UNITED STATES DEPARTMENT OF DEFENSE

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DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

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PUBLIC MEETING

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THURSDAY
JANUARY 19, 2017

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The Panel met in the Grand Ballroom, Holiday Inn Arlington at Ballston, 4610 North Fairfax Drive, Arlington, Virginia, at 10:00 a.m., Martha Bashford, Chair, presiding.

PRESENT
Martha Bashford
MG(R) Marcia Anderson
Hon. Leo I. Brisbois
Kathleen Cannon
Meg Garvin
Hon. Paul W. Grimm
Dean Keith Harrison
A.J. Kramer
Jennifer Gentile Long
SGT(R) James Markey
Dr. Jennifer Markowitz
CMSAF Rodney J. McKinley
Dr. Cassia Spohn
BGen(R) James Schwenk
Meghan Tokash
Hon. Reggie Walton
WITNESSES

Hon. Jennifer M. O'Connor - General Counsel, Department of Defense
CAPT Warren Record, JAGC, U.S. Navy, Chair, Joint Service Committee on Military Justice
Dwight Sullivan - Associate Deputy General Counsel for Military Justice, Department of Defense
Maria Fried - Associate Deputy Office of the General Counsel

STAFF:
CAPT Tammy P. Tideswell, U.S. Navy - Staff Director
LTC Patricia Lewis, U.S. Army - Deputy Staff Director
Julie Carson - Legislative Liaison and Staff Attorney
Theresa Gallagher - Staff Attorney

DESIGNATED FEDERAL OFFICIAL:

Lt Col Jacqueline Stingl, U.S. Air Force, Alternate DFO
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Adjourn

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PROCEEDINGS

10:04 a.m.

LT COL STINGL: Good morning everyone
and welcome to the very first meeting of the
Department of Defense Advisory Committee on
Investigation, Prosecution and Defense of Sexual
Assault in the Armed Forces.

My name is Lieutenant Colonel
Jacqueline Stingl and I have been appointed as an
Alternate Designated Federal Officer, or DFO, for
this Committee. And, I will serve as the DFO for
today's public meeting.

Captain Tammy Tideswell is the Staff
Director to this Committee.

This Committee was established
pursuant to Section 546 of the National Defense
Authorization Act for Fiscal Year 2015, and that
aside, by Section 537 of the National Defense
Authorization Act for Fiscal Year 2016 and in
accordance with the Federal Advisory Committee
Act of 1972, 5 United States Code Appendix as
Amended and 41 CFR.
As this Committee is a Federal Advisory Committee, it must comply with the Federal Advisory Committee Act, commonly referred to as FACA.

Committee meetings will be open to the public and transcribed.

The Committee also has a publically accessible website at http://dacipad.whs.mil. Publically available information provided to the Committee is posted on the website to include information about the meetings of the Committee, transcripts and recordings of the meetings and background information documents provided to the Committee Members.

The Committee has not received any written requests for public comment at today's meeting.

Any information provided by the public to the Committee Members must be made available to the public. This includes emails or notes passed or sent to the Committee Members related to their work as Members of the Committee.
The Secretary of Defense has approved the appointment of the Members of this Committee. And, Ms. Martha Bashford serves as its Chair.

As you will note on today's agenda, the Committee held an administrative session this morning. The purpose of that session was to provide administrative briefings and the oath of office to the Committee Members.

Today's public meeting has a full agenda which includes an overview of the court-martial process, legislative highlights and history of sexual assault issues in the Armed Forces since 2012 and a history of two predecessor panels in this specific area.

The briefers' presentations will be followed by a Committee planning session to determine the strategic way ahead.

Unfortunately, due to unforeseen circumstances, the FACA brief which was previously scheduled on the agenda for this morning will not take place today, as the presenter was unable to attend.
Accordingly, the Committee Members will receive their FACA briefing here in the next public meeting.

Madam Chair, are you ready to proceed?

CHAIR BASHFORD: Yes, we are. Thank you.

Thank you Lieutenant Stingl and good morning. I would like to welcome the Members, participants and everyone in attendance today to the first meeting of the Defense Advisory Committee on Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces, or DAC-IPAD.

The Secretary of Defense appointed 16 Members to the Committee and all Members are present here today.

The DAC-IPAD, as you heard, was created by provisions of the National Defense Authorization Act for Fiscal Years 2015 and 2016.

Our mandate is to advise the Secretary of Defense on the investigation, prosecution and defense of allegations of sexual assault and
other sexual misconduct involving Members of the Armed Forces.

Please note that today's meeting is being transcribed and the complete written transcript will be posted on the DAC-IPAD website.

We will begin today's meeting with a presentation on the court-martial process provided by Mr. Dwight Sullivan, Associate Deputy General Counsel of the Department of Defense for Military Justice.

Mr. Sullivan is a Retired Marine Corps Judge Advocate with 30 years of commissioned service and will serve as the Designated Federal Official for the DAC-IPAD.

Next, the Committee will receive a presentation on the recent legislative highlights and history of sexual assault issues in the Armed Forces provided by Captain Warren Record.

Captain Record is a U.S. Navy Judge Advocate who currently serves as the Chair of the Joint Service Committee on Military Justice.
After we break for lunch, the Committee will receive a final presentation on the history and work of the two predecessor Department of Defense Federal Advisory Committees on sexual assaults.

The first is the Response Systems to Adult Sexual Assault Crimes Panel and the second is the Judicial Proceedings Panel.

Ms. Maria Fried, the Associate Deputy General Counsel of the Department of Defense for Personnel and Health Policy will provide this presentation.

Ms. Fried has served as the Designated Federal Official for the Response Systems Panel and is currently the Designated Federal Official for the Judicial Proceedings Panel.

Following these informational presentations, the Committee will hold a planning session to discuss the task given us by Statute, our topical priorities and a strategic plan to implement our work.

Each public meeting of the DAC-IPAD
will include time to receive input from the public and has been said, the Committee received no requests for public comment for today's meeting.

Thank you very much for joining us today. We are ready to begin the meeting and our first presenter is Mr. Dwight Sullivan.

Thank you for joining us, Mr. Sullivan. We look forward to hearing from you.

CAPT TIDESWELL: Ms. Bashford, if you don't mind, we are honored to have the DoD General Counsel here, Ms. O'Connor who would like to make some opening remarks on behalf of the Department of Defense.

If you don't mind, I know you all have already heard Ms. O'Connor's bio, but I think the public might benefit from the abbreviated version, Lieutenant Colonel Stingl, if you don't mind.

And, Ms. O'Connor, if you would please honor us with your presence.

LT COL STINGL: Today, we are most
fortunate to have the Honorable Jennifer M. O'Connor, the General Counsel of the Department of Defense join us here this morning.

In her capacity at the DoD GC, Ms. O'Connor was appointed by the President with the advice and consent of the Senate, and is by Statute, the Senior Legal Advisor to the Department of Defense, providing legal advice on all matters impacting the Department directly to the Secretary of Defense.

She supervises all lawyers within the Department on a daily basis and they regularly deal with matters of grave importance to national security.

Ms. O'Connor, thank you very much for joining us today.

HON. O'CONNOR: Thank you.

Good morning everybody.

I'd like to welcome the distinguished Members of the Defense Advisory Committee on Investigation, Prosecution and Defense of Sexual Assaults in the Armed Forces to your inaugural
meeting. One, I might add, that coincides with
another significant inauguration event here in
Washington, D.C.

As you're aware, this Advisory
Committee was established by the Secretary of
Defense as directed by Congress in the 2015 and

I am delighted to have such a
distinguished panel of experts on this Committee.
And, thank you for your public service and your
willingness to dedicate your valuable time to the
important task ahead of you.

Your work will follow the tremendous
efforts of two predecessor DoD Advisory
Committees tasked to review and assess military
sexual assault issues over the last four years,
the Response Systems Panel and the Judicial
Proceedings Panel.

In recent years, the Defense
Department has implemented numerous changes to
the manner in which sexual assault allegations
are investigated and tried.
By regulation, a report of any sexual assault over which the military justice system apparently has jurisdiction must be investigated by one of the three military criminal investigative organizations which are independent of the uniform chain of command, Army CID, NCIS and the Air Force OSI.

In 2012, the Secretary of Defense required that any charge of penetrative sexual assaults go to at least an O-6, a Colonel, or a Navy Captain who's also a Special Court-Martial Convening Authority for disposition.

No commanders lower in the chain of command such as a company or a battalion commander may act on such a charge.

In January of 2013, the Air Force launched an initiative called the Special Victims' Counsel Program to offer Servicemembers and their adult family members who report being the victim of a sex crime, a military lawyer to form an attorney-client relationship with for the purposes of representation.
That pilot program proved so successful that, later in 2013, the Secretary of Defense ordered all of the military Departments to institute such programs.

Congress has, subsequently, expanded eligibility for such representation to family members who are minors and DoD civilian employees who report being victims of sex crimes.

In 2014, at the request of the then Chairman of Joint Chiefs, General Dempsey, the Secretary of Defense ordered a comprehensive review of the military justice system.

That review was spearheaded by the Honorable Andy Effron, former Chief Judge of the Court of Appeals of the Armed Services. And, it led to the recently enacted Military Justice Act of 2016, the most substantial reform of the military justice system since 1968.

I know you'll be hearing more about that Statute later today, but I will highlight that it modernized the military justice system in a number of ways.
For example, tying the language of the
number of UCMJ offenses more closely to their
analogues in Title 18 while substantially
enhancing the systems transparency such as by
requiring the Department to establish an online
database similar to PACER to provide the public
with instantaneous access to filings in court-
martial cases.

While substantial reforms have already
been made, it is critical to continue to improve
the military's investigative prosecution and
defense functions. Clearly, there's still a long
way to go.

It's also important to closely
scrutinize the reforms that have already been
made to consider whether they may have produced
any unintended negative consequences and whether
they can be further improved.

This afternoon, as the Committee
develops its strategic plan, I would encourage
you to consider these topics.

Are those involved in the
investigation, prosecution and defense of sexual
assault cases in the military sufficiently
trained and experienced and do they have adequate
resources to fulfill their responsibilities?

How are the military's investigation,
prosecution and defense functions performing in
deployed settings?

What best practices from civilian
jurisdictions should be incorporated into
military practice?

Are the investigation, prosecution and
defense of sexual assault cases influenced by the
grade of either the suspect or the victim?

Are the Services collecting the right
data and properly analyzing it to help inform
public policy decisions?

And, what has been the effect of the
Services special victims' counsel program or the
victims' legal counsel which is what they're
known as in the Navy and Marine Corps? And, are
changes to those programs warranted?

It's important that the new Secretary
of Defense be provided with the best possible advice concerning the investigation, prosecution and defense of sexual assault cases.

That is your charter over the next several years. Your collective qualifications and expertise on criminal justice issues will lend an authoritative and informed voice to the work of the Committee.

And, you have the opportunity to make a lasting impact on the Department and the lives of the men and women who so proudly serve in the Armed Services.

I thank you all, again, for your commitment and your service. I'd also like to thank the staff of the DAC-IPAD, a team of dedicated and talented attorneys, paralegals, administrative support personnel who I think you will find do a terrific job as they continue to provide this Committee with outstanding support.

As my time as the General Counsel, the Department draws to a close, I wish you great success and I look forward to following your
progress and hard work in the days, months and
years ahead.

Please do not hesitate to call on me
if there's anything I can do to help.

Thank you very much.

CAPT TIDESWELL: Thank you, ma'am.

Mr. Sullivan?

MR. SULLIVAN: Ms. Bashford,

permission to move about the well.

CHAIR BASHFORD: Granted.

MR. SULLIVAN: From the legal
perspective, I used to practice in front of Judge
Grimm, so I'm kind of getting a flashback. It's
a nice flashback for me, I hope it's not too
dramatic for you, Your Honor.

HON. GRIMM: Same for me.

MR. SULLIVAN: So, let me preface this
by a warning that I'm just fascinated by military
justice. I can talk about it all day. As
General Schwenk knows, some days I do.

So, but, I don't want to cut into our
records time this morning, so I'm going to just
I want to start by providing an overview of the military justice system which may be helpful to you.

And, when you think about it, the group of people that is covered by the military justice system fall within this jurisdiction who includes one -- more than one and a third million active duty Servicemembers.

And, those Servicemembers are -- when you think about that, that's more than the population of ten states. It's more than the population of the District of Columbia.

So, right there, you have a major group that's subject to this military justice system.
And, then, those who are on active
duty are subject to it 24 hours a day, seven days
a week, 365 days of the year. So, if a uniformed
member is on leave for 30 days, let's say they
come back from deployment, they're on leave for
30 days, they're no where near a military
installation. You know, they're at home and they
smoke marijuana. They have just violated the
Uniform Code of Military Justice and can be
prosecuted by court-martial for that.

So, if you are subject to the UCMJ,
there is jurisdiction over you.

Now, some of you may have been
familiar with a requirement that was in effect
for 1969 to 1987 for there to be a service
connection in order for the military justice
system to have subject matter jurisdiction over
an offense. That's gone. The Supreme Court did
away with that in a case called Solorio.

So, again, the system is dependent
upon the personal jurisdiction over the accused.
If that personal jurisdiction exists, the court-
martial system has jurisdiction without any
further requirement.

But, those one and a third million
people aren't the only folks in the country who
are subject to the UCMJ. There are also about
800,000 members of the Reserve component of the
various Services.

And, I know we have a proud Coast
Guard alumnus, and this includes the Coast Guard
as well. You're not only the DoD Military
Services, but also our colleagues in the Coast
Guard.

And, there are about 800,000
Reservists, including the Coast Guard and that
includes National Guardsman and includes members
of the Air Guard.

So, when they are on active duty, when
a Reserve member -- I was a Marine Corps
Reservist, when I was on active duty as a Marine
Corps Reservist, I was subject to the Code while
I was performing my duties.

For our Guardsmen, if they are
performing duties in a federal capacity, they're subject to the Code. If they're performing their duties in state capacity, they are not.

So, we have these 800,000 people who come on and off of being subject to jurisdiction.

Do you all remember Brigadoon, you know, the wonderful musical? Yes, so, the jurisdiction comes and goes like the men who were being shot, comes in from the mist then leaves.

And, the military justice system also sometimes has jurisdictions over civilians. And, so, let's look at some instances where there's jurisdiction over civilians.

So, first, an active duty retiree who's entitled to pay is subject to the UCMJ. So, General Schwenk, today, is subject to the UCMJ even though he's a civilian. Because he's a retired member of an active component entitled to pay, he's subject to the UCMJ.

As a retired member of a Reserve component, I am not.

Civilians accompanying the U.S. Forces
in the field in either a time of declared war or
a contingency operation, so, if we have a
civilian that's accompanying us, they can be
subject to the Code. This has been exercised
since the Vietnam War a grand total of once.

And, it happened in a case in Iraq.

So, normally, when we have a contractor or a
dependent with us, what we'll do is we'll -- and
there's a criminal allegation, normally, would be
tried in U.S. District Court under MEJA.

This case in Iraq, it involved a dual
national. This person was a national of both
Canada and Iraq. MEJA does not allow us to try
in U.S. District Courts under the Military
Extraterritorial Jurisdiction Act, we can't try
somebody for an act committed in a country of
which they are a citizen.

So, because this person had dual
sovereignty, al be, he could not be tried by MEJA
because he was an Iraqi citizen. The act
happened in Iraq. We tried him by court-martial.

It went up to the Court of Appeals for
the Armed Forces which affirmed in a very narrow ruling which left open the question of whether the outcome would have been the same had it been a U.S. citizen, the outcome depended, in part, upon the fact that he was not a U.S. citizen. 

And, then, certiorari was sought from the Supreme Court but denied.

So, again, that power, the second bullet on that slide has been used a total of only once and there's some ongoing question about that.

A third category of individual is, let's say we have somebody at the U.S. Disciplinary Barracks supporting us on the campus and they've been sentenced to 20 years confinement.

And, their appellate review is complete and we discharge them, but they're still active U.S.D.B. They are still subject to court-martial jurisdiction even though they've been discharged and are a civilian.

Now, these authorities are rarely
used. As I said, the second has been used only once. But, there are certain instances in which they have been used.

And, so, one example, right now, there are four people on military death row at Fort Leavenworth. It was five until the day before yesterday when the President commuted the death sentence of Private Loving to confinement for life without eligibility for parole.

But, there are four people on death row. One of these four was prosecuted as a retiree. He normally would have been prosecuted for three homicides in North Carolina. Convicted, sentenced to death, appealed his case up through the North Carolina courts.

The North Carolina Supreme Court reversed his conviction, prosecuted again in North Carolina, acquitted. All right? So, then, he goes back in the line and serves out the remainder of his career and retires as a Master Sergeant, Master Sergeant Hennis.

Then a cold case unit, at the time of
these offense, all we could tell from the blood
was the blood type. The blood type matched
Hennis, but that's 17 percent of the American
public, too.

And, but, through DNA evidence, a cold
case unit went back and said, ah, there's only a
one in several trillion chance it was anyone
other than Hennis that left this evidence at the
crime scene.

And, so, he couldn't be tried again in
North Carolina. But, one important part of the
system, of course, is under the dual sovereignty
concept, because a court-martial is a federal
entity and it was the state that acquitted him,
the federal entity could charge him again.

And, he was tried by a court-martial
and sentenced to death. He's one of the four
people on death row.

Which also raises an important point,
for an offense that happens in the United States,
almost any common law type offense that's covered
by the UCMJ falls under multiple jurisdictions.
So, I work at the Pentagon, the Pentagon is an area of exclusive federal jurisdiction. If a Servicemember is suspected of committing an offense in the Pentagon -- in the Pentagon -- that offense can be tried either by court-martial or in Federal District Court in the Eastern District of Virginia, but not both because is the same sovereign.

If you have somebody out in town, so a Servicemember out in Virginia in Arlington commits an offense. That offense can be tried either in Circuit Court in Arlington County or it can be tried by the military or, because those are different sovereigns, it could be tried in both.

And, there are some areas of military bases that fall under concurrent jurisdiction. And, so, and individual in that instance could be tried in state court or in U.S. District or by court-martial.

It's very rare for a Servicemember to be tried in U.S. District Court. Usually, the
cases where the individual accused is a Servicemember are handled in -- by court-martial rather than U.S. District Court.

But, sometimes, there are jurisdictional issues with regard to off-base offenses, particularly with states.

So, again, this power to try civilians is rarely used, but it is used on occasion and has been used in some fairly high profile cases.

So, let's go back to the beginning, you know, as a lawyer, I like to say, you know, what's the legal authority? So, what is the legal authority for our military justice system?

And, of course, it comes from the Constitution Article I, Section 8, Clause 14 of the Constitution specifically gives Congress the power to make rules and regulations for the government of the land of Naval Forces.

So, that's the basic power. And, before the UCMJ was enacted in 1950, there was separate military justice systems for the Army, and then ultimately the Air Force in the very
brief time the Air Force existed before the UCMJ was enacted, the Air Force and the Navy and Marines Corps. They fell under different -- entirely different systems.

So, the Army system was known as the Articles of War. In the Navy, it was governed by the Articles for the Government of the Navy.

Now, the Articles for the Government of the Navy were commonly known as Rocks and Shoals. You know, people refer to the UCMJ, in that era, the Articles for the Government of the Navy were referred to as Rocks and Shoals.

And, that is because Article 4 of the Articles for the Government of the Navy included a provision that said, and I quote, the punishment of death or such other punishment as a court-martial may adjudge, be inflicted upon any person in the Naval Service who intentionally or willfully suffers any vessel of the Navy to be stranded or run upon rocks or shoals.

And, so, that gave its colloquial name as it was known.
So, we have these entirely separate systems of criminal justice. There was widespread belief that these systems did not work particularly well during World War II.

And, so, after World War II, there was an effort in Congress to revise these systems. And, then, with the advent of the Department of Defense, but also combined them, so we have the Uniform Code of Military Justice. The Uniform not referring to the clothing that our Servicemembers wear, but to the fact that it's supposed to apply the same in all the Services.

As we'll see, in a lot of instances, it doesn't, but the idea was to have the system applied in the same way in all the Services.

So, Congress passes the Uniform Code of Military Justice. In 1950, President Truman signs it into law and then it becomes effective on the last day of May 1951.

And, the UCMJ, it does a lot and it does a lot more than what I'm going to say, but it's probably going to be half.
Let me just highlight three things that the UCMJ does and then talk about those three things in greater detail.

So, the first thing it does is it establishes the structure of the military justice system, the authority to have courts martial, the authority to NJP people. I'll talk about that more. NJP is non-judicial punishment, I'm going to talk about that more.

It also establishes the punitive articles. It provides the substantive critical offenses under which Servicemembers could be tried at court-martial.

And, the third thing that it does is it delegates a lot of authority from Congress to the President.

So, we saw that the Constitution gives Congress the primary authority. Of course, the President also has authority as the Commander in Chief. In fact, the Supreme Court has actually said that, even if Congress doesn't give the President the authority to convene a court-
martial inherent in his authority as Commander in Chief, his inherent authority to convene a court-martial.

So, the President has some independent authority under Article II. But, under Article I, the main power, the bulk of the power was given to Congress.

Congress has delegated the substantial amount of that authority to the President and did so via the UCMJ. And, we'll look both at what those delegations are and then we'll look at how the President has executed those delegations until Art drags me off when I cut into his time.

And, so, just a warning before we go further or Volatility Ahead sign, here's a warning, there is about to be massive change to the system. So, it's a very interesting time to look at it.

So, Congress, though, as the General Counsel mentioned, on December 23rd of 2016, the President signed the National Defense Authorization Act for Fiscal Year 2017.
Division E of that legislation is the Military Justice Act of 2016. And, as the General Counsel mentioned, it's certainly the most systemic change, the most substantive change to the UCMJ since the Military Justice Act of 1968.

And, it's going to make a number of changes. It's going to make a lot of changes to the military justice system structure, to the way -- to the number of folks who sit on court-martial.

It's going to make a lot of changes to the substantive law and the punitive articles.

But, most of the provisions in that bill don't take effect until the date to be designated by the President no later than January 1st, 2019.

And, because, as I earlier mentioned, Congress has delegated a lot of authority to the President, the President's going to need to rewrite a lot of rules, the equivalent of the Federal Rules of Criminal Procedure, the Rules
for Courts Martial, going to need to rewrite a
lot of those in order to carry out this
legislation.

So, the legislation says, hey, Mr.
President, provide those new regulations within a
year, by January 1st, 2018 and then they have to
take effect with the -- on a date that you're
going to specify that's no later than January
1st, 2019.

So, for the remainder of my -- but,
so, if you see, the first two years of your
existence here, the system is not going to be
this. The system's going to be what it is today.

And, then, even after two years, think
about it, so, the President has it take effect in
two years, well, an offense that occurs before
that, so an offense that occurs in December of
2018 may tended to be tried under the current
system.

And, so, you may even have after
January '19, the bulk of the cases for a while
still being tried under the current system.
So, it's very important that you understand the current system. And so, for the remainder of my remarks, with just a couple of asides that I won't be able to resist, I'm going to talk about the system as it exists today.

Jim Schwenk's smiling because Jim was just talking about that.

Okay, so, but for the bulk of my remarks, I'm going to talk about the system as it exists today.

My friend and colleague, Art Record, is going to talk to you next, the head of military justice for the Navy and is the Chair of the Joint Service Committee on Military Justice.

He's going to talk some about the Military Justice Act of 2016, correct? Because, you're going to talk some about the revisions that this legislation will create.

It may be helpful for you later because once you've rolled up your sleeves and understand the system a bit more, it may be helpful later on to have another briefing on what
changes are coming.

But, so, again, I'm not going to talk about it aside from just a few snide asides.

Captain Record is going to talk about the subject today, but again, the focus is going to be on the system as it exists today and will exist for at least two more years.

Okay. So, we put the Volatility Ahead, but there's also substantial volatility behind us. Okay?

So, if you look at the last three years, okay, if you look from December 26th, 2013 through that legislation, not even counting, let's just put aside the Military Justice Act of 2016, okay, putting that aside, Congress has, first, enacted one new UCMJ Statute, Article 6B which is the Victims' Rights Statute.

In that same three year period, not only did they enact it, they amended it twice.

All right? And, then, they also amended 17 existing UCMJ Statutes, six of which they amended twice.
So, there's been substantial volatility that has already happened as well.

So, those of you who are very familiar with the military justice system as it existed in November of 2013, the system's a lot different today than it was then. And, I am going to look at those changes that have occurred.

So, I'll also mention that the -- that we have this delegation of authority. The President carries out that delegation of authority through the Manual for Courts Martial.

I didn't have a prop, Art, could you raise up that Manual for Courts Martial I have right there?

HON. GRIMM: It's right by your seat.

MR. SULLIVAN: Oh, I'm sorry, yes.

Sorry about that. Thank you.

So, this is the what the Manual for Courts Martial looks like. And, when you look at this, I'll tell you, basically, this part here is basically the Congressionally prescribed part and everything else is prescribed in this by either
the President or the Department of Defense.

So, you have most systems, the Statute is only a little tiny bit of what you have. And, of course, beyond this, you have volume after volume of case law that further interprets this.

So, this provides the day to day rules for how the system's carried out.

And, so, when you look at the same time frame, December 2013 to December 2016, there have been four Executive Orders modifying this as well. Because I'm holding up the 2012 edition of this. This is the last one that's actually printed.

If you go online, you can find the 2016 version, which is the version that's in effect today. It's literally at the Army printers right now having copies being run off. So, we'll soon have a hard copy of 2016. The most recent hard copy we have is 2012, again, horribly out of date.

All right, so, we have volatility behind us, we have volatility ahead of us, so,
with that warning, I am going to, with great
trepidation, now describe the system as it exists
today, realizing that everything just changed and
everything is about to change again.

So, we'll start with the military
justice system structure.

So, there are lots of ways that
commanders discipline Servicemembers. Right?

So, there's counseling, there's -- what do you
have in the Navy where you have the Petty
Officers Counsel, what do you call that?

CAPT TIDESWELL: The Chief Petty
Officer of the Board?

