

## 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

## 1 P R O C E E D I N G S

2 10:04 a.m.

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

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

13 Captain Tammy Tideswell is the Staff  
14 Director to this Committee.

15 This Committee was established  
16 pursuant to Section 546 of the National Defense  
17 Authorization Act for Fiscal Year 2015, and that  
18 aside, by Section 537 of the National Defense  
19 Authorization Act for Fiscal Year 2016 and in  
20 accordance with the Federal Advisory Committee  
21 Act of 1972, 5 United States Code Appendix as  
22 Amended and 41 CFR.

1                   As this Committee is a Federal  
2                   Advisory Committee, it must comply with the  
3                   Federal Advisory Committee Act, commonly referred  
4                   to as FACA.

5                   Committee meetings will be open to the  
6                   public and transcribed.

7                   The Committee also has a publically  
8                   accessible website at <http://dacipad.whs.mil>.  
9                   Publically available information provided to the  
10                  Committee is posted on the website to include  
11                  information about the meetings of the Committee,  
12                  transcripts and recordings of the meetings and  
13                  background information documents provided to the  
14                  Committee Members.

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

18                  Any information provided by the public  
19                  to the Committee Members must be made available  
20                  to the public. This includes emails or notes  
21                  passed or sent to the Committee Members related  
22                  to their work as Members of the Committee.

1           The Secretary of Defense has approved  
2           the appointment of the Members of this Committee.  
3           And, Ms. Martha Bashford serves as its Chair.

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

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

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

18          Unfortunately, due to unforeseen  
19          circumstances, the FACA brief which was  
20          previously scheduled on the agenda for this  
21          morning will not take place today, as the  
22          presenter was unable to attend.

1                   Accordingly, the Committee Members  
2 will receive their FACA briefing here in the next  
3 public meeting.

4                   Madam Chair, are you ready to proceed?

5                   CHAIR BASHFORD: Yes, we are. Thank  
6 you.

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

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

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

20                   Our mandate is to advise the Secretary  
21 of Defense on the investigation, prosecution and  
22 defense of allegations of sexual assault and

1 other sexual misconduct involving Members of the  
2 Armed Forces.

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

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

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

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

20 Captain Record is a U.S. Navy Judge  
21 Advocate who current serves as the Chair of the  
22 Joint Service Committee on Military Justice.



1                   After we break for lunch, the  
2                   Committee will receive a final presentation on  
3                   the history and work of the two predecessor  
4                   Department of Defense Federal Advisory Committees  
5                   on sexual assaults.

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

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

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

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

22                  Each public meeting of the DAC-IPAD

1 will include time to receive input from the  
2 public and has been said, the Committee received  
3 no requests for public comment for today's  
4 meeting.

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

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

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

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

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

22 LT COL STINGL: Today, we are most

1 fortunate to have the Honorable Jennifer M.  
2 O'Connor, the General Counsel of the Department  
3 of Defense join us here this morning.

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

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

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

17 HON. O'CONNOR: Thank you.

18 Good morning everybody.

19 I'd like to welcome the distinguished  
20 Members of the Defense Advisory Committee on  
21 Investigation, Prosecution and Defense of Sexual  
22 Assaults in the Armed Forces to your inaugural

1 meeting. One, I might add, that coincides with  
2 another significant inauguration event here in  
3 Washington, D.C.

4 As you're aware, this Advisory  
5 Committee was established by the Secretary of  
6 Defense as directed by Congress in the 2015 and  
7 2015 National Defense Authorization Acts.

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

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

19 In recent years, the Defense  
20 Department has implemented numerous changes to  
21 the manner in which sexual assault allegations  
22 are investigated and tried.

1           By regulation, a report of any sexual  
2 assault over which the military justice system  
3 apparently has jurisdiction must be investigated  
4 by one of the three military criminal  
5 investigative organizations which are independent  
6 of the uniform chain of command, Army CID, NCIS  
7 and the Air Force OSI.

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

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

16           In January of 2013, the Air Force  
17 launched an initiative called the Special  
18 Victims' Counsel Program to offer Servicemembers  
19 and their adult family members who report being  
20 the victim of a sex crime, a military lawyer to  
21 form an attorney-client relationship with for the  
22 purposes of representation.

1                   That pilot program proved so  
2 successful that, later in 2013, the Secretary of  
3 Defense ordered all of the military Departments  
4 to institute such programs.

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

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

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

19                   I know you'll be hearing more about  
20 that Statute later today, but I will highlight  
21 that it modernized the military justice system in  
22 a number of ways.

1           For example, tying the language of the  
2 number of UCMJ offenses more closely to their  
3 analogues in Title 18 while substantially  
4 enhancing the systems transparency such as by  
5 requiring the Department to establish an online  
6 database similar to PACER to provide the public  
7 with instantaneous access to filings in court-  
8 martial cases.

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

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

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

22           Are those involved in the

1 investigation, prosecution and defense of sexual  
2 assault cases in the military sufficiently  
3 trained and experienced and do they have adequate  
4 resources to fulfill their responsibilities?

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

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

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

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

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

22 It's important that the new Secretary



1 of Defense be provided with the best possible  
2 advice concerning the investigation, prosecution  
3 and defense of sexual assault cases.

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

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

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

20 As my time as the General Counsel, the  
21 Department draws to a close, I wish you great  
22 success and I look forward to following your

1 progress and hard work in the days, months and  
2 years ahead.

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

5 Thank you very much.

6 CAPT TIDESWELL: Thank you, ma'am.

7 Mr. Sullivan?

8 MR. SULLIVAN: Ms. Bashford,  
9 permission to move about the well.

10 CHAIR BASHFORD: Granted.

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

16 HON. GRIMM: Same for me.

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

21 So, but, I don't want to cut into our  
22 records time this morning, so I'm going to just

1 stop an hour from now no matter where I am, I'm  
2 just going to stop.

3 So, with that said, I encourage you to  
4 ask any questions or engage in any dialogue or  
5 raise any matter as we go along rather than wait.  
6 So, at any time, just please feel free to jump  
7 in.

8 I want to start by providing an  
9 overview of the military justice system which may  
10 be helpful to you.

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

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

20 So, right there, you have a major  
21 group that's subject to this military justice  
22 system.

1                   And, then, those who are on active  
2 duty are subject to it 24 hours a day, seven days  
3 a week, 365 days of the year. So, if a uniformed  
4 member is on leave for 30 days, let's say they  
5 come back from deployment, they're on leave for  
6 30 days, they're no where near a military  
7 installation. You know, they're at home and they  
8 smoke marijuana. They have just violated the  
9 Uniform Code of Military Justice and can be  
10 prosecuted by court-martial for that.

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

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

20                   So, again, the system is dependent  
21 upon the personal jurisdiction over the accused.  
22 If that personal jurisdiction exists, the court-

1 martial system has jurisdiction without any  
2 further requirement.

3 But, those one and a third million  
4 people aren't the only folks in the country who  
5 are subject to the UCMJ. There are also about  
6 800,000 members of the Reserve component of the  
7 various Services.

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

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

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

22 For our Guardsmen, if they are

1 performing duties in a federal capacity, they're  
2 subject to the Code. If they're performing their  
3 duties in state capacity, they are not.

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

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

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

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

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

22 Civilians accompanying the U.S. Forces

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

6 And, it happened in a case in Iraq.  
7 So, normally, when we have a contractor or a  
8 dependent with us, what we'll do is we'll -- and  
9 there's a criminal allegation, normally, would be  
10 tried in U.S. District Court under MEJA.

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

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

22 It went up to the Court of Appeals for

1 the Armed Forces which affirmed in a very narrow  
2 ruling which left open the question of whether  
3 the outcome would have been the same had it been  
4 a U.S. citizen, the outcome depended, in part,  
5 upon the fact that he was not a U.S. citizen.

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

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

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

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

22 Now, these authorities are rarely



1 used. As I said, the second has been used only  
2 once. But, there are certain instances in which  
3 they have been used.

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

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

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

22 Then a cold case unit, at the time of

1 these offense, all we could tell from the blood  
2 was the blood type. The blood type matched  
3 Hennis, but that's 17 percent of the American  
4 public, too.

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

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

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

19 Which also raises an important point,  
20 for an offense that happens in the United States,  
21 almost any common law type offense that's covered  
22 by the UCMJ falls under multiple jurisdictions.

1                   So, I work at the Pentagon, the  
2 Pentagon is an area of exclusive federal  
3 jurisdiction. If a Servicemember is suspected of  
4 committing an offense in the Pentagon -- in the  
5 Pentagon -- that offense can be tried either by  
6 court-martial or in Federal District Court in the  
7 Eastern District of Virginia, but not both  
8 because is the same sovereign.

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

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

21                   It's very rare for a Servicemember to  
22 be tried in U.S. District Court. Usually, the

1 cases where the individual accused is a  
2 Servicemember are handled in -- by court-martial  
3 rather than U.S. District Court.

