiers know and they will do anything for you if they know that you are going to take care of them.

JUDGE JONES: General.

LTG CAMPBELL: Admiral, this is Jim Campbell. If I could give it a shot, sir.

The two questions you brought up, they are the toughest and they are also the
ones that your subordinate leaders and
soldiers will watch most carefully because
they know it is the toughest.

And if I could share with the panel,
and I will do this short and to the point, a
rough experience I had is a colonel-level
commander in which, and this was in Somalia
when one of our young soldiers had done an
extraordinary job one afternoon in a really
difficult spot. And I was so impressed with
his composure in that situation that I sought
him out to thank him for doing his job. And
he said sir, I just did what I was trained to
do. And so at every opportunity, I would
trumpet this young man as being kind of what
we all want to be, very low keel, no fanfare,
doing his job.

Well, low and behold, I wish I could
put a period at the end of the sentence but he
got in a lot of trouble. He got in so much
trouble, I had to refer it to a court-martial.

And what it taught me was what you
look for is three things. You are looking for competence. You are looking for commitment and character. And when it is most dangerous is when the person is most competent and has that character issue. And that is when you have got to step up.

To your other point, which is a great one that I really hadn't given a whole bunch of thought until you had just mentioned it about how I would look, were I to do something along those lines to refer charges. I am a firm believer, and I shared this with junior officers, sir, that the day you arrive as a leader is the day the respect and admiration of those you serve to do the right thing is a lot more important than any praise you get from a boss or how people look at you. And so you have to stay to that standard, in my opinion to be a solid commander.

Thank you.

JUDGE JONES: Mr. Bryant?

MR. BRYANT: Yes, thank you. For
those on the phone, this is Harvey Bryant --

JUDGE JONES: Oh, I'm sorry.

RADM BAUMGARTNER: One thing that

you do have with a conflict of interest is you

have higher commanders. And the difficult

thing for me, the most uncomfortable, should

be when you decide that you don't think that

you should go forward with something or move

further on allegations on someone that you are

close to. You do have the ability, and I

think commanders, it is incumbent upon you to

send that out to your higher commander and

give the whole matter to them. I mean, that

is an option that we have. And as higher

commanders, they have to be aware that you

receive those with no questions asked if a

lower commander does, that send that up to

you.

In my position in the past, I have

taken cases where I looked and knew that there

was a popular person there that was the

accused and we simply took it right away from
that command, so they didn't have to deal with that issue. Because I do believe people can make the difficult decision and go forward and prosecute someone but it is more difficult and you do need -- there should be some introspection if you actually are close to somebody to make sure that you have been objective.

And we do have mechanisms for that, which is the higher command. Your SJA should be able to help you with that and deal with higher commands as well. But I do think that is an important thing.

JUDGE JONES: Thank you. Mr. Bryant?

MR. BRYANT: Thank you, Your Honor. My name is Harvey Bryant. For those on the phone, I parachuted in about 30 minutes ago. I wasn't here from the beginning but what we have heard from this panel and the issues that are before us have been repeated over time. While I missed General Dunwoody's
comments, I think I heard the majority of
General Brady's and of course all the rest of
you.

My question is, and I preface it by
some assumptions, and that is that all
commanders, when we talk about trust, we talk
about caring for them. They have to trust as
a fulltime job. We are responsible for their
healthcare, welfare. That also means
medically and safety-wise. I assume that
commanders are still rated and encouraged to
maintain safety within their organization so
that people aren't slipping and falling and
busting their heads in the motor pool or
whatever it happens to be, falling off of
bridges if they are in the engineering corps.
And also medical safety. If a unit's sexually
transmitted diseases go off the chart or
become more than the norm, if meningitis
breaks out in a particular unit but nowhere
else on post or on base, tuberculosis breaks
out, then there is going to be some emphasis.
Commanders have that responsibility, do they not, in all instances?

And so my question then is, and I don't really mean to be facetious or smart with you but I think it is a decent analogy. How many of you commanders have made the decision when one of the people in your command needed an operation or needed to go to the hospital? Isn't that the function of technicians, which are doctors, just like lawyers are? And how do you feature that as affecting the morale in your unit when it is not your decision whether this person needs an appendectomy, or a heart catheterization, or an amputation, or whatever it might be that they need hospital care for? Isn't that the function of the doctor technician? And do your troops then say well, gee whiz, commander, I thought you were making all the decisions here. Why does Joe have to have an appendix taken out? Or I don't think there is anything wrong with Joe's kidneys.
And so I ask how in the context of which we are speaking that particular issue fits in with the issue that the commander must make all decisions about everything for everybody?

GEN BRADY: With respect, Mr. Bryant, that is not a good analogy.

MR. BRYANT: All right.

GEN BRADY: Because we are talking about behavior.

MR. BRYANT: Well, isn't safety --

GEN BRADY: And commanders -- yes, we are responsible for safety.

MR. BRYANT: Right and if somebody --

GEN BRADY: We are responsible for buffoonery.

MR. BRYANT: And if somebody breaks their arm, you don't decide whether or not it is going to be a splint or what the treatment of the person is going to be.

GEN BRADY: No, we don't.
MR. BRYANT: I prefaced it by saying that I understand you are responsible, all commanders are, for safety and for health, cleanliness within their units.

GEN BRADY: Yes.

MR. BRYANT: But when something goes wrong, when something goes bad, aren't those medical people's decisions?

GEN BRADY: They are. The specific treatment, obviously, most commanders are not medical experts. But we had better be behavior experts.

MR. BRYANT: Why?

GEN BRADY: Because command is about behavior. It is about behavior. And most of us have a background or we wouldn't be commanders. We have some technical expertise.

But your real expertise, when you make someone a commander, you are most interested in, and when you sit on Command Selection Boards, which I am confident everybody on this panel has, when you sit on
a Command Selection Board, it is different from a Promotion Board because what you are looking at is, and there are very candid discussions on the Command Selection Boards that you can't have in a Promotion Board because Command Selection Boards are dictated by law. I mean Promotion Boards are dictated by law and what you can do and not do. Command is not. And the reason is because you need to have command, you need to have candid discussions about the judgment of this individual. Everybody you meet in the Command Selection Board is competent, technically competent. It is about judgment. And the things that we have to make judgments about more than anything else is people's behavior, including sexual assault.

BG McGuire: Your Honor?

Judge Jones: Yes.

BG McGuire: But as a commander, don't you believe that in the event somebody in your unit gets a broken arm or needs some
treatment, something of that sort, that as a commander, you are going to look into the conditions in which that event happened --

GEN BRADY: Of course.

BG McGuire: -- and take actions to ensure that they get good treatment and make sure that it doesn't happen for everybody else?

GEN BRADY: It is not an isolated event.

BG McGuire: That is exactly right.

GEN BRADY: It is. It could reflect many other things about the unit.

BG McGuire: Correct.

RADM BAUMGARTNER: And -- I'm sorry. Go ahead.

BG McGuire: But I just wanted to make a statement on that particular point but I would also, and this is after 30 plus years, the majority of my career in law enforcement, you can't help but sometimes be a little jaded at times, that I find that nobody is
infallible.

And so when we look at our current system, we have a system of law enforcement investigators that during the course of the investigation, work hand-in-hand with the legal community to ensure that evidence is being collected properly.

Then when it is presented to a commander, that commander then also gets advice and judgment with another lawyer to ensure that they want to go forth with prosecuting the offense or not.

And on the occasions where the decision is or not and it is both the lawyer and the advisor and the commander, there is also the recourse of the investigator to go further, to pursue that as well. And that is an aspect I think that we have forgotten in some regards is that when we take one individual out of the decision-making aspect of that entire chain, we are starting to lessen the opportunities for covering the
checks and balances and that your -- the
infallibility of any one person then is kept
in check. By taking the commander out, I'm
not so sure all lawyers would assume and say
they are infallible in and of themselves.

RADM BAUMGARTNER: One thing I would
like to say, the medical analogy, it would
only work if the people actually setting the
arm and doing the procedure were laymen.

When you have a trial, the people
that are making the ultimate irrevocable
decision are the men and women on the court-
martial panel. Laymen not lawyers.

So you have fundamentally different
processes. And the judgment that you are
asking a commander to do is evaluate things in
terms of overall justice as they appear to
laymen, as they appear to commanders. If you
go onto the civilian side, you have governors,
you have the president that have authority to
oversee different aspects of the justice
systems that aren't lawyers. So, the doctor
is more like the pilot. I have had pilots
that work for me that land the plane, make
decisions on how they are going to do those
things. They take care of that technical
area. They are the in person doing it. Very
different, I think, in the military justice
system where in the end it is lay people on a
jury or on a court-martial panel that make the
irrevocable decision.

MR. BRYANT: Well, if I may, Admiral
Baumgartner, I really wasn't talking about the
ultimate decision of the trial. I was talking
about the process of initiating, referring
charges. That pilot decides how he is going
to land and if he is going to land, regardless
of who else is onboard.

So, what I am trying to point out,
I think through this question is that if,
hypothetically, in a medical situation it is
the doctor, the medical community who is
making the decision, whether it is in a combat
situation or back here in the United States or
a large Army base, Air Force base somewhere
else in the world, the doctors are making
those decisions. And I would hope we would
all agree they are the proper people to be
making that decision. It doesn't mean that
commanders are still not going to be
responsible for ensuring the health and safety
of their units. There is still going to be
that emphasis. If you say well, the doctors
are making those decisions, I don't care what
goes on in the motor pool or what the safety
is here or how clean we keep this place
because doctors are ruling that.

And I am trying to say that when we
say well, if we turn this over to someone
else, some other entity, hypothetically
military lawyers, that suddenly commanders
aren't going to care about sexual assault
anymore. And I think you have all pretty
clearly said yes, you will. Yes, commanders
will continue to emphasize and be responsible
for sexual assaults in their units, just as,
to repeat myself, they are responsible for
safety. They are responsible for health, even
though when things go wrong and a body gets
assaulted non-sexually, a body gets assaulted
by something that fell from the roof that
should have been secured at some point, that
the decision of what to do with that crushed
head is going to be made by someone other than
the commander.

GEN BRADY: I think again, Mr. Bryant, I take your point but we are talking
about behavior here and we are talking about
judgment.

MR. BRYANT: In every respect.

GEN BRADY: And I think it is
different.

MR. BRYANT: Well if the company
commander, if the sergeants aren't seeing that
people are eating healthily, for instance, or
washing their hands after whatever, and that
the barracks and the housing areas are not
kept clean, sanitized, and all sorts of
medical issues break out in that unit, that is
a behavior issue, is it not? So, the
commanders are still going to be responsible
for that behavior or lack thereof, I am
assuming, in their units, even though medical
personnel are the ones who are making the
ultimate decisions how to treat the wounded.
In this case we will call them the victims or
the perpetrators.

GEN DUNWOODY: Maybe this will help
clarify. I think, from my experience being in
command and 16 years of my 38 as a commander,
what the commander is ultimately responsible
and accountable for everything that happens in
his or her unit.

What you have, you have a suite of
people, technical IG, JAG, doctor, -- I am
not a doctor but I had doctors working for me
-- equal opportunity people. You have a bench
of technicians that are there to advise. And
not every activity belongs in one of those
stovepipes, sometimes the chaplain and the EEO
or the command climate. And the commander has
the ability to integrate the capabilities that
he or she has on the staff to come up with the
best solution recommendation in order to
address the issue.

And I think we go back into these
stovepipes and we lose, the commander loses a
purview of their experience, their leadership
abilities. They also see things, it has been
my experience, that even if stovepipe folks
won't see, although as we grow up in
professional development, all of us get better
in our business. But the commander is the
integrator of all that information in order to
know how to best deal with that issue.

JUDGE JONES: Ms. Holtzman?

MS. HOLTZMAN: Yes, I agree with the
analogy isn't exact in the sense that of
course who is making the decision to send that
military person to the doctor to begin with?
If it is the person himself or herself, they
may not be a doctor but they say I need
medical help. Or if it is a commander, you
know, you are walking around looking funny.
You look like you need to go to the hospital.
Okay, that initial decision is not going to be
made necessarily by a medical doctor.

That is how a lot of decisions are
made about medical help. Someone sends
someone to a doctor, or someone gets to the
doctor they themselves aren't medical. But of
course once it is determined that you need
professional help, then of course you need a
professional. And sort of the same thing
happens here.

My question was going sort of to the
point, I wanted to see what your comment was,
something that Admiral Baumgartner said. Now
whether you see this as also somehow a
response to the question about the analogy of
medical personnel, what you were saying as I
took it is that having the commander put his
or her imprimatur on the decision to
prosecute, is not just a technical decision,
oh, you need to go to the doctor. It is also
sending a statement to all the troops that
this behavior on its face is not acceptable
and I, as commander convening authority, want
to make it clear that when this kind of
behavior takes place, it has got to go to the
hospital. It has got to be addressed, whether
it is our legal system. And so that that
itself is a message that is important to, to
use your phrase, good order and discipline, or
to morale or to ethical standards.

Am I misunderstanding what you said?

RADM BAUMGARTNER: No. No. In fact
my opening statement, that is very much line
with that. That is an important thing. And
if you want to go to other areas that
certainly if your troops are reminded by the
hospital that it is time to come in and have
their dental exam, that is one thing.

MS. HOLTZMAN: Oh, I forgot about
that.

RADM BAUMGARTNER: If their
commander says I want that dental exam done on
time and you better be green for deployment,
it is going to happen, they understand. This
is operational. This is coming from those
people that I trust with my life. This has
that stamp there.

In fact, throughout my career, I
picked different items that were always
problems administratively. You put your
imprint on those items, relate them to
operations and effectiveness and how you have
to have a climate, you have tremendous impact
on how those particular items are addressed
and what the compliance is because it makes
the commands, priority has that command
influence behind it. So you understand
exactly what I am talking about.

JUDGE JONES: Professor Hillman.

PROF. HILLMAN: Thank you, Judge

Jones.

Admiral Baumgartner, you are making
me feel guilty about missing my last dentist
appointment and grateful for the freedom to
cancel it.

(Laughter.)

RADM BAUMGARTNER: Well, if your
commander had told you to go, you would go.

PROF. HILLMAN: Yes, I would have.

I have a small question and then a
bigger question. So the small question, which
is perhaps inappropriately characterized as
small, goes to why we have this problem now.

And General Brady, I am grateful you
are back today. This is -- I am grateful for
everyone who is with us on the phone and in
person. You are not the first group of
incredibly impressive accomplished military
senior commanders who have led our force
through these past decades of so many
challenges. And General Brady, you said
something the last time that we heard from you
about the nature of the problem, I think. And
I just want to put that out here and ask if
this is what you see as the source of the
problem today in the Armed Forces.

You said finally -- this is the end of your statement to us the last time we heard from you: The Department of Defense needs to realize we are in the parenting business. Our society by any measure is coarsening. And while I have the ultimate respect for the young men and women who choose to serve this nation, too often they do not respect the opinions, the bodies, or the basic humanity of those around them. They come to us with 18 years of society's conditioning and some of it is absolutely, is inimical to teamwork, respect, good order and discipline and, ultimately, the success of our mission.

So, General, is the problem then the people that we are getting in the service today rather than the military culture itself?

GEN BRADY: Well, it is all our problems but the military didn't invent this. It is we have in too many cases -- and the only good number in this business is zero. In
too many cases we have not done all that we
could do, I believe.

I hate it when people read my words
back to me but yes, that is what I said.

(Laughter.)

PROF. HILLMAN: Lawyers like to do
that. That is exactly what I said and that is
the story I am sticking to.

No, I think that there are lots of
challenges. I think what I said about the
generation coming in now I think is true. And
I think research would back that up. That
does not in any way excuse our responsibility
in the service to take that on. But we are.
We are doing some parenting that we wouldn't
have done in past years, I think. Because we
are having to correct some behaviors that we
might not have in former times, perhaps, but
we must be willing to do that.