MR. SULLIVAN: Well, you guys have the

--

CAPT TIDESWELL: Oh, the Captain's
Mast?

MR. SULLIVAN: No, no, no, no, where
the Petty Officers do it.

CAPT RECORD: DRB.

(SIMULTANEOUS TALKING)

MR. SULLIVAN: So, you have EMI, you
have --

CAPT RECORD: DRB, the Disciplinary Review Board.

MR. SULLIVAN: And, so, all these mechanisms and then, you know, you can put something in the person's Service record book.

There are various things you can do.

But, setting all of that aside, the UCMJ prescribes four ways for a commander to deal with misconduct. All right?

So, there are non-judicial punishment, and this is in the order or increasing severity, non-judicial punishment, summary court-martial, special court-martial and general court-martial. So, let's take a look at each of those.

So, NJP can be imposed only by commander but there's certain very limited situations where that power can be delegated. But, generally, it's a commander's power.

If you're not attached to or embarked on a vessel and you're the person that is being taken to NJP, you're allowed to say, no, I refuse
to be taken by NJP.

And, if you do that, there's a good chance your case is going to a special court-martial where you can get hammered a lot harder than you could at NJP. But, you know, but you may think, no, this NJP is a proceeding that's fair. I'm innocent, I want to invoke my rights to a court-martial and you can refuse NJP.

The Statute actually says you have a right to demand trial by court-martial. It doesn't -- it isn't carried out consistently with that legislation.

So, he refuses NJP. The commander just drop -- they don't actually have to take you to court-martial even though the Statute says demand a trial by court-martial.

If you're attached to or embarked on a vessel, you do not have the right to refuse NJP. And, that stands even if you're in a ship that's in the shipyard, you know, if you're on base. You know, you're not going underway any time soon, as long as you're still attached to,
you know, USS Kitty Hawk, you do not have the
right to refuse NJP.

There are substantial differences in
the way that the Services carry out NJP. I'm not
going to get into all those, but understand that
the way NJP happens in the Air Force is very
different that Office Hours in the Marine Corps
or Mast in the Navy.

And, NJP is not a criminal conviction.

All right?

So, what are some of the things that
the CO can do?

He can throw somebody in the
correctional custody for up to 30 days, forfeit
up to half a pay per month for two months.

For those that are embarked upon and
attached to vessels, you can -- the CO can -- the
Captain of that ship can have him confined on
bread and water for three days.

This will be one by where asides the
Military Justice Act of 2016 does away with that,
no more. Well, it did with those -- when that
takes effect in sometime in 2019 probably, the
power to give bread and water goes away.

But, today, and for the next two
years, a Captain of ship can still subject
someone to confinement on bread and water for
three days as a non-judicial punishment.

Okay, summary court-martial is a one-
person court-martial. The -- it can't prosecute
an officer, it can only prosecute enlisted
members. Everyone can refuse trial by summary
court-martial, even if you're attached to or
embarked upon a vessel. Anyone can refuse trial
by summary court-martial.

There are enormous differences in the
way that the Services carry these things out.

In the Air Force, they look sort of
like a trial, in the Marine Corps, they don't.
There are enormous differences in the way they're
carried out.

And, the Supreme Court has said that,
because you don't have a right to counsel at a
summary court-martial, but the Air Force kind of
gives you one, but because you don't have a right
to it, the Supreme Court has said, it is not a
criminal conviction. So, the summary court-
martial conviction is not a criminal conviction.

Actual punishment includes confinement
for up to 30 days. Significantly, a summary
court-martial cannot give someone a punitive
discharge. They can't kick somebody out of the
military.

Now, that said, it's quite common that
you see someone gets a summary court-martial and
then administratively separated on the basis that
they have a summary court-martial conviction
basically.

So, you'll often see a summary court-
martial in conjunction with an administrative
discharge. But, the summary court-martial itself
cannot kick somebody out of the military.

All right, that brings us to a special
court-martial.

For most purposes, and I'll give you
two important caveats to that, for most purposes,
a special court-martial looks an awful lot like a trial in a U.S. District Court.

    And, if you just dropped somebody that's used to trying cases in U.S. District Court into a special court-martial as counsel or in with GCM's counsel, they could probably do it. You know, there's some oddities that they wouldn't notice, but they'd understand what's going on.

    The Rules of Evidence are almost identical with two exceptions. One, you know, the 300 series on civil presumptions, it isn't part of what the President promulgated in the Military Rules of Evidence because they don't cover civil cases.

    Instead, the President put in rules about search and seizure and self-incrim.

    And, then, also, the other main difference is privileges. So, as you all know, Congress elected not to adopt the recommended privilege rules under the Federal Rules of Evidence. The President did adopt them in the
military and has revised them.

So, we have codified privilege rules under the 500 series of the Federal Rules of Evidence.

But, again, for the most part, you know, it translates pretty well. You know, of course, Judge Grimm had to deal with me litigating in front of him after litigating courts martial, maybe he'd tell you, it didn't. But, my perception is it translated pretty well.

As I stood up in the State Court in Maryland one time shortly after I got out of the Marine Corps, I stood up and I said, Your Honor, the Defense moves for a finding of not guilty. And, I stopped and said, no I don't, for a judgment of acquittal. I used the military term instead of the Maryland term.

But, it translates fairly well if you remember which system you're litigating it in.

Okay, the two main differences, first, if you're being -- a member being tried can generally pick between trial by members, the
equivalent of a jury. The court-martial panel, they refer to as members. They are not a jury.

If the jury rules that apply constitutionally to states apply to the military justice system, it would be unconstitutional. It is, you know, it doesn't meet the jury requirements in terms of size, in terms of unaniminity, in terms of the way they're chosen. So, it's not a jury and that's actually quite important. It's a members panel, but it functions much like a jury.

If you -- if the member chooses to be sentenced by the jury, by the members, the members -- the member chooses to be tried. So, if the members are deciding guilt or innocence, they will also assess the sentence after an adversarial sentencing proceeding.

So, the way sentencing is done in our system, way different than the federal system or almost any state system.

If you're tried in front of the jury equivalent, the jury equivalent adjudges the
sentence, you go into sentencing right away after
the findings of guilt are announced, okay, we're
going into sentencing now.

Sometimes there's a break overnight,
it just depends on what time of day, really, the
members come back with a verdict.

But, if there is a conviction, there's
going to be an adversarial hearing, Rules of
Evidence apply. They're applied a bit
differently, they're relaxed a bit, but they
still apply and there's going to be an
adversarial proceeding.

And, then, again, if it's member
sentencing, the members come out, no pre-trial
information report or anything of the like.

The other substantial difference, and
this is something that General Counsel mentioned,
in 2013 the Air Force started a pilot program of
special victims' counsel that provided -- that's
offered to people that reported to being the
victim of the defense, a lawyer, a military
lawyer to enter in to an attorney-client
relationship with them and represent them.

So, and then Congress, as the General
Counsel mentioned, has expanded that program.

And, so, and the Marine Corps has
chosen to make VLCs, as they're called in the
Marine Corps, available to the victims of any
offense, not just sex offenses and the other
Services, they're limited to sex offenses,
generally.

But, so, you're going to have a lawyer
in that courtroom generally if it's a sex
offense, you're generally going to have a lawyer
in that courtroom who's representing the
complaining witness in the case.

And, so, that also, you know, throws
a wrinkle in the system. And, in some instances,
that victim is going to be -- that victims'
counsel is going to be even allowed to file a
Writ of Mandamus challenging certain evidentiary
rulings of the judge that are relevant under 18
USC 3771 in the federal system alleged violations
of the Federal Crime Victims' Rights Act can be
taken to the U.S. Court of Appeals under Writ of Mandamus.

But, note that those are only for violations of the Crime Victims' Rights Act itself.

In the system that Congress has enacted for the military is different. It's not just you can seek a Writ of Mandamus if there's been an alleged violation of the military Crime Victims' Rights Act, but the victim, also, if there's been a ruling on a rape shield issue, if there's been a ruling on psychotherapist-patient privilege issue, if there's been a ruling on the victims' advocate victim privilege with which the victim disagrees, a Writ of -- a Petition for Writ of Mandamus can be filed in that instance as well.

So, there's a broader right to interlocutory appeal at that stage.

Okay, so, I've gone over an awful lot.

I don't know -- yes, please.

CHAIR BASHFORD: When the members
panel is imposing sentence, do they have
guidelines, minimums, maximums?

MR. SULLIVAN: For the most part, no.

And, so, Congress has said that, if you are found
guilty of a penetrative sex offense or an attempt
to commit a penetrative sex offense as opposed to
a contact sex offense, the sentence must include,
if it's an officer, a dismissal which is the
officer version of a dishonorable discharge, or
if it's an enlisted member, it must include a
dishonorable discharge. So, that's one of the
very rare mandatory minimum.

There's also a mandatory minimum for
murder, I'm sorry, for premeditated murder and
for felony murder. The mandatory minimum for
those is life. The mandatory minimum is life
with eligibility for parole. Someone can also
get life without eligibility for parole.

And, then, there's another -- the only
other offense for which there's a mandatory
minimum is spying in time of war for which the
mandatory minimum is death. Okay?
That is actually one of the things that could change in two years, since, obviously, there's a constitutional about having a mandatory death sentence under Woodson v. North Carolina.

But, so that's going away in two years. And, it applies only in time of war and we haven't had to declare war -- it applies only in time of declared war. And, of course, we haven't had one of those since World War II.

So, you know, it hasn't been used lately, but that's -- those are the only mandatory minimums.

And, they are not given guidelines. In fact, one of the, we probably shouldn't get into this, but when DoD proposed the Military Justice Act of 2016, we proposed judge alone sentencing in non-capital cases with parameters that would function sort of like federal sentencing guidelines and require the sentencing judge to explain departures up or down.

They could depart, but they'd need to explain them which would provide basis for a
appellate review. Congress rejected that and it chose not to go with parameters and chose to retain the option of member sentencing.

But, again, that's -- I don't know if Art's going to talk about that, but that's in his presentation and not mine, so I will now be quiet about that.

CHAIR BASHFORD: Thank you.

MR. SULLIVAN: But, so, but great question. Anything else? We've gone over a lot so far. Anything else that you want to talk about now? Yes, sir?

HON. GRIMM: I don't know if it's now, but will one of you talk about convening authority, the authority of the convening authority to modify a sentence --

MR. SULLIVAN: Yes.

HON. GRIMM: -- imposed by members or a military judge?

MR. SULLIVAN: Yes, so that is one of the things that changed on December 26th of 2013 and I'm going to talk about that change.
HON. GRIMM: Okay.

MR. SULLIVAN: Yes, you bet.

Okay, so, we're talking about special courts martial now. Today, a special court-martial has to have at least three members. So, if you chose to be tried by members rather than judge alone, that court-martial is going to have at least three members, that's the statutory minimum. That's going to change.

So, I mentioned how NJPs in summaries, the procedures are very different among the Services. Here, for special courts martial and general courts martial, the procedures are very similar.

So, you know, any Army lawyer can walk into a Navy court-martial and litigate that case quite well. The procedures are very similar across the Services in special and general courts martial.

All right, so, the sentences that can be adjudged by special -- a special cannot either discharge an officer or give an officer
confinement. So, let's just put officers to the
side for purposes of special court-martial.

For an enlisted member, a special
court-martial can kick them out of the military
with what's called a bad conduct discharge. That
is a stigmatizing form of discharge. It's
designed to create a lifetime stigma.

It cuts off veterans benefits,
although, for the case of a BCD adjudged by a
special, the VA can waive it and provide the
person with benefits. But, again, it's designed
to be a punitive discharge.

A special can confine somebody for up
to 12 months. Used to be six months, Congress
raised that. You can confine somebody at a
special for up to 12 months. They can -- you can
adjudge forfeiture up to two-thirds pay per month
for 12 months.

And, you can bust somebody -- an
enlisted member down to the lowest pay grade,
down to E-1. Officers cannot be reduced in grade
by either special court-martial conviction or a
BCD conviction.

Okay, so, moving on to GCMs, so, oh, and for the special court-martial conviction and a general court-martial conviction are considered federal convictions.

So, if you were being tried under Federal Sentencing Guidelines and you had a conviction by special court-martial, you have a previous federal conviction.

So, for purposes of the GCM, it has to have at least five members. The number of members is going to change.

A GCM can adjudge any sentence that is authorized for that offense. As you'll see, the President set the maximum, except for death eligible offenses, which Congress establishes.

A GCM can impose up to the maximum offense, punishment for that particular offense including death. And, as we mentioned before, people under death sentences from courts martial to death.

So, the maximum punishments for an
enlisted member include a dishonorable discharge; for an officer, it includes a dismissal, which, again, is the officer version of a DD.

    They can also adjudge a BDC or no discharge except in the case of a penetrative sex offense.

    Confinement up to the maximum for the offense, total forfeiture of pay and allowances, reduction to E-1 for enlisted members and death, if authorized.

    So, for both a special and a GCM, here are the voting rules, and these are going to change in two years. But, for today, here are the voting rules.

    A two-thirds majority is necessary to convict. But, if you have less than a two-thirds majority, so, let's say you have an eight member court-martial and they split 50/50 on guilt-innocence. That isn't a hung jury, it's an acquittal.

    So, two-thirds majority necessary to convict. Anything less than two-thirds is an
acquittal.

And, think about in the military, one of those members is going to be senior to all the others. Right? And, I mean, this is the way it is in the military. I'll try two people with the identical date of rank.

You know, you're going to have two people, you're going to have these members, one of them is going to be senior. So, that senior member is going to be the president of the deliberations.

Congress was concerned that you wouldn't want that senior member to exert undue influence over the other people in the deliberation room.

So, they thought, you know what? If we have a hung jury, then what's to prevent that Colonel from going, you know, it really would be awfully good if we had a conviction here.

And, you know, so, Congress was so concerned about that, the members vote once and the outcome of that vote is that court-martial
finding. If it's two-thirds majority or more, it's a conviction; if it isn't, it's an acquittal.

And, again, there's that special reason why we don't have hung juries because Congress was so concerned about the influence of rank coming into the deliberation room.

For sentencing, interesting, for sentencing, there can be a hung jury, interestingly, for sentencing, you almost never see it, but it is theoretically possible.

So, generally, there's -- to impose a sentence, you need a two-thirds vote to get that sentence. However, there are two differences for that.

If it's death, the vote needs to be unanimous. There are special rules for death. I'm not going to talk about those any more today. Okay? It used to be that rape was a death eligible offense in the military, it isn't any more.

You may recall in Kennedy v.
Louisiana, the Supreme Court specifically left open the question of whether rape of a minor could be a capital offense. In the military, even though it can't be for status as they held in Kennedy v. Louisiana.

But, Congress, thereafter, went back and eliminated rape as a possible -- they eliminated death as a punishment for either rape or rape of a child. So, that issue doesn't exist. I'm just not going to talk about death cases because it's special rules. I'm not going to talk about those any more today.

But, if you want to impose a sentence for -- that's ten years or greater of confinement instead of two-thirds majority for that sentence, you need a three-fourths majority.

So, you think about it, you could envision a situation where there isn't a two-thirds vote for a sentence of less than ten years or a three-thirds for a sentence greater than ten years. And, that is, if you actually could have a hung members panel on sentencing, but, again,
it almost never happens.

Okay, so, Oliver Wendell Holmes famously said, "The life of the law has not been logic, it's been experience." So, let's look from -- go from the theoretical and look at a little bit of experience, including some court-martial numbers.

So, in fiscal year 2015, the most recent year for which we have numbers, there a total 1,104 GCMs tried throughout the military. So, this includes all four of the Services in DoD and the Coast Guard. That's the number of GCMs that were tried. About half of those were for sex offenses.

Special courts martial, 836; summary, 634 and then NJPs, remember we talked about NJPs before, 51,000. So, we put this in a pie chart, this is what we get.

So, you know, this, so, you know, the vast majority -- well, when something rises to the level of being dealt with under the UCMJ, as we talked about before, there are lots of things
that can happen under the UCMJ, counseling
sessions, service record entries and such.

But, if it gets to the UCMJ, the vast
majority of those cases with a blue field are
handled by NJP and then summary courts martial,
special courts martial and general courts martial
all make up each just a tiny sliver of that vast
majority of disciplinary actions that occur under
the UCMJ.

SGT MARKEY: Sir, can you go back to
that previous slide?

MR. SULLIVAN: You bet.

SGT MARKEY: Yes, thank you.

MR. SULLIVAN: Okay, then the next
slide we go to is going to show you how --

HON. BRISBOIS: One moment.

MR. SULLIVAN: Yes, sir?

HON. BRISBOIS: You broke down the
general courts martial by about 50 percent were
referred for sex assault related offenses.

MR. SULLIVAN: Yes, Your Honor.

HON. BRISBOIS: Do you have a
breakdown for special courts?

MR. SULLIVAN: Very few of those are going to be sex offenses because, by Statute, any penetrative sex offense has to go the GCM.

And, so, the only sex offenses that could go to a special would be contact sex offenses.

HON. BRISBOIS: Yes, and you've already drawn that distinction.

MR. SULLIVAN: Right. And, that's going to be -- it's not nearly the 50 percent there, it's going to be much lower. I don't have the exact number for that, Dr. Spohn, is that something you've looked at?

DR. SPOHN: Yes, but I don't have --

MR. SULLIVAN: Yes, sure.

DR. SPOHN: -- here.

MR. SULLIVAN: So, we can look at that. I think it's a lot lower than that 50 percent.

And, then, so for now, now we can look at, you know, for those of you that are involved
in the system a while ago, those numbers probably
look awfully small, don't they?

And, so, that's just looking at how
we've been able to change over time.

So, if you look at the number of
Servicemembers in fiscal year 2015, there were
about 4.5 percent fewer in 2015 than 2000. Okay?

And, so, we see that, you know, a
change of less than five percent, and yet, the
number of GCMs is down almost a third in that
time frame.

The number of specials is down three-
quarters in that time frame.

The number of summary is down three-
quarters.

And, the number of NJPs is down more
than a third.

Now, let's go back another ten years
and you'll see an even more marked drop.

So, in fiscal year 1990, so, there's
been a drop of about a third, so the DoD was
about a third, DoD and the Coast Guard combined
with that third larger than they are now. Two-thirds drop in GCMs.

So, you know, that year, we were doing 3,000 GCMs across the Services, now, we're down to about a 1,000.

Specials, down to 87.5 percent. We're going from 6,700 specials, I think, generally, probably most of those tried by the Marine Corps, right? A lot, the Department of the Navy back then tried the bulk of the specials.

BGEN SCHWENK: The BCD is special, I believe.

MR. SULLIVAN: Yes, exactly.

So, six, I've got to joke about the bulk being probably the Marine Corps, by the way, but the Marine Corps and the Navy account disproportionately in that statistic.

So, again, down from 6,700 to 836. Summary courts martial, similar decrease and then NJPs down two-thirds.

So a marked decrease in the in the use of UCMJ proceedings over ten years and then even
greater decrease when we pulled the aperture back further.

Okay, so, Judge Grimm, you asked about the power of the CA.

MR. KRAMER: I'm sorry, can I --

MR. SULLIVAN: Yes, please.

MR. KRAMER: So, what's the drop attributed to?

MR. SULLIVAN: Okay, I know of no good statistical study that looks at that question. I don't even know a bad one.

So, I can tell you what those of us that follow the UCMJ think contributes to that but, anyone's guess is just as good as good mine.

But, I'll tell you a couple things that people think might have contributed to that, again, we don't really know.

But, one thing that we think contributes to that is, first, so, let's think about it, so, it's probably going to mean, we have that decrease in courts martial, it's probably going to -- and NJPs, it's probably
going to mean, either, one, there's less misconduct.

Or, two, misconduct that does exist is being dealt with by alternative means than the UCMJ.

Or, three, there's as much misconduct but for some reason, it isn't being discovered. Okay?

Anecdotally, I don't have any reason to believe three exists. So, I do have a reason anecdotally to believe that one and two both exist. And, to some extent, one and two, there's less misconduct and the misconduct that does exist is being dealt with by other means.

Those two probably account for the bulk of that change.

So, let's think about this, why would there be less misconduct today?

Well, one reason is, in our system, I don't know about how this is in the District of Columbia criminal courts, please tell me, we find that, in an enormous amount of our misconduct is
tied to alcohol. Is that the case in civilians or is that not the case so much in the civilian?

MR. KRAMER: No, there's more drugs or

MR. SULLIVAN: Okay, so, an enormous amount of our misconduct is people doing stupid things when they're drunk. Okay? And, then, you also have drug offenses. So, an enormous amount part of misconduct.

When you think about a deployed military, a lot of those people are deployed in areas where, one, by regulation, they're not allowed to drink. And, two, even if they were inclined to violate that rule, they probably can't get alcohol even if they wanted to. Right?

So, part -- so, what is one reason we might have had a decrease in crime in the military? Well, one reason is, because an enormous percentage of our folks today are deployed that weren't in 1990.

And, so, that large part of our military is not getting into alcohol related
offenses. All right? So, that's part of it.

And, then, it may be, Dr. Spohn, you may know this, but it may also be that a higher percentage of our military is married today than in 1990. The married Servicemembers get into less misconduct on average than an unmarried Servicemember.

So, the, you know, the -- so the demographics of the Service may have changed in ways that move it toward being less likely to engage in that misconduct.

There -- it used to be that we provided rather liberal waivers. So, generally, if you have a previous civilian conviction, you can't get into the military.

During the height of the Iraq conflict, we were waiving that. So, and now, we're not as much.

So, it may be that some of those stricter enlistment criteria are also tied to a reduction in post-enlistment misconduct.

So, but, again, it's probably a
combination of those things and a lot more.

Okay?

And, then, the other part, so, it's probably also the case that there are -- there's offenses that used to be tried by courts martial that aren't. And, then I'll talk about a couple reasons for that.

But, again, this is anecdotal. One is, we hear from commanders that they are more reluctant to send to a court-martial someone that has combat experience. And, right now, an enormous percentage of our military has combat experience.

Sort of the threshold for getting into court has probably raised a bit.

Our sensitivity to a lot of issues like post-traumatic stress disorder or traumatic brain injury is a lot better today.

So, somebody that used to be just, you know, labeled as a miscreant, that's not the actual word they would use, but I can't quite properly say the actual word they would use.
Someone that used to be labeled a miscreant now
might be thought of in a more holistic fashion as
being somebody's suffering from PTSD, TBI.

And, then, but there's also been one
really interesting thing that happened in the
Marine Corps, because the Marine Corps vastly
disproportionate percentage, if you look at the
number of folks in the Marine Corps, the
percentage of people in the Marine Corps -- in
DoD that are in the Marine Corps, they compared
that to the number of in the 1990s, the numbers
of the Marines are subject to special courts
martial is off the charts.

It used to be that a battalion
commander, because in the Marine Corps, a
battalion commander can convene a special court-
martial, it used to be that the battalion
commander would send an awful lot of cases to
special courts martial.

And, that changed a few years ago.

And, one of the reasons people think that
changed, there was actual an article in the
Marine Corps Gazette and, you know, we all wrote these long articles, because does anyone read these? And, of course, the answer is no.

But, there was this one article in the Professional Journal that actually led to -- seems to have led the change.

There was an article in the Marine Corps Gazette called The Lost Battalion. And, so, when you go through a court-martial and you're convicted and you're sentenced to a BCD and you're kicked out of the military, well, you don't actually get kicked out of the military at that point because your case has to go through levels of appeal.

And, the Marine Corps and the Navy, in particular, for a while, had a huge backlog in their cases. In fact, the Congress directed there be a study why the Department of the Navy had such a huge backlog.

So, these people were getting convicted and then for maybe three years, they were still members of the military. Now, they
weren't on active duty, they were in a status
called appellate leave. But, in the status of
appellate leave, they still count against the
Marine Corps numbers.

And so, someone wrote an article in
the Marine Corps Gazette that said, look, if you
look at all the Marines that are on appellate
leave, that's a battalion. So, we're losing a
battalion of trigger pullers to have these guys
on appellate leave.

And, that article actually seemed to
lead CAs to, instead of sort of readily sending
some people to special, instead, send it to a
summary and then administrative discharge, which
gets rid of the guy right away, no appeal, no
appellate leave, no lost battalion.

So, again, an awful lot of reasons.

I'm sure many of you can come up with additional
reasons, but those are some of the speculations.

Judge Grimm?

HON. GRIMM: I was just going to say,
the administrative elimination was much faster
way of fixing some of these problems.

MR. SULLIVAN: Exactly, exactly.

DEAN HARRISON: Mr. Sullivan?

MR. SULLIVAN: Yes, please.

DEAN HARRISON: I want to make sure I understand the mandatory minimum for penetrative sex assaults.

So, there is a mandatory minimum of at least a punitive discharge, is that right?

MR. SULLIVAN: Correct.

DEAN HARRISON: And, did I understand you correctly that that has also taken away the convening authority's charging discretion?

MR. SULLIVAN: So, great question.

Okay, so, there have been proposals in Congress to take away a CA's authority to exercise prosecutorial discretion and move it to a judge advocate. That has not happened.

But, what Congress did do is say, hey, CA, if you are going to refer for trial penetrative sexual assault or attempted penetrative sexual assault, the only forum to
which you can refer that is a GCM.

    So, it's still the GCM convening

authority who decides. But, if the special
court-martial convening authority wanted to refer
that to a special, he or she could not.

    Only a general court-martial convening

authority. So, a summary can't try it, a special
can't try it, a general can.

    But, it's not -- it isn't the case

that a CA who gets such a charge has to refer it.
But, the only place they can refer it to is a
GCM.

    Now, that said, Section 1744 of the

Year 2014 imposed a review requirement for non-
referral decisions.

    So, this is what Congress said in that

provision. Hey, general court-martial convening
authority, if you're SJA writes and Article 34
advice letter, of course, you know, Dean, what
that is, no reason anyone else should, but
obviously, you know, so, if your SJA writes this
recommendation from the lawyer to the CA and says, hey, hey, General, hey, Admiral, you should refer this and the CA doesn't, that case has to go to the Secretary of the military department for review.