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

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

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

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

19 So, that's the basic power. And,  
20 before the UCMJ was enacted in 1950, there was  
21 separate military justice systems for the Army,  
22 and then ultimately the Air Force in the very

1       brief time the Air Force existed before the UCMJ  
2       was enacted, the Air Force and the Navy and  
3       Marines Corps. They fell under different --  
4       entirely different systems.

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

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

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

21              And, so, that gave its colloquial name  
22       as it was known.

1           So, we have these entirely separate  
2 systems of criminal justice. There was  
3 widespread belief that these systems did not work  
4 particularly well during World War II.

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

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

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

20           And, the UCMJ, it does a lot and it  
21 does a lot more than what I'm going to say, but  
22 it's probably going to be half.

1           Let me just highlight three things  
2 that the UCMJ does and then talk about those  
3 three things in greater detail.

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

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

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

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

1 martial inherent in his authority as Commander in  
2 Chief, his inherent authority to convene a court-  
3 martial.

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

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

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

19 So, Congress, though, as the General  
20 Counsel mentioned, on December 23rd of 2016, the  
21 President signed the National Defense  
22 Authorization Act for Fiscal Year 2017.



1           Division E of that legislation is the  
2 Military Justice Act of 2016. And, as the  
3 General Counsel mentioned, it's certainly the  
4 most systemic change, the most substantive change  
5 to the UCMJ since the Military Justice Act of  
6 1968.

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

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

14           But, most of the provisions in that  
15 bill don't take effect until the date to be  
16 designated by the President no later than January  
17 1st, 2019.

18           And, because, as I earlier mentioned,  
19 Congress has delegated a lot of authority to the  
20 President, the President's going to need to  
21 rewrite a lot of rules, the equivalent of the  
22 Federal Rules of Criminal Procedure, the Rules

1 for Courts Martial, going to need to rewrite a  
2 lot of those in order to carry out this  
3 legislation.

4 So, the legislation says, hey, Mr.  
5 President, provide those new regulations within a  
6 year, by January 1st, 2018 and then they have to  
7 take effect with the -- on a date that you're  
8 going to specify that's no later than January  
9 1st, 2019.

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

14 And, then, even after two years, think  
15 about it, so, the President has it take effect in  
16 two years, well, an offense that occurs before  
17 that, so an offense that occurs in December of  
18 2018 may tended to be tried under the current  
19 system.

20 And, so, you may even have after  
21 January '19, the bulk of the cases for a while  
22 still being tried under the current system.

1           So, it's very important that you  
2 understand the current system. And so, for the  
3 remainder of my remarks, with just a couple of  
4 asides that I won't be able to resist, I'm going  
5 to talk about the system as it exists today.

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

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

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

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

19           It may be helpful for you later  
20 because once you've rolled up your sleeves and  
21 understand the system a bit more, it may be  
22 helpful later on to have another briefing on what

1 changes are coming.

2 But, so, again, I'm not going to talk  
3 about it aside from just a few snide asides.  
4 Captain Record is going to talk about the subject  
5 today, but again, the focus is going to be on the  
6 system as it exists today and will exist for at  
7 least two more years.

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

11 So, if you look at the last three  
12 years, okay, if you look from December 26th, 2013  
13 through that legislation, not even counting,  
14 let's just put aside the Military Justice Act of  
15 2016, okay, putting that aside, Congress has,  
16 first, enacted one new UCMJ Statute, Article 6B  
17 which is the Victims' Rights Statute.

18 In that same three year period, not  
19 only did they enact it, they amended it twice.  
20 All right? And, then, they also amended 17  
21 existing UCMJ Statutes, six of which they amended  
22 twice.

1                   So, there's been substantial  
2                   volatility that has already happened as well.

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

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

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

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

16                  MR. SULLIVAN: Oh, I'm sorry, yes.  
17                  Sorry about that. Thank you.

18                  So, this is the what the Manual for  
19                  Courts Martial looks like. And, when you look at  
20                  this, I'll tell you, basically, this part here is  
21                  basically the Congressionally prescribed part and  
22                  everything else is prescribed in this by either

1 the President or the Department of Defense.

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

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

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

14 If you go online, you can find the  
15 2016 version, which is the version that's in  
16 effect today. It's literally at the Army  
17 printers right now having copies being run off.  
18 So, we'll soon have a hard copy of 2016. The  
19 most recent hard copy we have is 2012, again,  
20 horribly out of date.

21 All right, so, we have volatility  
22 behind us, we have volatility ahead of us, so,

1 with that warning, I am going to, with great  
2 trepidation, now describe the system as it exists  
3 today, realizing that everything just changed and  
4 everything is about to change again.

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

7 So, there are lots of ways that  
8 commanders discipline Servicemembers. Right?  
9 So, there's counseling, there's -- what do you  
10 have in the Navy where you have the Petty  
11 Officers Counsel, what do you call that?

12 CAPT TIDESWELL: The Chief Petty  
13 Officer of the Board?

14 MR. SULLIVAN: Well, you guys have the  
15 --

16 CAPT TIDESWELL: Oh, the Captain's  
17 Mast?

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

20 CAPT RECORD: DRB.

21 (SIMULTANEOUS TALKING)

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

1 have --

2 CAPT RECORD: DRB, the Disciplinary  
3 Review Board.

4 MR. SULLIVAN: And, so, all these  
5 mechanisms and then, you know, you can put  
6 something in the person's Service record book.  
7 There are various things you can do.

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

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

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

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



1 to be taken by NJP.

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

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

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

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

1 you know, USS Kitty Hawk, you do not have the  
2 right to refuse NJP.

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

9 And, NJP is not a criminal conviction.  
10 All right?

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

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

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

20 This will be one by where besides the  
21 Military Justice Act of 2016 does away with that,  
22 no more. Well, it did with those -- when that

1 takes effect in sometime in 2019 probably, the  
2 power to give bread and water goes away.

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

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

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

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

20 And, the Supreme Court has said that,  
21 because you don't have a right to counsel at a  
22 summary court-martial, but the Air Force kind of

1 gives you one, but because you don't have a right  
2 to it, the Supreme Court has said, it is not a  
3 criminal conviction. So, the summary court-  
4 martial conviction is not a criminal conviction.

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

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

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

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

21 For most purposes, and I'll give you  
22 two important caveats to that, for most purposes,

1 a special court-martial looks an awful lot like a  
2 trial in a U.S. District Court.

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

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

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

18 And, then, also, the other main  
19 difference is privileges. So, as you all know,  
20 Congress elected not to adopt the recommended  
21 privilege rules under the Federal Rules of  
22 Evidence. The President did adopt them in the

1 military and has revised them.

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

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

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

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

20 Okay, the two main differences, first,  
21 if you're being -- a member being tried can  
22 generally pick between trial by members, the

1 equivalent of a jury. The court-martial panel,  
2 they refer to as members. They are not a jury.

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

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

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

21 If you're tried in front of the jury  
22 equivalent, the jury equivalent adjudges the

1 sentence, you go into sentencing right away after  
2 the findings of guilt are announced, okay, we're  
3 going into sentencing now.

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

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

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

16 The other substantial difference, and  
17 this is something that General Counsel mentioned,  
18 in 2013 the Air Force started a pilot program of  
19 special victims' counsel that provided -- that's  
20 offered to people that reported to being the  
21 victim of the defense, a lawyer, a military  
22 lawyer to enter in to an attorney-client



1 relationship with them and represent them.

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

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

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

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

1 taken to the U.S. Court of Appeals under Writ of  
2 Mandamus.

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

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

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

20 Okay, so, I've gone over an awful lot.  
21 I don't know -- yes, please.

22 CHAIR BASHFORD: When the members

1 panel is imposing sentence, do they have  
2 guidelines, minimums, maximums?

3 MR. SULLIVAN: For the most part, no.  
4 And, so, Congress has said that, if you are found  
5 guilty of a penetrative sex offense or an attempt  
6 to commit a penetrative sex offense as opposed to  
7 a contact sex offense, the sentence must include,  
8 if it's an officer, a dismissal which is the  
9 officer version of a dishonorable discharge, or  
10 if it's an enlisted member, it must include a  
11 dishonorable discharge. So, that's one of the  
12 very rare mandatory minimum.

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

19 And, then, there's another -- the only  
20 other offense for which there's a mandatory  
21 minimum is spying in time of war for which the  
22 mandatory minimum is death. Okay?

1           That is actually one of the things  
2           that could change in two years, since, obviously,  
3           there's a constitutional about having a mandatory  
4           death sentence under Woodson v. North Carolina.

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

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

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

21          They could depart, but they'd need to  
22          explain them which would provide basis for a

1 appellate review. Congress rejected that and it  
2 chose not to go with parameters and chose to  
3 retain the option of member sentencing.