I think that a great advance, in
fact the most significant thing that happened
in my 41-year career was the increasing role
of women in the service. It did incredible things for us. First of all, just in terms of numbers, you cannot have an all-volunteer force without women. Not only that, but they bring a civility -- I'm sorry. I'm old enough to think that men and women are different but thank God they are. They bring a civility to the workplace that was not there when I first came in the service.

And sometimes I am bothered when we characterize this. It sometimes gets characterized as a women's issue. It is not. It is a man's issue because the men are the ones doing it, by and large. And that is a case that we have not made as effectively and as widely, I think, as we must because women are not going to solve this problem. Men are going to have to solve this problem. And it has to do with the men in an organization led by a commander who understands it to say this is the sort of thing that doesn't happen in our unit. This will not happen to our
sisters. And if you do, you will deal with us.

And commanders want -- we are given the responsibility for good order and discipline. And so I want and I think every commander wants, just about, if there is a sexual assault, if there is somebody thinking about sexual assault, I want them to have my picture in their mind thinking I am going to have to deal with this guy if this happens.

GEN DUNWOODY: Can I just add something? On the societal piece, and I think there is a societal piece of this issue, when I came in the Army, I came out of a values-based family, Catholic, four generations of West Pointers. I really didn't have any intention of staying in the Army more than my little two-year commitment but what I found was that I had joined a values-based institution that was responsible for self-discipline, policing itself, rebuilding your Army after the Vietnam War. And I stayed in
the Army because it was a values-based institution.

And what you find from kids that are coming in today, not necessarily all, some come in from broken homes, not the same values, certainly that I grew up with. And so it is incumbent upon the service as we bring new members into the military that we spend time with the soldierization of values, respect, dignity that we expect to be existent in our force.

And what I will tell you that whether someone comes into the military for two years, ten years, twenty years, they will return a better citizen because of the discipline, the leadership and responsibilities that we put on them in the military. I personally believe that.

JUDGE JONES: General Campbell.

LTG CAMPBELL: Ma'am, I had the opportunity the last two days to sit in the back of the room of, I will use the acronym
and then I will do my best to define it, the Army's SHARP Summit, Sexual Harassment Assault Response and Prevention Summit, in which the Chief of Staff Army and the Sergeant Major of the Army with the most senior Army commanders and command sergeants major in the world came from all over, attended this two-day event. And the issue of society in the contributing factor was one of the big discussion points.

And what was refreshing to me, from where I sat, is a renewed emphasis to look at where a young soldier is most vulnerable, where he or she is most vulnerable. And it usually, and I will use military grade, from E-1 private to E-4 specialist, probably the most vulnerable is a victim. And what the Army is doing now in terms of putting a razor beam on what we do to that environment. Because if you do get a young man or a woman who comes in from society to sit down with them and say look, this behavior may have been acceptable from where you came. It is no
longer acceptable. And to really put the razor on that environment in which they work.

So, I can tell you it certainly has the attention of the senior leadership of the Army.

PROF. HILLMAN: Thank you, General.

JUDGE JONES: You had your larger question.

PROF. HILLMAN: Right.

(Laughter.)

PROF. HILLMAN: So you are not the first folks we have heard from on this but you are close to the last that we will hear on this narrow issue. We are close to having to start to decide about some of the many, many issues that face us in the realm that we are studying. And this really is just but one of many. You have actually given us insight into many others.

But on this issue of the sort of convening authorities rule, I am just going to cut to the chase here and say if commanders as...
convening authorities can solve this problem
and if it is so easy as General Brady has
suggested to remove commanders who falter, and
if commanders are indeed experts in behavior
and understand the ways to get servicemembers
to do right, you have all talked a lot about
doing the right thing -- I keep seeing that
movie, actually you have said it so many times
-- I think we have done a lot of the wrong
things in the wrong way for a very long time
in this narrow arena of stopping rape and
sexual assault and sexual harassment in the
Armed Forces during the time that you have
been senior leaders in the services.

Why should we not consider this
change, whether you consider it technical or
far-reaching, of removing convening
authorities from the criminal justice process
when what we have been doing has not worked?

VADM HOUCK: I would like to add,
before you answer, I would like to add a
companion question to it to consider in
parallel. And what makes me ask the companion question is the media report over the past weekend about the White House study of sexual assault on college campuses. And which that report, if it is accurate, and I am repeating what I have heard accurately, I don't vouch for the report, is that one in five women on college campuses are the victims of sexual assaults and that 12 percent of those victims, 12 percent report, and that 88 percent do not.

And so the companion question that I would raise is why are we not, because society has done so poorly, why are we not considering and revamping the civilian system of prosecution that we have right now? Why are we not removing the authority from senior civilian prosecutors to prosecute cases?

RADM BAUMGARTNER: I will start to respond there. One thing --

VADM VITALE: If I could, this is Mike Vitale.

JUDGE JONES: Go ahead.
VADM VITALE: Thank you, ma'am.

Ma'am, I think the answer, quite frankly, is the fact that as leaders, every generation learns and understands how society is changing. And clearly, that is true for all of us. And while you can make a case that this has been going on for some time and leaders should have been aware of it all along, I would argue that just to the gentleman's comment about what we are learning about going on in college is we probably surmised it for some time but now we have the data. And with the data, we can take action.

And so we have been now, for the last three to five years, extremely focused on trying to ensure that we are in fact eliminating this problem. And so I would argue that given that, we need to give ourselves -- recognize that it is not a broken system. It doesn't require radical surgery. It just needs tuning.

And you can make this argument that
tuning this could be done by this legislation but I would argue that the tuning can be done by merely the fact that the commanders are now well aware of the challenge and are trying to do what is right to take care of that challenge.

So giving it time to make that happen is different than the past where you said hey, we didn't do anything about it. Well, we didn't really understand the significance of that problem and that is why people talk to it but really didn't grab it and run with it. We are grabbing and running with it now and I think it needs time to take effect.

JUDGE JONES: Admiral?

RADM BAUMGARTNER: Yes. I would say a couple of things in response to that. One, is we should be careful to a system that doesn't seem to be working for society in general. And I suspect there are other ways to look at these numbers on college campuses.
There are much worse places to be than the military, especially when you look at the percentage of males and females and you factor in the percentage of people inclined to be perpetrators versus the number of victims and so forth.

So you will find out that it is probably a much worse problem on college campuses than it is in the military, even much worse percentage-wise when you are just looking at statistics.

So that would be part of my question. Why move to a system that is more likely it isn't working there? The second part of the answer would be if we go back ten years, we had people that did not understand the problem. Many people in society don't understand the problem. One of the challenges that we have is that the vast majority of men are not inclined to be perpetrators here. And it is hard, until it is shoved in your face that there are men out there that do this kind
of stuff, that will do it, and that you have
to come to grips with that. And I think that
has happened. And that has certainly happened
over the last five to ten years in the
military and specifically, say in the last
three or four, thanks to a lot of publicity,
a lot of help from the outside to make that
focus and to come to that significant
emotional understanding that your colleagues
out there do these kinds of things. And that
you won't necessarily know that because they
will look to be normal. They will look to be
productive, good soldiers, sailors, coast
guardsmen, airmen, and so forth.

We have passed, I think, that
understanding. And we have got that
understanding now. We can take that
understanding, some greater tools, put them in
the hands of commanders with a system that can
get things done and focus them on this. And
there are tweaks that I think that need to be
made and have been made already in the last
couple of years to the system that will
prevent many of the problems. And I think we
are in a much better place to go forward and
we can accomplish much more inside the system
because we can control in the right way many
more of the elements that are involved.

GEN BRADY: Let me make a comment
regarding, and I think it is one that I made
the last time when I called in by phone. And
that is about everybody on every side of this
issue has their data, okay, has their data and
their reporting and their surveys, et cetera.
In my experience, and I came into the fight
directly in about 2004 in the sexual assault
response coordinator program and the first
thing we had to do is educate ourselves about
the nature of the crime. And we did that.

We reached out to people like Dr.
Lisak, who is at Boston University. We
reached out to a woman named Anne Munch, who
was a -- some of you may know her. She was a
prosecutor. And they did yeomen's work for us
educating us in senior leadership about the
nature of this.

One of the things that we learned
and that the FBI had already known was that
this was a, as they called it, the most under-
reported crime in America. The number was
five percent or something like that. You said
12. It is not big enough is the answer.

And so one of our mantras to begin
with was, we need more reports. We suspect it
is happening. We don't know how big it is but
it is bigger than we think it is. So, we
really need more reports. So, we worked on it
pretty hard for a long time.

Recently, there was this report that
came out from the services of a vastly
increased number of reports of sexual assault.
Some folks took that to mean oh, my gosh, it
is even worse than we thought it was. You
guys are worse than we thought you were. But
some of us took it as saying this means that
people have increased confidence in the chain
of command to deal with this and so they are
coming forward in bigger numbers than they
have in the past.

So, I guess your glass can be half
empty or half full on that one but we wanted
more reports. We are not happy that we have
them but we are happy in the sense that if
there is any good news there is that there
does appear to be increased confidence.

Finally, on the accountability
issue, if I am a commander and I have referred
a case to court-martial, I am going to bird
dog that issue. Okay? It is in my job jar
and I am going to follow it, and I am going to
know what is happening, and I am going to ask
questions about what is happening, as opposed
to it being on a court docket. If it goes
someplace else, it is on a court docket.

Commanders, their human nature, are they going
to be unconcerned? No but all commanders have
got more to do than they have got time to do
it.
So, where is it going to get the attention, if it has been shuffled off to some specialist in another chain or if it is still part of my job jar?

JUDGE JONES: Ms. Holtzman.

MS. HOLTZMAN: Thank you, Madam Chair. First, thanks to all of you for coming and to those of you on the phone. I appreciate the information you're giving us to grapple with this very serious question. And I think Admiral Houck raised an issue that's concerned me a lot which is what is this whole concern about conflict of interest. And I think the reason that people are raising the idea of conflict of interest is because there's somehow a notion that a commander can really squelch, interfere with the process. So if some sexual assault has taken place in his or her command, they can just push it under the rug and that they have an interest in doing it. I see someone in the audience nodding their head. That's what I think is at
the crux of this concern about conflict of interest, that a commander is going to have an interest in not proceeding with a prosecution of sexual assault and will be able to squelch it.

Could you please address that? Just that in a narrow way. Can commanders squelch it? Can they interfere with the investigation? Can they stop the prosecution? Can they push these things under the rug?

I'd like you all to respond.

GEN BRADY: If you're not very smart. I mean I don't know what rock you've been living under if you think you can hide anything from anybody as a commander. No, I mean the Congress, bless their hearts, you know, they get any email they want.

No. We live -- the glass house is a trite phrase, but it's absolutely true. If you're in any position of authority in 2014, there's some young airman, some young PFC, some young soldier who can see you doing
anything, you use your staff card or drop your
child off at elementary school on the way to
your office and you will be held off the
Brigadier General list. I guarantee you.
I've seen it.

So no, you can't hide anything. And

that's the way it ought to be. That's what we
sign up to. One of my mentors said we sign an
unlimited liability clause. And we accept
that. And that's the way it ought to be, so
no. I don't think we can. You will be found
out. And you should be, if you are subverting
the process.

GEN DUNWOODY: I think there is this

notion that there is this good old boy network
that would allow people to sweep it under the
rug, but my experience is that does not exist.

There may be people that attempt, but in this
day and age, the consequences of trying to do
that on the good order and discipline of the
organization are much worse than doing the
right thing for the right reason.
MS. HOLTZMAN: And are there ways -- does the commander control the investigation?

GEN BRADY: No.

LTG CAMPBELL: No.

MS. HOLTZMAN: Can the commander stop the investigation?

GEN BRADY: I suppose you could, but man, I don't know under what justification. No. That would be pretty silly.

RADM BAUMGARTNER: It would be a great peril if you tried to do that.

Certainly, I can't speak for how all of the other services are set up, but the investigators, there is transparency to other places of what they're doing. So other people know what investigations are happening. They're monitored. So that if you squelched an investigation, it would not be very long before the highest levels, certainly in the Coast Guard, knew that you had squelched an investigation. It would be a great peril.

BG McGUIRE: And I can speak on
behalf of the Criminal Investigation Division,
at least, in command in the Army is that
because it's an independent investigative arm,
commanders do not have the authority to
interfere in an investigation.

GEN BRADY: And I have been at the
most senior levels of the Air Force sitting
with our Chief and he would routinely ask our
senior attorney or our IG, how is
investigation X going? And all he was asking
about was a time frame. I've never seen
anybody would ask -- he was just saying are
you close to being through? Or how are we
doing? And they'd say well, it's going to
take quite a bit while longer.

No commander that has any awareness
gets involved in the investigation process
once he or she launches it.

MS. HOLTZMAN: Yes, sir.

LT GEN JODICE: Ma'am, this is Ralph
Jodice on the phone if I could add in, please?

MS. HOLTZMAN: Sure, go ahead.
Thank you.

LT GEN JODICE: Yes, thank you.

Commanders can't squelch those kind of things.

Again, I'll use my own personal experience that the NATO commander there, Commander, Izmir, there were allegations against my senior enlisted advisor. And again, folks came to me, presented me with their facts. I launched a commander-directed investigation.

If I had squelched that, all the other people in the unit knew that there were inappropriate things that this individual had said and done. And we've all talked about good order and discipline. If I had squelched that and swept it under the rug, it just would have torn the entire unit apart.

So as a commander, you owe that answer, no matter how that answer comes out, you owe that answer to everybody, to the victim and to those that are making the allegations. And so you can't squelch it. That's the responsibility of command. Would
not allow you to do that. And we wouldn't
take command so seriously if we go oh, yes,
I'll just push it away. Because we owe that
answer to everybody and to ensure that if
there is a problem, we take care of and then
we make the right decision and the decision
might be a significant punishment for the
individual. It could be the loss of a rank.
It could be even imprisonment. And so I don't
see that squelching -- it does absolutely no
good. And it's detrimental to any
organization. And you've got to find the
right answer, no matter how hard it is.
You've got to find that right answer so that
everybody knows when the decision is made that
the right thing has been done. And some might
disagree with it along the way, but as a
commander, you know that you've done that and
you dug into it and you poured over the report
that's presented to you. You've taken all the
experience that you had and you take the
advice again from your legal advisor, from
your deputy commander and others. Then you
know you're going to make the right decision.

JUDGE JONES: General Campbell?

LTG CAMPBELL: The only thing I was
going to add, and again this is based on what
I heard the last few days, is that there are
so many mechanisms in place the moment a
victim steps forward and says something bad
has happened that the commander at great peril
to his or her professional career, if they
don't report that within hours, then they
might lose that chance to command that unit.

Special Victims Counsel who leap
into action, they track this, ma'am. They
track down to the hour that this is being
done. I cannot imagine a scenario in which a
commander will say let's squelch this. It
ain't going to happen.

JUDGE JONES: Did you have anything
else, Liz?

MS. HOLTZMAN: No, that's it. Thank
you. Thank you, ma'am.
JUDGE JONES: Colonel Cook.

COL COOK: Thank you. For those on the phone, this is Colonel Holly Cook. It's going to build on something you've all gone to. One of the other perceptions besides the conflict of interest issue that there's concern about, can commanders make that call. The other concern is -- the other reason to give it to the judge advocates, take it away from the commander and make it truly objective is commanders, they're not trained to do this.

Now five out of six of you don't have law degrees. Sir, you do. All of you have left the military with -- most of you within the last 24 months. General Campbell, sir, you are a bit more removed than everybody else in terms of your timing, but you currently work with the -- according to your résumé, currently work with the Chief of Staff of the Army on development of our general officers.

Even this morning, a comment that
was made this morning, you can go back to the
transcript, but my notes said that commanders
are rarely trained to exercise informed
judgment for cases. They are trained for
operational success.

I'm not talking about past training
because the problems have been there. But
data is being collected. We're learning still
from the past. But can you comment, if you
know, on the current training for our senior
leaders to make informed judgments, if you
believe they can make that and what are we
doing to keep that current in terms of the
information that is constantly being
developed?