So, in the case of the Marine Corps, it would have to the Secretary of the Navy to review that non-referral decision.

The Statute also says, hey, General, hey, Admiral, if your lawyer writes in a 34 advice letter that this penetrative sexual assault should not go to a court-martial, that needs to be reviewed by your next senior General or Admiral in the chain of command.

So, whenever there is an Article 34, but remember lawyers writing an advice to a convening authority about a penetrative sexual assault, someone -- and, the CA does not refer it, someone has to review that non-referral. No requirement.

So, let's say the SJA says, don't refer it and the CA says, you know, thanks,
judge, I'm referring it, no requirement for
review. But, if it's -- it does matter if the
judge advocate says don't refer and there's a
non-referral, still requires review one level up.
If the judge advocate says refer and there's not
a referral, review by the Secretary of the
military department.

I also would say, so that provision
was part of the NDAA for FY2014. That provision
took effect on December 26th, 2013. So, we're a
little bit more, we're listing three year out.

So, Dean, in that time, in those three
years, how many instances do you think there have
been? I know the exact number. How many
instances do you think there have been where the
SJA has said, hey, General, hey, Admiral, you
should refer this penetrative sexual assault to a
GCM and the Admiral or the General said no,
requiring the Secretary of the military
department, how many times do you think that's
happened?

DEAN HARRISON: No much more than
zero.

MR. SULLIVAN: Exactly, you would be correct. And, that precisely is zero times.

BGEN SCHWENK: So, is that an example of congressional influence on the independent decision making of the convening authority?

MR. SULLIVAN: So, General, I'd say that would be an example of congressional constraint on the independent exercise of discretion by the convening authority which, of course, you know, as we all know, well, I guess we don't know, some of you have no reason to.

So, in the military, under this concept of unlawful command influence. A superior can't tell a junior how to exercise discretion about military justice matters, unlawful command influence.

BGEN SCHWENK: So, if the President said something about sexual assault cases, you would become unlawful?

MR. SULLIVAN: Agent provocateur.

(LAUGHTER)
MR. SULLIVAN: See, that's the concept that you can't have unlawful command influence.

So, say there was a case, for example, the Commandant of the Marine Corps gave a number of speeches, it was called the Heritage Brief where he talked about the sex assault and basically said, false reporting is a myth, said a number of things. Said that in -- according to two members of a court-martial panel while the case was ongoing.

The appellate court said that violates the prohibition against unlawful command influence. You can't have unlawful command influence.

But, something that Congress has put in the UCMJ is, by definition, not unlawful. So, this would be a lawful, in fact, it is literally by law constraint, and he knows this, he's just prodding me because he likes to do it, so it's a lawful constraint adopted by Congress on the discretion of the convening authority in that instance.
Okay, so let --

DEAN HARRISON: One more question, I'm sorry.

The -- I can't remember the exact title, but the Victim Advocate attorney, that are --

MR. SULLIVAN: Yes, the SVC or VLC, depending on what Service.

DEAN HARRISON: Do they participate in Article 32 investigations?

MR. SULLIVAN: So, they are available to represent the accused [sic] at the 32.

Congress also changed the law to say that a victim --

So, it used to be the case, well, it still is the case today, that a civilian cannot be compelled to testify at a 32, but a Servicemember could.

Congress was concerned, hey, civilian victims can't be subjected to this, to being cross examined in a 32. Military victims can, as I'm sure you know, there's a case under the Naval
Academy that resulted in a great deal of attention about whether victims were being unfairly questioned and subjected to unfair proceedings at a 32.

So, Congress changed the law and said, hey, it's always been the case that civilian victims can opt out, now military victims can, too.

So, the military victim can completely opt out of participating in the 32. But, that SVC in the case of the Army or Air Force or the VLC in the case of the Navy or Marine Corps, is available to form an attorney-client relationship and represent a victim including for purposes.

So, if there was an issue that came up at a 32 about psychotherapist-patient privilege or scope of the rape shield law, that VLC or SVC would be in there advocating for the interest of the victim.

DEAN HARRISON: Thank you.

MR. SULLIVAN: Yes, Your Honor?

HON. BRISBOIS: So, there's zero times
when the convening authority has said I'm not
going to refer. But, do we know how many times
when the staff judge advocate has said this case
should not be referred and it has referred?

MR. SULLIVAN: That is, A, a great
question; B, a question that has led to
congressional hearings and I'm not kidding.

The short answer to the question is
no. And, so, the reason we can say that the
first one is precisely zero is because we can,
you know, call up the legal apparatus for the
Secretaries of military departments and say, how
many of these have you gotten and they tell us
zero.

But, there's no -- because there's no
requirement to report to anyone the other way, we
don't have a red belly button we can push and say
how many times has this happened?

So, the short answer to that question
is we don't know.

We know that there have been cases
that CAs have referred, notwithstanding the SJAs
advice not to. In fact, three of the cases from Naval Academy that we mentioned, the SJA advised the CA not to refer and the CA did.

So, we know it happens, but we don't know how often it happens. It appears that it is relatively -- and it appears that it is exceedingly rare, but it is longer than a null set.

Yes, please?

CMSAF MCKINLEY: Sir, a couple questions here.

The previous slide 1,100 in general courts-martial, 50 percent of those are sexual assault and that's a lot less numbers on general courts-martial over the previous couple of decades.

Do you have the percentages of the number of sexual assaults? Has the percentage of sexual assaults decreased or increased?

Also, a couple other things, how does that compare per capita to the civilian community?
And, also, do you have -- can you provide for us how it breaks down per rank and the different branches of the Service for the sexual assault secured rank?

MR. SULLIVAN: All three questions, Chief, so the short answer to the question on how that breaks down with civilians, and Dr. Spohn's -- you've analyzed that exact question, haven't you? Why don't I yield the floor to you?

DR. SPOHN: Well, I don't have the data here with me, but we did look at -- Meghan's going to get it -- but, we did look at the difference between those issues.

MR. SULLIVAN: So, we can get that information out to all the Members that report on some of the research that has been done so far.

Also, the DoD SAPRO Office has what's called a waterfall chart. So, we'll get you reports to answer your first question about of all the cases that come into the system, how many of those end up going to court-martial.

So, I can also get you some trend
lines answering your first question on that.
And, in terms of rank breakdown, I
don't see anyone here from SAPRO to help with
that. I'll look into whether we can get that.

I know that the answer -- I know we
have data to respond to your first two questions,
I would be surprised if we couldn't find data
that responds to your other question.

CMSAF MCKINLEY: Yes, it would be
interesting to see if those more occur in a
dormitory barracks situation or, you know, in a
deployed location. Those are relevant questions.

MR. SULLIVAN: They are, they're very
important questions, agreed. Yes, we'll see what
data is available and pump it out to you.

Okay, and so, my tech expert here, my
going forward doesn't always works.

But, let's stop here in any event.

So, if you could see it up to this point, you
could see the sexual assault report.

Okay, so, let's follow the system,
this will respond to your question, Judge Grimm,
about the CA powers.

And, so, let's just look at how a case progresses through the system. And, I'm going to use the Marine Corps example just because that's the Service that I know the best.

Okay, so, we're going to start with a sexual assault that's reported. And, so, if a sexual assault is reported, you'll recall the General Counsel mentioned that, by regulation, only what's called a Military Criminal Investigative Board position is allowed to investigate that offense.

So, a commander cannot say, I'm going to investigate that. And, in the Marine Corps, CID can't investigate it. And, in the Army -- the Marine Corps CID is different in the Army CID.

The Marine Corps CID can't investigate it, NCIS has to. In the Army, an MP can't investigate it, CID must. In the Navy, you know, Shore Patrol or National Guard can't investigate it, NCIS has to. In the Air Force, the SF can't
investigate it, OSI must.

So, any sexual assault, and this applies not only to the defendant but to the contact as well, must be investigated by the NCIS.

Once it's reported in either a restricted report which doesn't go in the military justice system but makes the victim eligible for services, or an unrestricted report which must go to the military justice system, or in the investigative system.

In the Marine Corps, they'll be offered a VLC right then. So, right from the beginning of the investigation, as soon as the person makes the restricted or unrestricted report, they are offered to form an attorney-client relationship with a VLC.

But, they don't have to. When you look across the Services, it looks like in about 75 percent of the cases an unrestricted report, the person chooses to enter into a attorney-client relationship with a VLC/SVC. They don't
have to, but it's always offered.

HON. GRIMM: What's that percent?

MR. SULLIVAN: About 75 for
unrestricted reports. But, for restricted
reports, it's about 25 percent. But, for
unrestricted reports the latest data we have
suggests about three-quarters take advantage of
that.

Okay, so then, NCIS investigates.
And, then, so if the case goes forward, charges
are preferred. So, somebody's subject to the
Code swears that they have reason to believe that
this Servicemember committed an offense.

And, so, if it's a penetrative sexual
assault, so normally, in the Marine Corps, the
charges would then go to a battalion commander
who would serve as the special court-martial
convening authority.

But, because, you'll recall the
General Counsel mentioned that for purposes of a
penetrative offense, it has to go to somebody
who's at least an 0-6 and who is a special court-
martial convening authority.

So, in the Marine Corps, so, this the alleging a penetrative sexual assault, it's going to go to the regimental CO, not the battalion CO.

And, so, that individual is a special court-martial convening authority. In addition to being able to convene a special court, that person can order what's now called an Article 32 pre-trial -- a preliminary hearing.

And, so, they'll refer it to a preliminary hearing and that preliminary hearing officer will then provide a report back to the special court-martial convening authority who, at that point, could dismiss the charges or could refer the charges up.

You'll recall, for a penetrative offense, that person can't refer them to a special. If it's the contact offense, that person could also have the option to referring to a special.

HON. GRIMM: I might mention, my capacity to serve the military analogue of grand
jury?

MR. SULLIVAN: Exactly, exactly.

So, this preliminary hearing, except the only important difference on the preliminary of course, is the accused has the right to show up.

And, so, and be represented by counsel at that Article 32 preliminary hearing.

Okay, so then, so, let's say the special court-martial convening authority basically you refer to a GCM. So, that special, that regimental commander would then push it up to the division commanding general and that division commanding general will then get advice from his or her staff judge advocate.

And, then we talked about the consequences of that advice, depending upon what it recommends.

And, so, if they want to refer the case to the court-martial, they're refer it to a court and then the case, for most purposes, for most purposes, the case then belongs to the trial
judge.

And, so the trial judge is going to be presiding over that case.

The CA still gets to make some decision, especially anything that requires paying money. So, like if you want -- if there's a issue about bringing a witness in, the CA gets to decide whether to pay to bring that witness in and then the judge can review it.

But, for the most part, the case, at that point, belongs to the judge.

So, then, you get, let's say you a conviction, then the case goes back to the convening authority.

And, so, now, we get into this point where our Judgment Management Report, the laws change.

So, before 2013, that convening authority could either set aside any finding of guilty or could reduce the punishment in any way the convening authority wanted for any reason or no reason at all.
And, then, there was a prominent case out the Air Force, the Wilkerson case, where clemency was granted. There was a widespread consternation about clemency being granted.

It turns out that the factual basis on which clemency was granted turned out not to be so true, not to be so factual, that's a very delicate way of putting it.

And, so, Congress changed the law. And, so, they said, for the most part, a CA, a convening authority, can no longer change the findings. They can no longer take the conviction and make it not a conviction or knock it down to a lesser included offense.

For the -- and so, then the court changed. Now, there's a caveat. There is one class of cases for which the convening authority still retains the old powers and that's for an offense for which the maximum punishment is less than two years, so the maximum punishment that the President prescribed the Manual for Courts Martial is less than two years, and, in fact,
that court-martial did not result in either a punitive discharge, so BCD, that kind of discharge, dishonorable discharge or dismissal, or more than six months of confinement.

So, turning it around the other way, the only cases where the CA can still exercise that power over findings and exercise general power over the sentence to knock it down, are cases that have less than a two year maximum punishment under the Presidentuary prescribe maximums and the court-martial resulted in a sentence that was -- it included confinement for no more than six months and didn't include a punitive discharge. Okay?

It's not important, I just know there's more.

SGT MARKEY: And, where do sex offenses fall in that particular decision process?

MR. SULLIVAN: So, Congress also said, so, essentially, no contact or penetrative offense would ever fall within that exception.
But, just to be sure, Congress went ahead and said, oh, by the way, no Article 120 offense, which is the main Statute under which these are tried ever qualifies regardless.

So, essentially, so, for the cases that you're most interested in, they don't apply, okay, for the most part.

And, you can say there might be violating unlawful general order, which is how we try to say underage drinking, you don't ask for that one to apply as well.

This catches a real small number of cases.

Now, Congress also restricted, but not to quite as great of an extent, the CAs power to grant clemency on sentencing.

So, the way we do plea bargains in the military, and most, if you look at most GCMs across all the Services, most general courts martial are resolved by a plea bargain.

But, if you look at special courts martial across all the Services, most special
courts martial are resolved by plea bargain. We call them pre-trial agreements in the military. They impose special rules. So, the way we do plea bargaining is weird, all right. And, by the way, this is also going to change in two years, okay.

But, the way we do plea bargaining is very odd. Okay, so, the accused and the defense counsel negotiate with the convening authority and they agree on a maximum sentence.

So, General, have you been a convening authority? Okay, so, you've had defense counsel go to you and say, hey, General, here's why you should cap this case at no more than three months confinement.

And, then, you decide whether you're going to grant that request. Okay?

So, let's say the General grants that request. And, so, for this particular offense, let's say it's an unauthorized absence of three months. Okay, so somebody goes AWOL in the case of the Army or UA in the case of the Navy and
Marine Corps.

I also had a very funny discussion in the Air Force, of course, UA cases are drug cases, I had a discussion with an Air Force lawyer where we're both talking about a UA case which in the Marine Corps means an unauthorized absence case, an AWOL case. And, we're both talking about the same case, we were talking about UA case.

And so, suddenly he mentions a lab report. I'm like, you have lab reports for UA cases? And, I'm like, what, you know, because I'm thinking, in an AWOL case, you have a lab report?

And, he looks at me with this look of absolute horror on his face and goes, in the Marine Corps, you don't have lab reports on UA cases?

I'm like no. He's talking about a urinalysis kit.

Anyway, for Army purposes, you have an AWOL case and let's say you agree to a three
month deal, so you agree that this person will go to a special court-martial and whatever the sentence is, she'll knock down the confinement to no more than three months in exchange for this person pleading guilty.

So, then the case goes to a court-martial. And, let's say the part of the deal, as most deals do, says it has to be tried in front of a judge, for members, you have to try in front of a judge.

So, you go in front the judge and the judge has no idea what this deal. The judge knows there's a deal, but doesn't know what it's for. Okay?

So, then, let's say the judge comes back and says, okay, I sentence you to confinement for four months and a BCD.

Then the judge like opens up the secret envelop and sees that there's a deal between us and says to the accused, okay, well, the convening authority acts, you'll get no more than three months. That power still exists.
So, through the plea bargaining power, the CA can still knock down the sentence in that same way.

Now, let's say, the accused only gets two months at that court-martial. The accused gets the two months. So, the accused gets the better of the two deals. It's called beating the deal in military practice.

So, if you have a deal and you get it, you come in under the deal, you get the lower sentence.

If you have a deal and the court-martial comes in above the deal, it's going to get knocked down to the deal. Again, that's all going to change in two years, but that's the odd system we have today.

So, Congress retained that authority of the CA because they wanted to retain the ability to have plea bargains the way it's done in the military. They retained the authority of the CA with one exception, and here's that one exception.
You know, how we mentioned the mandatory minimum for penetrative offenses includes kicking you out with bad paper, a CA knock down that dishonorable discharge to a bad conduct discharge, but that's it. They can't knock it down lower, even through plea bargain.

There's one exception, it's very rarely used where a CA can give great expert clemency power if the trial counsel recommended, the trial counsel being military vernacular for prosecutor, if a prosecutor recommends after the court-martial, because the person, you know, rats out somebody else and participates with the government in another prosecution, they can get extra clemency there. It's very rarely done.

So, for the most part, Congress took away the CAs authority to grant clemency on the back end by your setting aside the discharge and setting aside confinement for more than a year.

But, they kept on the front end by being able to do it through a pre-trial hearing.

What time is it? I think I'm cutting
away on your time, by the way.

      CAPT RECORD: It's 10:45, you have 45 minutes left.

      (LAUGHTER)

      MR. SULLIVAN: Let me stop. I talked way too long and I've strained everybody's patience way too long. I'll just stop there.

      You know, if anybody has anything else they want to ask about, but I'm going to yield to Art and then, you know, if going forward if you think it would helpful to hear more about the system, as I've said, I am always happy to talk about it and I'd be more than happy to come back and yammer at y'all some more if anybody can stand it.

      So, does anybody want to raise anything nor or everyone just wants a break and wants me to shut up?

      SGT MARKEY: Just one thing, will we have access to that flow chart? Okay, thank you.

      CAPT TIDESWELL: Yes, sir. I believe that you all received that, I believe that Mr.
Sullivan stayed up all night and had an all
nighter because we had a new brief this morning.
So, we will provide that to you.

SGT MARKEY: Thank you.

MR. SULLIVAN: All right, thank you
very much.

SGT MARKEY: Thank you.

CAPT TIDESWELL: Is there any interest
in a comfort break? Is everybody good to go?

Comfort break, I'd recommend a comfort break at
this point.

(Whereupon, the above-entitled matter
grew off the record at 11:26 a.m.)

CAPT RECORD: Good morning, ladies and
gentlemen. I'm Captain Art Record, Deputy
Assistant Judge Advocate General of the Navy for
Criminal Law, a really long title that nobody
really cares about, but also the Chair of the
Joint Service Committee on Military Justice,
which I guess is why Captain Tideswell asked me
to be here.

I have three rules that I really try
to work hard to adhere to, which I try to adhere:
never volunteer for duty in D.C.; never go back
to a job I've held before; and never follow Mr.
Sullivan when I speak.

(Laughter.)

CAPT RECORD: And so a long, long time
ago Captain Tideswell called and said, hey,
buddy, I need you to go to OJAG Code 20. This is
when I was a lieutenant, went to work for General
Schwenk. So that's to tell you that I'm
violating my rule about going to jobs in D.C.,
I'm violating my rule about going back to a place
I'd been before, and now I get to violate my rule
about following Mr. Sullivan. So today is
already a disaster for me.

(Laughter.)

CAPT RECORD: I'm hoping I'm setting
your bar really low, because I've got to reset
expectations after Mr. Sullivan's presentation.

I have some slides that I'm just going
to use as anchors or weigh points as we go along
hopefully to facilitate more of a dialogue and
some response. If I had a thesis for this brief, it would be that since 2012 the practice of military justice and the Department of Defense in general, and particularly with regards to sexual assault, has been through more changes than in the 51 years, 61 years of military justice that preceded that. So my thesis is we are in a time of significant scope and depth of change.

So I thought I would start the conversation by recognizing it -- if we go back and you'll see some dashes in there. If we go back to 1951 and the UCMJ, it was an imperfect product rolling out the door. It was far better than what had been the Articles of War and the Articles of the Governance of the Navy than what had preceded it, but it was not ready.

And that was really immediately tested in Korea when we had 55,000 courts-martial in the first year of the UCMJ. Do you remember our slide we just saw? We had about 2,000 total special and general courts-martial in 2015 for the whole DoD in one theater of operations. One
of my rules is don't do public math. I'm going
to follow that rule.

(Laughter.)

CAPT RECORD: In one theater of
operations we had way more courts-martial in
1952. But it was imperfect. And so we see a
couple of holistic or major reviews in the next
couple of decades.

So we from 1968 a review -- the 1968
Military Justice Act, which led to the 1969
"Manual for Courts-Martial." We call that over
at Code 20 here comes the judge. So we have --
we realize that an option to note have a judge is
a good reason to not have a judge. So we have
mandatory presence of judges and we have
enhancement to the professionalism of the defense
bar.

So if I had a second thesis, it would
be that changes, especially big changes, take
time to take effect. So we see some enhancements
of the rights of the accused, some recognition --
if you go back to the hearings on the UCMJ, which
are thankfully to the Army now available in the
Library of Congress online, you can see that a
lot of the concerns that still persist were there
during the hearings. And one of the comments
earlier was about the role of the commander. And
so in the 1968 Act and the 1969 Manual, by
addressing the role of the defense counsel and
the role of the military judge, they tried to
further refine the system.

Fast forward to the 1983 Military
Justice Act, our 1984 Manual and you see the next
evolution of the system, which is the mirroring
of civilian Rules of Evidence and Rules of
Procedure. So, and I say that because those two,
if you look at the role of the judge and the role
of the defense counsel, we really see those
things playing out in the '70s and '80s.

And then if you look at the Rules of
Evidence and the Rules for Courts-Martial, we see
those playing out in the '80s and '90s. And so,
that kind of brings to my second thesis, which is
there's a significant lag time in the application
of major change.

Why do I say that? 2012 until now has had a number of changes, some of which are contained in the Military Justice Act of 2016, but many of which were in previous legislative cycles or regulatory cycles. And so, Mr. Sullivan alluded to this. He pointed out some of it. But we had 75 significant military justice changes in NDAA's '12 through '15 -- or '12 through '16. So five NDAA cycles. We have 75 significant military justice changes. A number of sexual assault-related changes. And you're largely familiar with those. We'll hit some of the wave tops as we go along.

I realize I talk very fast, so if anybody has a question, just shout it out. And I am capable of shutting up.

So all of that leads up to here, but it's important for you to recognize that we're grounded in an ongoing dialogue. And many of you remember the number -- the claim of 26,000 rapes in the military. We have been in this dialogue
-- we're going to talk a little bit about -- mostly about 2012 until now, but this dialogue predates that time frame.

So back when then-Colonel Schwenk was my boss in Building 111, the good old days of Code 20, we were getting the same taskers, the same calls for data, the same questions regarding our handling of sexual assaults. In fact, we'll talk a little bit about data management, data related to sexual assaults. But back then the question was how do we get our arms around what the data is? And my boss said, well, we need to count -- create a system. And the JAG Corps has created three or four systems, none of which have really gotten to that point.

But, so we need to know how many there are. But this is the number that gets people's attention. This number has driven the creation of your predecessor Panels. And I am neither as good a public speaker as Mr Sullivan, nor am I as smart as Ms. Fried, so I will only say that there's a background rooted in some statistical
data that we can't ignore.

There's a narrative that commanders sweep it under the rug. And Mr. Sullivan alluded to the Wilkerson case, but that is a perception. And whether it's true or not -- I have a personal opinion as a former SJA that's not, but we recognize that's the narrative and that's what drives conversations about sexual assaults in the military Service.

We talked a little bit about mandatory discharges and sentencing schemes, and that also leads to the fairly partisan perceptions -- and not political partisan, but partisan perception of the military justice system, because when you do see a case play out, it's very hard to understand the outcome. And certainly on the accountability front that comes out.

From -- and I notice we have many esteemed members of the victims' rights organizations here in the audience, but for the victims and for those who represent them we recognize that there is a tension between our
military system in which the commander is responsible by statute and regulation for the maintenance of good order and discipline for ensuring an efficient and effective force. So there's a tension between that and this -- the most personal of all reports of offense that are going to lead to consequences, including being interviewed, having to do that to your commander. So that is part of the tension that drives the need for reviews.

And then in recent years -- I talked a little bit about the 1950 hearings on the UCMJ and the question about the role of the commanders. In recent years that has come up again. And we have seen challenges to the role of the commander. Of course two Panels ago the RSP looked into that fairly significantly. Some of the intervening groups have not looked at it in as much depth, but that is a part of the ongoing conversation.

And then the most recent really big ticket item that we see extensively reflected in
the National Defense Authorization Act for 2017 is the need to protect victims, reporters, first responders and those who serve them from retaliation, reprisal, ostracism, maltreatment, a wide variety of maligned types of treatment that could be affected upon people who are associated with the report of a sexual assault.

So a little bit of background. And I'd like to go beyond just JPP and RSP, again mostly because I'm not the smartest guy in the world, but also because we have a lot of history. So we're never at square one when we talk about reviewing issues related to the processing of sexual assault cases or the issue of sexual assaults more generally.

So if we go back in time for some of you who've been a part of these conversations, back in the oughties -- is that still a word?

(Laughter.)

CAPT RECORD: Back in the oughties we had the Defense Task Force on Sexual Assaults in the military Service, and this was a Panel
appointed by act of Congress that went around to
the installations. I know I hosted -- I -- not
I. Nobody came to my house. But we and my
region hosted a team for about a week. And they
did interviews, they did small-group-type
surveys, focus groups. So we have some what I
will call modern -- anything in the oughties and
forward we'll call modern. So some modern
experience with the Defense Task Force, of course
ELPB and some other organizations.

We at the JSC have looked into this,
both with our Sexual Assault Subcommittee and
more recently with our collateral misconduct
subsequently. So your active duty service
organization that works for and on behalf of the
General Counsel has looked into with some rigor
issues related to things that you will be
studying. The most recent sexual -- Collateral
Misconduct Subcommittee I know more detail about
because that was during my tenure as a voting
group member, not as the chair.

By the way, I've been the chair for
about 21 days. Skipped right over Spring training. There was no Cactus League. It was just like, boom, we're going to the majors and briefing the DAC-IPAD. So if I strike out, you'll just know that I didn't get any warm-up pitches.

But, so I know from that one we put hundreds of hours into looking into the issue of collateral misconduct. We did non-scientific surveys, more polling of the various interests. I know from the Navy standpoint we communicated with our defense bar, with our Trial Counsel Assistance Program, our prosecution bar. We communicated with our Victims' Legal Counsel Program. We at Code 20 speak to the leadership of our Victim Legal Counsel Program almost every single day. And so we reached out, collected all the data we could to try to make some good recommendations. So we're not blind to either the issues or the need to incorporate people far forward from the Washington Navy Yard and propose solutions.
And then we'll just kind of lead into the last two very significant muscle movements were the JPP and the Military Justice Review Group, which had different focuses, of course. They were convened -- they arose out of the same sort of collection of incidents that created a focus, but different focus groups. So 2012 we get the new Article 120 Statute, which would be otherwise not all that interesting of an event in military justice history. Many of us would yawn except that 2013 was the year of great trial and tribulation for the military justice system.