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

8 CHAIR BASHFORD: Thank you.

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

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

17 MR. SULLIVAN: Yes.

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

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

1 HON. GRIMM: Okay.

2 MR. SULLIVAN: Yes, you bet.

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

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

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

20 All right, so, the sentences that can  
21 be adjudged by special -- a special cannot either  
22 discharge an officer or give an officer

1 confinement. So, let's just put officers to the  
2 side for purposes of special court-martial.

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

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

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

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

1 BCD conviction.

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

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

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

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

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

22 So, the maximum punishments for an



1 enlisted member include a dishonorable discharge;  
2 for an officer, it includes a dismissal, which,  
3 again, is the officer version of a DD.

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

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

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

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

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

1 acquittal.

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

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

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

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

20 And, you know, so, Congress was so  
21 concerned about that, the members vote once and  
22 the outcome of that vote is that court-martial

1 finding. If it's two-thirds majority or more,  
2 it's a conviction; if it isn't, it's an  
3 acquittal.

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

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

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

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

22 You may recall in Kennedy v.

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

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

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

17 So, you think about it, you could  
18 envision a situation where there isn't a two-  
19 thirds vote for a sentence of less than ten years  
20 or a three-thirds for a sentence greater than ten  
21 years. And, that is, if you actually could have  
22 a hung members panel on sentencing, but, again,

1 it almost never happens.

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

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

15           Special courts martial, 836; summary,  
16 634 and then NJPs, remember we talked about NJPs  
17 before, 51,000. So, we put this in a pie chart,  
18 this is what we get.

19           So, you know, this, so, you know, the  
20 vast majority -- well, when something rises to  
21 the level of being dealt with under the UCMJ, as  
22 we talked about before, there are lots of things

1 that can happen under the UCMJ, counseling  
2 sessions, service record entries and such.

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

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

12 MR. SULLIVAN: You bet.

13 SGT MARKEY: Yes, thank you.

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

16 HON. BRISBOIS: One moment.

17 MR. SULLIVAN: Yes, sir?

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

21 MR. SULLIVAN: Yes, Your Honor.

22 HON. BRISBOIS: Do you have a

1 breakdown for special courts?

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

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

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

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

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

16 MR. SULLIVAN: Yes, sure.

17 DR. SPOHN: -- here.

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

21 And, then, so for now, now we can look  
22 at, you know, for those of you that are involved

1 in the system a while ago, those numbers probably  
2 look awfully small, don't they?

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

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

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

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

14 The number of summary is down three-  
15 quarters.

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

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

20 So, in fiscal year 1990, so, there's  
21 been a drop of about a third, so the DoD was  
22 about a third, DoD and the Coast Guard combined



1 with that third larger than they are now. Two-  
2 thirds drop in GCMs.

3 So, you know, that year, we were doing  
4 3,000 GCMs across the Services, now, we're down  
5 to about a 1,000.

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

11 BGEN SCHWENK: The BCD is special, I  
12 believe.

13 MR. SULLIVAN: Yes, exactly.

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

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

21 So a marked decrease in the in the use  
22 of UCMJ proceedings over ten years and then even

1 greater decrease when we pulled the aperture back  
2 further.

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

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

6 MR. SULLIVAN: Yes, please.

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

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

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

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

18 But, one thing that we think  
19 contributes to that is, first, so, let's think  
20 about it, so, it's probably going to mean, we  
21 have that decrease in courts martial, it's  
22 probably going to -- and NJPs, it's probably

1 going to mean, either, one, there's less  
2 misconduct.

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

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

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

15 Those two probably account for the  
16 bulk of that change.

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

19 Well, one reason is, in our system, I  
20 don't know about how this is in the District of  
21 Columbia criminal courts, please tell me, we find  
22 that, in an enormous amount of our misconduct is

1 tied to alcohol. Is that the case in civilians  
2 or is that not the case so much in the civilian?

3 MR. KRAMER: No, there's more drugs or  
4 --

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

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

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

21 And, so, that large part of our  
22 military is not getting into alcohol related

1 offenses. All right? So, that's part of it.

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

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

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

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

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

22 So, but, again, it's probably a

1 combination of those things and a lot more.

2 Okay?

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

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

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

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

19 So, somebody that used to be just, you  
20 know, labeled as a miscreant, that's not the  
21 actual word they would use, but I can't quite  
22 properly say the actual word they would use.

1       Someone that used to be labeled a miscreant now  
2       might be thought of in a more holistic fashion as  
3       being somebody's suffering from PTSD, TBI.

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

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

20              And, that changed a few years ago.  
21      And, one of the reasons people think that  
22      changed, there was actual an article in the

1 Marine Corps Gazette and, you know, we all wrote  
2 these long articles, because does anyone read  
3 these? And, of course, the answer is no.

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

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

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

20 So, these people were getting  
21 convicted and then for maybe three years, they  
22 were still members of the military. Now, they



1 weren't on active duty, they were in a status  
2 called appellate leave. But, in the status of  
3 appellate leave, they still count against the  
4 Marine Corps numbers.

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

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

17 So, again, an awful lot of reasons.  
18 I'm sure many of you can come up with additional  
19 reasons, but those are some of the speculations.

20 Judge Grimm?

21 HON. GRIMM: I was just going to say,  
22 the administrative elimination was much faster

1 way of fixing some of these problems.

2 MR. SULLIVAN: Exactly, exactly.

3 DEAN HARRISON: Mr. Sullivan?

4 MR. SULLIVAN: Yes, please.

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

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

10 MR. SULLIVAN: Correct.

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

14 MR. SULLIVAN: So, great question.

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

19 But, what Congress did do is say, hey,  
20 CA, if you are going to refer for trial  
21 penetrative sexual assault or attempted  
22 penetrative sexual assault, the only forum to

1 which you can refer that is a GCM.

2 So, it's still the GCM convening  
3 authority who decides. But, if the special  
4 court-martial convening authority wanted to refer  
5 that to a special, he or she could not.

6 Only a general court-martial convening  
7 authority. So, a summary can't try it, a special  
8 can't try it, a general can.

9 But, it's not -- it isn't the case  
10 that a CA who gets such a charge has to refer it.  
11 But, the only place they can refer it to is a  
12 GCM.

13 Now, that said, Section 1744 of the  
14 National Defense Authorization Act for Fiscal  
15 Year 2014 imposed a review requirement for non-  
16 referral decisions.

17 So, this is what Congress said in that  
18 provision. Hey, general court-martial convening  
19 authority, if you're SJA writes and Article 34  
20 advice letter, of course, you know, Dean, what  
21 that is, no reason anyone else should, but  
22 obviously, you know, so, if your SJA writes this

1 recommendation from the lawyer to the CA and  
2 says, hey, hey, General, hey, Admiral, you should  
3 refer this and the CA doesn't, that case has to  
4 go to the Secretary of the military department  
5 for review.

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

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

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

21 So, let's say the SJA says, don't  
22 refer it and the CA says, you know, thanks,

1 judge, I'm referring it, no requirement for  
2 review. But, if it's -- it does matter if the  
3 judge advocate says don't refer and there's a  
4 non-referral, still requires review one level up.  
5 If the judge advocate says refer and there's not  
6 a referral, review by the Secretary of the  
7 military department.

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

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

22 DEAN HARRISON: No much more than

1 zero.

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

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

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

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

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

21 MR. SULLIVAN: Agent provocateur.

22 (LAUGHTER)

1           MR. SULLIVAN: See, that's the concept  
2 that you can't have unlawful command influence.

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

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

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

1                   Okay, so let --

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

4                   The -- I can't remember the exact  
5                   title, but the Victim Advocate attorney, that are  
6                   --

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

9                   DEAN HARRISON: Do they participate in  
10                  Article 32 investigations?

11                  MR. SULLIVAN: So, they are available  
12                  to represent the accused [sic] at the 32.  
13                  Congress also changed the law to say that a  
14                  victim --

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

19                  Congress was concerned, hey, civilian  
20                  victims can't be subjected to this, to being  
21                  cross examined in a 32. Military victims can, as  
22                  I'm sure you know, there's a case under the Naval



1 Academy that resulted in a great deal of  
2 attention about whether victims were being  
3 unfairly questioned and subjected to unfair  
4 proceedings at a 32.

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

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

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

20 DEAN HARRISON: Thank you.

21 MR. SULLIVAN: Yes, Your Honor?

22 HON. BRISBOIS: So, there's zero times

1 when the convening authority has said I'm not  
2 going to refer. But, do we know how many times  
3 when the staff judge advocate has said this case  
4 should not be referred and it has referred?

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

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

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

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

21 We know that there have been cases  
22 that CAs have referred, notwithstanding the SJAs

1 advice not to. In fact, three of the cases from  
2 Naval Academy that we mentioned, the SJA advised  
3 the CA not to refer and the CA did.