Sir?

VADM VITALE: This is Mike Vitale,

if I could start.

JUDGE JONES: Yes, go ahead.

VADM VITALE: Thank you, ma'am. I

would argue you're probably correct in the
past that commanders early on didn't get a lot
of experience per se in this, but I would not say that that's a reason to take it away from them. From the first time, commanders usually are at the O-5 level have the first experience with this situation. And so those who come on board, a ship in my case, and you know being in command and now start gaining experience having to hold Article 15s. But they have a legal ability to reach back and get advice. And through that Article 15 experience begin to really understand how this process works and why the commander is so important to making sure that he makes fair and consistent judgments for each and every one of those cases. I can tell you that for me, coming into command, my objective was zero Article 15s. I was very naive and I was very optimistic.

(Laughter.)

By the time I was done with my command tour 14 months later, I had 60 cases. I didn't want to have 60 cases, but gained a
tremendous amount of experience through that. As you continued to escalate up through command, of course, that experience gets broadened and until you're finally a flag or general officer and now you're a convening authority, and I would tell you throughout that span, you're not only gaining experience yourself, but you're also getting advised by very professional JAGs who understand and have more experience than you do.

So I would argue that while you're not necessarily trained, you are getting training through that experience to the point where you do have a tremendous appreciation and understanding of how to balance plea bargaining with the charges, with what you want to see come out of that as potential justice in the best and most fair and consistent way for all those concerned, the victims as well as the accused.

That's what I would say at this point. But I would also tell you that with response
to your question about training now, we have recognized that there is a need to ensure. In the Navy, we have moved most of our general courts-martial to the regional commanders so that they can again continue building this body of experience. They do go through training now when they are assigned as regional commanders by our JAG Corps, to make sure that they're ready for that position, if not ready already.

COL COOK: And is that legal training, when you say they do go through training where they're assigned to those positions, is that specific legal training on what they may encounter?

VADM VITALE: Yes.

COL COOK: Thanks.

VADM VITALE: And trained by our JAG Corps specifically to do that. And again, it's not new. Remember, this isn't a new exposure. They've been doing this as commanders since the O-5 level. So they have
probably anywhere between seven to ten years
of experience in this arena and so it's not
new. It's the JAG just making sure that they
fully understand and new general court model
and being the authority, what that authority
brings and how best to execute.

LT GEN JODICE: Ralph Jodice, if I
could add?

COL COOK: Sure, go ahead.

LT GEN JODICE: As we go through and
become commanders at different levels, at
least in the United States Air Force, we go
through different types of commanders' course.

Now as a squadron commander or group
commander, wing commander, and in every one of
those levels and even we go through as flag
officers, such things as CAPSTONE and
PINNACLE, at the one- and three- star level,
legal courses or legal advice and legal
presentations are done in every one of those
courses.

And I haven't been to one in a
while, but I would venture to say that those are increasing even more and more. I know again in my particular situation when I took over as the command of the Air Force District of Washington and had court-martial convening authority for over 40,000 airmen located not only the National Capital Region, but around the world, I spent the time and sat down with my JAG to ensure I knew what it was that I could and could not do, what was expected. And there were cases that I was looking at all the time to including prison sentences and cutting those short, keep them where they were, and in every one of those cases and situations, the JAG is right here along with us.

And in the case of the things we were talking about with regards to sexual assault and victims, I believe that we are doing way more training today than we have in the past. And like Admiral Vitale has said, there needs to be a little bit of time and I
know there's not much, but I believe that all commanders know that they need to have that guidance because they're not legal experts and that guidance from their JAG or their legal advisor and to keep them very close when they're making these really tough and difficult decisions that affects people's lives. And I believe that they do.

GEN BRADY: I really think that all of the services, all the services have specific -- first of all, just an officer development course when you're a second lieutenant or an ensign all the way up, you get some legal information. But as you become commanders, I think all the services have a specific school for you for every level of command.

And certainly, things like the legal aspects of command, probably receive as much or more emphasis than anything else. But you don't learn to be a commander in a classroom. Where you learn it and I think you learn it
from -- I learned it from lawyers who were
normally half my age. Because every week we
had a session called Cops and Robbers and in
Cops and Robbers you discussed every case
going on on the installation. And your law
enforcement people were there, CID, OSI. The
attorneys were there. And you got a
background on every case and the status of
every case. That's where you learn about --
for me, that's where I learned about what was
appropriate and what was not appropriate, what
could and should be done along the way.

So by the time you're a senior guy
or gal, you've had a lot of experience with
the legal business. You're not a legal
expert. You never run out of the need for an
attorney, but you probably spend as much time
with the attorney as you do with anyone else,
was my experience.

JUDGE JONES: General Dunwoody.

LTG CAMPBELL: If I could add,

ma'am?
JUDGE JONES: Sure, General Campbell.

LTG CAMPBELL: Yes, ma'am. The training a general officer receives is very individualized. If a young man or woman is selected to become a brigadier general and is moving to a command position, they go to our Staff Judge Advocate School in Charlottesville. And it's not sitting with PowerPoints. It is one-on-one.

I just talked to a young man the other day that had gone through that and how impressed he was that the people took the time to do that for him. At each of our pre-commands, it's a very important part.

Now I suppose you could say the danger is you would come out of that saying I'm a pretty smart guy. I know this stuff. And I'm not trying to be glib, but one of my golden rules was if you ever got ready to do something that feels real good, stop and ask your lawyer.
(Laughter.)

And I can't tell you the number of times that saved me from perhaps doing something that might not have been smart. And so I tried to follow that as best I could.

JUDGE JONES: Ms. Fernandez.

MS. FERNANDEZ: I have a pretty stark question. I think Admiral Baumgartner, you said a lot of changes happened in the last two or three years. Let's say the threat of taking the commander out of the process goes away. Just goes away.

We've heard a lot of testimony that that has gotten a lot of the change moving, the threat of taking the commander out. Once that threat is gone, are all these changes and trainings and resources that have been put towards this problem going to go away? That always lies in the back of my mind. Is if this panel reports out that we're going to leave the commander just where he or she is, that then we're going to stop looking at this
problem as much as we've been looking at it
for the last two or three years.

RADM BAUMGARTNER: I would say my
guess would be that if attention faded from
this problem and progress wasn't made, that I
think the services are all well aware that
legislation could be introduced in five years
and if nothing has happened or it hasn't
improved in five years or gotten worse in five
years, it would be a very short conversation
at that point in time. I think the services
are all well aware that any progress that's
made has to be sustained, otherwise, this is
still an issue. It's still a threat. And it
doesn't need all this process to go forward in
the future, if the services get what they ask
for, but don't deliver.

GEN BRADY: Ma'am, I think that's an
important question. And my answer would be I
certainly hope not. But there's one thing I
mentioned in an earlier panel. We really need
better data and OSD can force that. The
services won't do it. I mean they'll all do it differently. We really do need some better data. Everybody's got their own set of facts. And none of them match up.

But OSD needs to drive CID, OSI, NCIS, all the attorneys, commanders, they need to collect, force the services to provide the same data, the same answers to the same questions, asked the same way so that we know what we're talking about in the nature -- to the degree that we can.

There's always going to be a little murkiness because of the nature of the crime and the nature of reporting. But we can deal with a better set of facts if we were a little more standardized. And I think that would be in my opinion an important recommendation for your panel for something that OSD needs to drive so that we know what we're talking about.

JUDGE JONES: General Dunwoody.

GEN DUNWOODY: I would say we
shouldn't need a threat to fix this problem
for starters. I would also say that probably
below the senior levels people don't know that
this could -- they could lose that authority
for the general population at large. But what
I think you're seeing is people are doing all
the right things for the right reason because
we're better educated. We understand the
problem better and we know we have to get
after it.

I think the measures and the focus
that Congress has put on it and this panel is
bringing to it has got leadership's attention.
They get it. And they know that we have to
get after this.

And when I think back, the
integrations of blacks into the Army, the
integration of women into the Army, the "Don't
Ask, Don't Tell" going out the door and that
non-event, who led those transformations? It
was the military. And it was the leaders in
the military. It was the commanders in the
military.

And we can lead this as well. And we need to lead this and we need to be the model for society, for campuses, for industry, who have a challenge bigger than ours, but we know and understand the issue and now we need to dig our heels in and get after it. And I believe this chain of command can do that.

VADM VITALE: Ma'am, Mike Vitale?

JUDGE JONES: Yes, go ahead. Thank you.

VADM VITALE: I would say, ma'am, to your question, the answer is I do not think so. And I think it's because unfortunately I don't really ever see this problem going away. The case study would be that we look at our drug problem. We recognized that drug problem back in the early '80s. We took pretty effective action and developed a very strong urinalysis program, identified that problem and continued to track and eliminate it. We're still doing urinalyses today. So I
would say it's likely we will continue to
recognize that this problem exists and
continue to treat it and do all the things
that we're talking about and doing today.

JUDGE JONES: Anything further? All
right, then I think with our thanks, we're
going to adjourn this panel now and again, I
can't thank you enough for coming.

We'll be in recess for lunch.

(Whereupon, the above-entitled
matter went off the record at 12:17 p.m. and
resumed at 1:25 p.m.)
1 A-F-T-E-R-N-O-O-N  S-E-S-S-I-O-N

2 1:25 P.M.

3 Col HAM: Before we start the public

4 comment period, we did receive a statement

5 from Senator Clara McCaskill that's been

6 distributed to the panel and as soon as we can

7 get it posted on the website we will.

8 Now we're going to proceed to public

9 comment and again we had requests from four

10 different people for public comment. I

11 mispronounced Mr. Collins' name. I don't know

12 if Mr. Collins is present. We're going to

13 start with Melissa Davis. Ms. Davis from

14 Arkansas. Please come up and have a seat.

15 MS. DAVIS: Thank you. Good

16 afternoon.

17 JUDGE JONES: Good afternoon, Ms. Davis.

18 MS. DAVIS: I would like to start by

19 saying thank you for allowing me the

20 opportunity to address this panel and discuss

21 military sexual trauma for I will not be

22 silenced anymore.
I am an Army veteran, the wife of a retired Marine lieutenant colonel. I am the granddaughter of a decorated soldier. I am a military sexual trauma survivor.

I am the author of Silenced No More. I recounted my sexual assault, as well as the story of Carrie Knowling and Sophie Champineau, who lost their lives to the hands of military sexual trauma.

I am also a former law enforcement sexual assault investigator. I have a Bachelor of Science in criminal justice, specializing in victim studies.

I am here both as a victim and as an advocate. In 1982, Captain Ted Mars was stationed at Fort Eustis, Virginia, and was tasked with conducting a survey of military women on that post. His task was to determine how female soldiers were adapting to the military, were they being treated as equals. Since he felt this was a task better suited for women, he felt women would open up better
to another woman, he assigned four female soldiers to perform this survey.

Captain Mars was so enraged and mortified by the atrocities that were reported back to him, he took it upon himself to write the first zero tolerance policy. I have personally been in contact with Captain Mars. It's where I received this information.

I'd like to go from there, keep in mind it was 1982. In 1986, I was 18 years old by three months. I had completed basic training which no one can say they enjoy, but I will say it took me from a civilian to a soldier. I had two of the best drill sergeants you could ever say and no one likes drill sergeants. I did not at the time. If they tell you they do, they're lying.

Those gentlemen taught us what honor, courage, strength, loyalty was about. I loved the military. I came from a broken home, an abusive home. I found a place I belonged until I reached Fort Eustis,
Virginia.

I was on that installation not even one week when we were at our supply, been issued our gear. My platoon's sergeant went inside to see where we were at in order. While he was gone, I was called out of formation by a male drill sergeant. Any of you that have been in the military know it's bad enough to be called out by your own drill sergeant or sergeant, much less one you do not even know. All you can think of is what have I done? Your whole mind, your heart races, you're terrified. And as I run over to this drill sergeant and stand at attention, I was rather shocked when he asked me where I was from. I couldn't fathom. I replied Texas. His comment was "That's what I thought. I heard you talking and I love that Southern accent."

My sergeant came back outside and yelled for me to return to formation which I did. We went in and was issued our equipment.
I never gave it another thought of being called out until four days later while I was laying in my bunk reading a letter from my husband who was also a soldier at Fort Sam Houston training. A female enlisted came in with a note that told me that I was to report to the first sergeant's office. Again, all you can think of is terror.

I had no idea why I was being called there. That fear is drilled in you from day one. I reported to the office. There was no one in the outer office. If you've been in the military, well, it's kind of like a CEO. You have your secretaries that sit out there and your office is in the back. There was no one there.

As I walked in I was told to enter. I walk in and the first sergeant is sitting there. And it's the male who had called me out of formation that day. He had just replaced our former first sergeant who was being held over on rape charges.
I was told to report for a special duty. Later that night at nine o'clock we would be wearing PT gear and I was dismissed. I went back to my room, finished the letter to my husband and reported for duty. When I arrived there it was actually a room that was two doors down from my dorm room. I knocked on it. There was no answer. I knocked again. No answer. I tried the door handle, opened it, and there was a dark room. I reached in to turn a light on and was grabbed by my arm and pulled into that room.

I was pushed against a brick wall.

As I was being told he had not stopped thinking about me since he heard me talk that first day. It was then I realized who was in that room with me and it was in that room during a thunderstorm I was raped for the first time. And I say the first time because I was under his command for another seven weeks. I was threatened that he would ruin my husband's and my military career. We come
from poor families. We are the first of both
of our families to even graduate high school.
This was our opportunity to go to college to
change our lives, to be better.

I was threatened that if I said
anything, my husband and I would never serve
at the same base. And the ultimate threat was
he would hold me over and recycle me which
would put me under his command for another
eight weeks.

But you see, even with all of the
threats, I did speak out. I told my husband,
whose advice was to keep quiet because it was
a few weeks out of the rest of our life. I
called an uncle who was a master sergeant
serving in Korea, who advised me that if I
wanted to stay in the military, that I would
keep quiet and go to my next base. So I kept
quiet and I was an exemplary soldier.

I served until my husband was killed
by a drunk driver. I was six months pregnant
and had a two and a half-year old and got out.
I have raised my children. I've gotten a college degree, but I never spoke of those rapes until 1990.

I went to the head of the Women's Department at the Houston VA because I was having depression, nightmares. I can't even begin to describe the things. I was informed there were no programs to help me. She recommended I go to AA meetings. I do not drink. I did not drink. But that was the help that was offered, AA meetings.

I did not speak again until September 2012 when I was sitting in my room with a gun to my head. I couldn't take the pain any more. My husband cannot walk up behind me and hug me without giving me warning because I startle. He's currently a contractor in Afghanistan. When he's gone, I sleep with a loaded gun on the pillow next to me. I spent three years in my home. I could not leave. I had a teenage son who became my chauffeur when my husband was gone. This
child spent his young adult days driving me
back and forth to doctor's appointments,
psychiatrists. Did the grocery shopping
because I couldn't be out in public.

So you see for the panel that sit
here before me, a few minutes ago, I would
like to say this, there is one major fact that
has been overlooked. From the very day you
enter the military, submission is drilled into
you. You are told you do not challenge
ranking NCOs or officers. There was no one in
my chain of command that I knew nor felt
comfortable enough to tell what happened to
me. Had I had someone, anyone at that time
that I could have gone to, I wouldn't have
been silenced for 26 years.

I have grown children that I am
trying to build bonds with that should have
been done when they were children. But
because of disassociation, I was not able to
give them the nurturing love that they
deserved. I am a 46-year-old woman who is
learning what it means to be compassionate with my children. My children were raised with what was drilled in me. Put your big girl panties on, get up, and move on.

My children frequently referred to me as the ice queen because I don't show emotions. I don't show love. I don't show hate. I'm just me.

The panel before me sat here and said that the chain of command is equipped to deal with this. I say it's not. Had I told my platoon sergeant, he would have had to report it to the chain of command, to my first sergeant, my rapist. How could I feel secure in reporting it? Keep in mind the threats and the intimidation. How could I have received fair and just investigation when my chain of command included my rapist?