So we talk about 2012 because that's the legislative history of our statute under which we're still operating, but 2012 was just another year in prosecution and defense of courts-martial except that it was the year that came before 2013.

So 2013 we see the Judicial Proceedings Panel on Military Justice Review Group. Of course JPP was created by Congress. MJRG was internal, and MJRG recognized a need to
conducted a holistic review. So the Chairman and
the Secretary collectively agreed we need to do a
holistic review. We have not done a true
holistic review since 1951. So that team -- and
I am sure that at some point you will get a brief
from one in a long line of people who are smarter
and better at talking than myself

But Chief Judge Effron led the MJRG
team, and they did literally from preamble to
appendix, whatever. Let's look at everything in
what I call the "Big Red Book" and see is the
UCMJ and the "Manual for Courts-Martial" set up
to achieve its purposes?

So that kind of leads to where we are
today. If we're talking about the 2012 until now
history of sexual assaults, we have to talk about
the changes that have come. And then I'll finish
up just because I'd really rather talk about the
Military Justice Act of 2016 the whole time, but
I'm really going to hit that towards the end
because it's not going to take effect until
sometime between now and January 1 of 2019, as
defined by the President.

So let's talk about where we get information. And of course, we've got Dr. Spohn, but many of you are aware that there are many sources of information to make decisions about sexual assault. And we have had for years a report to Congress on sexual assault. You all will probably recall in 2013 President Obama directed more rigor in our analysis and directed us to prepare a report, what we called the POTUS Report, and which the staff at Code 20 considered an excuse to eat beer in the colonel's -- eat pizza, drink beer without shoes on in the colonel's conference room while working 24 hours a day for weeks on end.

But it was really somebody dig in and figure out what the data is, try to figure out what the data means. And so, that is another anchor to which I would invite your attention. Of course we've got other sources of information. The Military Service Academies Report is a valuable tool because it's survey-conducted. So
the Annual Report to Congress is really driven by reports of sexual assault that come in to the services. Restricted reported, unrestricted reports, and then data gathered about the disposition of those unrestricted reports.

The Military Service Academies Report is another DoD SAPRO tool that is driven by surveys, biennial surveys at the Service Academies. So a little more real time, a little more people-focused information. The RAND survey, the source of that 26,000 or 20,000, or whatever the next iteration, I should say. And then some FOIAs that shed light on what is going on.

So, and then the most recent focal areas. I mentioned retaliation and reprisal is a significant focal area. In fact, we've been working with Mr. Sullivan on an implementing reg for DoD to help address this. Of course I'll tout my own Service because I am wearing Navy stripes on my sleeve, and I'll say that Secretary of the Navy way back in December of 2014 signed a
SECNAV instruction explicit -- expanding the
definition of retaliation and reprisal.

Many of you have aptitude experience
or otherwise work with whistleblowers, and you'll
know that historically our Military Whistleblower
Protection Act and its implementation focus more
on EO-type whistleblowers, so people who make
protected communications to Congress. But
SECNAVIST 5370 really tried to focus more on the
maltreatment, ostracism and reprisal, a broader
group of protection for whistleblowers. And DoD
and all of the Services are also moving in that
direction.

And a couple of other things that
drive the conversations that we have when we're
talking about the laws pertaining to sexual
assault are perceived incidence rates and the
delta between incidence rates and reporting
rates, restricted reporting and unrestricted
reporting and attempting to figure out why people
make a restricted or unrestricted report, our
interactions with the special victims' counsel
for the other Services' victims' legal counsel
for the Navy and Marine Corps, because special
victims' counsel could be confused with special
victims' investigation and prosecution
capability. So those are some of the focal
points of the conversation.

And then we get into the weird way in
which military law is made. And there are a lot
of words on the screen. What I'll say is that of
course Congress makes laws, but we also have laws
that are made at the executive level by executive
order, and we have laws that are made at the
local level by some sort of order to punitive
regulation. And we have aspects of the process
that the JSC working for the DoD General Counsel
will propose changes. And then we have groups
such as yourself which make recommendations
either to us or to Congress. So we have a lot of
ways where all of these changes -- a lot of areas
from which all these changes come.

So this is just one. And there's a
reason why I'm going to show you 2014. But I
mentioned my number one thesis is that the scope of change since 2012 is the most significant in the history of the UCMJ. This is the military justice and SAPRO-related provisions from the FY 14 National Defense Authorization Act. And if you're a practitioner or a service member trying to keep up with this, this is what affected your life on this one particular topic in that one legislative cycle.

We stopped doing this slide after '15 because we couldn't come up with a type that was small enough and still be legible. So this is just two legislative cycles worth of SAPR and military justice-related changes, only from the NDAA. So only one source of change to the law affecting how we do these cases.

And, so this slide is an old slide that I only offer because we talked about important changes. I think most of us know and have interacted with General Altenberg, or many of us have fairly well knowledgeable and experience with the judge advocate. And he
called the 2014 NDAA change the most significant since 1968. I'll leave that to him. He has said that. I would say whatever you think about 1968 versus 1983 versus 2014, NDAA 17 is -- has to take the cake as the most significant change.

So let's just talk a little bit about the changes. And I'm going to focus on '14 forward because as you may recall the real timeline, the genesis for our current changes really is triggered there in the fall -- summer/fall of 2013.

So we had a few changes in the FY 12 NDAA, most notably our current version of Article 120. We had a few changes in the FY 13 NDAA. Changes explode in the FY 14 NDAA, which by kind of how it happened to come out was not on the street when the fall furor of calendar year '13 hit. And so we got a chance to respond to some of the challenges that we saw in 2013.

Mr. Sullivan mentioned the codification of the Crime Victims' Rights Act, which had historically been partially implemented
by regulation, but certainly there were aspects
that were left out and it was not statutory at
the time.

Some of the other significant changes
that year involved the elimination -- I think we
talked about the commander's authority under
Article 60 to take any action favorable to the
accused after trial and the withdrawal of that,
in most cases the imposition of mandatory minimum
punishments in the form of the discharge. So
what we see is that -- in FY 14 we see the
beginning of the explosion of statutory,
regulatory, and structural change.

We talked a little bit earlier about
the Victims' Legal Counsel/Special Victims'
Counsel Program. That program became fully
applicable across the Services during FY 14 as
well.

So we fast forward to '15, and this
pace of change continues. Fifteen was not as
significant or monumental in terms of the pace of
change, but we did see some corrections to some
of the minor impacts of '15 and we did see some
significant changes, including to the maximum
punishment.

FY 16, another very large year, in
fact almost as large as '14. And this goes back
to my second thesis, which is that change takes
time to evaluate. So FY 14 we get a special
victims' counsel program. FY 15 we start hearing
from people who are in special victims' counsel
and VLC jobs, and we start hearing from people
like first responders, SARCs, service providers.
And there's a recognized need to protect people
who take these very hard jobs on behalf of
victims. So we see a statutory change regarding
the reporting on the fitness of special victims'
counsel.

Changes related to the retention of
case files. That was a big one because many of
you with experience in the Executive Branch know
that we're all under records management or
records disposition regulations and all of our
records exist with some sort of FOIA Act record
system or some sort of Privacy Act system of
records.

And case files, case notes are no
different, so you keep it as long as you're
legally required to and no longer, because you
have this conflicting obligation to keep as long
as you have to and an obligation to destroy when
retention is no longer necessary. So we saw some
changes to our case file retention requirements
as well.

So that's the background for all of
the changes that we've been dealing with until
this year. And then this year we get the mother
of all NDAAAs for military justice.

A little bit -- I -- back at Code 20
we spend a lot of time talking about Section E,
the Military Justice Act, but it is worth asking
you to recognize also that in every NDAA there's
usually a section dealing with military justice
matters generally. And so, we saw a section in
the 500 Series dealing with the rights of victims
and with protection against retaliation and
reprisal, as well also addressing a study on the
advisability of the military justice litigation
career track. But I digress.

So in NDAA 17 we get the Military
Justice Act of 2016. And this is kind of where
the Joint Service Committee is spending our time
right now. It looks like this if you're a paper
person. If you're a PDF person, it just looks
like this one at a time.

(Laughter.)

CAPT RECORD: But MJA16 is a major
structural change. And so if I had a third
thesis, it would be that the Department is aware
of the need to continually assess ourselves, to
continue to look at what we're doing and whether
we're doing right, and that the Military Justice
Act -- the Military Justice Review Group and its
legislative proposal, which you can Google MJRG
and find all of this right online, is proof that
we are aware, we possess self-awareness. So the
Military Justice Act includes structural and
procedural and substantive changes. And most of
the comments that we normally talk about are on the procedural side. So I'll kind of run off a highlight of those.

We talked about the system as it exists today. Mr. Sullivan talked about the system as it exists today, but the changes for the Military Justice Act really -- if you remember his chart of something bad has happened until sentence is complete, the changes of MJA go beyond that. So in terms of something bad has happened, Congress -- we've never had the authority for judges to be involved in a case that was not referred to trial.

So referral is our equivalent right now of charging. If you were to submit a FOIA request and ask me what percentage of cases in which a person was charged, went to trial, then I'd say, all right, well, we have to work from referral, because preferral doesn't even necessarily require a judge advocate to be involved. You'll recall that we talked about the commanders owns the system.
So we lawyer types may not know that there is a preferred charge sheet if a commander is looking to dispose it through non-judicial punishment or if a commander conducts his preliminary inquiry in accordance of Rules of Courts-Martial 303 and makes his R.C.M. 303 decision that this case does not demand adjudication, or if it's sent to a summary court-martial. We never know that. But, so in that whole phase there's no authority for a judge to be involved under existing law.

The Military Justice Review Group looked at that, studied it and identified some places where that would be appropriate. For instance, digital communications, right, like you have to have a judge sign a warrant under the DCMA to get electronic communications. So that's one of our big changes, a significant structural change from the way we've done business since 1951, and really dating back to the Roman army, if you want to follow it that far back.

Another change that -- I'm going to
refer to my notes, if nobody minds that. Another change I would invite to your attention is along with those pretrial processing changes and authority for the appointment of magistrates. One of the questions is what is appropriate for a judge to do, what's appropriate for a commander, and what do you do with things that are sort of in between? So there's an authorization for a magistrate program.

There's a requirement for regulations governing some sort of judicial tenure. Don't ask me what that's going to look like. I am a voting group member, but I don't have a clue yet. But, so the MJRG took what I would call some provisions we have all held beyond -- as not being subject to question for the first 20 years of my Naval Service and said why? Why are those not subject to question? And they did question them and proposed some changes that Congress has written into law.

That goes back to the second thesis point I made, which was change takes time. So
1969 you see -- 1968-'69 you see an expansion of
the independence and the need for the judiciary.
You track that through the '70s and '80s and you
see the cases questioning the role of the
judiciary and the interplay of the judiciary
within an Executive Branch. And so, we had some
cases in the Naval Service. Of course there was
the big case, the Carlucci case. So challenges
to the judiciary. And now we have come sort of
to a place that will fairly closely mirror the
authority of non-federal civilian judges, some
sense of your seat is not impacted by the
decision you make in this court-martial.

The second point that the Military
Justice Act really I think adds a benefit is the
enhancement of the role of the staff judge
advocate. So the Military Justice Act includes
significant amendments to Article 34. And we all
group with an Article 34 advice being sort of a
one-time moment-in-time opinion that only applies
in general courts-martial. So if anybody from
J'accuse to special court-martial getting this
report of an Article 32 hearing, anybody along the way says this case is dying, then that was the end of it.

The new Article 34 includes a requirement to consult with a judge advocate, not necessarily the commander staff judge advocate, but to consult with a judge advocate regarding the disposition of a special courts-martial as well. So a further integration. And there's a requirement to have what I will call a U.S. Attorney-like manual, a set of disposition, non-binding disposition guidance that should be considered by the commander.

So the Military Justice Act, sort of the first thing I would say it does is further civilianize or moves towards civilianization of our pretrial practice. The second thing I would say is it enhances the reliability and aligns with civilian practices our process of making a prosecutorial decision yes or not, but also offers post-trial relief.

You may recall Mr. Sullivan pointing
to this ping-pong game of back and forth with the
court under Article 60. That ping-pong game is
gone. And the new process, there will be some
very narrow authority for the convening authority
to make a post-trial -- to do some things
post-trial, but the judge is now in charge of
post-trial.

Which brings up a point we were
talking -- he was talking about pretrial
agreements. And in a weird oddity that I'm not
smart enough to understand we never had a
pretrial agreements authorizing statute in the
military justice system. So the Military Justice
Act for the first times gives us one. And this
really kind of reflects that tension.

The only a commander had previously,
to enter into a pretrial agreement was this
plenary authority under Article 60 to only
approve so much of the findings as he chose. So
-- findings and sentence. So he or she would use
that authority then as a basis to agree to
exercise the authority in the pretrial agreement.
Kind of an odd way of building a system, but if you remember it was built in 1951 and evolved and was adapted to the needs. It would make sense that that was just how they found a way to do business.

I think we all agree pretrial agreements, plea bargaining is a valuable tool. Any prosecutor, any defense attorney would say this is a valuable tool that needs to be part of a system. Well, the Military Justice Act explicitly provides under the new Article 53(a) the authority for the convening authority and the accused to agree to the manner of disposition of the charges and/or specifications and/or to the limitations upon a sentence. That may be a judge. So a more modern and compatible with civilian practices pretrial agreement practice.

And then things that the next Panel will really appreciate, they really -- I apologize that I don't have a backward time machine, or just a time machine --

(Laughter.)
CAPT RECORD: -- to give you the benefit of this one now, but there's a 140(a), a new Article 140(a) that will require us to do a better job of keeping data, statistics, numbers, reports. That is what you really need to do any sort of analysis. And we just do not have a system for that that is applicable Department-wide.

What this will look like I don't know, but I know Congress has mandated it, so we will do it. So 140(a). Some future group that will hopefully not be looking into sexual assaults. I hope they're going to be looking into something not nearly as intense. But some group some day will want to look at how many people were accused of driving in excess of the speed limit on the Washington Navy Yard, and they will have data on all that.

And then finally, another part of how we are here today. We talked about all of the Panels and Committees that have come before, and one of the challenges has been conducting an
ongoing review without a standing organization to
do that and recognizing the internal conflict.
The UCMJ was built around the concept that the
Code Committee would conduct that review, but it
happens to have the appellate court on it. So a
new Panel, a Military Justice Review Panel that
will hopefully help in the far-distant future to
avoid the need for Special Panels and Committees
to look into these things.

Before I leave I just wanted to talk
a little bit -- well, actually no. But before I
get to the JSC's accomplishments, I forgot to
mention there are a couple of -- there are many
substantive punitive articles in the new Military
Justice Act, the majority of which were drawn
from the old Article 134 Presidentially-specified
offenses. So we have our enumerated offenses
that Congress gives us, and then we have the
offenses the President give us, and then we have
violations of orders. So if neither the Congress
nor the President has said thou shalt not or thou
must, my boss can tell me thou shalt not or thou
must and then that can be punished through Article 92.

Over the years that list of offenses within the enumerated offenses in Article 134 had really grown quite long, and Article 134 gives us the ability to assimilate crimes or to prosecute crimes, not capital, that are prejudicial during this point, or service-discredited. Well, over time the list of things that were prosecuted because they were prejudicial to good order and discipline or service-discrediting, which might -- was much longer than the list of enumerated offenses. And so the MJRG gathered up those that they thought they could fit into an offense without a requirement for proving the terminal element of prejudicial to good order and discipline or service-discrediting. So that's most of the substantive change.

I would highlight a couple of changes that are not just moving articles and rewording them to make them more applicable.

There's a new Article 93(a). So we
talked about retaliation. And I bragged on my Service's and my Department's instruction, but Congress -- the new Article 93(a) has the exact same terms that are in our SECNAV instruction right now regarding maltreatment, ostracism, and reprisal. So a new punitive Article to deal with these type of maligned conduct towards reporters of sexual assault.

And then we'll go to the back end of the punitive articles. No, I apologize. 132 at the back end of the punitive articles is our retaliation crime which deals with this maltreatment, reprisal, ostracism. The front end, 93(a), deals with an issue that we've had lots of conversations with the predecessor Committee about -- which is the -- punishing sexual interactions between people in positions of authority and people who are subordinate.

So the 93(a) is -- makes punishable having a sexual interaction with a person who is subordinate. For instance, in a recruiter-recruitee relationship or an
instructor-trainee relationship. So two major
punitive articles that are related to your
charter that unfortunately a couple of years down
the road.

I would like to highlight, I mentioned
that we're self-aware and the MJRG is one aspect
of that. I would say the Joint Service Committee
is another major aspect of that. And in your
notes you see some of the executive orders that
we've assisted in proposing and that has made it
through to being signed by the President to try
to address some of these things along the whole
list of how do we implement the 2012 Article 120,
what are the definitions and maximum punishments,
all the way through the protection of the rights
of representatives of victims in courts-martial,
the implementation of Article 6(b), our victims'
crime victims' rights.

So the Joint Service Committee has
also been a partner in trying to make sure that
we stay involved in addressing the issues that I
think you're going to look at addressing.
And so, we are in a time of quite significant change, and that change has proven to take -- the issuing of an edict or fiat has been proven to take time to take effect, but we think that we are on the right track. And subject to your questions, that is my brief, but I'm hoping you have lots of questions because I love my job.

Yes, sir?

CMSAF McKINLEY: Sir, a great job.

Two quick questions for you:

One of your first slides says 26,000 rapes. What time period does that cover?

CAPT RECORD: So, that was the RAND report, and I believe that that report covered the one year prior to the taking of the survey, and that the survey was taken in either 2012 or 2013.

CMSAF McKINLEY: That's a one-year --

CAPT RECORD: So that is an estimated prevalence rate using RAND's methodology, their survey methodology, an estimated one-year prevalence -- or one-year incidence rate.
I know, because I just looked it up for other reasons that in 2014 RAND estimated 20,500 incidents. So they take the -- they do their surveys and then however they normalize it and provide a statistical reliability. I don't do math.

CMSAF McKinley: Well, looking at our stats from last year on 1,100 general courts-martials, and 550 of those were for sexual assault or rape, and you had 20,000 rapes, I'm not -- I see issues there.

Capt Record: So absolutely that is the $64,000 question. And I recognize Dr. Spohn has a lot of good information on this.

And would you like to speak now or would you like me to really just screw it up? I think --

(Laughter.)

Dr. Spohn: Well, the RAND survey, as I understand it, is a victimization survey. And so, it gets at crimes that are and are not reported, correct?
CAPT RECORD: That's correct.

DR. SPOHN: And so, that's one of the differences between -- and some of those crimes that are reported are reported in a restricted way so that they're not investigated. And so, by the time you whittle that down to the crimes that are in fact reported -- and I assume you have that data as well, a number of unrestricted reported that occur each year.

CAPT RECORD: So the RAND survey; because I'm not a statistician, I won't speak beyond, they have a methodology that they use to try to estimate the incidence rate, the victimization rate across the Force by doing surveys and then trying to take that data and apply it Force-wide.

Where we have -- what I -- so we have the estimated incidence rate that we can get from RAND and then we have our reporting rate. We know for a fact how many restricted and unrestricted reports we get every year. Because we have a tool, we gather those for that
Congressional Report on Sexual Assaults in military Service.

Yes, sir?

HON. GRIMM: Yes, but could you just give me a little more detail about the distinction between a restricted and unrestricted report? I got the gist of it, but I'd like to know a little bit more detail and who makes the decision? Is it the victim's decision? And what kind of guidance or counseling do they have available to them in deciding what happens?

CAPT RECORD: Certainly. So a little bit of background. And you just have to permit to frolic and detour.

If we go back into the early 2000s, we realized that victims of domestic violence were not reporting domestic violence because they were afraid their husband was going to get fired in the case of family advocacy programs. There's almost always the male Service member whose wife was afraid.

So they said -- so we created a tool
called restricted reporting for domestic violence. The same issue pops up later in the 2000s, a perception that victims of sexual violence are not coming forward. And so, we created a tool to authorize the filing of a restricted report.

And that one's a little bit more challenging, right, because if you're a commander and you become aware that there's been an alleged sexual assault within your organization, you have some legal obligations to refer that over to the MCIO, like Mr. Sullivan mentioned.

And so, this restricted report then -- I say that because it's better, but it's still a little bit of a work in progress. So the victim ultimately holds the right to choose whether to make a restricted or unrestricted report.

And if the victim makes -- wants to make a restricted report to get to services -- well, wants mental health or medical services or access to legal services, but only wants to make a restricted report, they can do that to a
receiver of restricted reports, which is your
sexual assault response coordinator, your medical
health personnel, your victims' legal counsel,
receivers of restricted reports, people who would
have privilege. You can't define the term with
itself. People who would have privilege then
become authorized to receive restricted reports.

If the victim tells a person who has
a duty to report, then that is an unrestricted
report. So you tell your CO, you tell law
enforcement. There is still an area that still
creates a challenge which is the what-if-I-tell-
someone-else? So the governing regulations have
tried to address -- because of course we all --
like in the Navy, Navy Regs 1137 explicitly
requires you to report all known offenses that
come under your observation, or whatever the
words are. I'm not a lawyer.

But, so what if your friend tells you
I was sexually assaulted last night, or you see
them walking out crying and say what happened?
Then what are your obligations? So there's some
challenge. But for the most part victims have
the right to choose whether the report is
restricted or unrestricted, and that drives
whether it gets a law enforcement investigation
and whether they get the full panoply of
services; those are good things, right, and
whether their commander is notified and they
become a witness and some things that are not
necessarily desirable to all victims, or whether
they make an unrestricted report and get a
limited scope of services provided.

So that's at their discretion subject
to some exceptions when something wasn't intended
to be an unrestricted report, but is unrestricted
because of how it was made.

HON. GRIMM: Thank you very much.

CHAIR BASHFORD: Do you have a sense;
if you had a pie chart up, of what percentage of
reports would be restricted versus unrestricted?

CAPT RECORD: Dr. Spohn, do you know
that?

(Laughter.)
CAPT RECORD: I mean, so first off, I just don't remember. Last year I think we had -- I think for the Navy last year we had about 60 -- the total number of unrestricted last year I believe was about 1,013 more or less. And I believe the number of restricted was in the 600s. Which kind of goes to I think your point, which is there's this estimated incident rate number that is really big.

And there's this number that is flowing in that we actually know anything about, have any ability to interact with the victim, is much smaller. And then of those the restricted report really narrows the ability to interact further because the law enforcement and the commander are the people who could do something about the bad act. Only know about let's say a fifth or a sixth of all the alleged estimated incidents.

CHAIR BASHFORD: Although again violating your rule never do math in public --

CAPT RECORD: I just did some, I know.
(Laughter.)

CHAIR BASHFORD: -- wouldn't that be about a third were restricted if you had 1,000-plus?

CAPT RECORD: About 600 were restricted, so --

CHAIR BASHFORD: And you -- out of 1,000-plus?

CAPT RECORD: About 600. Yes, so you're right. About a third. About 600 of about 1,600. So about a third are restricted who received services, but the military doesn't get to do its military thing.

DEAN HARRISON: I wonder with regard to the restricted reports or an SJA investigation that says we think something happened but there's not enough proof to prove beyond a reasonable doubt, what does a commanding officer do with regard to a Service member that he has a -- he or she has a pretty good feeling is victimizing other people, preserving that person's right to pursue their career while at the same time
safeguarding the rest of the command? Is there
a uniform way outside of UCMJ of handling those
situations?

CAPT RECORD: So on the restricted
reports the commander doesn't know. On the
reports where there's not sufficient evidence,
then the commander is aware, but in a
significantly harder point. Because as you
mentioned, there's the commander's statutory and
moral obligation to maintain good order and
discipline. And then there's the victim's rights
and the accused's rights, and all of those are in
constant tension against each other.

But one of the things that has
happened, both as a result of legislation and as
a result of internal action, is they've expanded
the statute of limitations, expanding the
retention requirements for records, not only for
law enforcement records, but if you went back
with your really good reading glasses and read
that little tiny print, but for SARC records as
well.
And they've created a tool to allow victims to convert from a restricted report to an unrestricted report. So a victim may come in and get a safe exam conducted, but choose to just do an unrestricted report and then may change their mind and jump back in. So there's some ability to revive or change a report.

There's also a new program coming online to allow victims to opt in to capture limited data regarding restricted reports, which then if there's ever like a match for that offender, in a future case the victim could opt -- elect to be contacted. Hey, I want to consider whether to go from restricted to unrestricted.

So they've tried to -- the system has tried -- the system, they, the system. I am totally relieving myself of all agency regarding any challenges you may have to what I'm saying, but the goal is to maximize victim dominion and sovereignty while respecting commanders' control. And then where those two butt up against each
other, a DoDI that has come out in these years of
great changes directs commanders to give maximum
consideration to the victim's wishes. So we've
got Congress has told us to consider the victim's
wishes as to disposition and a DoDI that requires
commanders to give great consideration.

So they try to sort it out in
accordance with those principles, recognizing
that there --

DEAN HARRISON: I just -- we -- we're
of course focusing on the criminal aspect, and a
commanding officer is a convening authority in
many cases, but he or she is also an employer and
in some locations a dean of a school, and all of
those different hats that they wear. And if an
investigation does not result in a criminal
prosecution, that does not mean that that person
is sleeping well at night wondering about what's
going on in their installation and whether or not
somebody who might be making a military careers
is not someone who should be making military
career.
CAPT RECORD: And that's incredibly hard to stomach.

DEAN HARRISON: Yes.

CAPT RECORD: The -- it is hard to stomach the absence of a binary solution, and so it's very easy to decide there's no evidence, so we're not going to go forward, or there's overwhelming evidence, so we are going to go forward. And I don't think this attitude still exists today, but for those of you who have been on active duty you know there's also a desire just for someone to be accountable.