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

9 Yes, please?

10 CMSAF MCKINLEY: Sir, a couple  
11 questions here.

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

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

20 Also, a couple other things, how does  
21 that compare per capita to the civilian  
22 community?

1                   And, also, do you have -- can you  
2 provide for us how it breaks down per rank and  
3 the different branches of the Service for the  
4 sexual assault secured rank?

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

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

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

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

22                  So, I can also get you some trend

1 lines answering your first question on that.

2 And, in terms of rank breakdown, I  
3 don't see anyone here from SAPRO to help with  
4 that. I'll look into whether we can get that.

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

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

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

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

18 But, let's stop here in any event.  
19 So, if you could see it up to this point, you  
20 could see the sexual assault report.

21 Okay, so, let's follow the system,  
22 this will respond to your question, Judge Grimm,

1 about the CA powers.

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

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

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

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

1 investigate it, OSI must.

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

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

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

18 But, they don't have to. When you  
19 look across the Services, it looks like in about  
20 75 percent of the cases an unrestricted report,  
21 the person chooses to enter into a attorney-  
22 client relationship with a VLC/SVC. They don't

1 have to, but it's always offered.

2 HON. GRIMM: What's that percent?

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

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

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

19 But, because, you'll recall the  
20 General Counsel mentioned that for purposes of a  
21 penetrative offense, it has to go to somebody  
22 who's at least an O-6 and who is a special court-



1 martial convening authority.

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

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

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

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

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

1 jury?

2 MR. SULLIVAN: Exactly, exactly.

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

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

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

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

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

1 judge.

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

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

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

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

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

18 So, before 2013, that convening  
19 authority could either set aside any finding of  
20 guilty or could reduce the punishment in any way  
21 the convening authority wanted for any reason or  
22 no reason at all.

1           And, then, there was a prominent case  
2 out the Air Force, the Wilkerson case, where  
3 clemency was granted. There was a widespread  
4 consternation about clemency being granted.

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

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

15           For the -- and so, then the court  
16 changed. Now, there's a caveat. There is one  
17 class of cases for which the convening authority  
18 still retains the old powers and that's for an  
19 offense for which the maximum punishment is less  
20 than two years, so the maximum punishment that  
21 the President prescribed the Manual for Courts  
22 Martial is less than two years, and, in fact,

1 that court-martial did not result in either a  
2 punitive discharge, so BCD, that kind of  
3 discharge, dishonorable discharge or dismissal,  
4 or more than six months of confinement.

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

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

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

20 MR. SULLIVAN: So, Congress also said,  
21 so, essentially, no contact or penetrative  
22 offense would ever fall within that exception.

1           But, just to be sure, Congress went  
2 ahead and said, oh, by the way, no Article 120  
3 offense, which is the main Statute under which  
4 these are tried ever qualifies regardless.

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

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

12           This catches a real small number of  
13 cases.

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

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

21           But, if you look at special courts  
22 martial across all the Services, most special

1 courts martial are resolved by plea bargain. We  
2 call them pre-trial agreements in the military.

3 They impose special rules. So, the  
4 way we do plea bargaining is weird, all right.  
5 And, by the way, this is also going to change in  
6 two years, okay.

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

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

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

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

1 Marine Corps.

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

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

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

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

21 Anyway, for Army purposes, you have an  
22 AWOL case and let's say you agree to a three



1 month deal, so you agree that this person will go  
2 to a special court-martial and whatever the  
3 sentence is, she'll knock down the confinement to  
4 no more than three months in exchange for this  
5 person pleading guilty.

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

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

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

18 Then the judge like opens up the  
19 secret envelop and sees that there's a deal  
20 between us and says to the accused, okay, well,  
21 the convening authority acts, you'll get no more  
22 than three months. That power still exists.

1                   So, through the plea bargaining power,  
2                   the CA can still knock down the sentence in that  
3                   same way.

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

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

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

17                  So, Congress retained that authority  
18                  of the CA because they wanted to retain the  
19                  ability to have plea bargains the way it's done  
20                  in the military. They retained the authority of  
21                  the CA with one exception, and here's that one  
22                  exception.

1           You know, how we mentioned the  
2 mandatory minimum for penetrative offenses  
3 includes kicking you out with bad paper, a CA  
4 knock down that dishonorable discharge to a bad  
5 conduct discharge, but that's it. They can't  
6 knock it down lower, even through plea bargain.

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

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

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

22           What time is it? I think I'm cutting

1 away on your time, by the way.

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

4 (LAUGHTER)

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

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

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

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

21 CAPT TIDESWELL: Yes, sir. I believe  
22 that you all received that, I believe that Mr.

1 Sullivan stayed up all night and had an all  
2 nighter because we had a new brief this morning.  
3 So, we will provide that to you.

4 SGT MARKEY: Thank you.

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

7 SGT MARKEY: Thank you.

8 CAPT TIDESWELL: Is there any interest  
9 in a comfort break? Is everybody good to go?  
10 Comfort break, I'd recommend a comfort break at  
11 this point.

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

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

22 I have three rules that I really try

1 to work hard to adhere to, which I try to adhere:  
2 never volunteer for duty in D.C.; never go back  
3 to a job I've held before; and never follow Mr.  
4 Sullivan when I speak.

5 (Laughter.)

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

16 (Laughter.)

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

20 I have some slides that I'm just going  
21 to use as anchors or weigh points as we go along  
22 hopefully to facilitate more of a dialogue and

1 some response. If I had a thesis for this brief,  
2 it would be that since 2012 the practice of  
3 military justice and the Department of Defense in  
4 general, and particularly with regards to sexual  
5 assault, has been through more changes than in  
6 the 51 years, 61 years of military justice that  
7 preceded that. So my thesis is we are in a time  
8 of significant scope and depth of change.

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

17 And that was really immediately tested  
18 in Korea when we had 55,000 courts-martial in the  
19 first year of the UCMJ. Do you remember our  
20 slide we just saw? We had about 2,000 total  
21 special and general courts-martial in 2015 for  
22 the whole DoD in one theater of operations. One

1 of my rules is don't do public math. I'm going  
2 to follow that rule.

3 (Laughter.)

4 CAPT RECORD: In one theater of  
5 operations we had way more courts-martial in  
6 1952. But it was imperfect. And so we see a  
7 couple of holistic or major reviews in the next  
8 couple of decades.

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

18 So if I had a second thesis, it would  
19 be that changes, especially big changes, take  
20 time to take effect. So we see some enhancements  
21 of the rights of the accused, some recognition --  
22 if you go back to the hearings on the UCMJ, which



1 are thankfully to the Army now available in the  
2 Library of Congress online, you can see that a  
3 lot of the concerns that still persist were there  
4 during the hearings. And one of the comments  
5 earlier was about the role of the commander. And  
6 so in the 1968 Act and the 1969 Manual, by  
7 addressing the role of the defense counsel and  
8 the role of the military judge, they tried to  
9 further refine the system.

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

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

1 of major change.

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

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

18 So all of that leads up to here, but  
19 it's important for you to recognize that we're  
20 grounded in an ongoing dialogue. And many of you  
21 remember the number -- the claim of 26,000 rapes  
22 in the military. We have been in this dialogue

1 -- we're going to talk a little bit about --  
2 mostly about 2012 until now, but this dialogue  
3 predates that time frame.

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

16 But, so we need to know how many there  
17 are. But this is the number that gets people's  
18 attention. This number has driven the creation  
19 of your predecessor Panels. And I am neither as  
20 good a public speaker as Mr Sullivan, nor am I as  
21 smart as Ms. Fried, so I will only say that  
22 there's a background rooted in some statistical

1 data that we can't ignore.

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

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

18           From -- and I notice we have many  
19 esteemed members of the victims' rights  
20 organizations here in the audience, but for the  
21 victims and for those who represent them we  
22 recognize that there is a tension between our

1 military system in which the commander is  
2 responsible by statute and regulation for the  
3 maintenance of good order and discipline for  
4 ensuring an efficient and effective force. So  
5 there's a tension between that and this -- the  
6 most personal of all reports of offense that are  
7 going to lead to consequences, including being  
8 interviewed, having to do that to your commander.  
9 So that is part of the tension that drives the  
10 need for reviews.

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

21           And then the most recent really big  
22 ticket item that we see extensively reflected in

1 the National Defense Authorization Act for 2017  
2 is the need to protect victims, reporters, first  
3 responders and those who serve them from  
4 retaliation, reprisal, ostracism, maltreatment, a  
5 wide variety of maligned types of treatment that  
6 could be affected upon people who are associated  
7 with the report of a sexual assault.

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

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

19 (Laughter.)

20 CAPT RECORD: Back in the oughties we  
21 had the Defense Task Force on Sexual Assaults in  
22 the military Service, and this was a Panel

1 appointed by act of Congress that went around to  
2 the installations. I know I hosted -- I -- not  
3 I. Nobody came to my house. But we and my  
4 region hosted a team for about a week. And they  
5 did interviews, they did small-group-type  
6 surveys, focus groups. So we have some what I  
7 will call modern -- anything in the oughties and  
8 forward we'll call modern. So some modern  
9 experience with the Defense Task Force, of course  
10 ELPB and some other organizations.