I'd like to move on to 1996, Aberdeen Proving Ground. After the scandal broke, retired Colonel Ned Mars was interviewed by People magazine in which the
study that was conducted in 1982 was discussed, the zero tolerance policy he had written 14 years earlier. It is now 2014, 32 years after that policy was written and we are still giving lip service to zero tolerance and the command's ability to control and reduce the alarming rate of military sexual assault.

Clearly, zero tolerance has not and is not effective. The military is not just about its leaders. It is not just about the command. It needs to focus and care as much about the lower enlisted and officers.

It was suggested by the gentleman on the end, I didn't catch his name, I'm sorry, that we give the chain of command another chance. I say 32 years, actually if you look at it, much longer than that was enough of a chance. If we give them another five years, if we do that, at the current rate of 26,000 sexual assaults that was reported in 2012, we are allowing a minimum of another 130,000 soldiers to be potentially assaulted while the
command attempts to prove it can be effective
in what it has failed at for the last 50 years.

That shows us that the majority of reports do not even reach the higher command out of fear of intimidation, retaliation, humiliation and potentially death as in Carrie Knowling and Sophie Champineau cases, the two women I talk about in my book. These are the reasons I support Senator Gillibrand and the Military Justice Improvement Act, for removing the convening authority. Zero tolerance is not a new phrase. It's not a new policy. It's been around at least 32 years. It has not worked. It will not work. I do not think that the commanders deserve another 130,000 victims so that they can prove they can do something that they have not managed to do in the last 34 years.

Thank you for your time.

JUDGE JONES: Thank you, ma'am. I just want to say it's very important that you
came here today and that we were able to hear
what happened to you. And I appreciate that
it couldn't have been easy for you.

MS. DAVIS: Thank you very much.

JUDGE JONES: Next is Ginny Lee, also from Arkansas.

MS. LEE: It is a pleasure to be here today because I get a chance to no longer be silent. I knew when I was a little girl taking care of my mom just after she had broken her back that I wanted to be a registered nurse. I spent my school career going towards that goal of being a registered nurse.

My senior year in high school, our country was attacked overseas. Libya bombed a popular GI bar, hangout in Frankfurt, Germany. President Reagan responded swiftly and with the least amount of casualties possible and taught me that I wanted to be a soldier, too, so that I could combine two dreams into one. I could enlist, become a
Those dreams started to swiftly be taken away from me. My second week in basic training I had gotten sick from all the immunizations and my drill sergeant who was often under the influence of alcohol more than he was sober said that I had to be isolated because my fellow recruits said that I was keeping them awake with my coughing.

In the middle of the night I could feel a hand touch my head as if feeling for fever. At first I thought hey, this is my dad, checking on me, you know? Then that hand moved down to my breast and then it continued down the rest of my body. As I tried to fight him, he took his forearm and placed it over the top of my shoulders, my chest and my throat so I couldn't scream out. He told me if I quit fighting, I wouldn't be hurt. I kept fighting for a while and I realized he had far more strength than I did.
When he was done he told me to go clean up and put on other clothes and report back to my bunk. The next morning, I had bruises on my neck, my arms, my chest, on the inside of my legs and my knees. But I remembered his threat. He told me if I dared to say anything that I would end up like the girl in the cycle before us. I would be dead.

Seven weeks later, I thought I was pregnant. I didn't know yet that physical activity makes a woman’s menstrual cycle stop. The whole time I had also been suffering with a really bad urinary tract infection that started from that night. But I was scared to do anything. My gut told me to just deal with it. I had called my mom and I had told her about what happened. My mom told me if you don't talk about it, it didn't happen. My best friend, when I called her, she just listened to me cry. But when I thought I was pregnant I had to find out, so I requested to go to sick call. They treated me for a UTI,
but they said I wasn't pregnant and explained
to me why.

That night the drill sergeant, drunk
again, came after me and yanked me from the
bottom bunk by the collars of my BTUs. He
threw me against the wall, the brick wall,
destroying my shoulder. My female drill
sergeant heard the noise, ran upstairs, saw me
pinned against the wall, and her only reaction
was "oh shit" and walked back down the stairs.
I was then summoned to their office and told
that if I even dared to report either incident
that it would be their word against mine and
that there would be more punishment to come.

The next morning I didn't know how
badly my shoulder had been injured. I tried
to do PT that morning and my shoulder was
completely out of joint with the first push-
up. They personally escorted me to sick call
and told them that I dislocated my shoulder
during grass drills. And that's what I was
told would be my story.
I managed to get out of basic, but continued to have problems with the shoulder. I had also had bruises on my hips from where he had thrown me to the ground after the drill sergeant showed up. And I thought they were just bruises. My parents reiterated to me that the only way to survive this was to act as if it didn't happen and not to ever speak of it again.

But I didn't want to be that person because if he did it to the girl in the cycle before me, who else was he going to do it to? Because he did it to me. So at one of my orthopedic appointments I tried to tell the doctor. I did tell the doctor the real reason behind the shoulder injury. He didn't document -- not one part of the story, but he did refer me to social work services for counseling. I was never allowed to go. At that point I just wanted to get to my next duty station which was going to be Germany. When I got to Germany, no one knew
what had happened to me, until one day I was working on the base post office by myself and I was looking out the window, just daydreaming. A patron walked in and all it took was five words and I knew it was him. I picked up everything I could to throw at him. First thing was a tape dispenser. Next thing was a stapler. The whole time I was screaming for anyone to come.

Instead of being the happy-go-lucky person that I had been the first year and a half in Germany, I changed. I cried at the drop of a dime. Or it could have been a look. My XO finally got me to talk about -- and I told her what happened. She, of course, did what she needs to do which was to take it to the top first sergeant and to our captain. Not long after that I was told that I was going to be medically discharged because of my shoulder. My shoulder kept dislocating, but the injury was more complex because the collarbone itself had also been completely
torn out of both sockets. So every time I
would try to run, do PT, push-ups, the
collarbone would go on my airway and it would
crush the airway. They had to go in and
remove an inch of it.

It was my firing shoulder. So they
said if I couldn't fire a weapon, I couldn't
be a soldier. So I thought one more time I'm
going to try to tell what really happened so
that something can be done. So when the
medical review papers started coming in, I
filled out the form where I requested to
appear in front of the medical review board
and specifically asked for a woman to be on
the board so I could tell them what happened
to me.

Within a month my discharge papers
were there. Mysteriously, a telephonic form
showed up in the my files saying that I agreed
not to go and testify in front of the medical
review board. They just wanted me out.

Everything about the military I
loved. Going up Drag Ass Hill didn't bother me at Fort Jackson, South Carolina. Running 12 miles didn't bother me. The long nights, cold nights, wet nights, none of that bothered me. Because when I came in I thought I was going to be part of a team, a family, with brothers and sisters at arms that would have my back and I would have theirs, that I would take a bullet for and they would take a bullet for me. And I believed that all the way through my chain of command.

I have spent the last 20 years trying to get my disability through the VA for PTSD. Even though it wasn't as severe as it is today, I still have the nightmares and I lost four marriages because of it. When the shoulder injury got so bad that I could no longer be a registered nurse, it was like being raped all over again. Now both of my dreams are gone. And I became a shell.

To the gentlemen that were sitting at this table before us, I want to tell them
that every blind eye they developed and every
deaf ear they turned, they raped me as much as
the drill sergeant did that night. To me,
being silent isn't enough any more.

In President Reagan's words, "They
counted on me to be passive. They counted
wrong." You raped me. And it's time for it
to change. The military has had their time.

Thank you.

JUDGE JONES: Thank you very much,
Ms. Lee. I very much appreciated hearing from
you.

MS. LEE: Some of the things that I
want you all to take into consideration --

JUDGE JONES: I'm sorry, I thought
you said thank you and you were leaving.

MS. LEE: Just a few statistics.

All of you can see that I'm someone's
daughter, but just for a moment think that I'm
your son. Because there are many men out
there being raped and brutalized as there are
women. But we have spoken more about women
throughout this entire process than we have the men. And that needs to be addressed, too.

There needs to be tougher penalties, mandatory prison. When they do get out, they need to be required to be on sexual assault prevention registries and maybe, just maybe last year two police officers wouldn't have lost their lives because the chief warrant officer was given a choice to either resign his commission after raping a fellow officer and enlistee or face court-martial. He resigned. And he did it again in the civilian world. And now there are two officers, dead. Wives without husbands and children without their father. Because we gave him a choice. Neither way was what happened to me or how that happened is right. And that's why the chain of command has got to be taken out of it.

As a sexual assault nurse examiner volunteer, that needs to be a part of the process for every victim, male and female.
They know the protocols. Commanders don't
know the protocols. They don't know how to
take pictures to see tears in the cervix or to
comb for evidence or to look under fingernails
for scrapings that can prove a case.
Commanders aren't trained. They're trained to
get us ready, troop ready to go to war, not to
go to court.

JUDGE JONES: Thank you again, Ms. Lee, very much.

COL HAM: Ma'am, we had a request
from a Mr. Tim Collins. I don't know if he
has been able to make it today.

JUDGE JONES: Mr. Collins? And he
did say that he might not be able to make it,
so it doesn't look like he did.

COL HAM: And our final public
comment is from Ms. Sara Zak from Arlington.

MS. ZAK: Good afternoon, Your
Honor. My name is Sarah Zak. Thank you for
the opportunity to address the Systems
Response Panel today.
I'm a retired Navy commander and a graduate student on leave of absence from the University of Southern California, School of Social Work. I am not a stakeholder and I am not looking for employment. I am not a victim of sexual assault and I am not an expert in any of the professional fields that are currently addressing this problem.

I am an independent, self-supported, concerned citizen who has come to the D.C. area to learn about the military sexual assault problem and what is being done to fix it.

First, I would like to offer my thanks to the panel for all the work that has been done to find a solution to this problem. I can't imagine all the time and energy that has gone into it from your part. I certainly have an idea of how it has been for the witnesses.

Given that the purpose of this panel is to make recommendations on how to improve
the current system, I join with others who are eagerly anticipating the public release of the results of your investigation. Personally, I hope your report will include recommendations for two or three alternatives to the current system of investigation and prosecution and I hope that one of them will give Senators Gillibrand and McCaskill a basis for collaborating on a single bill that will improve the military sexual assault problem, be acceptable to the Department of Defense, and get strong bipartisan support in Congress.

As I stated earlier, I have a perspective on this issue that I believe is unique so in closing, I request your permission to offer a couple of personal thoughts. I agree with those who believe the commander of the accused should remain part of the prosecution of an alleged sexual assault offender. I also agree with those who believe the commander of the accused may be too biased to fairly adjudicate cases involving sexual
With due respect to sexual assault victims and Senator Gillibrand, removing the commander of the accused from the process is not the only way to eliminate the perceived bias. As with many things in the military, training may be part of the answer and I know that is being addressed by the Department of Defense Sexual Assault Prevention and Reporting Office.

Unfortunately, the statistics that are used to support military sexual assault prevention and reporting training pose a credibility problem. The consistency with which the statistics are being kept through the Department of Defense is an issue of concern. A lack of understanding about the source and collection of the data also contributes to the general disbelief that military sexual assault is a problem at all.

So although the DoD annual report on sexual assault for Fiscal Year '12 presents
data that you have in front of you, it's a pie
chart that indicates the percentages of rape,
sexual assault, aggravated sexual contact,
abusive sexual contact, non-consensual sodomy
and other. I would propose that when that
chart is presented in front of some training
to commanders they'll see the pie chart, but
instead of seeing rape, they'll see the victim
asked for it. Instead of seeing sexual
assault, they'll read too much alcohol
involved. Instead of reading aggravated
sexual contact, they'll think oh, my God,
another he said/she said problem. Instead of
abusive sexual contact, they're going to be
thinking the victim is lying. And as far as
non-consensual sodomy is concerned, they'll
probably think my sailor, airman, soldier,
Marine, is not a sex offender. And for the
other category it may be something as trivial
as the accused was just joking around.

After three decades of empty threats
of zero tolerance, it seems to have taken
hours in the congressional hot seats for the
leaders of the military services to finally
get that there is a serious sexual assault
problem in the military. I hope they are able
to overcome challenges such as doubt of the
statistics and get the rest of the troops on
board with the new program in a timely manner.

Again, thank you for the privilege
of speaking with you today.

JUDGE JONES: Thank you very much,
Ms. Zak.

COL HAM: That completes the public
comment, ma'am. Did you want to take a five-
minute break?

JUDGE JONES: We're going to try to
reconfigure the seating up here, so we're
going to take a five-minute break and we'll
come back to continue the process. Thanks.

(Off the record.)

JUDGE JONES: All right. At this
point, ladies and gentlemen, we've heard our
presenters and we've also taken public
comment. And, again, I want to thank the last three speakers who were kind enough to come in here and tell us their thoughts and their stories of what happened to them. It's very important to us.

What we're going to do now, and let me explain it, is the following. As I think I've mentioned earlier, the panel has three Subcommittees so that we could divide the tasks, and a Subcommittee has one or more, usually two or more — they can't hear me?

Okay. Sorry. I don't know if we've ever had a —

(Off the record comment.)

JUDGE JONES: Once the Panel was formed with its nine members, we also created three Subcommittees. And the one that you've heard from today the most has been the — or the topic of is the role of the commander, and there is a Role of the Commander Subcommittee. That Subcommittee has worked at a number of meetings. We've also, of course, all been
present for the other public meetings which
are not Subcommittee but full panel meetings.
And we have an initial report, an initial
assessment with respect to whether commanders,
senior commanders should retain authority to
refer cases of sexual assault to courts-
martial.

This is a report out from a
Subcommittee. It is not - it has not been
deliberated by the full panel, the nine-member
panel, and that's what we intend to do today.

Each of the panel members has been
presented with a copy of the initial report
out from the Role of the Commander
Subcommittee, and at this point I'm going to
introduce the topics that have been covered,
the findings that the Subcommittee has arrived
at, as well as a narrative of the initial
assessment and conclusions of the
Subcommittee.

As I said, this is not the report of
the full panel. This is the deliberations of
the full panel on this initial assessment out
of a Subcommittee. So, let me begin with a
little description of what our methodology has
been.

Since June 2013 this panel and
Subcommittee members have held and attended 16
days of hearings including public meetings,
Subcommittee meetings, as I mentioned. We also
had preparatory sessions and there were site
visits. You may have heard some testimony with
respect to that. We've had more than 170
presenters. Presenters have included surviving
sexual assault victims and we've heard from
more today, current and former commanders both
active duty and retired military justice
practitioners, military and civilian criminal
investigators, civilian prosecutors, defense
counsel, and victim's counsel, sexual assault
victim advocacy groups, military and civilian
victim advocates, military sexual assault
response coordinators that we all know as
SARCs, Judge Advocates General from each of
the services, a variety of academicians including social science professors, law professors, statisticians, criminologists, and behavioral health professionals, first responders, chaplains, and currently serving United States Senators, Senators Gillibrand and McCaskill have both appeared before the panel and given us the benefit of their thoughts.

In addition, the Subcommittee has considered publicly available information and documents and materials that have been provided to us including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, and training aids. To date, the Department of Defense and the services have submitted more than 400 pages of narrative responses, and more than 750 attached documents. This panel has also sent letters to 18 victim advocacy organizations around the
country soliciting input from these
organizations to assist us in our review.
Advocacy organizations providing information
to the panel have included those working
specifically in military sexual assault,
including Protect our Defenders, Service
Women's Action Network, Rape, Abuse and Incest
National Network, the National Organization
for Victim Assistance, and the National
Alliance to End Sexual Violence.

All right. Let me now read the
background and the findings and conclusions
which I wish to mention again are an initial
assessment from the Subcommittee to be
deliberated now by the full panel.