So there's a desire to look at things through a binary lens that I experienced as a young judge advocate that I will not attribute to anyone left on active duty today, which was, all right, either it's true and he needs to go to jail or it's a lie and she needs to go to jail. I don't think that attitude prevails. In fact, one of our former prosecutors who I've worked with a lot over the years likes to talk about us as the most enlightened trauma-informed
organization with which she's ever been associated. But we recognize that that is at least a background, that I've got to have good order and discipline.

And that drives -- Mr. Sullivan mentioned that if you have two-thirds minus one, that's an acquittal. That's not a mistrial. It's not a nolle pros. It's an acquittal. Because as a commander it's real easy to say, okay, IT1, you are not guilty. Now you have your Top Secret clearance back. Get back to working on this operating system.

It's hard to deal with uncertainty, the unknowingness, because we entrust often very young people, often not based on our own experience, but just based on the fact that they've been assigned. This is what we've been given. This is the person. We entrusted them with very valuable monetary systems, with high levels of access to information, with very important decisions really across the Force, including trusting some guy from the Navy Yard to
come brief the DAC-IPAD.

(Laughter.)

CAPT RECORD: So we give people -- not because they've proven to be capable, but just because of the position to which they've been assigned. You can't do that if you have just this persistent uncertainty. And so that's a tension that I experience less now as our -- as the training on things like trauma and neurobiology of trauma. As that has taken root, I recognize that just members in general, and certainly commanders and deciders also, are more aware of sometimes there's going to be some uncertainty.

But you're right, it's hard to stomach if you think about it.

CMSAF McKINLEY: Sir, I see very extensive changes coming into UCMJ very soon, and just one of them just very simply is modification and definition of sexual harassment. That's just one. But do we have a plan on how to train and educate the 1.3 million members serving on these
changes as they come out?

    CAPT RECORD: That's a great question that I get asked literally every single day. So I'll be an economist and I'll say on the one hand, but on the other hand.

    On the one hand, in May of 2015 when the Military Justice Review Group gave us their legislative proposal, we started planning for that plan to train. But we couldn't really firm up that plan to train until December 23rd when the President signed the National Defense Authorization Act because we knew some things would change, and they did. So we've been moving towards it.

    I can tell you that each of the Services is working through that. I know that for the Navy, Marine Corps and Coast Guard we actually had a meeting yesterday about that and one of my taskers was to talk to my brothers and sisters at the Army and the Air Force to find out what they're doing. So I know it's in the works. I don't know what the exact answer is.
Any other questions?

(No audible response.)

CAPT RECORD: Well, thank you so much. I think I actually have run over, so I appreciate your tolerance. And just as Mr. Sullivan did, I will say that I am available to you any time you need something that I can offer. Captain Tideswell called and the answer was absolutely I'll be there.

As I mentioned, she has sent me to places like Gulf Port and Code 20 and --

(Laughter.)

CAPT RECORD: So like she's called and asked a lot harder things than coming to the Holiday Inn Arlington at Ballston of me, and I have always said yes, and I assure you you will get the same cooperation and consideration.

Thank you very much for your time.

ALL: Thank you.

CAPT TIDESWELL: Chair Bashford, this is the part I think where we get to eat lunch.

CHAIR BASHFORD: Sounds great.
CAPT TIDESWELL: Maybe if I could recommend we put it at 1:30, even though it will be just a little shy of an hour so we stay on schedule.

CHAIR BASHFORD: Yes.

CAPT TIDESWELL: And the good news is I've been informed by our 1:30 speaker that she will not take the full hour, so I told her she already has --

(Laughter.)

(Whereupon, the hearing was recessed at 12:38 p.m. to reconvene at 1:30 p.m. this same day.)

LT COL STINGL: Madam Chair, I would note for the record that all 16 members of the committee are present and have returned from lunch.

Our speaker for this afternoon on the agenda is Ms. Maria Fried from the Department of Defense Office of General Counsel.

Madam Chair, are you ready to proceed?

CHAIR BASHFORD: Yes.
MS. FRIED: Madam Chair, distinguished Panel, good afternoon.

First and foremost, I would like to thank you all for your service to the DAC-IPAD. Having served and still serving as a Designated Federal Official to two other advisory committees, I appreciate the time and expertise you bring to this effort.

I was asked to provide a historical overview of two other Advisory Committees' Panels. The Response Systems Panel to Adult Sexual Assault Crimes, also known as the RSP and the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel. These two Panels preceded the creation of the DAC-IPAD.

Since at least 2006, the Department has faced intense scrutiny from Congress, the White House, media and advocacy groups on how it handles sexual assault prevention, response, investigation, prosecution and adjudication. And as you have heard from Captain Record, there has been a lot of activity in this area by the
Department and Congress.

The RSP and the JPP were established by Congress as part of that effort to understand and address sexual assault in the military, specifically the NDAA for FY 2013 Section 576, Congress required DoD to establish two independent Panels to assess how the military handles assault and make recommendations. We should note that after enacting the legislation in 2013, Congress further expanded the scope of those two committees.

The legislation established in the RSP and JPP were specific in scope. The RSP was to conduct a comprehensive review of all responses to adult sexual assault, laying out specific areas of review, which I will get to shortly.

Its follow-on Panel, the JPP, is tasked with reviewing, among other things, implementation of UCMJ reforms related to the offense of sexual assault, restitution, and compensation to victims, as well as victim rights.
Congress was specific as to the establishment of both of these Panels, including membership composition and qualifications. Members had to be from the private sector and collectively possess expertise in the military, civilian law, investigations, prosecution, adjudication of sexual assault in federal and state courts, victim advocacy and the organization and mission of the Armed Forces and defenses related to sexual assault. Next slide, please.

So as you can see, the composition of the RSP was nine panel members. Five of those panel members were appointed by the Secretary of Defense, four of those panel members were appointed by the Chair and ranking members of the House Armed Services Committee and the Senate Armed Services Committee.

The Chair of the RSP was the Honorable Barbara S. Jones, a former federal District Court judge in New York. Her bio and those of other RSP members are available on the RSP website.
The RSP terminated after one year from the date of its first public meeting. Initially, it was to remain in existence for 18 months from the time it was established but, given the urgency of the issues and the interest, the Secretary of Defense at the time, Secretary Hagel, shortened that period and requested they complete their work in a year. And shortly thereafter, Congress changed the Statute to say you will have a year to produce this work. So, they did quite a bit in that one year.

The RSP held 14 public meetings, heard testimony from former, current, and retired military officials and leaders, sexual assault victims, advocacy groups, academia, historians, members of Congress, including Senators Gillibrand and McCaskill, and Representatives Spears and Frankel. They heard from senior officials from our allied nations, Canada, Australia, the United Kingdom, and Israel, and countless other subject matter experts. It issued its report on June 27, 2014.
Congress also required that two of the RSP members also serve on the follow-on Panel of the JPP. To that end, Judge Jones is a Member of the JPP and, additionally, former Congresswoman, Representative Elizabeth Holtzman, who was Chair of the JPP, also served on the RSP.

Information on the work of the JPP and its membership is also available on the JPP website, which we can provide to you separately.

Next slide.

I just posted a few pictures of the Panels at work, the RSP in particular here. And I just wanted to get to the scope of the RSP at the moment.

As I mentioned earlier, the Congress was very prescriptive on what it wanted the Panel to look at. And I won't go through all these specifically but, essentially, the RSP looked at the processes in place from the time a person makes a report of a sexual assault to whoever that is, whether it is investigators, a sexual assault response coordinator, but just presents
to an official with a sexual report, up until disposition of a particular case, if it gets adjudicated.

I think somebody probably talked about unrestricted and restricted reports earlier and I understand that some questions came up as to the numbers. I have that information if you are interested. So I had that information. Just bear with me one moment.

CAPT TIDESWELL: Which slide, Ms. Fried?

MS. FRIED: It got it. I'm sorry.

So in 2015, there was a total of 6,083 reports of sexual assault involving members as either subjects or victims. Of that number, 4,584 were unrestricted reports, 1,499 were restricted reports. And that number also includes 504 incidents reported by Servicemembers that happened prior to service. So some of the reports come from people who may have been victimized before having been on active duty but they seek to report it because they are looking
for support services and additional resources.

And there is additional information on those numbers and the breakdown in the Sexual Assault Annual Report which we just posted online at the SAP, sapr.mil website.

So you have the slides in front of you. You can see the scope for the RSP is pretty broad. I will get into specifics in a moment but the next slides lay out what those areas were.

For instance, the strength and weakness of systems, including the administration of UCMJ investigation and prosecution during the period of 2007 through 2011, a comparison of military and civilian systems for those processes, also identifying best practices for incorporation into the military system.

They looked at sentencing guidelines, whether or not those would be something that would be helpful to the military; training levels of prosecutors and defense counsel; and court-martial conviction rates and outcomes of judicial proceedings.
They also looked at the strengths and
weaknesses of proposed legislative initiatives
and the adequacy of support systems in place to
assist victims.

So, as you can see, the breadth of
what the RSP had to cover was quite large. To
better manage the work of the Panel and ensure
all areas were addressed, Judge Jones requested
and the Department of defense approved the
establishment of three subcommittees to assist
the RSP in its review. The Role of the Commander
Subcommittee was one of them, Comparative Systems
was another, and Victim Services was a third.

The Role of the Commander Subcommittee
looked at legislation pending and enacted,
including proposed legislation from Senator
Gillibrand that remove authority from commanders
to convene courts-martial and invest that
authority with military prosecutors. Given the
intense discussion on this issue on the Hill and
in pending NDAA, the RSP issued an interim report
regarding the role of the commander and his
authority to convene courts-martial.

The RSP recommended against enacting this legislation because, after considering all of the evidence and testimony, there was no evidence that such a radical change to the fundamental structure of the military justice system would reduce incidents of sexual assault or increase reporting.

Two of the RSP members dissented from the majority view and provided separate views in their report. Ultimately, Congress did not enact Senator Gillibrand's recommendation.

The Comparative Systems Subcommittee did an extensive review comparing military and civilian systems. In some areas, this proved challenging for a variety of reasons, including how DoD defines sexual assault and its definition captures a wide range of sexual misconduct, whereas many civilian systems capture only felony-level offenses, such as rape.

Also, few civilian jurisdictions maintain or publish prosecution and disposition
data. And the differences in disposition data between the military and civilian systems make it difficult to compare.

Victim Services Subcommittee reviewed support services available to victims in the military and civilian systems and, again, looked at best practices.

In total, the three subcommittees held 65 meetings and produced separate reports, views, and deliberation by the subcommittee. I just wanted to point out, the subcommittee does a lot of its work but what it prepares is only the work of the subcommittee. The RSP, which is the parent Panel, gets to consider that information and either adopt, modify, or disregard the work of the subcommittee. And the Panel, the RSP Panel, basically what is sent to the Secretary of Defense, is the work of the RSP, not the subcommittees. But again, the subcommittees inform that deliberation for the main Panel.

Next slide.

So actually I just want to note it was
132 recommendations, not 138. So that should be corrected. Sorry about that.

The RSP issued 132 recommendations and I believe you have been provided a listing of what those were. And the recommendations fell into seven major areas: measure the scope of sexual assault in the military and civilian communities; and assess the role of the commander, the commander's responsibility and accountability with regard to sexual assault prevention, and the commander's convening authority.

The third area was strengthening the Special Victims' Counsel Program, victims' rights, support and services.

Another area was ensuring the fairness and due process for those accused, those suspected of sexual assault; improving military justice procedures; sustaining and adequately funding promising DoD programs and initiatives; and conducting independent audits and assessments.
With respect to those recommendations, DoD accepted 88 recommendations, partially approved 10 recommendations, and one recommendation was disapproved. The remaining recommendations were referred for further review by the Department or were already under review by the Military Justice Review Group, or the Joint Services Committee on Military Justice, otherwise in pending legislation.

It deferred consideration of one recommendation that recommended for an independent panel to oversee sexual assault in the military and the deferral was because the JPP was already the next follow-on Panel and now we have the DAC-IPAD.

So that is where the RSP completed its work.

Any questions? Okay, moving on to the next slide, please, the JPP.

So the JPP terminates in September 2017. It had a little bit longer duration than the RSP but like the RSP, it is required to
provide assessments and recommendations to the
Secretary of Defense and the Congress.

It is composed of five Members, two of
whom, as I mentioned earlier, had to serve on the
RSP. They were appointed by the Deputy Secretary
of Defense. And the purpose of the JPP is to
conduct an independent review of judicial
proceedings, conducted under the UCMJ involving
adult sexual assault crimes, since the amendments
that were made by the NDAA for FY 2012.

The deliverables are similar to what
the RSP was required to produce reports. Next
slide. And that is the JPP Members at action.
Photo opportunities.

Okay. So the scope of the JPP was
focused primarily -- it was a little bit more
narrow than what the RSP had. It focused a lot
on court-martial proceedings and processes
regarding Article 120. And as a result, their
work product focuses a lot on preliminary hearing
processes, court-martial disposition, and
Military Rules of Evidence regarding the prior
conduct of the victim and privileges.

Again, the scope of the -- I laid it out. I don't think I need to read that. Please feel free to read it in your leisure, unless you prefer I go over them.

So the JPP released its initial report on February 4, 2015. That report contained 11 recommendations. The Department approved seven of the 11 recommendations, partially approved three recommendations, and disproved one of the recommendations.

In 2016, the JPP released four reports: Restitution and Compensation, Retaliation, Article 120, and Statistical Data Regarding Military Adjudication of Sexual Assault Offenses. Those are also posted on the website.

And currently, the Department is reviewing the recommendations that were made by the JPP, the 2016 annual -- in their reports. Those are currently under review so I can't report any specific DoD action on those at this time. Next slide.
So the JPP also has a subcommittee.
That subcommittee consists of nine members, two
of those are members of the JPP, the parent
Panel. Recently, they conducted site visits at
installations in the United States and in Asia
and they are currently preparing reports on
observations at those site visits relative to
their taskings for consideration and deliberation
by the JPP. I would note that General Schwenk is
a member of the JPP Subcommittee. And I would be
remiss if I didn't note that Meghan Garvin was an
active participant on the Victim Services
Subcommittee of the RSP and also appeared before
the JPP to speak on the issue of victim rights.
And Dr. Cassia Spohn also assisted on both of
those Panels in their efforts in providing
information that was helpful to the committees.

So the next meeting is projected for
February 24, 2017 of the JPP and that is open to
the public, just like this Panel is.

And with that, that concludes my
presentation. Does anyone have any questions?
MR. KRAMER: Can I? The scope of the RSP was to assess the strengths, weaknesses, including the administration of the UCMJ, the investigation, prosecution, and adjudication of adult sexual assault crimes. And ours is the investigation, prosecution and defense.

MS. FRIED: Yes.

MR. KRAMER: And I was curious -- I do see they had about assessing the training level but I was curious how the defense got added to this committee because it wasn't part of the RSP.

MS. FRIED: So I think there was some -- I would be speculating but I can tell you that the RSP noted some issues with the defense bar. In particular, there was concerns about pressure to prosecute sexual assault cases that maybe some of the disposition would have been appropriate. There was concerns about undue command influence. There was concern about resourcing of the defense community because currently, if you are a victim of sexual assault in the military, you have a
prosecutor on your case, you have a special
victims' counsel assigned to your case, and
sometimes you have a senior trial counsel. If
you are a defense counsel, it is just the defense
counsel, typically. You may have a senior
defense counsel assigned but that may or may not
be the case.

So I suspect they were just trying to
balance the tables but I really can't speak to
the thought process as the new DAC-IPAD. But I
know that both Panels looked at the training
levels and experience of both prosecution and
defense.

MR. KRAMER: Thank you.

CAPT TIDESWELL: Ms. Fried, if you
don't mind, Mr. Kramer, you raised a good point
with the word "adult." Those were part of what
the predecessor Panels were tasked with looking
at. That word "adult" is not in the current
language for you all. That is something that
will be open for discussion.

CMSAF MCKINLEY: Let me ask a
question. Did you guys look at, at any point in

    time, the disposition or the follow-on what

    happened to the victim, even after the conviction
    of the perpetrator, but how did that victim --
    did that victim stay in the military? How were
    they treated? Did you look at any of that?

    MS. FRIED: So they heard testimony

    with regards to that. And in fact, the JPP

    issued a report recently on retaliation based on
    some of that testimony, that which was heard at
    the RSP and what was heard at the JPP.

    Concerns were raised by participants

    of both Panels, especially in the victim advocacy

    groups, as well as some victims who did come and
    testify, and special victims' counsel that people
    who made reports of sexual assault perceived that
    they were being retaliated against after making
    that report, either by peers, they were being
    ostracized or excluded, or potentially even their
    leadership.

    But actual data for that information,

    neither Panel looked at that that I can recall.
I know it came up and they did make broad
recommendations as to people making those
allegations. But as to the specifics -- I hope I
am answering your question -- I don't think they
really dove deep in that.

CMSAF MCKINLEY: Yes, I just wonder
about did some of the victims choose to separate
or did they stay in or were they forced to --

MS. FRIED: I think there was
testimony that some chose to separate. There was
also testimony that said some continued on
because they found good support in their units.

MS. GARVIN: May I ask a question?

MS. FRIED: Yes, please.

MS. GARVIN: You know that the next
JPP meeting is February 2017. How long will the
JPP continue?

MS. FRIED: Until September 2017 is
when their work is concluded. I don't think they
will be having meetings up until that because
that is when it ends and they have to have their
report to Congress by then.
Anything else? Yes.

MS. CANNON: Were there reports generated doing some of the things that you were tasked to do; that is, a report that did compare the civilian with the military handling of sexual assault cases that didn't result in maybe the materials we have in terms of the bills or recommendations?

MS. FRIED: We have -- each of the subcommittees produced independent reports and we have compilations of those reports and they are available.

MS. CANNON: How are they available?

MS. FRIED: I think they are still available electronically. I have hard copies.

MS. CANNON: But some of these things you have investigated to a certain degree already?

MS. FRIED: Oh, yes. Yes, and the comparative systems -- all the subcommittees did a very comprehensive review and you will see that the annex that contains the work of the
subcommittee, is several inches thick and the RSP report, itself, is less but that is because they were informed and took that information and adopted it as their own in that process. But there is a lot of paperwork on the websites that basically all the resources that were used by the RSP that we posted, public information that was used, anything they deliberated on would be available on their website.

And as of yesterday, that was still up in up and I expect it still will be.

MS. CANNON: Thank you.

SGT MARKEY: And I don't know if you have any more information about the site visits because it says that reports are going to be forthcoming. I was just curious about what those site visits entail. Are there assessments? And I really feel strongly that what is happening in the field is very critical to the decision we are going to make within this committee and so sometimes going out into the field to see what is occurring -- and I am just curious. When you say
site visits, that could mean a lot of different things. I am curious what the composition is.

MS. FRIED: So the subcommittee, members of the subcommittee, not the entire subcommittee, went out to certain sites and I believe Mr. Schwenk participated in some of those as well, and spoke to stakeholders in the process, and basically took that information back to the subcommittee and deliberated on that information. And then that information gets reported out to the parent Panel, the JPP.

I know they looked at a variety of issues like defense investigative resources. There is another one that escapes me at the moment but they have not completed their deliberations so it is not publicly available information, at this point. But the plan is that when the subcommittee is finished deliberating on their product that they wanted delivered to the JPP, that subcommittee briefs it publicly to the Panel. So members of this Panel could attend that information or at least -- attend those
briefings or at least have that information
available. Once it is publicly available, it
will be made available to the Panel.

CHAIR BASHFORD: All right, with that,
thanks again.

CAPT TIDESWELL: Madam Chair, if you
don't mind, I would recommend maybe a five-minute
break while we reconfigure the room for the
deliberations portion.

CHAIR BASHFORD: Right, thank you.

(Whereupon, the above-entitled matter
went off the record at 1:56 p.m. and resumed at
2:02 p.m.)

CHAIR BASHFORD: All right. So if you
all could take a look at Tab 11, I think sort of
a proposed outline, I think it is very ambitious
for the time we have. What I would like to have
a sense of is who else, besides myself has no
military experience whatsoever.

Let's see, one, two, three, four,
five, six, seven. Okay, that is more than I had
thought. Just sometimes when people are using
acronyms I need to have to keep turning to Marcia and say what is an Article 32.

So one of things I would like to have us do, if our staff could provide, is contact information for everybody. I think so far all the emails have come to us individually. So if we could get preferred email, preferred phone number, it would be very helpful.

These are just some random things that came up to me while we were talking. All the websites that have been mentioned, like we found this on the SAPRO website, we could find this on this website, if we could actually have those websites sent to us, the links to them.

CAPT TIDESWELL: Yes, ma'am.

CHAIR BASHFORD: And the last thing I want to say before opening up to everybody is there is a lot of work that has been done in this already and I would hope, although some of the work I think necessarily will overlap, I don't want to redo what somebody has already done. So if we could try to forge new ground, perhaps.
There is no way it won't overlap but I don't want to just redo something.

So I think the first thing, then, is logistics. What do people think about frequency of meeting? Once a year is not, I don't think -- is not a realistic option to get anything done.

BGEN SCHWENK: I think, from my perspective, it depends on whether we have subcommittees or not.

CHAIR BASHFORD: I think we will have subcommittees.

BGEN SCHWENK: So if we have subcommittees and they meet monthly or something, then you need to give them -- the full committee needs to give them some time to put something together to brief the big committee.

So if we did three months of subcommittee meetings and then come back and all get together and share what we have and redirect where subcommittees are going, based on the other peoples' views, then you end up with maybe three more meetings this year.
CHAIR BASHFORD: I also think -- how many people from the west coast as well? Not as many but a monthly meeting for the entire group means three days of being away from work, normally speaking. And then we can also do phone conferences, as needed.

What do people think in terms of subcommittees? And we have the option of expanding them beyond our membership, as well. We can bring other people in to various ones.

HON. BRISBOIS: Isn't identification of subcommittees today a little premature? I mean we really have to get our hands around what is the enabling charge of this committee.

CHAIR BASHFORD: But I want something to happen in the next three months.

HON. BRISBOIS: Sure but I mean if you identify a subcommittee and you organize it and it turns out we don't need that group after all because one of the things that came out to me from these materials is the definition of what is the scope of this committee is very much up in
the air. And until that is clarified, subcommittees are kind of just estimating or guessing.

One of the things that struck me is I think the five-year charge of this committee as compared to the one- and two-year charges of the prior committees suggests that this is much more of a, how is the implementation going kind of thing, as opposed to what changes to make. And that is going to have a different set of subcommittees than those other groups.

I mean I agree that subcommittees are probably the most effective way to do the work on the groundwork but until the group, as a body, identifies what is that scope within the enabling legislation, we can't really identify what those subcommittees should be.

CHAIR BASHFORD: And we only have one mandate, as opposed to the Response Systems. Our mandate is to review cases and that is also very broadly defined -- it is not defined.

HON. BRISBOIS: Exactly. That is part
of the problem.

SGT MARKEY: Are there other tasks that we are considering as a subcommittee that we want to look at, broaden that reviewing of cases? And I go back to the 138, 132 recommendations. Is it something that we want to look at to see -- or is somebody looking at -- have those been implemented and are they effective and are they being measured or is that something that we, as part of this committee would want to do? And that is a pretty daunting task.

MS. CARSON: That is not something we formally review. But that is definitely something that this Panel can do.

CHAIR BASHFORD: Yes.

MS. CANNON: Well on page 2, the planning session outline, it asks a lot of good questions and points that kind of talk about our substance and how we might bring some questions and issues. And then there is, on page 5, the idea of the subcommittees but I think we are all kind of coming together and really not gelled as
to what our specific role is, let alone the more
general one. And I am not sure how to go forward
from that but I think that there are some good
questions here.

One is also history. As has been
pointed out, we need to know the history that has
come before us so we don't repeat it.

So answering these questions and
devoting our attention to these pages of what is
the strategic plan might not be able to be
completely considered in an hour. So I don't
know how we could break it down so that maybe we
could digest. Before me coming to this, I had no
idea exactly my role was going to be and I would
imagine that I am not the only one. And I have
learned a lot today and it is kind of
overwhelming, in some respects. So where do you
begin?

And I thought this outline has a lot
of good questions but do we want to take some
time to reflect on this stuff and come back or
develop a strategy off of reflecting on this,
rather than coming up with some ideas off the top of our heads?

CHAIR BASHFORD: But one thing I think is on page 3, framing the mission. Since that is our only statutory task is to review cases, we should probably just, without making decisions, discuss what sorts of cases we would like to review or we think is appropriate to review. And they sort of, at least in sub (1), break them down a little bit.

DR. SPOHN: So in the data that has been collected by the JPP Staff, which I am reviewing now for Fiscal Year '15, that includes outcomes. So it would include the dispositions and the sentences and so on. But what it doesn't tell you is the why.

So there are a lot of cases that result in acquittals or dismissals. And there is not really anything in the database that tells you why those cases resulted in the dispositions that they did.

And so one possible approach might be
to take a random sample of cases that resulted in acquitteds or dismissals, or whatever kind of disposition one wanted to focus on and really go to the case files and collect more detailed data on those kinds of cases, if it is an evidentiary issue, if the victim refused to cooperate, is the case moving forward, none of that is in the database.

And so it might be interesting to get that kind of detail on the cases that resulted in specific kinds of dispositions.

CHAIR BASHFORD: Do you have the breakdown of -- and if I am using the wrong terminology -- once the charges have been preferred, what the ultimate --

DR. SPOHN: Disposition is.

CHAIR BASHFORD: -- for conviction.

DR. SPOHN: Yes.

CHAIR BASHFORD: And what would that be? Or I don't mean to put you on the spot. If you don't have it on hand.

DR. SPOHN: I don't have it right
before me but for Fiscal Year '15, there are 790 cases where charges were preferred. And I am just now starting to do some of the data analysis on those cases.

But as I recall, and maybe Meghan can, I believe that the acquittal rate was something around 25 to 30 percent.

MS. PETERS: Yes, that's correct.

MS. GARVIN: And just out of curiosity, because the question on -- one of the questions that is on page 2 of these documents is for us to make sure we have a common definition of case. Was there a common definition of case for that data and what was it?