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

22 By the way, I've been the chair for

1 about 21 days. Skipped right over Spring  
2 training. There was no Cactus League. It was  
3 just like, boom, we're going to the majors and  
4 briefing the DAC-IPAD. So if I strike out,  
5 you'll just know that I didn't get any warm-up  
6 pitches.

7 But, so I know from that one we put  
8 hundreds of hours into looking into the issue of  
9 collateral misconduct. We did non-scientific  
10 surveys, more polling of the various interests.  
11 I know from the Navy standpoint we communicated  
12 with our defense bar, with our Trial Counsel  
13 Assistance Program, our prosecution bar. We  
14 communicated with our Victims' Legal Counsel  
15 Program. We at Code 20 speak to the leadership  
16 of our Victim Legal Counsel Program almost every  
17 single day. And so we reached out, collected all  
18 the data we could to try to make some good  
19 recommendations. So we're not blind to either  
20 the issues or the need to incorporate people far  
21 forward from the Washington Navy Yard and propose  
22 solutions.



1           And then we'll just kind of lead into  
2           the last two very significant muscle movements  
3           were the JPP and the Military Justice Review  
4           Group, which had different focuses, of course.  
5           They were convened -- they arose out of the same  
6           sort of collection of incidents that created a  
7           focus, but different focus groups. So 2012 we  
8           get the new Article 120 Statute, which would be  
9           otherwise not all that interesting of an event in  
10          military justice history. Many of us would yawn  
11          except that 2013 was the year of great trial and  
12          tribulation for the military justice system.

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

19                 So 2013 we see the Judicial  
20          Proceedings Panel on Military Justice Review  
21          Group. Of course JPP was created by Congress.  
22          MJRG was internal, and MJRG recognized a need to

1       conduct a holistic review. So the Chairman and  
2       the Secretary collectively agreed we need to do a  
3       holistic review. We have not done a true  
4       holistic review since 1951. So that team -- and  
5       I am sure that at some point you will get a brief  
6       from one in a long line of people who are smarter  
7       and better at talking than myself

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

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

1 defined by the President.

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

16           But it was really somebody dig in and  
17 figure out what the data is, try to figure out  
18 what the data means. And so, that is another  
19 anchor to which I would invite your attention.  
20 Of course we've got other sources of information.  
21 The Military Service Academies Report is a  
22 valuable tool because it's survey-conducted. So

1 the Annual Report to Congress is really driven by  
2 reports of sexual assault that come in to the  
3 services. Restricted reported, unrestricted  
4 reports, and then data gathered about the  
5 disposition of those unrestricted reports.

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

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

1 SECNAV instruction explicit -- expanding the  
2 definition of retaliation and reprisal.

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

14 And a couple of other things that  
15 drive the conversations that we have when we're  
16 talking about the laws pertaining to sexual  
17 assault are perceived incidence rates and the  
18 delta between incidence rates and reporting  
19 rates, restricted reporting and unrestricted  
20 reporting and attempting to figure out why people  
21 make a restricted or unrestricted report, our  
22 interactions with the special victims' counsel

1 for the other Services' victims' legal counsel  
2 for the Navy and Marine Corps, because special  
3 victims' counsel could be confused with special  
4 victims' investigation and prosecution  
5 capability. So those are some of the focal  
6 points of the conversation.

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

21           So this is just one. And there's a  
22 reason why I'm going to show you 2014. But I

1 mentioned my number one thesis is that the scope  
2 of change since 2012 is the most significant in  
3 the history of the UCMJ. This is the military  
4 justice and SAPRO-related provisions from the FY  
5 14 National Defense Authorization Act. And if  
6 you're a practitioner or a service member trying  
7 to keep up with this, this is what affected your  
8 life on this one particular topic in that one  
9 legislative cycle.

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

17 And, so this slide is an old slide  
18 that I only offer because we talked about  
19 important changes. I think most of us know and  
20 have interacted with General Altenberg, or many  
21 of us have fairly well knowledgeable and  
22 experience with the judge advocate. And he

1 called the 2014 NDAA change the most significant  
2 since 1968. I'll leave that to him. He has said  
3 that. I would say whatever you think about 1968  
4 versus 1983 versus 2014, NDAA 17 is -- has to  
5 take the cake as the most significant change.

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

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

20 Mr. Sullivan mentioned the  
21 codification of the Crime Victims' Rights Act,  
22 which had historically been partially implemented



1 by regulation, but certainly there were aspects  
2 that were left out and it was not statutory at  
3 the time.

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

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

19           So we fast forward to '15, and this  
20 pace of change continues. Fifteen was not as  
21 significant or monumental in terms of the pace of  
22 change, but we did see some corrections to some

1 of the minor impacts of '15 and we did see some  
2 significant changes, including to the maximum  
3 punishment.

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

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

1 system or some sort of Privacy Act system of  
2 records.

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

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

15 A little bit -- I -- back at Code 20  
16 we spend a lot of time talking about Section E,  
17 the Military Justice Act, but it is worth asking  
18 you to recognize also that in every NDAA there's  
19 usually a section dealing with military justice  
20 matters generally. And so, we saw a section in  
21 the 500 Series dealing with the rights of victims  
22 and with protection against retaliation and

1       reprisal, as well also addressing a study on the  
2       advisability of the military justice litigation  
3       career track. But I digress.

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

10               (Laughter.)

11               CAPT RECORD: But MJA16 is a major  
12       structural change. And so if I had a third  
13       thesis, it would be that the Department is aware  
14       of the need to continually assess ourselves, to  
15       continue to look at what we're doing and whether  
16       we're doing right, and that the Military Justice  
17       Act -- the Military Justice Review Group and its  
18       legislative proposal, which you can Google MJRG  
19       and find all of this right online, is proof that  
20       we are aware, we possess self-awareness. So the  
21       Military Justice Act includes structural and  
22       procedural and substantive changes. And most of

1 the comments that we normally talk about are on  
2 the procedural side. So I'll kind of run off a  
3 highlight of those.

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

14 So referral is our equivalent right  
15 now of charging. If you were to submit a FOIA  
16 request and ask me what percentage of cases in  
17 which a person was charged, went to trial, then  
18 I'd say, all right, well, we have to work from  
19 referral, because preferral doesn't even  
20 necessarily require a judge advocate to be  
21 involved. You'll recall that we talked about the  
22 commanders owns the system.

1           So we lawyer types may not know that  
2           there is a preferred charge sheet if a commander  
3           is looking to dispose it through non-judicial  
4           punishment or if a commander conducts his  
5           preliminary inquiry in accordance of Rules of  
6           Courts-Martial 303 and makes his R.C.M. 303  
7           decision that this case does not demand  
8           adjudication, or if it's sent to a summary  
9           court-martial. We never know that. But, so in  
10          that whole phase there's no authority for a judge  
11          to be involved under existing law.

12                 The Military Justice Review Group  
13          looked at that, studied it and identified some  
14          places where that would be appropriate. For  
15          instance, digital communications, right, like you  
16          have to have a judge sign a warrant under the  
17          DCMA to get electronic communications. So that's  
18          one of our big changes, a significant structural  
19          change from the way we've done business since  
20          1951, and really dating back to the Roman army,  
21          if you want to follow it that far back.

22                 Another change that -- I'm going to

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

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

21           That goes back to the second thesis  
22 point I made, which was change takes time. So

1 1969 you see -- 1968-'69 you see an expansion of  
2 the independence and the need for the judiciary.  
3 You track that through the '70s and '80s and you  
4 see the cases questioning the role of the  
5 judiciary and the interplay of the judiciary  
6 within an Executive Branch. And so, we had some  
7 cases in the Naval Service. Of course there was  
8 the big case, the Carlucci case. So challenges  
9 to the judiciary. And now we have come sort of  
10 to a place that will fairly closely mirror the  
11 authority of non-federal civilian judges, some  
12 sense of your seat is not impacted by the  
13 decision you make in this court-martial.

14           The second point that the Military  
15 Justice Act really I think adds a benefit is the  
16 enhancement of the role of the staff judge  
17 advocate. So the Military Justice Act includes  
18 significant amendments to Article 34. And we all  
19 group with an Article 34 advice being sort of a  
20 one-time moment-in-time opinion that only applies  
21 in general courts-martial. So if anybody from  
22 J'accuse to special court-martial getting this



1 report of an Article 32 hearing, anybody along  
2 the way says this case is dying, then that was  
3 the end of it.

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

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

22 You may recall Mr. Sullivan pointing

1 to this ping-pong game of back and forth with the  
2 court under Article 60. That ping-pong game is  
3 gone. And the new process, there will be some  
4 very narrow authority for the convening authority  
5 to make a post-trial -- to do some things  
6 post-trial, but the judge is now in charge of  
7 post-trial.