Based on all information considered
to this point, a strong majority of
Subcommittee Members agrees the evidence does
not support a conclusion that removing
authority to convene courts-martials from
senior commanders will reduce the incidence of
sexual assault or increase reporting of sexual
assaults in the Armed Forces, nor does the
evidence indicate it will improve the quality
of investigations and prosecutions, or
increase the conviction rate in these cases.
Further the evidence does not support a
conclusion that removing such authority will
increase confidence among victims of sexual
assault about the fairness of the military
justice system or reduce their concerns about
possible reprisal for making reports of sexual
assault.

As a result, the Subcommittee's
assessment at this time is that the authority
vested in senior commanders to convene courts-
martial under the Uniform Code of Military
Justice for sexual assault offenses should not
be changed.

Now, in reaching this conclusion the
Subcommittee has made the following findings.
First, criticism of the military justice
system often confuses the term "commander"
with the person authorized to convene courts-
martial for serious violations of the Uniform
Code of Military Justice. These are not the
same thing.

Second, under current law and
practice the authority to refer a sexual
assault allegation for trial by court-martial
is reserved to a level of commander who will
normally be removed from any personal
knowledge of the accused or victim. If a
convening authority has an interest in a
particular case other than an official
interest, the convening authority is required
to recuse himself or herself.

Third, senior commanders vested with
convening authority do not face an inherent
conflict of interest when they convene courts-
martial for sexual assault offenses allegedly
committed by members of their command. As with
leaders of all organizations, commanders often
must make decision that may negatively impact
individual members of the organization when
these decisions are in the best interest of
the organization.

        Fourth, there is no evidentiary
basis at this time supporting a conclusion
that removing senior commanders as convening
authority will reduce the incidence of sexual
assault or increase sexual assault reporting.

        Fifth, sexual assault victims
currently have numerous channels outside the
chain of command to report incidents of sexual
assault, and they are not required to report
to anyone in their organization or any member
of their chain of command. These alternative
reporting channels which exist today are well
and broadly publicized throughout the
military. Military personnel in the United
States may always call civilian authorities,
health care professionals, or other civilian
agencies to report a sexual assault.

        Sixth, under current law and
practice sexual assault allegations must be
referred to and investigated by military
criminal investigative organizations that are
independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice which would be a violation of the Uniform Code of Military Justice.

Under current law and practice, the authority to resolve sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.

Eighth, none of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems
including eliminating the role of the convening authority and placing prosecution decisions with independent military or sometimes civilian entities, our allies still face many of the same issues in preventing and responding to sexual assaults as the United States Military.

Ninth, it is not clear what impact removing convening authority from senior commanders would have on the military justice process, or what consequences would result to organizational discipline or operational capability and effectiveness.

Tenth, Congress has recently enacted significant reforms addressing sexual assault in the military, and the Department of Defense has implemented numerous changes to policies and programs to improve oversight and response. These reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.
And lastly, prosecution of sexual misconduct contributes to the overall effort to address this problem. Commanders must play a central role in preventing sexual assault by establishing command climate that ensures subordinates are trained in and embrace their moral and legal obligations, and by emphasizing the role of accountability at all levels of the organization.

The Subcommittee heard many perspectives and reviewed considerable information, as I mentioned earlier, about the commander's role in the military justice system as the prosecutorial disposition authority for sexual assault allegations.

Proponents advocating for system change and those defending the UCMJ's current convening authority framework offered different opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what consequences, positive or
negative, would result from substantially changing the UCMJ's convening authority framework. Accordingly, the Subcommittee believes caution is warranted and systemic change may not be advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening decisions for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September panel public meeting observed that it assumes too much that somehow a prosecutor is always going to be better at this than commanders. Civilian jurisdictions face under-reporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions where prosecutorial decisions are supervised by elected or appointed lawyers is more effective.
A recent White House report describing the civilian sector notes, and I quote, "Across all demographics rapists and sex offenders are too often not made to pay for their crimes and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped, many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them."

The White House report also highlighted how that low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors abound. Often, prosecutors based charging decisions on whether physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor's character or behavior. Other factors outside the intrinsic
merits of the case such as budget, staffing, or time constraints also may influence charging decisions for prosecutors.

In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Congress, as I had previously mentioned, has recently enacted significant reforms to address sexual assault in the military, and the Department of Defense has implemented numerous changes to both policies and programs to include oversight and response. Preliminary indicators demonstrated in recent reporting and prosecution trends appear encouraging, but these reforms and changes, as I've mentioned, have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of changes to senior commander authority in the military justice
system, commanders and leaders at all levels
must continue their focused efforts to prevent
incidents of sexual assault and respond
appropriately to incidents when they occur.

Military commanders are essential to
creating and enforcing appropriate command
climates and senior leaders are responsible
for ensuring all commanders effectively
accomplish this fundamental responsibility.

I'd only like to add that, as I
mentioned and I'll say it again, this is our
initial assessment, and with respect to the
Role of the Commander Committee there are a
number of other issues that we are tasked with
looking into. And, indeed, I am certain that
we will hear more information with respect to
the, retaining the commander as the convening
authority.

I'd like to now ask Professor
Hillman to speak as she has a separate
statement for the consideration of the panel.

PROF. HILLMAN: Thank you, Your
Honor. I appreciate the opportunity to set forth my perspective on the issues as a member of the Subcommittee that I reached. Three prefatory notes, then I'll read the statement that's before you that's attached behind the report of the Subcommittee.

First, I'll note that I wrote it before we heard testimony today, and I appreciate the testimony of everybody today. And as the Subcommittee overall will do, I will integrate that into the statement that I wrote. And I don't want folks to feel not heard because you came today rather than earlier.

Second, I want to thank our staff. I could not have reached conclusions or written this without the support of a staff that has compiled a Herculean amount of information, and I'm grateful for that.

I'd also like to mention that the Subcommittees, the other two Subcommittees have not yet reported to us, and I look
forward to their reports, too, as does the
panel overall, I'm sure, as we assess these
issues.

And then the third thing I want to
say before I read it is I have great respect
for the survivors of military sexual assault,
for the leaders of our Armed Forces, and for
my colleagues on this panel. We share a goal
of improving the military's response to rape
and sexual assault.

I understand the recommendation to
retain prosecutorial discretion in command
stems from their commitment to both fight
military rape and sexual assault, and preserve
a military, legal, and command structure that
works. I don't share their opinion that this
particular part, that the military, legal, and
command structure works for this particular
problem, and that's why I reached a different
conclusion from considering the same evidence.

I wrote separately to explain why I
stand apart from my Subcommittee colleagues on
the issue of whether convening authorities should retain prosecutorial discretion. I believe we should vest discretionary authority to prosecute rape and sexual assault in the same people on whom federal, state, and many respected Military Criminal Justice Systems rely, trained, experienced prosecutors.

For decades, military sexual assaults scandals have been a regular source of national embarrassment. Senior military officers testified repeatedly and convincingly before our panel and Subcommittees about the imperative to "get to the left of the problem," not to wait until the next incident to respond but, instead, make immediate changes to break the cycle of scandal, apology, response, and recurrence.

They and many other witnesses asserted that the only way to prevent military sexual assault is to attend to the big picture factors, cultural, social, demographic, environmental that enable it to occur. We
heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault. We did, however, see proof that rape and sexual assault continue to occur at too high a frequency in the Armed Forces despite distinctive elements of military service that should curb their prevalence. These elements include the elevation of honor and sacrifice above personal gain, a greater degree of surveillance in military life, the higher ethical standards that service members must embrace, and the military's ability to select its members from among those eligible to serve.

Rape and sexual assault pose distinctive challenges in the U.S. military which remains predominantly male and marked by imbalances of power among the individuals who serve. We entrust our military with the legitimate use of force to support and defend our country and our Constitution against all
enemies, a duty it bears in part by drawing on
a history of war and military successes in
which sexual violence has unfortunately been
commonplace.

Commanders must overcome this by
leading a cultural shift towards greater
respect for gender equality and legitimate
avenues for sexual expression away from a norm
that celebrates only aggressive male
sexuality. This shift is no slight change in
force. It is a sea change, albeit one
underway.

If commanders remain focused on
implementing this change they will continue to
improve the confidence of survivors in the
military's ability to respond. Survivors and
their families and communities will be able to
trust that their assailants with stellar
military records or mission-essential skills
will not be protected from legitimate
prosecution. They will realize that reprisals
from fellow service members are not an
inevitable consequence of reporting a sexual
assault, and all service members will know
that attitudes that denigrate women and gay
men will not be tolerated both because they
violate regulations and because they create
conditions in which sexual assault is more
likely.

Although commanders must lead the
way in changing military culture, they are
neither essential nor well-suited for their
current role in the legal process of criminal
prosecution. Command authority in military
Justice has already been reduced significantly
over time. It will be further limited through
recently enacted changes, yet the UCMJ
continues to require that convening
authorities exercise prosecutorial discretion.
This mixture of roles in which a convening
authority must both protect the overall well-
being of a unit and insure that unit's mission
is accomplished, as well as decide whether a
specific factual context warrants prosecution,
creates a conflict that cuts in different ways, all unhealthy.

For example, commanders who speak out assertively on the importance of prosecuting sexual assaults risk undermining the legitimacy of any later courts-martial.

Likewise, in light of the heightened attention now directed towards military sexual assault, defense counsel's well-founded concern that convening authorities under pressure to demonstrate high rates of conviction and prosecution will order courts-martial to go forward regardless of the strength of the evidence. Removing the convening authority from the charging process would address these concerns while freeing commanders to zero in on the changes in culture that are our best hope for sustainable improvement in sexual assault prevention and response.

The decision to prosecute is among the heaviest burdens we place on attorneys in public service. The ethics of the prosecutor
are among the most powerful and studied in the profession. Whether there is evidence to support a criminal prosecution is a question of law and of discretion. Senior judge advocates licensed by the same authorities that license civilian attorneys and subject to the professional ethics codes of both civilian and military authorities are every bit as capable of exercising that discretion as their civilian counterparts.

When some of our allies adopted legal reforms to replace convening authorities with experienced and trained prosecutors, opponents voiced concerns about the deterioration of command and disengagement from the problem of sexual assault that were very similar to those now raised by many U.S. military leaders; yet, no country with independent prosecutors has reported any such dire consequences. I see no reason to defer to predictions about the impact of this change over the pleas of survivors of sexual assault,
many of whom consider an independent prosecutorial authority the cornerstone of any effective response to military sexual assault.

Likewise, U.S. service members who face courts-martial deserve no fewer safeguards of an impartial and independent tribunal than service members of other countries with whom they serve. The United Kingdom, Canada, Australia and most other countries with well-regarded military justice systems have already ended command control of courts-martial to protect the rights of accused service members. That goal is consistent with the procedural fairness that both victims and alleged perpetrators of rape and sexual assault deserve from U.S. Military Justice.

Our panel and Subcommittees heard again and again that the sexual assault problem in our military has given service members and others reason to pause when young people turn to them for advice about whether
they should join the U.S. Armed Forces. That reluctance to allow our daughters and sons to embrace a life of service to our country is the real threat to U.S. military effectiveness at stake in this debate. An impartial and independent military justice system that operates beyond the grasp of command control would help restore faith that military service remains an honorable, viable choice for all.

Thank you, Your Honor.

JUDGE JONES: Thank you. At this point, are there any comments before we begin actual deliberations with respect to the contents of the report, or the findings?

Colonel Cook.

COL COOK: Yes. One point just based on the initial assessment read both by the majority of the Subcommittee and by Professor Hillman in her statement, the one thing I would suggest is just in the methodology just to reflect that we heard from both male and female surviving sexual assault victims, and
that we heard from our allied brethren, the
other military forces. That's addressed in
Finding 8 on the initial assessment and both
Professor Hillman's, but it's not reflected in
terms of who we looked for, and who we
considered. So, just as an administrative
comment.

JUDGE JONES: Thank you, Colonel. Any
other comments with respect to the substance
of the report?

All right. Why don't I just begin,
and I - we can go finding by finding, and
then reach the ultimate conclusion which we
can then discuss. The first one is the
criticism of military justice system often
confuses the term "commander" with the person
authorized to convene courts-martial for
serious violations of the UCMJ. These are not
the same things.

I think I'd just like to throw out
the fact that when I first got on this panel
I didn't know what a convening authority was,
and learning exactly how the system works within the military, how the Justice System works has made a big difference.

The convening authority, and I think this is a later finding, is almost always not the direct commander of either the accused or the accuser. And I think there's a perception out there that a victim of sexual assault ends up having her case determined by her direct commander, or his direct commander. And I think that it's important to make that distinction.

I guess I should back up and say this is also a Response Systems panel that is charged with looking for positive responses that will be effective to reducing sexual assault in the military. And I have not been persuaded that the removal of a commander as the convening authority is going to have a positive impact.

There is no empirical evidence that reporting is going to increase. There is no
empirical evidence that prosecutions will be better handled, that investigations even before prosecutions will be better handled. And I should say, by the way, there's a lot of evidence that with reforms and also just the training that's been going on for several years, investigations and prosecutions are being handled in a better fashion than they were with the military reaching out to the best practices of civilian systems. So, I'm not denigrating those investigations and prosecutions, I'm simply saying that there is no evidence that removing the convening authority is going to improve any of those parts of the system as they exist now.

If I were persuaded that removing the convening authority would encourage victims to report then this would be a different story, but I'm not persuaded of that. If you think back on most of the evidence that we've heard both from victims who have come in to tell us what happened to
them and others, the complaints are about not
just commanders, of course, but sexual
assaults by many members of the military,
complaints about ostracism by peers,
complaints about lack of services, complaints
about not being listened to or understood.
Those are all legitimate complaints. They all
speak to the culture of the military and the
failure to provide those services that are
necessary, or the quality of services that are
necessary. In my mind, they do not have
anything to do with a convening authority who
makes a decision on whether or not to
prosecute.

I think that when you have a
problem, as we do, we look at it and try to
figure out what the elements of it are, we
look for causes, and then you look for how to
cure it. I just don't see a result coming out
of removing a convening authority that is
going to make a difference. What I do see will
make a difference is the work of the
commanders, the leadership of the commanders, and believe me, I agree with other statements today, they are under a lot of pressure to get it right, if you want to call it that, this time. That's been a changed culture, and I don't - I just don't see the efficacy of removing the commander as convening authority.

I've spoken for a long time. Maybe others would like to comment.

BG DUNN: Could I add something to your remarks?

JUDGE JONES: Sure, by all means.

BG DUNN: I think one of the other things that we have seen is a big divide in understanding the way the system works between those who are young in age, maybe also young in terms of time in service. And although I know we're discussing the role of the commander here in our larger capacity as a panel, you know, I think that's where our future discussions on training and victim services, and execution so that individuals
know where to go and where to turn when
something happens is much more of an issue
than, as you said, a high level far removed
from the incident actually makes a decision on
whether a case goes - you know, is referred
for court-martial.

PROF. HILLMAN: Can I respond?

JUDGE JONES: Sure. Absolutely.

PROF. HILLMAN: I agree that there's
no proof of what difference this would make.

There is no - chairing the Comparative
Systems Subcommittee has made clear there is
no comparable jurisdiction to the U.S.
military, none. Foreign military jurisdictions
are not directly comparable, civilian
jurisdictions which are all over the place in
size and demographics, and the complexity of
the cases, and the frequency of the cases, and
all the things that shape responses, they're
all over the place. We can't say - we can't
look to a system and say this is one that we
- has made this change that we can understand
what happens. That's absolutely right. I just
don't see proof of the negative effects of it
either. And, in part, that goes to this first
point about the commander and the convening
authority. I don't think the soldier on the
ground knows who the convening authority is.
And if the soldier on the ground already
doesn't know who the convening authority is
who's ordering the prosecution to go forward,
then what difference would it make to move it
to an independent military prosecutor who is
potentially remote, because if already don't
have that conflict embedded in a close in
commander who knows what's happening, and
that's why the service member would trust that
it would be handled appropriately because that
commander is someone who has the trust of that
service member already. That's not the person
making the decision, so why would it harm
their confidence in the system to move it from
that distant convening authority, distant in
rank and location frequently, to a arguably
similarly distant military prosecutor?