DR. SPOHN: For the JPP, it is cases where charges were preferred.

MS. GARVIN: And so nothing other than cases where charges were preferred.

DR. SPOHN: Right.

MS. GARVIN: But then the entire universe of cases that were preferred were --

DR. SPOHN: Yes.
MS. GARVIN: Okay.

HON. GRIMM: But acquittal is by trial, right?

DR. SPOHN: Yes.

HON. GRIMM: Not just -- because once it has been preferred, then I don't know if there is a dismissal if the victim did not want to cooperate. In the civilian system, the prosecutor brings a charge and could file a motion to dismiss the charge if they didn't think that they had the evidence.

DR. SPOHN: But that would be post --

HON. GRIMM: Right. Acquittal implies it went to trial.

DR. SPOHN: Yes, correct.

DEAN HARRISON: Could I go back to the definition of case? Because it seems to me that if we are dealing in an area where there are a large number of victims who do not report. And if that failure to report reflects a lack of faith in the system, should we expand case to basically -- I mean not just legal case, not just
prosecutions, but incidents of assault, which
might mean, for example, finding out what
veterans groups have who treat veterans who were
assaulted during their service, who did not
report anything until their separation. I'm just
throwing that out.

If we are wondering -- an
investigation, for example, the best
investigation comes up when something is
reported. And if people are failing to report,
we can't have good investigations.

MS. TOKASH: This is Meghan Tokash
speaking. I would agree with Dean Harrison. I
think a case should envelope when the report of
incident is started because I think it would be
important for this Panel to investigate and
inquire several things, as the process has
started. Coming from a prosecutorial experience,
you know what factors are being considered when
judge advocates are advising commanders whether
to prefer charges, or as we would say in the
civilian world now, indict a specific individual?
What goes into that?

I know there was reference made to one of the changes being something akin to a U.S. Attorneys' Manual for the military. You know certainly, there does not exist a uniform standard of prosecution and definitions of that in the armed Services right now. Would that be helpful at the initiation of the case? And if so, how would that impact preferral and then, subsequently, referral decisions?

CHAIR BASHFORD: I think it might be hard to get, although going to veterans' groups is one way but I think it is hard to get hard data on cases that were never reported. But to limit ourselves to cases that went forward only, I think we are seeing a very small subset of the universe and I think it would be crucial to us to see certainly unrestricted reports, where charges were not preferred. Ideally, I would like to see restricted reports as well but I don't know if that is something that is actually feasible or not. But the unrestricted reports which, for
whatever reason, were either deemed to be
unfounded or were withdrawn by the complainant or
they thought there was a lack of proof or what
happened didn't fit the definitions of a crime, I
would like to see -- I think this group would be
badly served if we didn't get to see that as well
because it could be very illuminating.

MS. LONG: Just sort of going to the
back end of the what is a case, I am wondering if
we will have access to transcripts for cases that
did go forward to look at. And I know that they
could be very voluminous and perhaps DoD has a
method for going through and analyzing but are
the notes of testimony available with these files
for cases that have been disposed and moved
through the system? And if so, would we have
access?

CAPT TIDESWELL: Yes, ma'am, there is
transcripts of trials.

HON. GRIMM: If it is electronically
available, then you could search. It is probably
available in the searchable ones. If it is like
in the federal system, once you get it, you can
do a word search.

MS. LONG: You can do that search but
I feel like to really understand outcomes, you
need to start reading through these transcripts
to see where there might be trial issues, or
prosecution strategy issues, or whatever is
coming up.

DR. MARKOWITZ: Do we have records of
trial for cases that ended in acquittal or only
in cases where there is a conviction?

CAPT TIDESWELL: There are records but
they are not verbatim.

DR. MARKOWITZ: So that will be the
one challenge, I think, is that we don't have
apples and apples when we are looking at
conviction versus acquittal. And that is
something I think that needs to be considered.

CHAIR BASHFORD: I must say I am also
not 100 percent clear what the definitional
difference is between sexual assault and sexual
misconduct. Here they say sexual -- did we want
to look at cases where sexual misconduct charge is preferred? Does that mean something different factually or is that simply a charging decision to charge somebody with something of a lesser degree of severity?

MS. CARSON: My sense is that leaves open for you to determine if there are broader areas you want to investigate, like sexual harassment.

CHAIR BASHFORD: But is there a definition of sexual misconduct, as opposed to sexual assault?

MS. CARSON: No, that is not a defined term.

CHAIR BASHFORD: And is there a mechanism by which we could, even if it were anonymized, find out the details of unrestricted reports that, ultimately, where charges were not preferred?

MS. CARSON: You want to look at unrestricted reports where charges were not preferred?
CHAIR BASHFORD: Where charges were not preferred. Can we find that out?

LTC LEWIS: Yes, there would be an investigation filed. There is information. There is data. It may not be in a cohesive form.

MS. CANNON: You would have the report. You would have the investigative file and what happened -- where it ended.

MS. GARVIN: And with regard to restricted reports, at this juncture, what is the -- I mean the numbers are recorded, at least, right? Is that the scope of data available on restrictive reports, this shear number?

MS. CANNON: At this time. At this time, that is all you can get. I think there is a movement, I am not sure if it is required or not, but to try to gather more data from the unrestricted reports I think for analysis purposes.

SGT MARKEY: I would support the fact that we need to really look at not just those cases that are going into the system to either
charge or not charge but when you show the
numbers of what they believe, 26,000 cases, and
then you look at the numbers that actually made
it into the court system, the process -- and I
apologize for the term that I am using -- there
is a very large gap.

And so my question would be, one, what
is happening to these investigative cases prior
to getting to the position where they are going
to review it for charges or not? And are there
gaps there that we need to look at
investigatively from the first response to the
investigative follow-up and the practices that
are being conducted at that point to what kind of
case is actually being presented to the
prosecutor to review?

And are there concerns, gaps, that the
prosecutor says I just don't have a good
investigation; I just can't move this forward?
And maybe the ones that are being moved forward
because of those gaps are not getting appropriate
dispositions.
So I would love to grab the investigative case files. And that would include everything from the first contact response, every documentation. And I don't know. It has got to be a massive number of cases that investigations have been opened up on but I would like to be able to see is there something within that investigative process that we need to look at to improve the quality of that investigation to make a better determination on whether that is an appropriate case to move forward on the charge. Because folks are making decisions. I hear a lot of decisions that are being made whether to move cases or not and what information do they have that they are making that decision on? I mean what facts or what circumstances have they been given to make that decision?

And so I think it is important to kind of go back upstream a little bit to look to see if there are some gaps and considerations in that process that would be appropriate for us to look at investigatively prior to the prosecutorial
position on these cases.

   DR. SPOHN: We could really build on what the RSP did, in terms of I think one of their recommendations concerned unfounding. And I know they asked me to comment on the data from the various Services and what I found is that the Services defined unfounding differently and they had different people making the decision.

   So one of the recommendations was that there should be some consistency across the Services. And so I would be really interested in a study that focused on the unfounded cases and determining whether they are, in fact, false or baseless, based on the wording. I think the recommendation was to follow the Uniform Crime Reporting definitions of false or baseless. I don't know whether that has happened but we could certainly do an analysis of those cases that were unfounded and why they were unfounded.

   CHAIR BASHFORD: And apart from a Service-by-Service comparison, it probably would be interesting to look at, if you can drill down
that far, to a base-by-base or jurisdiction-by-
jurisdiction in the civilian world. You see some
police departments with a volume rate of like 65
percent and others with 5 percent.

DR. SPOHN: Five percent, yes.

CHAIR BASHFORD: So there are those
disparities. It would be interesting to see.

DR. MARKOWITZ: There are some
challenges, too, I guess, and forgive me for
being incredibly narrow but coming specifically
from the medical forensics sides of things, there
are some aspects to this that are difficult to
find some uniformity that are also probably worth
looking at.

And so I am thinking about the fact
that we don't consistently have the medical exams
being conducted within military hospitals. Some
of them are sent out to the civilian component,
depending on either what Service it is or the
jurisdiction or installation. On top of that, in
places like Asia or Europe where you have folks
having exams done on the economy there and the
differences, we know that these sorts of things impact the quality of the evidence, the quality of the testimony, the willingness of people to participate in the process to begin with, their understanding of restricted versus unrestricted and their general options.

So the question is, then, how do these sorts of things also impact the whole process how victims feel in terms of just participating, how those cases move through, and do these kinds of things make a general difference or is it negligible? And I don't think we have that information. So strictly from my tiny slice of the pie, I would say I would certainly be interested in looking at that.

CMSAF MCKINLEY: Ma'am, I would be interested in one of the questions I have there is the RAND study had 26,000 victims who said they were raped, 26,000 in a year. That is an enormous number. But that statistic comes from the fact that they were able to report that without anything happening to them, whether they
said this happened to me while I was active duty. Now then there is only 550 that went to general court-martial and then the big thing is why? But I think probably a lot of the victims, they look at what has happened to other victims that they had seen before. And those victims were forced to separate from the military, or maybe go to another unit, or cross-train into another career field and they become a victim again.

And how can we make recommendations so that they can freely come forward and report that they were raped and not have to feel like they are going to be a victim again, that they can no longer work in the unit? And until we fix that, we are going to have 26,000 reported privately but we are not going to have them coming forward.

CHAIR BASHFORD: I mean I think we have to look at -- when you are looking at an institution, are there structural impediments in place that disincentivize reporting? But there is also a cultural component, too. And I think
somebody had referenced ostracism. You know ostracism by peers, that is a very hard thing culturally to fix. It is easier to fix it in the command structure I think.

CMSAF MCKINLEY: But when you have a unit and you have the person who assaulted and the victim and they are in the same unit, and they work with the same people. And for the commander leadership in that squadron is what do you do with them now? You can't transfer them. So maybe you put one person working in the dorms or whatever or work in the orderly room. What do you do with them?

And it is hard to put them back into the normal workforce doing their normal work. Or maybe you put one of them in pretrial confinement.

But it is a very difficult thing and what it does is people in the squadron kind of take sides.

CHAIR BASHFORD: Very similar to college campuses.
CMSAF MCKINLEY: Yes, and it can tear a squadron and the mission and morale apart. It really can.

And so that person who is the victim, do they still want to be a part of that?

MS. LONG: Oh, I'm sorry.

CHAIR BASHFORD: Go ahead.

MS. LONG: I'm just thinking of in terms of the cases that we are reviewing because there might be differences among the -- certainly not among the law but among maybe the way the different branches -- I always forget how to say it, the different branches, the different Services handle the cases, maybe if we can come up with some sort of form to make sense sort of an issue that you raised or among so that we can try and have some consistency in our review among the differences that might exist.

DR. MARKOWITZ: The other challenges that I would see is that I mean I do think that we need to decide whether we are looking at just adult sexual assault, if we are going to look at
child, because it is a very, very different beast altogether. And so we need to be thinking about what are we talking about when we are talking about an effective response to child sexual abuse versus adult, versus intimate partner assault. There are different services that are available to military members, depending on which one of those the victimization falls under.

So I think that probably an early task for us will be to decide whether the scope of this committee is to look at sort of sexual assault at large or whether we really need to think about narrowing this focus, since I think that will dictate how we move forward.

CHAIR BASHFORD: There is also how broad do you want to be in terms of the victim's relationship to the Services.

DR. MARKOWITZ: Right.

CHAIR BASHFORD: Obviously, I would think you would want to look at intrafamilial cases, where one person is not a member of the Service. But do we look at cases where somebody
has gone off base and assaulted a civilian? A lot of that I think would probably be handled with the civilian courts but I actually don't know.

MS. LONG: I think it would be helpful to look at that. At least in the beginning, I think we would want to look at the whole thing.

CHAIR BASHFORD: Yes.

MS. CANNON: One of my concerns and kind of interest in being on this committee is this criminal defense attorney. And with the advent of victims' rights and victims being represented, as well as the prosecution of these cases, the concern is that there is parity in terms of resources and level of representation, level of experts, investigation resources, all of that. And I think that is a concern I would like to be able to -- you know in this comparative analysis, is there fairness in resources and such?

HON. WALTON: Yes, I think one challenge you always have when you deal with the...
issue of sexual assault is whether the reports of sexual assault really reflects the magnitude of the problem. Because when I was Chair of the Prison Rape Elimination Commission, there was a number out there of how many assaults were purportedly taking place but the reality was that many of them were not being reported.

Now this may be beyond the scope of our mission but that is a major challenge because the 26,000 figure sounds bad but that may not be the real nature of the problem. It may be the tip of the iceberg. Because that is what we found in the Prison Rape Elimination issue is that we thought there were about 50,000 and then there was a survey done and it was estimated in 2014 there were about 100,000.

So I mean I don't know if that type of an assessment has been done or how you would do it because it is a major challenge.

BGEN SCHWENK: Let me just say my thoughts on one of the issues was what do we think the statutory scope of our charter is? And
being a guy in an executive branch person, I will
read this as broadly as possible. So I admit
that freely up front.

Okay, we are the third one of these
things and the charters were specific to begin
with and now they have become broader. But I
don't think that means narrower. I think it
means broader. It means we have got a lot of
specific stuff that was done by the predecessors.
We have taken action in Congress. The Secretary
has taken action. The President has taken
action. Now we need somebody for five years to
look and see what is going on and tell us what is
happening.

The case review, I believe, is the one
we shall have to do. We have to do the case
review. We have to figure out what we can learn
from that and maybe that we learn that the data
is insufficient to support getting to the whys
and DoD needs to change its system, but whatever
it is. But I don't think that is only. It is
just one thing.
And I think when Jen O'Connor was here today as the DoD General Counsel, her issues she wanted us to look at were all really broad -- training, resources, affect broadly -- affecting the deployed environment, civilian best practices that DoD doesn't do. Why not? Is there a reason because of our deployable nature or what have you? Or should we adopt that civilian best practice? Just a whole bunch of things that lead me to conclude we really do have a broad charter. We can make it as broad as we want. The one thing we have to do is the case review.

So I don't know how we want to start on that. I was tempted -- when I said earlier we need subcommittees, I was tempted to say the first thing, I would start by trying to wrap our heads around this and see what is there and read things, and to give us something to do, start on the cases. Because at least we can figure out what data is available in the Army; what data is available in the Navy; what data is available in the Marine Corps.
And in keeping with my broad charter,
I agree with those of you who think we start at
the allegation and we start right, what is the
data on allegations. And if we want to go to the
26,000 figure, which is the best extrapolation if
you believe that the statisticians can do
extrapolations from a more limited survey. It is
their extrapolation of well, if that data holds
factored for this or that, the estimate is about
26,000 types of sexual assault, not rapes but
sexual assaults in much broader definition, a
year in DoD and then here is the number we know
get reported and stuff.

To me, so I think we start from soup
to nuts. We have a very broad charter. The
thing we know we have to do is cases. So, I
would suggest we start with cases while we are
wrapping our heads around this.

And for subcommittees, nothing against
DoD, but I will bet we will find out the data is
different in every Service of what you can find
and what you can't find. So that is a natural
way for us to get started and get our feet wet. We have an Army Subcommittee, and a Navy-Marine Corps Subcommittee, and Air Force Subcommittee, and they sit there and they start figuring out what information is here. Give ourselves a couple of months to do it and we come back together.

In the meantime, while we are at those Subcommittee meetings, we are talking to one another about where are we going to go next. What are the issues that you see? What is a good follow-on issue from the JPP? They are going to drop some off that they are not making recommendations on that they have discovered from the site visits. Do we want to pick up one of those or not?

It gives us a way to get our feet wet while we are doing something productive. And also it does take a while to get authority to do Subcommittees. I mean it is, unfortunately, not under the Federal Advisory Committee Act, not something that is automatic. The Chair has got
to go back and ask for it. And then they are
going to ask questions about do you want only
your people or do you want other new people that
we have to appoint because they can do that for
us. Who is going to be the Chair of each one of
these things? Have you given them names?
Although I think the name we gave the JPP
Subcommittee was very clever -- Subcommittee.

CHAIR BASHFORD: Subcommittee A, B, C,
D.

BGEN SCHWENK: Yes. Well, and for us,
if we did the case thing to start with, it be
would Army, Navy, you know by departments and
that would be it and we could get started.

So, there is something substantive to
think about as a way to proceed. And feel free
to disagree because I have been wrong more than I
have been right.

CHAIR BASHFORD: Just one thing I want
to add is that my understanding is that the
Secretary of Defense can ask this committee to
provide advice on issues of interest to him as
well. So far, we have no request that I am aware of. But that is something that could be in the future.

SGT MARKEY: Yes, General, thank you very much. I totally agree with you. I think, as I look through the list of tasks or possible subject matter that Jen O'Connor had spoken about in her comments, a lot of these can be answered or looked at through the review of a case, an investigative case from the time of disclosure all the way through the criminal prosecution of it, if it goes criminal.

What we would have to decide is when we do -- first of all, what type of materials are we going to need to do an effective review and develop what sort of metrics. What sort of data are we asking or what are we looking for in that case review? So we have a logical pattern of what things we need to look for. And we all have a degree of expertise that we can look at, which is great. We can look at it with 20 different sets of eyes with their experience.
I just finished or I am in the process of doing a review with a civilian law enforcement agency. And as I am doing these case reviews, I am identifying some of these concerns like data collection, like it is not being appropriately documented and it is not being collected. I can tell by some of these investigations there is a lack of training and experience by the investigator or the first responders. I can say that there are practices that you could see within an investigative review or a case review to say hey, you know what, I know of a practice, policy or best practice in the civilian world that would apply very well for that.

So I think I agree, as a foundation to start to look at these cases, I think we will start to see those questions come out and that is where we start to identify, okay, where are we and what do we need to do and that would be a great foundation for starting. So I agree with you wholeheartedly.

DR. MARKOWITZ: I would just add to
that, though, that if we are interested in understanding the general issues related to what is happening with restricted reports and why people aren't coming forward, and, obviously, we don't really have a whole lot of data, except for raw numbers in terms of just the sheer number of folks who are not reporting, then one of the other things, while I agree very much with you, we may also want to look at convening focus groups with folks who are able to take restricted reports within the military, so chaplains, medical, our SARCs, and then the VLCs and SVCs, and actually have a focus group with those folks to say what are you hearing from victims about their reticence to report. Why aren't they reporting? What is causing people to flip their reports to unrestricted, potentially, or when they are considering whether -- you know what are the thought process behind it? What are you hearing as first responders? To be able to give us at least some illustration of what is happening on the restricted side of the fence.
CHAIR BASHFORD: It would also be interesting to find out is that a truly informed, voluntary decision of the person --

DR. MARKOWITZ: Yes.

CHAIR BASHFORD: -- or are they in any way being steered towards filing a report in a certain way.

DR. MARKOWITZ: Or not filing a report. Because I hear -- probably from my side of things I hear from folks just as much who are concerned about patients being discouraged from reporting because they don't feel like anything is going to happen. And I have sat in professional conferences with some of my colleagues who have talked point blank about discouraging patients from reporting.

So I think there may be as much pressure, potentially, that we don't recognize to not report because of the perception on the part of professionals who are interacting early on with victims about the utility of doing so. And that is just not something that we have ever
talked about. And so I think both of those things are worth exploring.

CHAIR BASHFORD: And then just flipping of the 790 charges preferred, the acquittal rate, that is 75 percent to 70 percent conviction rate, which is not bad. I mean that is pretty --

MS. CANNON: It's the other way around.

CHAIR BASHFORD: I thought it was the other way around.

PARTICIPANT: It is 25 percent conviction and 75 percent acquittal.

CHAIR BASHFORD: Sorry. I take that back.

DEAN HARRISON: Madam Chair, if I could ask Chief McKinley a question.

CMSAF MCKINLEY: Sure.

DEAN HARRISON: Is there a way to -- I'm not sure if there is an organization of command enlisted advisors or if there is a way to communicate because it seems to me that the
command enlisted advisor would have his or her finger on the pulse of whether or not a young victim of sexual assault perceived reporting as detrimental to career advancement.

CMSAF MCKINLEY: I don't think we have any stats on that. I have been at every level of leadership there on the enlisted side. And none of those really came up. I mean we have our SARC's and so forth that have the Sexual Assault Resource Coordinator. We need to give you a list of all these things.

But I am sure we can get that but I think it is a major problem, I really do. And just like she was saying that -- I have a granddaughter that was raped. And my granddaughter, she chose not to come forward because she didn't want the stigma attached to it. And we found out much later. But that is real not only in civilian life but in the military.

DEAN HARRISON: I speak because I had occasion this week to a young woman -- well not
young anymore but a woman who had spent a career in the Army. And I was asking her to speak to some women who were thinking about enlisting and she refused to do it. I asked her why and she said that she had been the victim of sexual assault on several occasions in her military career and not reported it because she wanted to stay in the Army.

And at that time that she was in, she did not perceive the community as being receptive to hearing those reports. Not to say that she was right or wrong but her perception.

CMSAF MCKINLEY: And I don't think that is any part of -- I mean I truly believe leadership in all branches of the Services are trying to do the right thing. But it is just, like I said, down at the unit, you know when it happens between people that are working together and they know both parties or whatever and things -- it is hard to deal with. And it is hard to stay in that unit.

And so it is easier to say I am out of
here. And that is a shame because well they are a valuable resource. We have spent hundreds of thousands of dollars training them and they should have the opportunity to still have a career but they give it up because they were a victim. And we have got to fix that.

MS. TOKASH: This is Meghan Tokash speaking again. I am also just going to throw this out here but we are in a pretty nice position, since we are here for five years, to be able to follow the life of an actual case. And that is probably something that the two predecessor Panels had not been able to do. They had been following statistics and cases. And I understand that is part of our charter as well but I think we would really be missing an opportunity if we didn't take advantage of that. And obviously, at some point when the case evolves into a public trial, that would be a real opportunity for us, as Members, to comment on and observe how the process is played out. So, I think that that might be something we should
consider as well. And that might entail a site
visit or several site visits but that might be a
very worthy cause.

MS. LONG: That's a great idea.

BGEN SCHWENK: Just to comment on the
site visits, I think that everybody -- well, I
can only speak for myself. Okay, the FACA rules.
Speaking for myself, and maybe being informed by
hearing from other people, the site visits were
terrific. They were not for attribution. We
just sat in small rooms. We only took a couple
of us so that they outnumbered us. So that was
good. And we just let them talk.

And you do learn a lot contemporarily
with it is who you have. You think back to when
you were that age and you were all hard charging
and everything was awful if it didn't go your
way. But we learned a lot. It was really good.

So I think that is something that
really needs to get done at some point in the
future.

MS. GARVIN: I will echo that. On the
victims that can be, we did site visits, and they were incredibly useful because we learned things that we didn't learn in the formal testimony.

BGEN. SCHWENK: Right.

MS. GARVIN: I would echo the idea of thinking of case as incident rather than case as something that a system has named as a case. I both agree and have some challenges with following a live case only because the fact of our existence alone attracts additional attention to things, and therefore the victim in that case as well as the alleged perpetrator in that case will have additional attention put on them if we are following a live case, and that a, tampers with what is happening in the case, right, because it's now shifted from what it was, but also the reality of privacy for both those people, even if it is a public case, when you turn a spotlight on it, it changes the reality, and for both the victim and the accused in that case, I'd have strong concerns.

CHAIR BASHFORD: Mr. Kramer, we
haven't heard anything from you yet.

MR. KRAMER: No, well, I mean, I've heard - I've read the - I actually was reading the statute and it says, "to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, and other sexual misconduct."

It clearly is very broad, not just any - it says "allegation," so that's way before a case even starts. I find it is extremely hard to find how many cases are not reported, and that - but that would seem to come within the scope of this statute where it says "allegations" because that's an allegation that's made later, but that's extremely difficult.

But it seems to me that what we've talked about, whether it involves on the base, civilians, children, whatever it is, it says, "allegations of sexual and other misconduct involving members of the Armed Forces." It's very broad.

It seems to encompass almost
everything everybody has brought up is, "Does it include this?" because that's an allegation involving a member of the Armed Forces.

So I think that it's - I agree with General Schwenk that it's much - where you have a very broad mandate, that one specific recourse is what everybody has said, we have to look at cases, but the mandate seems to encompass almost everything that everybody has discussed.

HON. WALTON: I mean, that type of assessment has been done, so we don't have to really recreate the wheel. You can check with the Bureau of Justice Statistics which did the random anonymous survey that was done within the prison system to see what the incident of sexual assault would reflect even if they weren't reported, and that's how they were able to make an assessment as to what the actual level of assault was when compared to what the level of reported assaults were.

MR. KRAMER: Yes, I mean, it doesn't say anything about "reported." It just says
"allegations."

CHAIR BASHFORD: It's very broad.

HON. WALTON: But the Bureau of Justice Statistics has all of that information that would give you some insight as to how they went about doing their survey.

CHAIR BASHFORD: And is that what RAND did, and what's the most recent RAND study of the military?

CMSAF. MCKINLEY: 2013?

DR. SPOHN: 2014?

CHAIR BASHFORD: So not that long ago.

No, we're not talking about something from -

(Simultaneous speaking)

MS. GARVIN: And was the RAND -

BGEN. SCHWENK: They used to always roll them out in the Spring when the Sexual Assault Prevention and Response Office did them, and then RAND did them afterward, say right around in the Spring, and they were based on the prior year's numbers. So if last Spring was 2016, it would have been 2015 numbers. Whether
fiscal year or calendar year, I don't know, but
2015 would have been that.

CHAIR BASHFORD: And I think that
would be a good thing to have access to, to see
the format of the study, what they ask, what
their definitions were.

BGEN. SCHWENK: Yeah, I think if we do
the subcommittee, then we do them by what date is
available. We're doing cases, you know, broadly
defined. The idea is to find out if I'm in the
Department of the Army, "What the heck data does
the Army have from the initial allegation when,
you know, reported versus unreported? Have you
ever asked anybody about why people make reported
and don't go unreported? Do you have any data?"

Find out what they have so that we
have a, "This is what's available," and then from
that, we can decide what's missing, and what to
dive down into, and where to go. But the first
thing, we need to know what's there, whether from
the Bureau of Justice Statistics or any place.