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

16 The only a commander had previously,  
17 to enter into a pretrial agreement was this  
18 plenary authority under Article 60 to only  
19 approve so much of the findings as he chose. So  
20 -- findings and sentence. So he or she would use  
21 that authority then as a basis to agree to  
22 exercise the authority in the pretrial agreement.

1 Kind of an odd way of building a system, but if  
2 you remember it was built in 1951 and evolved and  
3 was adapted to the needs. It would make sense  
4 that that was just how they found a way to do  
5 business.

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

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

22 (Laughter.)

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

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

19          And then finally, another part of how  
20          we are here today. We talked about all of the  
21          Panels and Committees that have come before, and  
22          one of the challenges has been conducting an

1 ongoing review without a standing organization to  
2 do that and recognizing the internal conflict.  
3 The UCMJ was built around the concept that the  
4 Code Committee would conduct that review, but it  
5 happens to have the appellate court on it. So a  
6 new Panel, a Military Justice Review Panel that  
7 will hopefully help in the far-distant future to  
8 avoid the need for Special Panels and Committees  
9 to look into these things.

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

1 must and then that can be punished through  
2 Article 92.

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

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

22 There's a new Article 93(a). So we

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

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

19 So the 93(a) is -- makes punishable  
20 having a sexual interaction with a person who is  
21 subordinate. For instance, in a  
22 recruiter-recruitee relationship or an

1 instructor-trainee relationship. So two major  
2 punitive articles that are related to your  
3 charter that unfortunately a couple of years down  
4 the road.

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

19 So the Joint Service Committee has  
20 also been a partner in trying to make sure that  
21 we stay involved in addressing the issues that I  
22 think you're going to look at addressing.



1                   And so, we are in a time of quite  
2                   significant change, and that change has proven to  
3                   take -- the issuing of an edict or fiat has been  
4                   proven to take time to take effect, but we think  
5                   that we are on the right track. And subject to  
6                   your questions, that is my brief, but I'm hoping  
7                   you have lots of questions because I love my job.

8                   Yes, sir?

9                   CMSAF MCKINLEY: Sir, a great job.

10                  Two quick questions for you:

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

13                  CAPT RECORD: So, that was the RAND  
14                  report, and I believe that that report covered  
15                  the one year prior to the taking of the survey,  
16                  and that the survey was taken in either 2012 or  
17                  2013.

18                  CMSAF MCKINLEY: That's a one-year --

19                  CAPT RECORD: So that is an estimated  
20                  prevalence rate using RAND's methodology, their  
21                  survey methodology, an estimated one-year  
22                  prevalence -- or one-year incidence rate.

1 I know, because I just looked it up  
2 for other reasons that in 2014 RAND estimated  
3 20,500 incidents. So they take the -- they do  
4 their surveys and then however they normalize it  
5 and provide a statistical reliability. I don't  
6 do math.

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

12 CAPT RECORD: So absolutely that is  
13 the \$64,000 question. And I recognize Dr. Spohn  
14 has a lot of good information on this.

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

18 (Laughter.)

19 DR. SPOHN: Well, the RAND survey, as  
20 I understand it, is a victimization survey. And  
21 so, it gets at crimes that are and are not  
22 reported, correct?

1                   CAPT RECORD: That's correct.

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

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

17                  Where we have -- what I -- so we have  
18 the estimated incidence rate that we can get from  
19 RAND and then we have our reporting rate. We  
20 know for a fact how many restricted and  
21 unrestricted reports we get every year. Because  
22 we have a tool, we gather those for that

1 Congressional Report on Sexual Assaults in  
2 military Service.

3 Yes, sir?

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

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

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

22 So they said -- so we created a tool

1 called restricted reporting for domestic  
2 violence. The same issue pops up later in the  
3 2000s, a perception that victims of sexual  
4 violence are not coming forward. And so, we  
5 created a tool to authorize the filing of a  
6 restricted report.

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

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

18 And if the victim makes -- wants to  
19 make a restricted report to get to services --  
20 well, wants mental health or medical services or  
21 access to legal services, but only wants to make  
22 a restricted report, they can do that to a

1 receiver of restricted reports, which is your  
2 sexual assault response coordinator, your medical  
3 health personnel, your victims' legal counsel,  
4 receivers of restricted reports, people who would  
5 have privilege. You can't define the term with  
6 itself. People who would have privilege then  
7 become authorized to receive restricted reports.

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

19           But, so what if your friend tells you  
20 I was sexually assaulted last night, or you see  
21 them walking out crying and say what happened?  
22 Then what are your obligations? So there's some

1 challenge. But for the most part victims have  
2 the right to choose whether the report is  
3 restricted or unrestricted, and that drives  
4 whether it gets a law enforcement investigation  
5 and whether they get the full panoply of  
6 services; those are good things, right, and  
7 whether their commander is notified and they  
8 become a witness and some things that are not  
9 necessarily desirable to all victims, or whether  
10 they make an unrestricted report and get a  
11 limited scope of services provided.

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

16 HON. GRIMM: Thank you very much.

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

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

22 (Laughter.)

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

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

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

22           CAPT RECORD: I just did some, I know.



1 (Laughter.)

2 CHAIR BASHFORD: -- wouldn't that be  
3 about a third were restricted if you had  
4 1,000-plus?

5 CAPT RECORD: About 600 were  
6 restricted, so --

7 CHAIR BASHFORD: And you -- out of  
8 1,000-plus?

9 CAPT RECORD: About 600. Yes, so  
10 you're right. About a third. About 600 of about  
11 1,600. So about a third are restricted who  
12 received services, but the military doesn't get  
13 to do its military thing.

14 DEAN HARRISON: I wonder with regard  
15 to the restricted reports or an SJA investigation  
16 that says we think something happened but there's  
17 not enough proof to prove beyond a reasonable  
18 doubt, what does a commanding officer do with  
19 regard to a Service member that he has a -- he or  
20 she has a pretty good feeling is victimizing  
21 other people, preserving that person's right to  
22 pursue their career while at the same time

1       safeguarding the rest of the command?    Is there  
2       a uniform way outside of UCMJ of handling those  
3       situations?

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

14                   But one of the things that has  
15      happened, both as a result of legislation and as  
16      a result of internal action, is they've expanded  
17      the statute of limitations, expanding the  
18      retention requirements for records, not only for  
19      law enforcement records, but if you went back  
20      with your really good reading glasses and read  
21      that little tiny print, but for SARC records as  
22      well.

1                   And they've created a tool to allow  
2 victims to convert from a restricted report to a  
3 unrestricted report. So a victim may come in and  
4 get a safe exam conducted, but choose to just do  
5 an unrestricted report and then may change their  
6 mind and jump back in. So there's some ability  
7 to revive or change a report.

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

16                   So they've tried to -- the system has  
17 tried -- the system, they, the system. I am  
18 totally relieving myself of all agency regarding  
19 any challenges you may have to what I'm saying,  
20 but the goal is to maximize victim dominion and  
21 sovereignty while respecting commanders' control.  
22 And then where those two butt up against each

1 other, a DoDI that has come out in these years of  
2 great changes directs commanders to give maximum  
3 consideration to the victim's wishes. So we've  
4 got Congress has told us to consider the victim's  
5 wishes as to disposition and a DoDI that requires  
6 commanders to give great consideration.

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

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

1           CAPT RECORD:  And that's incredibly  
2           hard to stomach.

3           DEAN HARRISON:  Yes.

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

13                 So there's a desire to look at things  
14          through a binary lens that I experienced as a  
15          young judge advocate that I will not attribute to  
16          anyone left on active duty today, which was, all  
17          right, either it's true and he needs to go to  
18          jail or it's a lie and she needs to go to jail.  
19          I don't think that attitude prevails.  In fact,  
20          one of our former prosecutors who I've worked  
21          with a lot over the years likes to talk about us  
22          as the most enlightened trauma-informed

1 organization with which she's ever been  
2 associated. But we recognize that that is at  
3 least a background, that I've got to have good  
4 order and discipline.

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

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

1       come brief the DAC-IPAD.

2                       (Laughter.)

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

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

17                      CMSAF MCKINLEY:  Sir, I see very  
18      extensive changes coming into UCMJ very soon, and  
19      just one of them just very simply is modification  
20      and definition of sexual harassment.  That's just  
21      one.  But do we have a plan on how to train and  
22      educate the 1.3 million members serving on these

1 changes as they come out?

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

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

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



1 Any other questions?

2 (No audible response.)

3 CAPT RECORD: Well, thank you so much.

4 I think I actually have run over, so I appreciate

5 your tolerance. And just as Mr. Sullivan did, I

6 will say that I am available to you any time you

7 need something that I can offer. Captain

8 Tideswell called and the answer was absolutely

9 I'll be there.

10 As I mentioned, she has sent me to

11 places like Gulf Port and Code 20 and --

12 (Laughter.)