JUDGE JONES: Well, I agree that I don't think many or most soldiers do know what or who the convening authority is, but I think that also means that making that change actually has little value in the day-to-day reactions of our soldiers who may be potential sexual assault victims.

BG DUNN: And we have heard so much testimony from commanders about how integral they view the Uniform Code, you know, their authority under the UCMJ to be to their ability to maintain good order and discipline in the command. And, you know, if I take what Professor Hillman just said about well, if we change it it's not going to impact the soldiers that much because it's so far removed, I think you don't make a change that large without a really good reason to make it. And from my perspective, we don't have the evidence to show that making the change will have the impact.
JUDGE JONES: Well, I'm also concerned that this change won't have an impact. It will be made but it won't have - if it's made, won't have an impact, and then, one, it won't have been an effective response. But, two, I worry about the reaction of sexual assault victims then.

There's a perception that this change is going to make - sort of make everything all right, or I think somebody today said was the last thing we need. I don't view it that way, and I think if you're going to make a change, as General Dunn said, is going to be a large systemic change in the way the Uniform Code of Military Justice works and how the command system works, the convening authority system works, we have to have some confidence that there's going to be a positive result in responding to sexual assault, which is why I don't believe that we're necessarily going to see that. I have no proof of it. And, moreover, I don't see where switching out a
commander who's advised by a judge advocate,
a general and his staff is going to come out
with any different, less informed decisions
than a different body of O-6 JAGS who will be
somewhere else. And, frankly, I don't think
the sexual assault victims are going to know.
They're going to see military lawyers, if they
see them, making these convening decisions,
and they're going to - I don't know how
different they're going to look from the
decisions they're getting now.

My concern is I don't - I cannot
say as I sit here that I think there will be
incredibly negative results to the command if
this convening authority is taken away. I
don't know, and that's something that we're
continuing to look at. We said we don't have
any clear evidence of what the impact will be
one way or the other. But what I also don't
have any proof of is that this is going to
make a difference in terms of how sexual
assaults are dealt with, the services that are
provided, how they're dealt with by
investigators or prosecutors. And I think the
results that need to be achieved here is more
reporting, better investigating, better
services, medical, mental health, all of
those, better prosecutions and adjudications,
and I think those are the kinds of results
that are going to make a difference in
victims' confidence, not the change of a
convening authority far distant from the
command where the event occurred, and the
abuses where the event occurred. Ms. Holtzman.

MS. HOLTZMAN: Madam Chair, I find
myself in a kind of unusual position here
because I feel - I mean, I've heard the
testimony of the survivors, and it's very
powerful, and it's very disturbing as an
American, as a woman. And, obviously, I think
everybody on this committee wants to do
whatever we can to try to make a difference so
that this kind of experience doesn't happen to
anybody else.
I spent a good deal of my professional life involved in fighting sexual assault as a member of Congress, as a District Attorney, so if the evidence were before me that removing the commander as convening authority and putting it in the hands of a prosecutorial bureaucracy would make the difference in conviction or quality of prosecution, in the willingness to report, in the willingness to cooperate, I would be saying junk it. We can't have the present system. But we haven't seen any evidence of that.

I think as the Chair pointed out, and I think Professor Hillman pointed out, this is such an abstract issue, the convening authority; nobody even knows what it is. I mean, very few people. I came also to this panel, I had no idea what a convening authority, I didn't know how the military justice system worked. And I'm not here as a handmaiden of the military, I'm here as
somebody who started out with a view that Senator Gillibrand is a very bright and intelligent, and committed person for whom I have great amount of respect, and I thought her proposal sounded right.

I've changed my mind, because I was just listening to what we heard. I started out that way thinking why not change it? And now I'm saying why change it? Because I do think that some of what we've heard here gives me pause in terms of what would happen to the present system. I do believe that when a commander makes a decision, the convening authority, which is military personnel, says that this conduct warrants referral for prosecution. That makes a statement to the whole military that this conduct is on its face unacceptable. That doesn't mean that this person did it, that the accused did it, or that it actually happened, but that this conduct is not tolerated. And I think that kind of a statement is really important.
If we junk this idea of the commander, high-up commander as the convening authority, convening authority meaning having the decision about whether to prosecute and what charges to bring, who are we leaving it up to? You know, it's like jumping from the frying pan into the fire. What are we jumping from, and what are we jumping to? And I'm very worried about the to, what we are picking out as an alternative. It sounds very wonderful. Let's turn this over to trained prosecutors.

I can tell you right now, I was District Attorney in Brooklyn, the fourth largest office in the United States. There is a major investigation about "trained" prosecutors going on right now in that county because the question is whether trained prosecutors follow the law, the Constitution, not the Code of Military Justice, but the U.S. Constitution with regard to the requirement to turn over exculpatory evidence to defendants. These are trained prosecutors.
There are other issues with regard to trained prosecutors, and when I became District Attorney I cared a lot about the prosecution of sexual offenses. And I made those changes in priorities. In my office when I came there, I wouldn't say that the prosecution of sexual offenses was a top priority, and I would say that if the case were close they might decide not to bring it. I made a change in that because I said, as some commanders might say, or convening authority might say, it's more important to send a message if the facts warrant it, and the law warrants it, to try to achieve a conviction than to say oh, I want to have a high conviction rate. Just turning it over to a prosecutor doesn't mean you're going to get the result that you're looking for here because a prosecutor - these are - what this provision would do is be to take all felony cases, burglaries, theft, assault, and other kinds of similar - murder and take them to
the prosecutorial authority, whatever it is.

Well, who's going to decide in this
prosecutorial authority that sex crimes are a
priority? Maybe they'll think that burglary is
a priority, or maybe they'll think that auto
theft at a felony level is a priority, or
maybe they'll think that regular assault is a
priority. That's what happened when I became
DA, I had to change those priorities. Who's
going to be setting those priorities? We don't
know.

Here we have a command structure
where we know who's held accountable. We know
the person who's made that charging decision.

When it's turned over to a faceless, nameless
organization who's making that charging
decision? Who do I complain to? Who do I hold
accountable? These are very serious questions.

And while it sounds very good to turn it over
to trained and experienced prosecutors, I've
been there. I had an office of 400 trained and
experience prosecutors, and I would not say
that without a leader setting the priorities
and setting the charging direction, that just
turning it over would produce a result that
any one of us would have supported. Each
decision might be fine on its own but, you
know, I've got this big caseload and I'm
worried about my promotion so I'm not going to
take this he said/she said, because if I lose
that, that's going to be a demerit for me.

  Don't think that prosecutors won't
have some of the very same concerns that
everyone is worried about with regard to
commanders. They are also human beings, so
before we jump from what I don't consider yet
to be a frying pan, I don't want to jump into
a fire. So, I need to know where we're going
to if we're going to make this change, and we
don't have that clear. And I think, also, that
if we had - we don't have the evidence that
we need to have to make the change at all.

  I just also want to point out the
decision now because of the focused attention
on this problem, the decision by the convening authority has been very narrow so that if the judge advocate, the legal advisor and the convening authority don't agree on what should be done, then the whole matter automatically goes up. So, the decision - no commander is going to have a final decision to say no, unless that's reviewed. Well, that's pretty serious. That means that that decision to say no is going to be really carefully scrutinized. And that's what I think was one of the problems here that I raised with the former members of the military, is the fear that if you leave this with any commanders that somehow they will try to push this under the rug by not deciding to prosecute, or by interfering with investigations.

Well, they can't interfere with investigations, but they can't push this under the rug either because a no decision is going to be reviewed on a higher level.

How this works in practice is
something we have to see. These are all new
changes that have been made, but it seems to
me that the changes that have been made will
protect the concerns that the commander - the
convening authority is making a serious
judgment. I might not always agree, people
might not always agree with my opinion, but
that the decision is made with sincerity, on
the basis of the evidence in an honest and
honorable, straightforward way. And if it's
not, it's going to be reviewed. And that's
going to be reviewed.

So, I think that the changes that
have been made should address the issue of
trust, and I think those people who want to
see the system changed ought to take a really,
really, really hard look at what the
alternative is. And that has not been spelled
out. It's very fuzzy, very vague, and very
problematic and troublesome to me having been
in that very hot seat of a prosecutor where we
had to prosecute these cases. And without the

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leadership, and without the drive to make
those changes, who knows what kind of
bureaucratic response there will be,
bureaucratic response to the issue of sexual
assault by trained professional prosecutors.
That could happen, and that is a danger here,
and that hasn't really been addressed by those
people who advocate that change. Thank you.

JUDGE JONES: Jim.

VADM HOUCK: I am one of the
Subcommittee members who is supportive of the
majority, if you will, opinion that's been
reached. And I think that to segue from
Congresswoman Holtzman's comments about
trained professional prosecutors, I have been
a professional prosecutor in the military. I
have supervised them. There are many things
that I don't know. There are probably a few
people who have more insight into this dynamic
than I do in terms of the relationship of the
prosecutor with decision makers in the
military.
I would submit that, number one, we have much evidence that the decisions will not change at all. Overwhelming evidence that in a statistically significant way the decisions won't change at all. I would submit that the decisions are actually better as a result of having commanders involved. That having been here myself and having been down this road, I've learned from commanders who I've argued with and debated, and the decision making process that comes out of that interaction between the commander and their Judge Advocate produces a stronger, not a weaker decision.

One of our witnesses this morning told part of a story that he told in its entirety in an earlier panel. Former Congressman McHale, Colonel McHale talked about this morning the fact that when he was on Reserve duty he was asked by a commander to do something that he viewed to be inappropriate. He was asked to rush an investigation, and Colonel McHale was outraged
by that. That's what he described this morning. At our previous session he told us the rest of the story, which was that he pushed back on the commander and he argued with the commander, and he persuaded the commander to do the right thing. That goes on all the time, and I think the evidence of this, I think that we haven't really commented much on, but I think ought to be pretty compelling to people is that we have advocacy for a system where military lawyers are essentially put in charge of prosecutions.

If you stop to think about it, your natural conclusion would be to think that military lawyers would support that kind of aggrandizement of their authority and their importance in their role of a system. It ought to say something that to a person military lawyers do not support that increase in their authority.

I was The Judge Advocate General of the United States Navy for three years, and
the Deputy JAG for three years before that. I think it would be a mistake to increase the authority of military authorities – military lawyers in that way. And it's not a gender thing. Female judge advocates feel the same way as male judge advocates do. Why is that? Why do we see it this way, in a way that's so curious sometimes to civilians and to outsiders who look at the system that exists for the rest of society, which seems to work well enough; although, I do think studies that are coming out to a certain degree give lie to how well it really does work. But why do we see it that way? I think because when we have served we have an understanding that a base fundamental to this is the issue of trust in the commander, and the role that that plays in military society. And it is not a decision to give somebody an appendectomy or to set a broken arm.

It is, as General Brady talked about this morning, fundamentally about behavior and
the trust that we place in people to make
decisions that put people in harm's way, to go
to their death, to die, and to say now at this
juncture to acknowledge the obvious, that we
have a long way to go. But that to remove
commanders from this now I think sends a
signal of distrust to commanders and their own
ability to fix it. And, frankly, I think that
it is wrong to say that the military has had
30-some years. It may not be wrong to say, but
I think it's over simplistic to say that the
military has had 30-some years, or however
many years you choose, to fix this. This
dynamic is changing. It's a moving target, and
we have to continue to keep our eye on the
ball to get there. But commanders have played
a central role, a central judicial role in the
solution of the drug problem in the military.
They've played a central judicial, quasi-
judicial role in the resolution of race as a
problem in the military. And I think that the
decision to keep the convening authority
involved in this is the right one for those reasons.

JUDGE JONES: Colonel Cook.

COL COOK: Madam Chairman, two points. One is going to be exactly what
Congresswoman Holtzman had just said. You know, when I sit there, I've been in the
system, but you sit there and you look back and say would it change anything if we did
remove the convening authority piece? And I can't - for me, I still come back to if it is
the evidence and that legal advisor and the commander that are considering the same
information, I don't see that the person, if it's a Judge Advocate, whether it's in a
regional type office or remote into a central location back in the United States, that
that's going to change any of those results, so I don't see that statistical difference.
But even if I assume that maybe it would, it changes the perception of the victims or of
the people involved in the system, and that is
critically important, as well.

The concern I have is to take that to the next step, the second- and third- order effects that you sometimes consider within the military and you do set up the centralized area, perhaps a prosecutorial bureaucracy. If you've got - you're talking about felony cases, not just sexual assault cases if you look at the proposal. If you've got now a team that is supposed to just prosecute these cases, that command's case, that sexual assault case that is now in a queue where it might be the most important case at an individual command where they're giving it their priority because they've got a problem with something like that, now it's going to fall into a queue with other cases. It becomes a number.

And if I try to think about what's the impact then on the victim that's still in the field, wherever they're located, on the command that's trying to maintain discipline
but they've got no input, or authority, or
maybe knowledge of what step in the process
that that's at, the victim may see extra
delays. I don't see how that helps.

The command may have a discipline
issue that they can't address, and you have
somebody who stands accused of an offense,
whether right or wrong, but that person is now
having this hung over their heads potentially.
There's no evidence to that regard, but
potentially longer than they might otherwise
have. So, part of me says not too much the do
no harm. I don't - we didn't get any evidence
that shows it would make a difference in terms
of what the decisions that are there. We also
have no evidence that those potential delays
are being part of a political bureaucracy or
prosecutorial bureaucracy of one case whether
it's adequately resourced or not, that that's
not going to cause more harm than it actually
helps in that part.

The second point I would make is in
terms of recognizing, the people who will read this report, this is the initial assessment. We'll put together a final report for the panel at the end, and recognizing it's not just going to be read by people who have a military background or any exposure. We watch that - the difference between a convening authority and a commander. The way this is currently worded it talks about that the criticism of the justice system often confuses the term "commander" with the person authorized to convene a court-martial. And that's not the same. Oh, yes, it can be. I would recommend that we clarify that. It's the authority. There's command authority, and there's convening authority, and it can be the same person, so don't focus on the person piece of that. A commander can have a convening authority and be the same person, which this talks about the person in the first sentence and it just says it's not the same thing. Command authority and
convening authority are not the same thing. It can be one person has both of those authorities, so I would just request that we clarify that in the final report.

JUDGE JONES: Thank you.

MR. BRYANT: Judge Jones?

JUDGE JONES: Yes, Mr. Bryant.

MR. BRYANT: Yes. First of all, I want to say how much I appreciate those who have been on the Role of the Commander Subcommittee. You're all very, very experienced people with a great deal of wisdom and good judgment, and you've certainly worked hard and heard a lot of information.

As a full panel member I have heard and been privileged to hear a lot of the information that we have all heard, and I am yet to understand how if we removed the convening authority from the military commanders, that somehow this has a tremendous effect on morale, it shows the troops we don't trust these men and women. And, you know,
we've talked about surveys.

It would be interesting if we could have a survey of, I don't know, E-5 and above, not to put down the 1-4s, but okay, we'll start with E-4s. If JAG officers were making prosecutorial decisions in felonies, would that somehow lessen your respect for your commander and your willingness to obey his or her orders? And I just have to believe in commonsense, the answer would be a resounding no, it's not going to affect anything that I would do because the ultimate thing we have to remember is our military, they're warfighters. That's what they do, that's what we want them to do. That's what we want to continue to empower them to do. So, this idea that somehow the perception of a commander is going to be lessened if he's not the one making this hopefully very small part of their overall duties, which is who's going to face a court-martial and who's not. I haven't seen anything that convinces me that that's going to, or
should be a problem other than the fact that
that was expressed early on in some of our
panel meetings. I haven't heard that as much
lately, that particular idea.

The other thing that we all need to
keep in mind is in justice, it's perception
that counts a lot. It counts an awful lot. In
your jurisdiction, Congresswoman - well, I
just went blank on your name. I'm sorry, Liz.