DR. SPOHN: A good place to start
would be the response. The RSP had waterfall slides from each of the Services that sort of depicted the flow of cases from the allegation to completion, and so those should be available. Those waterfall slides should be available on the website, I would think.

CAPT. TIDESWELL: Yes, ma'am.

MS. GARVIN: And a question I'm not sure, hopefully someone knows, but we can also find out. With regard to both the RAND and the RSP data and the waterfall, was that adult sexual violence or - I think they both are not touching on kid/child.

CHAIR BASHFORD: Adult.

MS. GARVIN: Yeah, so we have a gap also if we include, and I - our charge allows us to include children, and I would say that it is something that should be looked at, then we have a gap in data, a different gap in data there.

CHAIR BASHFORD: But that doesn't mean that the Services haven't -

MS. GARVIN: Correct.
CHAIR BASHFORD: They might have collected that.

MS. GARVIN: They might have. Ms. Anderson, you haven't said anything.

MG ANDERSON: I've been listening. In part of our presentation this morning, and it may have been new to some of the folks in the room who are not in the military, but there is a disparity in consequences for enlisted and officers when you may have very similar facts and circumstances.

And I don't know that that's going to fall within our charter, but I can't help but think at some point we may find someone asking us that question. Why is there an instance where you will find an enlisted soldier who is busted to E-1, and you will find an officer who doesn't suffer the same fate?

I think these days, it's probably a fair question, and there may be some history behind that, but I think we took a similar oath, and I think we have a similar ethos, or we should
have a similar ethos when it comes to our fellow
Servicemembers.

So having, I think, that disparity
between how - the outcomes for officers and
enlisted, I think it's a question we may want to
consider, maybe not at this point, but as we
review cases, we may find ourselves looking at,
as I said, similar fact patterns, and finding
very different outcomes.

CHAIR BASHFORD: I think there's very
little that doesn't fall under our charter. One
thing I personally would like some clarification
on, one of the earlier speakers talked about the
- in the civilian world, we call them plea
bargains. I thought it was, what, negotiated
plea in secret.

BGEN. SCHWENK: Pre-trial agreements.

CHAIR BASHFORD: And well, but then I
thought they said they went to court-martial
anyhow. Is that correct?

BGEN. SCHWENK: Mm-hmm.

CHAIR BASHFORD: So that's - how is
that a plea if you're still going to a court-martial?

HON. BRISBOIS: It's a sentencing trial only, and that's adversarial, just as is the guilt and innocent phase, and that's what they referred to as "beating the deal."

CHAIR BASHFORD: Yeah.

HON. BRISBOIS: So the incentive for the defense is to get the military judge or the panel to come in below what the convening authority agreed to.

BGEN. SCHWENK: So you go to trial.

HON. BRISBOIS: Right.

BGEN. SCHWENK: And under the pre-trial agreement, the accused has agreed to plea to certain offenses, all of them, some of them, whatever, and so the judge takes the pleas, then you go right into sentencing.

And when they go into sentencing after the pleas, the defense puts on its "why I'm a good guy" and the Government is "why you're not a good guy" and the judge or the members, whoever
is doing it, usually it's a judge alone in a
pre-trial agreement, announces a sentence, and
then they open the magic pre-trial agreement and
decide whether you get the benefit of the
pre-trial agreement, or if the sentence was lower
than the pre-trial agreement, so you get the
sentence.

CHAIR BASHFORD: But if there's a
plea, there's still not a fact finding? Is that
correct?

BGEN. SCHWENK: Right, there isn't.

CHAIR BASHFORD: Okay.

BGEN. SCHWENK: It's a plea. It's
just a plea.

LT. COL. STINGL: If I could just
interrupt for a moment, we still have the benefit
of having this morning's first speaker who is the
renowned expert on military justice.

BGEN. SCHWENK: But we're tired of
hearing from him.

(Laughter)

LT. COL. STINGL: If you'd like to
weigh in on relevance or any of the -

BGEN. SCHWENK: You're welcome, Dwight.

LT. COL. STINGL: - any of that, I'm sure -

HON. BRISBOIS: I'm sure it hasn't changed that much since I was a trial counsel, at least in terms of once you're in front of a judge. The pre-trial agreement's usually accompanied with some stipulated fact record that the fact finder gets to, you know, assess all of the good conduct/bad conduct character evidence.

BGEN. SCHWENK: All the aggravation that the government wants will be in there.

HON. BRISBOIS: So there will be some factual record. It's usually a stipulated record.

LTC. LEWIS: I'd like to add, ma'am, the judge actually has to question the accused to make sure that he is agreeing with the terms of the charges to which he is allegedly pleading guilty, so we go through a providence inquiry and he is asked.

He goes through each charge and he
says, "Did you do this?" and he has to explain to
the judge exactly how and why he did what he did.
And if the judge finds him to be provident, then
they go into the sentencing. He'll accept the
plea of guilty. Because there are times when,
based upon his explanation, he's not provident.
He's not pleading to the actual charges.

CHAIR BASHFORD: But is there an
analogous system as there is in the civilian
world? I'm a prosecutor. I'm looking at this
case. I don't like the case. I don't like the
victim. The defendant seems like a - the accused
seems like a good person.

Is there a way to, as part of a plea,
to lower the charges? "So you're charged with
this, but I'm going to let you plead to this."

MS. GALLAGHER: Yes, ma'am, they can
plead to a lesser offense.

CHAIR BASHFORD: Okay.

MS. GALLAGHER: Absolutely, yes.

CHAIR BASHFORD: So I think that's
something we would want to see as well,
particularly when you brought up the difference
between enlisted and officer, not just in
outcomes, but during the progress of a case. Are
they being offered a better outcome, not just
getting a better outcome?

DEAN HARRISON: But I think the - this
is Keith Harrison. I think the vision might be
even further in the upstream when you compare it
to the civilian world, because as a civilian
prosecutor, you're just handling the criminal
sphere, whereas the convening authority, and in
the military that's the person that supplies the
prosecutorial discretion who is not necessarily a
lawyer, might want to disclose -

For example, the perception might be
that officers get to end their careers without
going to any type of criminal arena for
misconduct. I'm not just talking about sexual
assault, whereas an enlisted person who engaged
in the same conduct, again not just sexual
assault, does not have that option of resigning
and going home, so to speak. It's gotten quiet.
CMSAF. McKinley: I would like to gather the information. Get all of the data sent to us from the RSP and the statistics from RAND or whatever, and I'd like to have enough time to digest it to see what questions that I have of it, and then with that, send an email to the group.

Each one of us does that. We send an email on what our concerns are, and then we possibly have a conference call and we combine those, and in that conference call, we kind of set the agenda for when we meet in person again, and then possibly have a couple of cases that we review, and that way we have a road ahead, and we've all—we have something set for when we come the next time.

Ms. Cannon: Can I ask you a question?

CMSAF. McKinley: Sure.

Ms. Cannon: When you say "the data," you're talking about these other two panels that have done a lot of work?

CMSAF. McKinley: Yeah, that, plus all
of the statistical of each branch of Service and
how many we've had and all. Yeah, so if we just
had a time to digest that, and especially for
those who have not been in the military, to
really, you know, see what's out there.

HON. GRIMM: I have a question just in
terms of availability of the information, where
and how to access it. Is it possible to have a
website that we all have access to so it's a
shared cloud environment that we can go and click
on it, rather than each one of us getting the
same stuff, having to open it up, figuring out
where we're going to file it, and how we're going
to read it, where it's going to be.

If we could set up - if we had access
to a site that was just simply the data
repository that we're all looking at, so that if
we had 15 case files and the reports from the
other two committees that had already provided
their reports, we could look at it whenever our
schedules allow us to do it as long as we have on
site access.
I'm sure it's not difficult to get password protection so that it's not - so there's adequate security, and we all have the same ability to see that shared source access to information.

LT. COL. STINGL: In accordance with the Federal Advisory Committee Act, any information that you all review, and any - if there's a meeting, a Committee meeting, I'll just offer the definition that FACA offers.

It's, "any gathering of Advisory Committee members, whether in person or through electronic means, held with approval of an agency for the purpose of deliberating on the substantive matters upon which the Advisory Committee provides advice or information." So we could definitely make the information available to you, but at the same time, any information that's made available to you also has to be -

HON. GRIMM: I have no problem with it being available to anybody who wants to see it.

I just want to have a shared location where we
can look at it so we don't have to click, and
save, and do all of that. It would just make it
easier to look at.

DR. MARKOWITZ: I have concerns.

Yeah, if we're looking at whole cases, that
includes things like medical evidence, and
genital photos, and like all - everything is
losing in my mind right now.

So I agree that it would be nice to
have like a central place you can get
information, but I do think as we proceed, and
again, that's why we need to talk about are we
going to talk about kids?

I mean, there are some very specific
privacy concerns related to review of cases and,
you know, safety of individuals, and things like
that that we, I think, need to be mindful of.
Even for cases that have been adjudicated, we
can't - I mean, we need to be thinking about sort
of the second and third order of effects here.

So I understand, like, from an
expediency perspective, but if we cannot have a
central place that's just ours, then I would
really want to make sure that we're very careful.

HON. GRIMM:  Well -

BGEN. SCHWENK: Okay, all the
information that we're going to get is going to
come from somewhere else, right? We're not going
to generate it ourselves. So when a Federal
Advisory Committee gets information from the
outside and it comes from the Government, it's
marked.

It's either unmarked, which means it's
open to the public and by law, we have to let the
public have access to it, so that's that, or it's
classified, in which case we can get access to it
if we get clearance, and we won't in this
Committee need it, but we could get access, but
we couldn't let the public see it.

But the other one is for official use
only kinds of stuff, the privacy stuff, the
medical stuff, the - and that's supposed to be
marked by whoever's delivering it to us. So
let's say we heard about the Smith case from five
years ago and it was a big deal, and there are a
lot of lessons learned supposedly, and we asked
the Service involved to send us the Smith case.

They should send it to us and either
say, "Look, this has been released to the public.
Everybody has already got it," in which case our
obligation, regardless of what's in there, is
released to the public.

It's already been out there for them,
or they would send us something and say, "This is
all public and this ain't, and we are denying
Freedom of Information Act requests for this
information for these reasons," and so then we're
obligated to follow that.

So we don't have to make those
decisions. We just have to make sure whoever is
providing us the information remembers -

DR. MARKOWITZ: Okay.

BGEN. SCHWENK: - to mark it
appropriately before they send it.

DR. MARKOWITZ: Great.

BGEN. SCHWENK: And then we follow
what they tell us.

HON. WALTON: Can I add something?
Whenever you talk about criminal justice issues,
there's always the elephant in the room that
sometimes people don't want to talk about, and
that's the issue of race.

And I know in the civilian world,
there's significant disparity when it comes to
race when it comes to conviction rate, when it
comes to sentencing, when it comes to charging
decisions, and if it's a reality in the civilian
world, it has to be a reality also in the
military world.

And it's something that we can't hide
from, and it's something that needs to be looked
at because I would suspect that if it hasn't been
looked at, it's just like we have found in the
civilian world, that there are problems along
those lines.

MS. CANNON: A similar note would be
sexual orientation.

MR. KRAMER: Can I ask a logistical
question? When we talk about either a case file or an investigative file, where - are they in an electronic form or hard copy form, and where are they kept? Are they kept at the location or are they in a central repository somewhere also?

CAPT. TIDESWELL: I would argue that typically they are not electronic. I believe a majority of the records would be in a hard copy. If they were investigative files, they probably rest at the various investigative agencies. So for instance, with the Navy, it would be with the Naval Criminal Investigative Service.

Records of trial, I think are based on where they are in the particular court process. There is sort of an end stop for them where they come to sort of, I'll call it the headquarters for the various Services within the JAG Corps, you know, either at the appellate level, or, you know, there's a repository. Everybody has their own offices if the trial is over at the end of a trial.

And so, but I would argue that a
majority of these documents are not electronic. They are in hard copy.

MR. KRAMER: And do you have any feel for like an average? Is it like a red wall? Is it a banker's box?

CAPT. TIDESWELL: I would argue, sir, that sexual assault cases are very voluminous. It would take hours to go through.

SGT. MARKEY: Madam Chair, then I guess I would ask for some guidance on what would be the best logistical process for trying to actually review a case, and I don't just think of written documentation.

I think of audio, video tapes, photographs, crime scene diagrams, witness written statements. I'm sure those are all part of a case file, and I'd love for you to mail me all of those case files. I think your budget would probably go over on that one.

So logistically, you know, do we need to think about, how can we actually do that? And I can tell you with the cases that I reviewed, it
took me six months to go through all of these cases, and some were thick. Some were very thin. I also did review of listening to audio and watching videotapes.

You know, if you want to do a complete and thorough review, it's more than just reading the report. And I'd also charge that we do really need to know what's going on in the field. They are the ones on the front line. They're the ones that are having to work with these recommendations and work with these changes, and is it working or not?

And that's where I think we'd break down, and I think we would see, you know, is it working? And if it's not, are there other recommendations or other things that we need to look at? And we really present this as we're from the government, we're here to help, right, as opposed to we're going to audit, and we're going to assess, and we're going to evaluate.

I think what we want to present this
as we're really looking for, what do you need to help do your job better and to help serve the victims of sexual violence in the military? These are no different in communities, in universities and colleges, on Indian reservations. It's all these core set of barriers and concerns and issues that are going on within sexual violence.

So I kind of digress, but I'm thinking of logistically how this group would take a file that's 12-inches thick and do a real good technical review, and then the question is how many of those cases do we do, and what's the sample of cases that we look at?

And so, I think we got to decide logistically how - what that would look like. And I totally get the privacy and the information in there that, you know, we could have somebody go and redact.

MS. TOKASH: I mean, there are also going to be portions that are going to be sealed, I'm assuming, M.R.E. 513 hearings, genital
photos, psychotherapist/patient records, things
like that that we will never have access to.

So this is Meghan Tokash again speaking. You know, there are going to be some portions of cases that we review historically that we'll never have access to because they've been judicially sealed.

DR. MARKOWITZ: If they went that far.

MS. GARVIN: And I would also, while I know there are processes in place to ensure the transfer of information, that the person on the sending end marks things appropriately. I always have concerns about that, so that the moment it hits us, it is public, and again with a spotlight on it that is really problematic.

And so before we say we want a case, I think we need to have really detailed, through our future meetings, what do we need? Where does the anonymizing happen? When does it make its way here, and how are we sure that we have not put someone in jeopardy to the best of our ability by having it here?
CHAIR BASHFORD: Could we get some clarification on the FACA rules, I guess?
Because clearly when you are doing site visits and you're gathering information, that is not public. It's not open to the public.

BGEN. SCHWENK: Right.

CHAIR BASHFORD: So if we -

CAPT. TIDESWELL: Yes, ma'am, the key to that was the subcommittee.

CHAIR BASHFORD: Okay.

CAPT. TIDESWELL: So if you broke yourselves off, if you so desire, into subcommittees, that would give you perhaps the level of sort of -

BGEN. SCHWENK: That's one of the advantages of using subcommittees.

CAPT. TIDESWELL: Yes.

CHAIR BASHFORD: Then I think we have to do that for records.

(Simultaneous speaking)

BGEN. SCHWENK: - but it's not open to the public. You can - now, the subcommittee
doesn't have any authority to do anything except
one thing, report back to the big Committee.

            LT. COL. STINGL: And I'll just -

            BGEN. SCHWENK: And that's it. So in
the big Committee, so you have to work out what
to do next.

            CHAIR BASHFORD: Lieutenant Colonel?

            LT. COL. STINGL: For reference, I'll
just read into - for the definition for
subcommittee would be probably useful and
helpful, "A group, generally not subject to the
Federal Advisory Committee Act, that report
reports to an Advisory Committee and not directly
to a Federal officer or agency, whether or not
its members are drawn in whole or in part from
the parent advisory committee."

            MR. KRAMER: Can I ask another
logistical question? I know from MEJA cases that
there's a fair number of sexual assault cases or
misconduct cases that happen overseas. The cases
we saw, is there a feel for how many of those
occurred domestically and how many of them
occurred over - outside of the United States?

CAPT. TIDESWELL: I do not have that feel, sir. We could see if it's been parsed down within the RAND study.

MR. KRAMER: Because I guess there were about 500 general court-martials, right, on sexual assault cases, and I'm just curious how many of those were alleged in the United States and how many overseas.

CAPT. TIDESWELL: That would be easy to determine if you wanted us to go back and look at the 500. That's a data point we could - we'd just have to look at the charge sheet where the offense occurred.

MR. KRAMER: And then did the overseas installations, if it's just an allegation and it stopped at the investigative stage, did they - they would have a file on that, but it would be in the overseas - on the base or wherever, the installation?

CAPT. TIDESWELL: Or the Headquarters might be tracking that, so in other words, NCIS
Headquarters would probably know what's happened out in their various field offices.

DEAN HARRISON: Do we have any data on sexual assault instances where one of the parties was in the military, but that was handled by state and local prosecutors for whatever reason?

CAPT. TIDESWELL: Yes, sir. I believe we would be able to determine that, yes, sir.

MG. ANDERSON: This may have already come up in our discussion and I may not have been following it, but do we know - I think you were kind of going in that direction.

Do we know how many people who were victims who elected to leave the military, how many have decided to say, and maybe, as you said, maybe have gotten reclassified?

But we probably need to look at that as well, and also break that down into restricted and unrestricted. I don't know if you could pull that data, Doctor, but there may be some way to do that.

DR. SPOHN: I don't have any data on
unrestricted.

CAPT. TIDESWELL: So General, one of the options you all have available is something we all refer to as an RFI, which is a Request for Information, and it's something that the staff would develop based on sort of the answers you were - the information you were looking for, and then we can send it to the various Services just inquiring, "What data do you have? Do you keep it? Do you parse it out?" and you know, just to find what it is you all are looking for, and we typically go through our Service representatives that each Service provides to the panel and give them a timeline, and so we could at least ask the question if you so desire.

MS. CANNON: Off of what Rodney had said about how to go forward, I think that one suggestion of doing this background review to see how we go forward, what do we know? What don't we know? What are our questions?

Before we look at a file and don't know what we're doing with that file, perhaps we
could break down, because we need subcommittees
apparently, break down into areas of concern and
look at this history.

    Put together some questions that we
think need to be answered or investigated further
under those concerns, because I've written down
11 concerns that have been raised here, and if we
have, like, I don't know, four or five that we
want to delve into, maybe we'd learn a lot.

    CHAIR BASHFORD: When we form a
subcommittee, which I understand the process you
have to go through, does - is there a specific
task or agenda given to the subcommittee or can
it change over time?

    CAPT. TIDESWELL: Typically, the Chair
of the Committee, you all come up with what you
expect of the subcommittee, and it's written
down, so it's a formal document tasking them with
whatever it is you would like them to be tasked
with.

    BGEN. SCHWENK: But it's internal to
the -
CAPT. TIDESWELL: It is.

BGEN. SCHWENK: -Committee that owns--

CAPT. TIDESWELL: Yes.

BGEN. SCHWENK: - the Chair.

CHAIR BASHFORD: And if the Chair - it could be very broad.

BGEN. SCHWENK: So you run that.

CAPT. TIDESWELL: And it's flexible, and if, you know, monthly we want to change it, then you just issue another -

MS. CANNON: You could just number them.

CHAIR BASHFORD: Given the process that needs to go forward, it would seem to be trying to establish a certain number of them, even if we don't have at the moment exactly what they're going to do. It might be helpful to just start the process if the Secretary of Defense has to approve it. Is that like a 48-hour turnaround?

LT. COL. STINGL: I guess what would be helpful to you is again, in the definition of subcommittee, and like General Schwenk was great
to point out, if you want to, it's a much easier
approval process if you just want to form a
subcommittee from the parent Advisory Committee,
because then we're not approving new members.

So that's quicker, but of course if
you want to add some subcommittee members, yes,
they have to go through the whole approval
process like you all did to be appointed as well,
so that would take a bit more time.

LTC. LEWIS: Although you all did your
approval period in record time.

LT. COL. STINGL: This is true. This
is very true.

MR. KRAMER: Well, one of the reasons
these other committees, they were much smaller,
so they needed outside people on their
subcommittees. I guess we have to figure out
whether we can staff the subcommittees ourselves.

BGEN. SCHWENK: Do it ourselves with
what we have.

MR. KRAMER: Yeah, there's 16 of us.
The other biggest one, I think, was nine, right,
and one was five, so I think -

CHAIR BASHFORD: Well, 16 divides into four very nicely. It would seem to me that if we could set up four with a very broad agenda, because I take what Judge Brisbois said to heart, that you can't know what you're going to do until you don't know what you don't know, although he said it much more eloquently.

But if we got that approval process, we would then have a vehicle by which we could, when it's time to do so, actually look at cases.

CMSAF. McKINLEY: You know, another side thing that, when you talk about sexual assault and rape, a side effect of all of this is what it does to our national security interests. And many of you know about cases in Okinawa where we've raped, you know, there have been rape cases military against civilian in another country, Korea, and I could name several other countries.

And now, you know, very possibly, we may have to move out of those countries or, you know, change our agreements with them. So the
impact of military sexual assault is not just,
you know, on that local base or whatever. It's a
national security issue.

MS. LONG: I guess I would just say I
agree with forming the subcommittees, but I've
been listening to the concerns, but is there a
way to form the subcommittees, but to just get
some consensus around the concerns to make sure
that they're organized right before they get
assigned to a committee? I guess, Martha, I'm
asking you because you're the Chair, before we
commit to -

CHAIR BASHFORD: Is our membership
fluid as long as it's within the committee
itself? Can we change subcommittees?

CAPT. TIDESWELL: Yes, ma'am.

LT. COL. STINGL: Yes, ma'am.

CHAIR BASHFORD: So I wouldn't be that
centered about it yet -

MS. LONG: Okay.

CHAIR BASHFORD: - because -

MS. LONG: Okay.
CHAIR BASHFORD: I would just like to get the legal authority to be able when necessary to get cases to review, and then as we decide that maybe we want to look at an investigation here, or maybe we want to look at different things here, we can, I think then we could -

MS. LONG: That's all I meant.

CHAIR BASHFORD: - just change it.

MS. LONG: Yeah, just -

CHAIR BASHFORD: The less we have to decide right today, I think the better.

MS. LONG: Perfect, yeah.

MS. CANNON: It seemed that the documentation that was generated by the other panels was pretty voluminous, and it would be good if we could kind of break that down into different areas of interest, some people looking into one thing, some people looking into others.

There have been different things raised here, and then coming back with the suggestions in those areas. Otherwise, we're all reading everything, and I'm not sure if that's as
helpful. So I would suggest that we maybe break it down into three areas or something.

CHAIR BASHFORD: The only problem I see with that since I don't know what it is, is like how do we - I think we sort of have to take a high altitude look at it and then break it down.

MS. CANNON: Okay.

CHAIR BASHFORD: It's just hard to say, "Let's have a group look at this part of it," since I don't know what it is.

MS. CANNON: Okay.

CHAIR BASHFORD: Unless somebody is much more familiar with it.

BGEN. SCHWENK: Maybe, well, I'm thinking off the top of my head. If we're going to start by reviewing what's already there so we can get to wrap our - one subcommittee might start by being the RSP subcommittee, and their job is go through all of the RSP data, all of their reports, all of everything, and make sense out of it all in a condensed version to brief the rest of us that are not on that subcommittee.
Another one does that for the JPP.

Another one does that for other data that's available. You know, go to the Services and see what's there starting from the beginning to the end, and so they can come and say, "This is what - and you're never going to get this," or, "They don't collect that," or - so when we got back together as the big Committee, at least we'd have those in for us all to look at and start analyzing.

And if the subcommittee wrote little summary reports, they could send those out to everybody before we showed up, like the read-ahead, which would give us a chance to read it a week ahead of time, and think about it, and come here ready to discuss how we want to then proceed based on what they've done in the past.

SGT. MARKEY: Madam Chair?

CHAIR BASHFORD: Well, it's better than reading it all.

SGT. MARKEY: I was going to say are there not in some ways executive summaries, I'll
call them that, with those subcommittees already
that they've compiled? Do we know?

    CAPT. TIDESWELL: Each of the reports,
the first couple of pages is literally the
executive summary of the findings and
recommendations.

    SGT. MARKEY: Yeah, but I'm wondering
how comprehensive that is compared to if we were
to go through it, we'd find other things, okay.

    BGEN. SCHWENK: It's like any
executive summary. It's good for most reasons,
but not if you really care about what's in it.

    SGT. MARKEY: Okay, okay.

    DR. SPOHN: It's just going to be the
highlights.

    SGT. MARKEY: Okay.

    MS. CANNON: I move to what he said.

    CHAIR BASHFORD: Yes, I think the
executive summary is not going to be sufficient
for our purposes.

    SGT. MARKEY: Okay.

    BGEN. SCHWENK: I mean, it is a good
start, but I think we want more.

DR. MARKOWITZ: The other question I have is have we taken a look at what the scientific literature has to say about experiences with sexual violence in the military in terms of, I mean, there have been some — I mean, there is a body of research that's out there that looks at, you know, obviously the short and long-term consequences health-wise and things like that, but there are also some studies that take a look at, you know, decisions around reporting, and involvement with the justice system, and that sort of thing, and has anybody taken a look at that so that we have that literature also available to us to — I mean, it's wonderful to have RAND and have the internal stuff, but there is some publications within the peer reviewed literature, the scientific literature.

CHAIR BASHFORD: That are specific to the military?

DR. MARKOWITZ: That is specific to
the military. I'm familiar with all of the stuff from the healthcare side of things, but I know that there is other stuff as well because, you know, I mean, we've turned to that in terms of curriculum writing and whatnot.

So I do think that if we're going to take a look at the literature and the statistics, we probably do need to look at the stuff that's been published, you know, externally as well.

BGEN. SCHWENK: Which, if we had a subcommittee for the RFP, the JPP, and internal DOD information, the fourth one could be external information –

SGT. MARKEY: External, yeah.