13 CAPT RECORD: So like she's called and

14 asked a lot harder things than coming to the

15 Holiday Inn Arlington at Ballston of me, and I

16 have always said yes, and I assure you you will

17 get the same cooperation and consideration.

18 Thank you very much for your time.

19 ALL: Thank you.

20 CAPT TIDESWELL: Chair Bashford, this

21 is the part I think where we get to eat lunch.

22 CHAIR BASHFORD: Sounds great.

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

5                   CHAIR BASHFORD:  Yes.

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

10                   (Laughter.)

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

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

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

21                   Madam Chair, are you ready to proceed?

22                   CHAIR BASHFORD:  Yes.

1 MS. FRIED: Madam Chair, distinguished  
2 Panel, good afternoon.

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

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

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

1 Department and Congress.

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

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

17 Its follow-on Panel, the JPP, is  
18 tasked with reviewing, among other things,  
19 implementation of UCMJ reforms related to the  
20 offense of sexual assault, restitution, and  
21 compensation to victims, as well as victim  
22 rights.

1 Congress was specific as to the  
2 establishment of both of these Panels, including  
3 membership composition and qualifications.  
4 Members had to be from the private sector and  
5 collectively possess expertise in the military,  
6 civilian law, investigations, prosecution,  
7 adjudication of sexual assault in federal and  
8 state courts, victim advocacy and the  
9 organization and mission of the Armed Forces and  
10 defenses related to sexual assault. Next slide,  
11 please.

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

19 The Chair of the RSP was the Honorable  
20 Barbara S. Jones, a former federal District Court  
21 judge in New York. Her bio and those of other  
22 RSP members are available on the RSP website.

1           The RSP terminated after one year from  
2           the date of its first public meeting. Initially,  
3           it was to remain in existence for 18 months from  
4           the time it was established but, given the  
5           urgency of the issues and the interest, the  
6           Secretary of Defense at the time, Secretary  
7           Hagel, shortened that period and requested they  
8           complete their work in a year. And shortly  
9           thereafter, Congress changed the Statute to say  
10          you will have a year to produce this work. So,  
11          they did quite a bit in that one year.

12           The RSP held 14 public meetings, heard  
13          testimony from former, current, and retired  
14          military officials and leaders, sexual assault  
15          victims, advocacy groups, academia, historians,  
16          members of Congress, including Senators  
17          Gillibrand and McCaskill, and Representatives  
18          Spears and Frankel. They heard from senior  
19          officials from our allied nations, Canada,  
20          Australia, the United Kingdom, and Israel, and  
21          countless other subject matter experts. It  
22          issued its report on June 27, 2014.

1 Congress also required that two of the  
2 RSP members also serve on the follow-on Panel of  
3 the JPP. To that end, Judge Jones is a Member of  
4 the JPP and, additionally, former Congresswoman,  
5 Representative Elizabeth Holtzman, who was Chair  
6 of the JPP, also served on the RSP.

7 Information on the work of the JPP and  
8 its membership is also available on the JPP  
9 website, which we can provide to you separately.  
10 Next slide.

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

15 As I mentioned earlier, the Congress  
16 was very prescriptive on what it wanted the Panel  
17 to look at. And I won't go through all these  
18 specifically but, essentially, the RSP looked at  
19 the processes in place from the time a person  
20 makes a report of a sexual assault to whoever  
21 that is, whether it is investigators, a sexual  
22 assault response coordinator, but just presents

1 to an official with a sexual report, up until  
2 disposition of a particular case, if it gets  
3 adjudicated.

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

10 CAPT TIDESWELL: Which slide, Ms.  
11 Fried?

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

13 So in 2015, there was a total of 6,083  
14 reports of sexual assault involving members as  
15 either subjects or victims. Of that number,  
16 4,584 were unrestricted reports, 1,499 were  
17 restricted reports. And that number also  
18 includes 504 incidents reported by Servicemembers  
19 that happened prior to service. So some of the  
20 reports come from people who may have been  
21 victimized before having been on active duty but  
22 they seek to report it because they are looking



1 for support services and additional resources.

2 And there is additional information on  
3 those numbers and the breakdown in the Sexual  
4 Assault Annual Report which we just posted online  
5 at the SAP, [sapr.mil](http://sapr.mil) website.

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

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

17 They looked at sentencing guidelines,  
18 whether or not those would be something that  
19 would be helpful to the military; training levels  
20 of prosecutors and defense counsel; and court-  
21 martial conviction rates and outcomes of judicial  
22 proceedings.

1           They also looked at the strengths and  
2 weaknesses of proposed legislative initiatives  
3 and the adequacy of support systems in place to  
4 assist victims.

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

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

1 authority to convene courts-martial.

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

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

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

21 Also, few civilian jurisdictions  
22 maintain or publish prosecution and disposition

1 data. And the differences in disposition data  
2 between the military and civilian systems make it  
3 difficult to compare.

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

8 In total, the three subcommittees held  
9 65 meetings and produced separate reports, views,  
10 and deliberation by the subcommittee. I just  
11 wanted to point out, the subcommittee does a lot  
12 of its work but what it prepares is only the work  
13 of the subcommittee. The RSP, which is the  
14 parent Panel, gets to consider that information  
15 and either adopt, modify, or disregard the work  
16 of the subcommittee. And the Panel, the RSP  
17 Panel, basically what is sent to the Secretary of  
18 Defense, is the work of the RSP, not the  
19 subcommittees. But again, the subcommittees  
20 inform that deliberation for the main Panel.  
21 Next slide.

22 So actually I just want to note it was

1 132 recommendations, not 138. So that should be  
2 corrected. Sorry about that.

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

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

16 Another area was ensuring the fairness  
17 and due process for those accused, those  
18 suspected of sexual assault; improving military  
19 justice procedures; sustaining and adequately  
20 funding promising DoD programs and initiatives;  
21 and conducting independent audits and  
22 assessments.

1           With respect to those recommendations,  
2 DoD accepted 88 recommendations, partially  
3 approved 10 recommendations, and one  
4 recommendation was disapproved. The remaining  
5 recommendations were referred for further review  
6 by the Department or were already under review by  
7 the Military Justice Review Group, or the Joint  
8 Services Committee on Military Justice, otherwise  
9 in pending legislation.

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

16           So that is where the RSP completed its  
17 work.

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

20           So the JPP terminates in September  
21 2017. It had a little bit longer duration than  
22 the RSP but like the RSP, it is required to

1 provide assessments and recommendations to the  
2 Secretary of Defense and the Congress.

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

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

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

1 conduct of the victim and privileges.

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

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

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

17 And currently, the Department is  
18 reviewing the recommendations that were made by  
19 the JPP, the 2016 annual -- in their reports.  
20 Those are currently under review so I can't  
21 report any specific DoD action on those at this  
22 time. Next slide.



1           So the JPP also has a subcommittee.  
2           That subcommittee consists of nine members, two  
3           of those are members of the JPP, the parent  
4           Panel. Recently, they conducted site visits at  
5           installations in the United States and in Asia  
6           and they are currently preparing reports on  
7           observations at those site visits relative to  
8           their taskings for consideration and deliberation  
9           by the JPP. I would note that General Schwenk is  
10          a member of the JPP Subcommittee. And I would be  
11          remiss if I didn't note that Meghan Garvin was an  
12          active participant on the Victim Services  
13          Subcommittee of the RSP and also appeared before  
14          the JPP to speak on the issue of victim rights.  
15          And Dr. Cassia Spohn also assisted on both of  
16          those Panels in their efforts in providing  
17          information that was helpful to the committees.

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

21                 And with that, that concludes my  
22          presentation. Does anyone have any questions?

1 Yes.

2 MR. KRAMER: Can I? The scope of the  
3 RSP was to assess the strengths, weaknesses,  
4 including the administration of the UCMJ, the  
5 investigation, prosecution, and adjudication of  
6 adult sexual assault crimes. And ours is the  
7 investigation, prosecution and defense.

8 MS. FRIED: Yes.

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

13 MS. FRIED: So I think there was some  
14 -- I would be speculating but I can tell you that  
15 the RSP noted some issues with the defense bar.  
16 In particular, there was concerns about pressure  
17 to prosecute sexual assault cases that maybe some  
18 of the disposition would have been appropriate.  
19 There was concerns about undue command influence.  
20 There was concern about resourcing of the defense  
21 community because currently, if you are a victim  
22 of sexual assault in the military, you have a

1 prosecutor on your case, you have a special  
2 victims' counsel assigned to your case, and  
3 sometimes you have a senior trial counsel. If  
4 you are a defense counsel, it is just the defense  
5 counsel, typically. You may have a senior  
6 defense counsel assigned but that may or may not  
7 be the case.