MS. HOLTZMAN: Holtzman.

MR. BRYANT: In your jurisdiction.

Yes, when you were District Attorney in
Brooklyn, if the perception was that justice
wasn't being done, then justice wasn't being
done in the mind of the public. And that's
part of the issue here. We cannot deny as this
group that there is a perception, and I think
it's at this point right or wrong, a
substantial perception that if we place this
authority in someone other than the commander
who's got all these men and women under his
command, that something fairer and better is
going to happen.

Congresswoman Holtzman, your point that who's going to decide what the priorities are I think is pretty easily answered. The Admiral Houcks of the world, when they are the TJAG, the Advocate General for the Navy, for the Army, the Secretary of the Army or Navy, they're going to decide whether or not this particular thing is going to be a priority for the JAG officers who are now tasked, if that's what it came to, to determine "what priorities are."

Now, there's an awful lot of criminal experience at this table, people who have been involved in actual prosecutions and even some defense work, and what also needs to be said is that in criminal law everything is fact-driven. You don't have good facts, you don't have a good case. I don't care whether it's mass murder, terrorism, rape, or simple assault. If you don't have good facts, you don't have a good case. So, for us to say that
we have no evidence, and I don't even know
that this is essential to this particular
issue of removing command convening authority,
say that we have no evidence that the
conviction rate would go up or down, or that
the reporting rate would go up or down. To me,
that's a side issue from whether or not we can
then say that trained professional prosecutors
as in the rest of our society are making these
ultimate decisions about whether or not a case
is winnable.

It disturbs me a great deal when we
heard evidence and testimony, which I will
relate in just a minute. You will probably
recall it. And when I read proposals that
indicate well, you know, commanders will go
ahead despite, and have gone ahead despite the
suggestion of their JAG officers. And I think
one of the examples that I'm leading up to is
the document that we have that refers to the
prosecution at the Naval Academy where the
convening authority went ahead despite the
prosecutor's advice and now looking back in hindsight we know that probably they should have followed the prosecutor's advice, at least in the cases that have been adjudicated thus far, as opposed to the commander ignoring that advice and going ahead in those particular cases.

Again, criminal cases are driven by facts, what facts are available, how well they're investigated, and who's willing to testify, and what kind of witness they make. And in my mind, the people who can best assess that are those who do it for a living, and that's the prosecutors.

I know it's - I'm going to bring up my old - well, let me finish with this. We had a - I don't remember what month it was. It was a full panel meeting and somebody on the end said that they had a case, and they were quite proud of it. They had a case of sexual assault, I don't remember whether it was rape or not, which they "knew we couldn't
win, but I had him court-martialed to teach
him a lesson."

        Now, that's just wrong. That's not
justice. It makes the system start to come
apart and fray at the edges. When you start
throwing bad cases into the courtroom, whether
it's civilian or military, just to "teach
somebody a lesson," when you know you're not
going to win; first of all, it's an abuse of
the process. And second of all, it doesn't
teach that defendant anything. What it taught
that defendant was hey, even court-martialed,
I can get away with this because that person
did. And that disturbs me as well as the
language that we have received to date
indicating that victims in these cases, and
I'm taking this out of a particular paragraph,
the victims in these cases got their day in
court because a commander, not a lawyer, had
the ability to move a case forward. If we
create a system in which prosecutors have the
only say we will see fewer cases go to court-
martial.

Well, what does it mean to say that, that commanders are going to have knee-jerk reactions to -

JUDGE JONES: You're quoting Senator McCaskill.

MR. BRYANT: That's one of them.

That's one of them. And I - we've had her before us, and I agree with Congresswoman Holtzman that she is a very dedicated, very wise person who has studied this.

MS. HOLTZMAN: I didn't say anything about Senator McCaskill, but you are quoting me even though I wasn't saying that.

MR. BRYANT: You were talking about Senator Gillian at the time.

MS. HOLTZMAN: Gillibrand.

MR. BRYANT: Yes, Gillibrand at the time. Boy, I'm having real bad trouble with last names. Let me check here. Bryant, okay.

Let me move on.

Well, there's some other things that
I want to say and could address, in particular. You know, when we say that commanders have to have that authority, you're probably tired of it, but the example that I used early on was in the paramilitary organizations of our sheriffs and police departments across the country, some who have thousands of employees, many of whom are committing crimes from time to time. We do not say well, you are their commander, you will decide whether or not this officer, this deputy sheriff will be prosecuted. That just doesn't happen. It goes to the prosecutor's office. And I've never heard a chief of police or sheriff say boy, my men and women don't respect me any more because I'm not the one deciding who gets prosecuted and who doesn't.

Letting the fox get in the henhouse sometimes is what gives the perception that things aren't going like they should go, like people expect them to go, and have a right to see them go.
The criticism, for instance, in the civilian world, oftentimes in the police departments is well, the police department is investigating itself. No wonder they cleared this officer in whatever particular conduct is must be. And that's the perception, rightly or wrongly, that is going on now with commanders having convening authority.

And, again, just to conclude, I haven't seen or heard anything that convinces me that if we put this authority somewhere else we have somehow significantly damaged, or even slightly damaged, frankly, the warfighting capability of our men and women in uniform because their commander no longer decides who's going to get court-martialed for a felony and who's not.

JUDGE JONES: Mai.

MS. FERNANDEZ: Yes. I wanted to address Mr. Bryant's comment sort of directly. You know, I think we are all here to deal with the facts around getting rid of sexual assault
in the military, not the perception of it. And
if the facts do not show that moving the
commander's authority is going to do anything
then I think it's our job to illuminate those
facts to the public, and to say we thought
that this was a good proposal. We've looked at
the proposal, but the evidence just doesn't
hold up.

And what you said was cases are
solved with facts. I think problems are solved
with facts. And I still think it's an open
question. If more facts are brought before
this Committee at some point that say look, we
get rid of the commander and we're going to be
able to deal better with the issue of sexual
assault, and show us the actual facts, I think
that we can take that into consideration and
make changes, but we haven't seen it. And
that's my issue, until we see it.

I work for the National Center for
Victims of Crime. We want to stop crime, not
the perception of crime because that doesn't
- that just placates us if we're stopping the perception of it. We're not getting to the root of the problem, and I'm also fearful that okay, we take the commander out. All of a sudden our attention shifts to is this change going to work? How many resources do we have to throw at it? And we're throwing resources at something we don't know is going to work. We need those resources for things that are going to work, and I think that's part of what this Committee is trying to do, also, is to figure out what is going to stop sexual assault in the military. So, I was like Congresswoman Holtzman, I went into this thinking, you know, it makes sense. I was a former prosecutor. I like the independence of a prosecutor. It just sort of when you hear it at first blush, you go yes, I want to go with that. But when you hear the facts like you would in a case, it just doesn't hold up. If there's evidence out there, I'd like to see it.
All of that said, I also do think that many of the changes that have taken place in the last couple of years are because we're arguing about the authority of the commander. And if that wasn't at risk, then many of these changes wouldn't take place. And I think we need to honestly have a conversation about how we keep the pressure on the military to continue these changes so that we have real change, and we see the end of sexual assault in the military.

BG McGuire: I also wanted to complement that thought, as well, in terms of we're dealing with so many variables all at once. And the more solutions and ideas to throw at the problem without really giving time to really identify the effects of what we're already doing is just, I think, throwing - is potentially complicating the whole issue.

Prof. Hillman: One of the challenges for us is that this decision to not alter the
convening authority's power isn't only -
 isn't taking place on a stable playing field
 because all sorts of things are changing right
 before us that we actually have no idea what
 the impact is going to be on reporting rates,
 or what the impact is going to be on The Judge
 Advocate Generals for each of the services, or
 what the impact will be on conviction rates.
 We don't know, for instance, what
 the Special Victims Counsel program will be
 like in terms of ultimate justice or resource
 allocation. We don't know what the changes in
 the Article 32 process, which are wholesale,
 that massive - that is a systemic change
 that's happening. We don't know what impact
 that will have. We don't understand how the
 emphasis on the specialized expertise to
 prosecute these complex cases that the
 military is developing and is transporting to
 the places where it's needed right now, we
 don't know if that's sustainable from a
 resource perspective.
All these changes are happening. If we don't actually change this part of the system, the charging authority part, then I deeply worry we're creating a system that is not only not better at doing what it's been doing, but will be much worse because commanders will pursue cases that aren't warranted, because they'll do what General Brady said, bird dog the issue. I mean, commanders are supposed to have full control of the system, and yet it's an independent and impartial justice system. I can't reconcile those concepts in my mind.

I agree we can't consider this outside of the larger context. I don't know what that proof would look like, that you want, that this change would work because we don't - we have this change in other military justice systems but they're not enough like our military to draw conclusions from it. And perhaps more significantly, no one collects the kind of data the United States does on
this. We have more information about what's happening in the United States, and even the information we have here is terrible. I mean, we're talking about an iceberg we can't see. Right? Because if we don't have 75 percent of the reports of these incidents, which is our best guess. Right? I mean, at most we have 25 percent reporting rate maybe, 5 to 25 percent are usually the numbers that we get. We don't know - until we know more about the problem, I don't think we can find actually evidence to support this kind of change.

COL COOK: In response to the last comment that you just made, Professor Hillman. One of the - you're right, I don't know what that evidence would look like. But for one of the concerns I have, I know that in the military one of the things that - one of the basic reasons to have a Uniform Code of Military Justice and to have an embedded military justice system is the expeditionary nature, the swift nature, the fact that
commanders in the military need to focus on
fighting and winning the nation's wars and
operational requirements, and having a case be
prolonged with the witnesses, and the victims,
and the accused is not - usually the cases
are handled very quickly and completely, and
it gets moved on. I'm not saying they're
always resolved appropriately. That's part of
why we're even here, but I - you know, as far
as that evidence goes, I'd want to know if you
put it into a queue essentially, then how long
does it take even within the civilian sector?
You know, how quickly - I know from my own
experience how quickly we have tried a murder
case from beginning to end from the time you
find the evidence to within six months you've
got a conviction and somebody in jail for
life.

I don't know if that's even possible
in the civilian community, but I would need to
know some of that more before saying we take
a risk to change something and put it into a
centralized area that doesn't do more harm
than it does help. And that would be one of
the things I would like to see, if it exists.
I'd prefer not to see any more cases, but
that's a different issue.

BG DUNN: I also think there is -
when you think about our military and its
mission, and the responsibility of commanders
which no one else in the world has to make
decisions that impact a unit, that send people
to die, and you tie good order and discipline
into that process, I mean, it does not work if
there's not good order and discipline in the
unit. And, you know, we have had commanders
and former - and retirees come in and tell us
that they think it could be moved, but by a
vast majority we have had current and former
commanders and leaders of all of our military
services come in and say that is integral to
the way we function as a military, and is so
critical to our good order and discipline
which allows us to get at our ultimate
mission, which is not to prosecute criminals, it's to prosecute our nation's wars.

I just - without knowing that it will make a difference, without having evidence that it will make any difference in sexual assault prosecutions I don't see how I could support a recommendation to change that.

MR. BRYANT: Madam Chair.

JUDGE JONES: Mr. Bryant.

MR. BRYANT: At one point last fall we were discussing as a panel, or it came up as a panel a prototype program where it wouldn't be service-wide, but a designated Air Force base, a designated Naval base, and maybe a designated, you know, Army base and so on would give this a try, and then maybe we would get some of the facts and results, and be able to look at this as a pilot program, if you will, to see how it might play out across the services. So, I just ask that whether or not as a Subcommittee you all might want to consider that as a secondary recommendation,
that this be given a try somewhere, even if
it's not all the services.

I remember - and I believe that 100
percent. As one of the Army generals said, you
know, we follow orders. We'll do what we're
required to do, and what we're told to do. And
it was in response to that proposal or that
suggestion. So, I put that out there as an
alternative and a way to find out would this
work, and maybe gather some statistics.
Obviously, it would have to be something that
ran for more than 12 months for you to find
it.

And then in terms of Colonel Houck,
Cook - maybe my contacts need changing.
Anyway, I'm embarrassed, to tell you the
truth. I've been with these people for months,
and I'm blowing their last names here today.
I don't know why it would take
longer to try the cases just because we change
who the convening authority would be. Wouldn't
that stay the same? I'm just curious. I don't
- maybe I missed your point, but I don't know why that would change the amount of time it takes to initiate and finish the case, because JAG officers are doing those cases. Right?

COL COOK: Yes, but if you have a team, now you've got - I think you increase and centralize the number of cases. And, again, you've got to prioritize within that scheme. Whereas, in a command right now that case could be the most important thing on your docket and on your plate. The judge is usually located within driving distance of your particular region or your area. The witnesses within - it's - I just get concerned that it gets lost in a number when it's all consolidated within a region, or within - definitely get concerned if it's consolidated within the United States and where we are located is not just in the United States, and not even mainly within the United States. But even if you put it on a regional basis, it has still got to be prioritized, allocated, and it
won't have the same - it's not the only case in town. And that may be what you find at a particular installation. And as you just said, if you try it at a particular command on a trial basis, the number would still stay relatively low. You couldn't have that Judge Advocate making that decision. Again, I still don't see that it might be different any more than what it is now when you do a prosecutor and the commander, but the volume is not going to be the same. It's not going to be that queue aspect that I'm probably more concerned with.

MR. BRYANT: Let's say just hypothetically, I don't have anything against Fort Bragg, but let's say we pick Fort Bragg because I think that's currently the Army's largest base in terms of number of people, and let it go there for a couple of years, see what happens. You've got all the things you're talking about, the judges are there, the JAGs are there, the people are there.
COL COOK: And I'll defer to the former Staff Judge Advocate for the highest command that's at Fort Bragg, and that would be General Dunn.

MR. BRYANT: Okay.

BG DUNN: And you have five different, six different general court-martial convening authorities with 50,000 active duty soldiers there. You have a combined number of cases prosecuted there and five separate - six separate court-martial jurisdictions over the course of a year that exceed all the rest of the cases in the United States Army. I mean, you know, exactly what Holly has said I think would be a concern because you would pull it away from all of those commanders over to one part of post, and it would become like trying to get a medical appointment at the hospital, you know. You are not getting that day after tomorrow. You are not getting it day after tomorrow.

JUDGE JONES: Ms. Holtzman.
MS. HOLTZMAN: You know, originally, too, I was open to the idea of a pilot project because I didn't come to this with an adverse approach to the proposal. So I said well, you know, if everybody thinks this could be harmful let's try it out. But I've now reversed my view about that because I don't see any reason to do it. If you give me a reason to do it, I'm ready to do it right now.

Where is the conflict of interest? I've heard people talk conflict of interest, conflict of interest, conflict of interest. I'm not seeing it. I don't see it. It doesn't exist. You show me the conflict of interest, I'll say okay, that's very serious. But just because a commander has to - who's an O-5 or O-6 level which I now understand is a Lieutenant Colonel, don't ask me what that is, but - it's a joke. But, you know, that's a pretty high level person, that commander - convening authority is not likely to know either one of the people, so what is the
conflict? That person is a commander, that convening authority has to resolve all kinds of conflicts. I get two people on the base get into a fight, not a criminal matter but they get into some dispute that has to be resolved. Is that a conflict if you have to decide that? Commanders have to decide all kinds of conflicts, all kinds of tensions, all kinds of issues like that. You know, who gets to drive the jeep today, or who gets two jeeps and one jeep. I mean, all those issues have to be resolved. That doesn't mean there's a conflict of interest, so show me the conflict of interest here. Then I'll say okay, what do we do to solve it? But I haven't seen that.

And to make changes just for symbolic purposes, I thought Mai said it very well. I mean, I think we need to be past that, and I think part of the reason we need to be past that is because we need to be honest with the American people. What is really going on here, and what's really going to make a
difference? And this is like a silver bullet. Everyone says oh, just do this, and then we can walk away, we solved our problem. It hasn't solved the problem, no way it can solve the problem. There are all the other issues of victim services, the quality of prosecution, how the rape statute itself which was rewritten several times, I think Professor Hillman has tried to - maybe you understand what it means but, you know, I mean, there are a lot of other serious problems here that have to be addressed. And Veterans Administration services which, you know, we haven't looked at but that came up over here. It's a huge problem.