BGEN. SCHWENK: - Bureau of Justice statistics, what's available there, you know, so that we had a listing, and when we got back together, we could say, "Yeah, number six on that list, number," you know. That's what we need to have.

SGT. MARKEY: Yeah.

HON. BRISBOIS: I'm still a little bit
at a loss for in order to put parameters around
those reports, how do you identify the relevant
material to report back without a clear
definition of what as a group we have decided our
charter is going to be? We'll end up making
decisions. The different parameter set will have
four different charter decisions without a
unified one.

So, I mean, it seems to me our - we
had five years to work on this, and the next six
months, certainly the next quarter before the
next meeting, the real meat and potatoes of what
we should be doing ought to be to define that
specific part.

"Review cases," what does that mean,
and then how much of that broader authority do we
want to exercise, and how? Without that, we're
all going to be coming up with different
priorities and different relevant reporting, and
we won't be meshing.

So I'm seeing some inefficiencies in
just going out and gathering data with
preliminary reports without that threshold being clearly established.

CHAIR BASHFORD: My understanding, and maybe I'm wrong, is that this would not be to in any way define our task, but just to have a better understanding of what has preceded us.

HON. BRISBOIS: But everybody's going to be making relevancy determinations on what to include in their reports based on what they think the priority of the Committee as a whole is going to be, and so, you know, each Committee is going to be making different priority decisions.

And then once, if we wait until after the subcommittee work to come up with a unified mission statement for ourselves, some of that subcommittee work is going to have to be redone because the priorities will shift.

BGEN. SCHWENK: Which may be happening for five years.

HON. BRISBOIS: Well, certainly.

BGEN. SCHWENK: You know, as we refocus from one thing to another.
HON. BRISBOIS: But those shifts then are efficient shifts because we're redefining saying that our original foundation needs to be tweaked for a legitimate reason. You know, in this case, we're saying, "Well, we didn't really have a foundational idea or a goal, you know, and so here are all of our reports."

Now we get a foundation and it turns out that we were wrong about what to report on, we've got to go back and redo that work. I just see sort of a cart and a horse problem right now.

BGEN. SCHWENK: Well, you could use my definition that everything is relevant.

HON. BRISBOIS: Well, but -

BGEN. SCHWENK: I have this really broad -

(Simultaneous speaking)

HON. BRISBOIS: And that gives us the flexibility in the second part of the mission statement that we develop to pick the things that we want to talk about, racial disparities, enlisted versus officer disparities, overseas,
you know, versus domestic disparities, you know, and prioritize those things in a way that those important issues of our own identification fall into that broad language.

But until we decide those fundamental foundational goals, then we don't have anything to make our relevancy determinations on as we're looking at source data.

DR. SPOHN: I tend to agree because there are some foundational issues that will really determine even just looking at data or looking at prior research. For example, if we're going to include children, there's a whole different literature out there on prosecution and investigation of child sexual assault.

HON. BRISBOIS: And some of those general courts-martial are going to be child sexual assault.

DR. SPOHN: Right, and if we're going to - I mean, it seems like everyone is in agreement that we should start with an allegation of a sexual assault, but what does sexual assault
mean? Are we going to only include the
penetrative offenses, or are we going to include
the contact offenses as well? So it does seem
that there are some sort of foundational
questions that we need to answer about what a
case is if we're going to do case review.

DR. MARKOWITZ: So I'll just go ahead
and sort of step into the fray. I personally
don't think we should tackle children.

BGEN. SCHWENK: It's an undertaking.

DR. MARKOWITZ: Yeah, I think that
this is a - I think that the services provided to
children are very, very different. I think that
there are ethics and privacy issues related to
looking at child victims that may be more than we
want to tackle.

So I just, that would be my personal
preference. I can be talked around on that, but
I just put that out there that if we want to try
to keep things, you know, pretty straightforward
in terms of where we've been and where we're
moving forward, it may be easiest to keep it
focused on adult victims.

HON. GRIMM: Did the earlier ones
differentiate? Because I think I agree with you
that we could always move to that once we get our
arms around the one that is the most - what was
the focus of the other two studies first.

DR. MARKOWITZ: The previous ones were
both adults.

HON. GRIMM: So it seems like that's
not a bad starting place, and then that might
take us -

MS. GARVIN: Right, I would just want
to make sure that we're not precluding it
downstream.

DR. MARKOWITZ: Yes.

MS. GARVIN: Because I actually have
a strong opinion we should go there, but not
first, because the research to date - the work to
date has been in adult, but so many other
processes being put in place, including the SVC
and VLC are now representing kids, and so if
we're going to start evaluating that intervention
at some point, we need to also look there.

   DR. MARKOWITZ: Yeah, I agree, going forward, I absolutely 100 percent agree.
   HON. GRIMM: Yeah, to start.
   DR. MARKOWITZ: We need to start - it just seems like if we need to sort of focus ourselves, that we leave kids off the table until we really have a handle on the processes for safeguarding privacy and all of that kind of thing.

   CHAIR BASHFORD: And I agree, at least at this point, and it seems to me that the biggest concern I've heard expressed around the table is that people should be able to serve in the military without being sexually assaulted, which doesn't mean we can't ever get to the issue of children, but if the big focus is how do we prevent this, and how do we keep military cohesiveness, and a path forward, and just results, we're really looking at adults.

   That's not to say we're not going to look at also members of the Service who are doing
domestic violence, sexual assaults on civilian
spouses, but the bulk of this should be how can
we keep people in the Service without being
sexually assaulted?

MS. LONG: Well, I wanted - I have a
differing opinion because I think adults who are
out of the Service should also be included
because of the victimization. And because of
what we know about reporting and perpetration,
I'm not sure that the people perpetrating against
the non-military are not also perpetrating
against military, but we're not hearing it.

CHAIR BASHFORD: I just didn't follow
you, adults who are not in Service?

MS. LONG: Who are not in Service. So
when you were saying - so looking at the victim
pool that we're looking at -

CHAIR BASHFORD: Right.

MS. LONG: - not only military, but
also other civilians who are victims, just to
make sure that they're included in the original
pot, okay.
DR. MARKOWITZ: My sense is that as we delve into the issues related to adults, that will really help us sort of focus up our questions about how things may differ with children or, you know, where the gaps are there and things like that, so.

HON. WALTON: But when you say "adult victim" though, you're saying adult victims who have some association with the military or any adult? Because aren't those who are non-military dealt with in the civilian world?

DR. MARKOWITZ: Not necessarily, no.

CMSAF. MCKINLEY: I'll give you an example. I know cases where, you know, the military member is deployed. The spouse is home living in base housing, and she is sexually assaulted by another military member on base in her own house, and that stuff happens, but that is on a military installation, a military member on a civilian. You know, so those are things I think we should look that.

CHAIR BASHFORD: And those reports
would be handled -

CMSAF. McKINLEY: Though the military.

CHAIR BASHFORD: - simultaneously with the civilian prosecution or just in -

CMSAF. McKINLEY: No.

CHAIR BASHFORD: - courts-martial?

CMSAF. McKINLEY: That would go through court-martial.

HON. GRIMM: So it would be in the data pool that we're looking at?

CHAIR BASHFORD: Yes.

DR. SPOHN: In the data from 2012 to 2014, a quarter of the victims were civilians.

HON. GRIMM: Yes.

CHAIR BASHFORD: A quarter?

DR. SPOHN: Yes.

BGEN. SCHWENK: You know, I sort of agree with Leo's point about we do need to get a focus on this, but I guess my thought was that we don't all know enough yet to be able to really do a focus. So I think he's absolutely right that we need to give ourselves a focus.
I just thought that if we gathered up the RFP, JPP data stuff, and we each had, as whatever subcommittee we were on, dig into it and think about things in the big picture, and read reports, when we got together the next time, it would be a lot easier to go directly to what he said which is, "All right, now that we have our feet wet and we know some things, more than we did three months ago or whatever the time difference is, what are we going to focus on? What is going to be the parameters we're going to go after for this year?" and then - so I guess I do agree with you. I was just trying to give us a chance to get our feet wet first, and you'd rather -

HON. BRISBOIS: But I think -

BGEN. SCHWENK: - analyze it first.

HON. BRISBOIS: - Judge Grimm's point of having a central place where we can review that source data, the RFP and JPP report, and the RSP report, I mean, you know, that gives us all three months to do that when we can do it with
the number one agenda topic for the next quarterly meeting being finalized.

You know, enabling legislation gives us a lot of discretion. So at the next meeting, we exercise that and say, "This is what we're going to do for the next four-and-a-half years, four-and-three-quarter years."

BGEN. SCHWENK: Or even one year.
HON. BRISBOIS: Or one year.
CHAIR BASHFORD: I mean, I think it's preferable if all of us start out with the same knowledge base.
BGEN. SCHWENK: I agree.
CHAIR BASHFORD: The only question is is it feasible that we can all get through those two, what there is out there on JPP and the Joint Response Systems. If it's feasible, I think that would be preferable that we have all looked at it.
HON. BRISBOIS: I mean, if we have three months to do that background work, that seems to me, you know, feasible. I mean, we
don't - you know, how deeply into the source
data, but - and beyond the executive summary, but
into the report itself. I think I can get
through two reports in three months.

BGEN. SCHWENK: I agree with that 100
percent. I just thought there was a value added
to the discussion, to the exchange of ideas which
you can't get if you're not in a meeting. Even
if we do phone calls, you know, we can conference
the meetings where you talk about the data, but I
do better -

I mean, I can read, but I don't
assimilate as well as when I hear somebody else
who read the same thing and said, "I can get that
out of that," or, "What about this?" and I didn't
even think of that issue.

I don't know, so that's why I thought
start earlier with the subcommittee meetings
rather than later, but I certainly agree with you
that in three months, most of us ought to be able
to get through the bulk of that stuff and have
some good ideas for when we come back.
CHAIR BASHFORD: If we all start with the same knowledge base, I think that's preferable. I think we're very uneven right now, and mostly that has to do with the military/non-military experience, so if we could all look at that, I think that's better. We're almost out of our time for this meeting. Is there a way to upload those that we could all have access to them?

CAPT. TIDESWELL: Yes, ma'am. From what I'm hearing, a lot of what you want is open source at this point, right?

CHAIR BASHFORD: Yes.

CAPT. TIDESWELL: The reports and - so there would be no reason why we -

BGEN. SCHWENK: Is there links to the RSP website and a link to the JPP website?

CAPT. TIDESWELL: Or we can consolidate it all in one place for you on the DAC-IPAD website.

BGEN. SCHWENK: Or whatever, yeah.

CAPT. TIDESWELL: That could go live
in a day.

HON. BRISBOIS: In effect, that's what I was - if you could consolidate it for us -

CAPT. TIDESWELL: Yes, sir.

HON. BRISBOIS: Because I know if I had to go find it on my own, my calendar is not going to allow me to be there plunking away on the internet, and not between motion hearings and conferences, and, you know, occasionally a trial.

I do get one once in a while.

But, you know, being able to go right to the source that you put together and read what I have time to read, that's what I need.

CAPT. TIDESWELL: Yes, sir, and it would be beneficial for the public. They would also have the same access and they could see what you all are looking at.

CMSAF. McKINLEY: May I make a suggestion? I'm on another board with several professors from major colleges and no military experience, and we learned that they were, you know, overblown with all of the acronyms we use
in the military, and we sent them a list of familiar acronyms.

CAPT. TIDESWELL: Yes, sir.

CMSAF. Mckinley: So it might be a good idea for the non-military members just to get a list.

CAPT. TIDESWELL: Yes, sir.

DEAN HARRISON: I have a question about FACA. Are we prohibited from, for example, if I had a question about something and if I called Mr. Kramer to discuss, I can't do that?

LT. COL. STINGL: No.

DEAN HARRISON: Okay.

LT. COL. STINGL: Not at this point.

DEAN HARRISON: Okay, I could call you guys. Okay, and you could call them.

CHAIR BASHFORD: Also, I thought I heard in the ethics lecture that when we email each other, that's public record, is that correct?

BGEN. SCHWENK: You can't substantively if it's communication.
CHAIR BASHFORD: I just wanted -

BGEN. SCHWENK: And that - you know,

the Committee's at risk if we start breaking

rules and going around the corner, so, you know,

you just can't talk to one another until we get

back here at some kind of a meeting, but we can
talk to the staff.

MS. GARVIN: But the Advisory Committee

is good?

CHAIR BASHFORD: Subcommittee.

BGEN. SCHWENK: Subcommittee, yeah,
it's a different world.

CAPT. TIDESWELL: Chair Bashford, it's

unfortunately that the FACA brief was not given
today, and so we can either wait until the next
meeting - I think what I'm hearing is a quarterly
meeting in several months.

CHAIR BASHFORD: Yes.

CAPT. TIDESWELL: Or there's an option

where we could try and do it over the telephone

where we gather, because that's more

administrative in nature, if that would be
beneficial, so you can sort of proceed with your
work.

        CHAIR BASHFORD: I think that would be
helpful.

        CAPT. TIDESWELL: So we can send
something.

        CHAIR BASHFORD: We've been peppering
you with those questions.

        CAPT. TIDESWELL: Yes, ma'am.

        BGEN. SCHWENK: Are you going to send
an email out with proposed dates?

        CAPT. TIDESWELL: Yes, sir, I will.

        CHAIR BASHFORD: So we're going to get
email addresses and telephone numbers, but we
won't use those to contact people until we have
broken up into subcommittees. I think this has
been very useful. I think it's great to meet
everybody in person. I think we're supposed to
stop in five minutes.

        My sense is that what we will do is
just review the open source data from the two
prior Committees, and then when we reconvene,
we'll discuss that, see what gaps there are or where that wants to launch us in the future, because we have an extraordinary, extraordinarily broad scope of work.

HON. GRIMM: And the source material will be consolidated to a website or a link that you will send to us that we can then go to, as Leo says, when we have that time available?

CAPT. TIDESWELL: Yes, sir, and just to manage expectations, we all do have off tomorrow. Because of the inauguration, it's going to be very difficult to move about the city, so we'll hit it hard first thing Monday morning.

BGEN. SCHWENK: What are you doing Saturday?

CAPT. TIDESWELL: Thanks, General.

BGEN. SCHWENK: I'll meet you in church.

MR. KRAMER: And we've heard lots of valid problems with this, but it does say, "for purposes of providing advice, shall review on an ongoing basis cases involving allegations." I
think we ought to think for the next three months about how we could possibly go about that given all of the privacy.

I mean, there are so many concerns, but that's our main, that's our specific charter in addition to the general one, so I think we ought to think about that.

SGT. MARKEY: And I second that, Mr. Kramer. I really think we need to define, you know, which cases are we going to look at? I mean, are we going to look at a time frame? Are we going to look at the geographical location? How are we going to assess those investigations?

Are we going to do it from the point of where they were charged going through the court-martial, or is it the prior investigation where there was a disclosure and an investigation was stopped, and identify and designate which are those cases? How much information are we going to view?

And then I'm more than happy and willing to share my assessment and review
process, and this is strictly from an investigative standpoint of what I did and how I continue to review sexual assault investigations, the data metrics that I collect, and what I do with that data, and how I actually have built an online - not an online, it's a web-based system for gathering that data and I can pull it out.

I can also share the metrics that I used to review these cases. It may be a little bit different, but it might be a starting point for us to take a look at it say, "Okay, if we're going to review these cases from an investigative standpoint, and not from the prosecution or the court-martial, you know, what are the things we want to look at?"

You know, and I've defined, you know, the biographical basic information, and that can be everything standard you see in a report, and then victim interaction, what would that look like, investigative follow-up, what did that look like, evidentiary follow-up, what did that look like, and then do an overall case assessment.
I actually, believe it or not, I actually put a process together to do that, and so far it's been okay, and I'm willing to share that information with anybody that would like to, again, that would be on the investigative process review.

MR. KRAMER: Not until we get into subcommittees.

MS. LONG: Right, I think your attrition studies, people should read because we used them all the time, well, like the ones that were replicated.

DR. SPOHN: From Los Angeles?

MS. LONG: From Los Angeles or others. Just to look at what you looked at, I think it's really instructive.

CHAIR BASHFORD: We should also in the next few months start thinking to follow-up on A.J.'s suggestion, how are we going to review a case? Because even the ones where charges were preferred, that's 790. I don't think we can logistically do that.
We've got to figure out a way to get a sample, and of the ones where charges weren't preferred, and if we can get to some sort of sense of the restricted, at least the numbers. How are we going to get a representative sample? Because I'm always wary when people pick. It's better to figure out some other way. So if we could start thinking about what we want to do during our adjourned time -

BGEN. SCHWENK: So we have two agenda items next time. What are we going to do for this year, and how are we going to do a case review?

CHAIR BASHFORD: Exactly.

DR. SPOHN: And just for logistics, are we meeting again in person in two or three months?

CHAIR BASHFORD: I believe we should meet in person in about three months. I think more than quarterly is logistically hard for people. Most of us, perhaps not Sergeant Markey, have day jobs still. He's retired.
HON. BRISBOIS: He's got a 24/7 job.

SGT. MARKEY: Watching you is my job.

CHAIR BASHFORD: And I think less than quarterly is - things just sort of flitter away. So if that's the consensus, that would be my recommendation.

CAPT. TIDESWELL: Ms. Bashford, are you all comfortable with coming back to Washington, D.C.?

DEAN HARRISON: For now.

CHAIR BASHFORD: For now. I think we should at some point decide if, you know, for the convenience of the members, if a different site at some point might be appropriate, and as we have subcommittees, I do think site visits are important.

CAPT. TIDESWELL: Yes, ma'am.

HON. BRISBOIS: Or even of the Committee as a whole, eventually going other places lends access and credibility.

CHAIR BASHFORD: Right.

HON. BRISBOIS: But that's, again,
later this year or next year.

   CHAIR BASHFORD: Baby steps first.

   HON. BRISBOIS: Yes.

   CAPT. TIDESWELL: And Ms. Bashford, the only other thing I would raise is there is a report due on the 30th of March, the bylaw. We, as the staff, will go ahead and draft the recommendation for you. It can be just very basic, you know, what's occurred today, sort of what the way ahead is as we know it so far.

   And ma'am, I'll send that to you, and then at some point we'll have to send it out to all of the members individually because you all are not allowed to deliberate, but you're allowed to come back to me one at a time to get your concurrence on that, and that's what will be submitted as the report.

   CHAIR BASHFORD: You have a lot of track changes.

   CAPT. TIDESWELL: Yes, ma'am.

   BGEN. SCHWENK: That's the report in March of what we did last year? It shouldn't be
hard.

CHAIR BASHFORD: I think we've got to conclude this meeting.

LT. COL. STINGL: Ma'am, did I hear you close the meeting?

CHAIR BASHFORD: I'm closing the meeting at 3:43.

(whereupon, the above-entitled matter went off the record at 3:43 p.m. and resumed at 3:34 p.m.)

CHAIR BASHFORD: I understand there is a request for public comment.

MR. CHRISTENSEN: That is correct.

CHAIR BASHFORD: And we would be happy to hear from you.

MG. ANDERSON: And I apologize, Madam Chairwoman. I thought you be - just it's on the schedule, so I thought that would be next on the agenda.

CHAIR BASHFORD: Could you just tell us who you are, sir?

MR. CHRISTENSEN: Sure, I know some of
you, but most of you I do not know. I am Don Christensen, Colonel United States Air Force, retired. I served 23-and-a-half years in the Air Force, all of it as a judge advocate. I have served as an area defense counsel, a circuit defense counsel, which is the defense counsel for the civilians, as a chief circuit trial counsel in Europe, which is like a chief prosecutor here.

I have served as a staff judge advocate, both in the United States and a deployed location. I have served as a military judge for two years, and I have served my last four years as the chief prosecutor for the Air Force, and I also was the chief of the appellate division for the United States Air Force for the government side.

I am currently president of Protect Our Defenders, which is an organization dedicated to reforming military justice, and we also advocate for survivors of sexual assault.

So my comments, briefly, I was very excited to hear the questions that were going on.
I had seen the briefings earlier. But one thing
I wanted to clear up before you started on your
deliberations and left was just a few factual
things that I thought could be cleared up, and
then give you what I think is something very
important for you to consider as you start your
deliberation over the next five years.

First, I've heard a lot of people talk
about the RAND survey. The RAND survey was a
one-time survey that occurred in 2014. Before
that, the surveys were done by the Department of
Defense, and now they're back to the Department
of Defense by the DMDC, which stands for the
Defense Manpower Data Center, so it's an internal
survey again.

The numbers fluctuate every year or
every time they do the survey. It occurs every
two years. It's not an annual survey. In 2010,
the numbers were 20,000. In 2012, they were
26,000. In 2014, they were 20,500 more or less.
That includes sexual assault and rape, referred
to as rape, sexual assault and rape.
You will hear people discount these numbers by saying it could be somebody looking at you wrong or sexual harassment. No, it is a sexual offense by definition under the Uniform Code of Military Justice, so those are sexual assaults.

The important thing to understand about the RAND survey is it's only of active duty military members. It does not count or in any way catch up civilian victims, or DoD dependent victims, or DoD civilian employee victims, so it only is that group. It's what I call the soft numbers because it's a survey.

Every year, we get hard numbers from SAPRO. They give us the exact number of sexual assault allegations, both restricted and unrestricted, how many of those resulted in preferral charges, how many of those resulted in referral charges, and how many of those resulted in a conviction for a sexual offense.

The current numbers on that, okay, so the most recent numbers or the fiscal year '15
numbers, those were about 4,200 unrestricted
reported, about 1,400 or so restricted reports.
Of those 4,200 or so unrestricted reports, 918, I
believe is the exact number, have referral of
charges for a sexual assault offense.

Of those 918, about 189 were disposed
of by what we call an administrative discharge in
lieu of court-martial. That's for an officer and
enlisted. About 550 actually went to trial, and
255 resulted in a conviction for a sex offense.

The military will often inflate the
sex offense conviction number by - so we have
somebody who's charged with rape and underage
drinking, gets acquitted of rape, gets convicted
of underage drinking, they will count that as a
conviction, but the actual numbers of sex assault
convictions, 255 out of the potential 20,000 plus
civilians.

There has been questions about how
civilians have jurisdiction. Civilian - so the
United States military has jurisdiction over
every offense committed by every military member
who is active duty anywhere in the world, so it doesn't matter. They have jurisdiction. That jurisdiction is almost always shared with some other entity, whether it's overseas or here. The United States military's policy is to maximize jurisdiction.

So there has been a lot of question about if the offense occurred off base, civilians will handle it. Sometimes they do, but the military will always try to get jurisdiction. So as somebody said, about 20 percent of the cases last year involved a civilian victim.

All right, and then I'm just about done with the numbers, and then what I want to get to.

Somebody asked about, I believe it was the Chief asked about how many civilians or how many victims leave after they report? DoD did an IG report that came out last year that I would encourage you to read dealing with retaliation and that subject, and one-third of victims, active duty victims are discharged within a year
of reporting, typically within seven months of reporting the offense, so that's from the DoD numbers.

I recommend you look at two reports by the Human Rights Watch who did very detailed reports on retaliation in the military and the impact on survivors of sexual assault after report.

Finally, then I'll get to what I have to say, the role of the commander will come up, and one thing I would like to encourage for many of you who are not military members, there is often a, from all sides of this debate, a muddying of the waters to what it means to be a convening authority versus commander.

The United States military has 15,000 commanders throughout all of their Services. Of those 15,000, about 480 are general court-martial convening authorities, the people who have the authority to send a sexual assault case to trial.

Of those 480, about 148, the last year we have numbers available, which I believe was
2014, actually referred a case to trial, so 99.9 percent of the commanders do not send cases to general courts-martial, just so you know.

All right, my thing that I want you to understand as you go forward, and I hear this debate, and I know you're trying to decide what you are really looking at, for me as someone who has served almost exclusively in military justice for 23-plus years, what is the problem? Well, I have issues with command. I'm not going to talk about that because that's what you're looking at.

What is the issue that's facing the military to keep them from really getting a handle on this? That is experience, experience with investigators, experience with prosecutors, experience with defense counsel. The military has a - the JAG Corps has, and investigative services, have this view of generalists when it comes to their attorneys.

So for example, in the Air Force which I'm most experienced with, there is a very big push to get you out of litigation after your
first assignment and you may never see it again.

Very few of us got to litigate for very long.

And what I would tell you is that
these cases are too serious, too complex, too
detailed to have young captains serving as lead
prosecutors, the same with our investigators.
The investigation experience you have would
almost be the entirety of the OSI. The years
that you have sums up their experience.

As a prosecutor, I cannot tell you how
many times that the investigator I was dealing
with, the lead investigator on the case, a
serious case, a murder case, a child abuse case,
child pornography case, rape case, that was the
first time they served as a lead investigator,
and it was the last time they served as a lead
investigator because they were moved onto
something else.

Within the investigative world,
especially in the Air Force, what they want to
get them into is counterintelligence, and that's
where they send them, and so the reality of it is
you have really talented, dedicated investigators, defense counsel, and prosecutors who are not allowed to specialize in it.

Specialization is what I would encourage you to look at, and I guarantee you'll get push back from the Services on that, but I would just ask you to have an open mind and understand that if we always did what the Services said, we still wouldn't have judges.

We still wouldn't have appellate courts. We still wouldn't have individual - excuse me, independent defense counsel in the military because every one of those things, the Services didn't want. So good luck.

CHAIR BASHFORD: Thank you.

LT. COL. STINGL: Madam Chair, is it your desire to readjourn the meeting at this point?

CHAIR BASHFORD: Yes, I am readjourning the meeting at 3:54.

(Whereupon, the above-entitled matter went off the record at 3:54 p.m.)
The text appears to be a collection of phrases and words, possibly from a larger document. Without additional context, it's challenging to determine the exact nature or subject of the text. It includes terms like 'strength', 'strategy', 'study', 'supply', and others, which might suggest a discussion on various topics, potentially including business or research themes. The text seems to be a list of words, possibly extracted from a larger document for analysis or indexing purposes.
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Defense Advisory Committee on Sexual Assault in the Armed Services

Before: US DoD

Date: 01-19-17

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]
Court Reporter