Okay. These are things that will make a difference in people's lives in a concrete way. So, I like symbols, I'm very interested in symbols, but I'm really interested in the concrete reality of what we can do that will really affect people's lives. And I'm open, you know, this Commission has
until - the panel has until what, the end of
June, or May, or whatever we have.

JUDGE JONES: I think the beginning
of June, right.

MS. HOLTZMAN: You know, I'm open to
change my mind again about this, but I would
rather if we don't have the evidence that
prompts the change, ask the military to review
it, ask them to look at it again, but let's
move on to something where we can really in a
concrete way make improvements that will
affect and qualitatively improve the
prosecution of these cases.

One other point I just want to
address. The question came up about well, how
can you get more prosecutions. That worries me
because the facts are the facts. Well, the
facts are the facts, he says X, she says Y.
Well, I'm a prosecutor, tough case to win.
Maybe I don't want to take that risk. That's
not a question of the facts really, it's a
question of am I going to put my win/loss
ratio on the line here.

Now, that's how a case can be brought or not brought. We don't want decisions - sometimes we don't want decisions made on that basis. Sometimes we want to say you know something, we're willing - it's a close case but the facts just - the facts and the law justify the prosecution. We're willing to accept the possibility, the risk of defeat. Some prosecutors may say no, I don't want to. That's how those things could work. Now, the question is who's going to make those judgments? Is it going to be someone in - under this system I don't know who makes those judgments.

COL COOK: It's interesting to me that in terms of your last comment, ma'am, I don't think we heard one commander who came and testified to this Panel at any point ever, use the term of a conviction rate. Those were the lawyer terms. They look at the command climate and they may be more likely to send
that case to court because they need to - it's
two people, credibility issue, put it in front
of a panel, or put it in front of a Military
Judge and let them have their day in court and
figure out what the justice comes out of the
results. So, conviction rate is a lawyer's
term.

MS. HOLTZMAN: And that could be a
factor for a prosecutor in deciding whether or
not to go forward with a case; whereas, it
would not be necessarily for a commander.

VADM HOUCK: And you can send a case
to court that you think you may not win and it
still is ethical, and it's still within the
realm of the attorney's ethics to do so. The
fact that you think that the case may not be
winnable doesn't mean that it's unethical to
send it for prosecution.

MR. BRYANT: Well, you have to take
a chance sometimes with prosecutions and, you
know, prosecutors are sometimes accused in
some place of just wanting to shoot goldfish
in a bowl. But I really don't think that's true in the civilian world, and I don't think it's true in the military world either. It has to be assessed for whether or not you have a substantial likelihood at least of a conviction.

I still think that just, you know, throwing a case up there and say is the Government ready? Yes, we're ready. When you know it's very unlikely you're going to get a conviction here spoils the view of the system for the jury panel, for the judge, and for everyone else. No commander, no warfighter is going to say well, we're going to attack that hill. I don't think we have a chance of taking it, but daggumit we'll teach them a lesson because it's - I feel like we ought to at least give it a shot. I hope we're not conducting wars like that. I feel confident that we're not conducting wars like that, and I hope we won't do prosecutions like that.

But there's a third aspect to the
conflict of interest, Congresswoman Holtzman,
that General Brady brought up in response to
Admiral Houck's two-pronged conflict, and that
is the actual conflict of bringing these cases
when perhaps they shouldn't be brought, and
that we were going to increase, you know, the
prosecution rate.

We only should be increasing the
prosecution rate if we've got legitimate
victims or legitimate evidence that has some
substantial likelihood of getting a conviction
rather than just throwing these things up as
a jump ball to see who gets it. That's
contrary to everything that I have seen, and
learned, and practiced, and believed in as a
prosecutor for 40 years.

JUDGE JONES: It's never been my
experience as a prosecutor that we looked at
things in terms of do we have a substantial
ability to get a conviction. I mean, we think
about it, of course, but in a sexual assault
case if you find the victim credible, at least
in my experience over the years, and believe
you already have probable cause, but believe
that the victim is telling the truth, you go
forward with that if you can, if you have the
resources or whatever other problems may
exist. But the fact that you may not think a
case is winnable is not a reason not to go
forward. That's all I wanted to say.

MR. BRYANT: But if you know, and
just for my own - I have to tell you that the
last case, the last jury trial I had in my
career was back in November, it was a rape
case. We had a victim who did not speak good
English, had to be translated from Chinese. We
had no DNA, no fingerprints, no sperm, no
nothing, and I took the case myself because I
just believed that a jury would believe her
testimony based on some of the other facts.
And we did get a conviction, three life
sentences plus. So I don't want to be
misunderstood. I'm not saying it has to be a
slam dunk. We certainly try cases that are not
slam dunks, and hope that the judge or the
t Jury agrees with us. But when a prosecutor's
experience and - primarily his experience and
his understanding of the law and the elements
tell him that there - I put this case on.
There shouldn't be a conviction, there might
be, but there shouldn't be, then that case
shouldn't even be brought.

VADM HOUCK: Well, I believe - I'm
very confident that if the overwhelming number
of cases that are out there that military
judge advocates are advising commanders on
that they are not treating these cases as jump
balls, throwing them in the air and saying
come what may, we're just going to do this
because it's politically correct. It is a
large, large Department of Defense, and just
like civilian jurisdictions are large, you're
not going to find a perfect record in any
jurisdiction, but it is not a norm within the
United States Armed Forces that the cases are
being prosecuted this way.
MR. BRYANT: And, Jim, excuse me. I was not suggesting that they were. I'm suggesting that that becomes part of the conflict - potentially becomes part of the conflict when we put such pressure on the convening authorities, the commanders to go forward.

JUDGE JONES: And I think all we're saying is that we're not putting win in the equation. We are trying to decide if you have a victim who wants to go forward and who's credible, and you have not just a probable cause case, but those other two factors, and then you go forward. So, I'm just - I'm saying I think we're only talking about win here.

MR. BRYANT: And I agree with you 100 percent, Judge, and all the lawyers on this panel and the non-lawyers have heard the cliche if you're not losing cases, you're not trying cases. I mean, you're going to lose your share of cases. Everybody knows and
understands that.

PROF. HILLMAN: Judge Jones, may I respond to Congresswoman Holtzman, because I have - I don't think I answered your question sufficiently what is the conflict, and why does perception - if this is about perception rather than actually stopping the crime, then why is it so important? Those are reasonable questions.

To me, the command control of the court-martial process is a great risk to the fairness of that process. And that's increasing - that has -- the consequences of failing to achieve high prosecution and conviction rates has never been higher for a convening authority right now. I mean, we're looking at command climate which is the term that's used to describe the atmosphere in which service members work and live under the leadership of their command.

If there is - if there are not sufficient - for instance, there could be
many more restricted reports that would go forward in a command climate that was changing. I could see pressure on a convening authority to force victims who report to convert from unrestricted - from restricted to an unrestricted report. I don't think that would be good for those victims. I want those - I want more unrestricted reports that actually can be investigated and prosecuted, but I think that the pressure to demonstrate progress on all the metrics that we actually as a panel are also going to put out that we want to know about what's happening on the ground creates a lot of pressure on convening authorities who are in charge of this process. And I think it creates an even larger specter of unlawful command influence, too much intervention in the court-martial process which is, in part, a matter of perception. Unlawful command influence is litigated all the time, and lots of times in sexual assault cases, and it has to do with the commander
being too embedded in the military justice process.

Some of these changes have already removed the commander from parts of this process, especially the tail end with the changes in Article 60. But having the commander - the convening authority - the commanders who are convening authorities as the charging authority at the top, at the front end, it creates a potential barrier to sustaining those convictions going forward, and a problem with the ultimate fairness of the process that is to me a very cognizable conflict there.

The other point about perception, the thing that we have to do, and some of our panelists today referenced this, to understand this problem better is to increase reporting rates. We all know that. You know, the biggest problem here is not the failure to investigate and prosecute. That is a big failure in some instances, not worse in the military than
elsewhere, but that is a problem. But the biggest problem is the failure to report. That's all about perception, isn't it? I mean, the perception is how my case will get treated when I come forward and say this is what happened to me. And, actually, some of what our panelists have said today and our public comments actually have made - the point they've made today, you know, the first person to hear that is the one we need to make the right choice about how to receive that report. I want our commanders to be fighting wars, winning wars, coming up with great operational strategies, taking care of their people, and educating everybody to - everybody within that military community over which they have far more control than we do over civilian communities, so that everybody out there if they hear that first report will say the right thing that will eventually lead to an unrestricted report, and will get the investigation, and prosecution, adjudication
and that perpetrator out of commission for any
crimes going forward. And to me that's just
all about perception, so I can't - making
changes based on perception might seem like
it's some soft thing on which to base our
decision, but to me it's the whole ball of
wax.

VADM HOUCK: I can't - I think two
points that Professor Hillman makes that I
think are worth talking about. One is, and she
has not said this but others have implied it,
some of our witnesses have implied it, that --
or said it directly, that the commander needs
to be freed to lead, and that removing the
authority from the commander will free the
commander to lead. I completely disagree that
there's any barrier to a commander leading
against sexual assault and not fulfilling his
or her burdens to prosecute cases, refer cases
in an ethical way.

It does require the commander to
consult with a lawyer, to consult with a Judge
Advocate to make sure that their public pronouncements on military justice are consistent with command influence law, but it's not difficult to do. Most commanders do it. There are the occasional exception but, again, that's the imperfection of life. This can be done, and it's not difficult.

I have not heard, a second point, in the testimony, the eloquent and the moving testimony of our survivors today and in other days. I, for one, have heard many of them say they support the changes that Senator Gillibrand is promoting. I have not heard one say that fear of the commander was a prominent part of their own situation, and there's a difference. And I think we need to be alert to that difference. And I would not presume for a minute to be inside the minds of survivors and what they've gone through, but I think others have said it, and I'll say it again. I have not seen the empirical evidence that suggests that fear of a commander is a
prominent issue in why we have under-reporting
in the military.

I would ask again why if the figure
is correct, why 88 percent of college student
women don't report. Is it their fear of their
commander? Of course not. So, I think that Ms.
Fernandez made a spectacular point and made it
in a really compelling way about this panel's
obligation who have studied this issue
rigorously and carefully to educate. And
Congresswoman Holtzman made the same point, to
educate and not react to perceptions if we
don't believe these perceptions are accurate.

Panel member, and witness, after
witness, after witness has used the same
phraseology in describing this. Those who
support the change by saying right or wrong
there's this perception. Well, I want to go
back to the right or wrong part. I think it's
our obligation to point out if we believe it's
wrong, and to not be led by the right or wrong
phenomenon in this.
MS. FERNANDEZ: Just to follow-up on Professor Hillman's issue about perception. I think that one of our biggest things is to get reports going up, but - and I am not going to sit in the shoes of a sexual assault victim in the military also, but my sense is in working in this field, is that your perception that the system is working for you is somebody who is the first person you have contact with says I believe you. I care about you. And then they start providing you with services.

The idea of joint - what's going to happen in a criminal justice system that I didn't understand myself until I left law school is something that's pretty far away from the initial victimization. All you want is somebody to believe you, and if you're hurt to help you get over your hurt. And then other things start kicking in. But I think that that perception is really important with where I do think our resources need to be going to, which is those people who are making the first
contact with victims. And some of those could
be commanders, some of those are SARCs, some
of them are best friends, some of them are all
over the place, but that's where the
perception that people will believe you is the
most important.

JUDGE JONES: Have we said it all
this afternoon?

MS. FERNANDEZ: I just also want to
thank those of you who came up and shared your
personal stories. It's not an easy thing to
do, and it brings a real reality to what we're
doing here.

JUDGE JONES: All right. We've had
our deliberations and I think we're - we have
a report from our Subcommittee which is, as I
said, an initial assessment. I think there is
consensus on the panel for the report, and
we've heard strong and very well-articulated
statements that disagree with the ultimate
conclusion, and some other parts of the
report.
Okay. This process will continue.

All right. Then at this time, I will take a poll of the full panel with respect to whether or not you are in agreement with the initial assessment from the Role of the Commander Subcommittee. Colonel Cook?

COL COOK: I'm in agreement with the initial assessment to leave senior commanders with the convening authority. One of the things I would - I know we talked about number one.

JUDGE JONES: Right.

COL COOK: The only thing I would suggest is - a couple of things I would just suggest besides on the methodology, that I would like to see included is, again, it's going to not just the military background audience. Even the basic difference between special court-martial convening authority and a general court-martial convening authority, defining them in the footnotes.

I would suggest that by the same
token something that is defined in the
footnote at number 54 that talks about the
special court-martial convening authority no
longer having jurisdiction on sexual offense
cases based on a recent move to put them to
general court-martial convening authority,
take that out of a footnote, put it up into
the body to show that as of June of - for any
offense after June of 2014. The question I
have, and I'm not familiar with the rule
change, if after June of 2014 it has to go to
a general court-martial convening authority to
refer a case to a court, does the special
court-martial convening authority still have
the authority to dismiss the case at their
level? The referral has to go up, but does the
dismissal decision get made by the special
court-martial convening authority? I don't
know the answer to that, but it's a point that
in here you talked about them being the
initial disposition authority on page 11, but
we don't address that point, so I want to see
that.

One of the comments we heard especially on the panel today talked in terms of that conflict of interest piece. It was, I think, better formulated today in terms of defining what is the exact conflict. I would like to see it. The conflict of interest piece that's in here just elaborated in terms of those things, and then add the concern that people have that they don't make informed decisions. What training? The commander's got their own experience, they understand — they've got their Judge Advocate but they also get specialized training throughout the process. They're not lawyers, but this isn't an uninformed decision, and if training is a concern then maybe putting something more into there about that.

With those comments made then, yes, I do agree with the strong majority of the Subcommittee that believes you leave the convening authority and the commander in the
same person.

JUDGE JONES: All right. And I should just say that this is a Subcommittee report out which is being adopted or not adopted in part or in whole by each panel member. It's not the final report. The final report will also have to be discussed, but it is important for those of you who are not on the Subcommittee to express comments just as Colonel Cook did. So, let me go to you, General McGuire.

BG McGUIRE: I'm in support.

JUDGE JONES: All right. General Dunn.

BG DUNN: I concur with the recommendation of the Subcommittee.

JUDGE JONES: All right. Ms. Holtzman.

MS. HOLTZMAN: I concur, as well. I mean, obviously, there's some editing changes but subject to those, I have - I concur with the conclusions and the findings.
JUDGE JONES: All right. I concur
with the conclusions and the findings.

VADM HOUCK: I concur.

PROF. HILLMAN: I do not concur.

MR. BRYANT: With all due respect for
the wisdom and insight and the well-reasoned
conclusions that you have reached at this
point in our deliberations, at this stage I
disagree.

MS. FERNANDEZ: I concur.

JUDGE JONES: All right. You make a
good point, Mr. Bryant, it's at this point. As
I started to say before, our job is not over.
We have more to do, but it seems important as
we reach certain levels of knowledge and
information that we make initial assessments,
so that's what we've done here. And I thank
you all for being so attentive, being here,
and in particular I thank the witnesses who
came up and who told their own stories with
respect to what happened to them as sexual
assault victims in our military. Thank you.
MS. FRIED: We thank the staff, too.

JUDGE JONES: Do I have to thank the staff?

(Laughter.)

JUDGE JONES: Yes, of course. We want to thank our staff. They're wonderful. They've been with us since May, and we'll thank them again because, as I said, our job is not over.

(Applause.)

MS. FRIED: The meeting is closed.

(Whereupon, the above-entitled matter went off the record at 4:14 p.m.)
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Assault Crimes Panel Meeting

Before: US DOD

Date: 01-30-14

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