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

14 MR. KRAMER: Thank you.

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

22 CMSAF MCKINLEY: Let me ask a

1 question. Did you guys look at, at any point in  
2 time, the disposition or the follow-on what  
3 happened to the victim, even after the conviction  
4 of the perpetrator, but how did that victim --  
5 did that victim stay in the military? How were  
6 they treated? Did you look at any of that?

7 MS. FRIED: So they heard testimony  
8 with regards to that. And in fact, the JPP  
9 issued a report recently on retaliation based on  
10 some of that testimony, that which was heard at  
11 the RSP and what was heard at the JPP.

12 Concerns were raised by participants  
13 of both Panels, especially in the victim advocacy  
14 groups, as well as some victims who did come and  
15 testify, and special victims' counsel that people  
16 who made reports of sexual assault perceived that  
17 they were being retaliated against after making  
18 that report, either by peers, they were being  
19 ostracized or excluded, or potentially even their  
20 leadership.

21 But actual data for that information,  
22 neither Panel looked at that that I can recall.

1 I know it came up and they did make broad  
2 recommendations as to people making those  
3 allegations. But as to the specifics -- I hope I  
4 am answering your question -- I don't think they  
5 really dove deep in that.

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

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

13 MS. GARVIN: May I ask a question?

14 MS. FRIED: Yes, please.

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

18 MS. FRIED: Until September 2017 is  
19 when their work is concluded. I don't think they  
20 will be having meetings up until that because  
21 that is when it ends and they have to have their  
22 report to Congress by then.

1 Anything else? Yes.

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

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

13 MS. CANNON: How are they available?

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

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

19 MS. FRIED: Oh, yes. Yes, and the  
20 comparative systems -- all the subcommittees did  
21 a very comprehensive review and you will see that  
22 the annex that contains the work of the

1 subcommittee, is several inches thick and the RSP  
2 report, itself, is less but that is because they  
3 were informed and took that information and  
4 adopted it as their own in that process. But  
5 there is a lot of paperwork on the websites that  
6 basically all the resources that were used by the  
7 RSP that we posted, public information that was  
8 used, anything they deliberated on would be  
9 available on their website.

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

12 MS. CANNON: Thank you.

13 SGT MARKEY: And I don't know if you  
14 have any more information about the site visits  
15 because it says that reports are going to be  
16 forthcoming. I was just curious about what those  
17 site visits entail. Are there assessments? And  
18 I really feel strongly that what is happening in  
19 the field is very critical to the decision we are  
20 going to make within this committee and so  
21 sometimes going out into the field to see what is  
22 occurring -- and I am just curious. When you say

1 site visits, that could mean a lot of different  
2 things. I am curious what the composition is.

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

12 I know they looked at a variety of  
13 issues like defense investigative resources.  
14 There is another one that escapes me at the  
15 moment but they have not completed their  
16 deliberations so it is not publicly available  
17 information, at this point. But the plan is that  
18 when the subcommittee is finished deliberating on  
19 their product that they wanted delivered to the  
20 JPP, that subcommittee briefs it publicly to the  
21 Panel. So members of this Panel could attend  
22 that information or at least -- attend those



1 briefings or at least have that information  
2 available. Once it is publicly available, it  
3 will be made available to the Panel.

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

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

10 CHAIR BASHFORD: Right, thank you.

11 (Whereupon, the above-entitled matter  
12 went off the record at 1:56 p.m. and resumed at  
13 2:02 p.m.)

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

20 Let's see, one, two, three, four,  
21 five, six, seven. Okay, that is more than I had  
22 thought. Just sometimes when people are using

1 acronyms I need to have to keep turning to Marcia  
2 and say what is an Article 32.

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

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

15 CAPT TIDESWELL: Yes, ma'am.

16 CHAIR BASHFORD: And the last thing I  
17 want to say before opening up to everybody is  
18 there is a lot of work that has been done in this  
19 already and I would hope, although some of the  
20 work I think necessarily will overlap, I don't  
21 want to redo what somebody has already done. So  
22 if we could try to forge new ground, perhaps.

1 There is no way it won't overlap but I don't want  
2 to just redo something.

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

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

10 CHAIR BASHFORD: I think we will have  
11 subcommittees.

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

17 So if we did three months of  
18 subcommittee meetings and then come back and all  
19 get together and share what we have and redirect  
20 where subcommittees are going, based on the other  
21 peoples' views, then you end up with maybe three  
22 more meetings this year.

1           CHAIR BASHFORD: I also think -- how  
2 many people from the west coast as well? Not as  
3 many but a monthly meeting for the entire group  
4 means three days of being away from work,  
5 normally speaking. And then we can also do phone  
6 conferences, as needed.

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

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

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

17           HON. BRISBOIS: Sure but I mean if you  
18 identify a subcommittee and you organize it and  
19 it turns out we don't need that group after all  
20 because one of the things that came out to me  
21 from these materials is the definition of what is  
22 the scope of this committee is very much up in

1 the air. And until that is clarified,  
2 subcommittees are kind of just estimating or  
3 guessing.

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

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

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

22 HON. BRISBOIS: Exactly. That is part

1 of the problem.

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

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

15 CHAIR BASHFORD: Yes.

16 MS. CANNON: Well on page 2, the  
17 planning session outline, it asks a lot of good  
18 questions and points that kind of talk about our  
19 substance and how we might bring some questions  
20 and issues. And then there is, on page 5, the  
21 idea of the subcommittees but I think we are all  
22 kind of coming together and really not gelled as

1 to what our specific role is, let alone the more  
2 general one. And I am not sure how to go forward  
3 from that but I think that there are some good  
4 questions here.

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

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

19 And I thought this outline has a lot  
20 of good questions but do we want to take some  
21 time to reflect on this stuff and come back or  
22 develop a strategy off of reflecting on this,

1 rather than coming up with some ideas off the top  
2 of our heads?

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

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

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

22 And so one possible approach might be



1 to take a random sample of cases that resulted in  
2 acquittals or dismissals, or whatever kind of  
3 disposition one wanted to focus on and really go  
4 to the case files and collect more detailed data  
5 on those kinds of cases, if it is an evidentiary  
6 issue, if the victim refused to cooperate, is the  
7 case moving forward, none of that is in the  
8 database.

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

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

16 DR. SPOHN: Disposition is.

17 CHAIR BASHFORD: -- for conviction.

18 DR. SPOHN: Yes.

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

22 DR. SPOHN: I don't have it right

1 before me but for Fiscal Year '15, there are 790  
2 cases where charges were preferred. And I am  
3 just now starting to do some of the data analysis  
4 on those cases.

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

8 MS. PETERS: Yes, that's correct.

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

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

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

19 DR. SPOHN: Right.

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

22 DR. SPOHN: Yes.

1 MS. GARVIN: Okay.

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

4 DR. SPOHN: Yes.

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

12 DR. SPOHN: But that would be post --

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

15 DR. SPOHN: Yes, correct.

16 DEAN HARRISON: Could I go back to the  
17 definition of case? Because it seems to me that  
18 if we are dealing in an area where there are a  
19 large number of victims who do not report. And  
20 if that failure to report reflects a lack of  
21 faith in the system, should we expand case to  
22 basically -- I mean not just legal case, not just

1 prosecutions, but incidents of assault, which  
2 might mean, for example, finding out what  
3 veterans groups have who treat veterans who were  
4 assaulted during their service, who did not  
5 report anything until their separation. I'm just  
6 throwing that out.

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

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

1       What goes into that?

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

11                   CHAIR BASHFORD: I think it might be  
12 hard to get, although going to veterans' groups  
13 is one way but I think it is hard to get hard  
14 data on cases that were never reported. But to  
15 limit ourselves to cases that went forward only,  
16 I think we are seeing a very small subset of the  
17 universe and I think it would be crucial to us to  
18 see certainly unrestricted reports, where charges  
19 were not preferred. Ideally, I would like to see  
20 restricted reports as well but I don't know if  
21 that is something that is actually feasible or  
22 not. But the unrestricted reports which, for

1 whatever reason, were either deemed to be  
2 unfounded or were withdrawn by the complainant or  
3 they thought there was a lack of proof or what  
4 happened didn't fit the definitions of a crime, I  
5 would like to see -- I think this group would be  
6 badly served if we didn't get to see that as well  
7 because it could be very illuminating.

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

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

20 HON. GRIMM: If it is electronically  
21 available, then you could search. It is probably  
22 available in the searchable ones. If it is like

1 in the federal system, once you get it, you can  
2 do a word search.

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

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

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

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

19 CHAIR BASHFORD: I must say I am also  
20 not 100 percent clear what the definitional  
21 difference is between sexual assault and sexual  
22 misconduct. Here they say sexual -- did we want

1 to look at cases where sexual misconduct charge  
2 is preferred? Does that mean something different  
3 factually or is that simply a charging decision  
4 to charge somebody with something of a lesser  
5 degree of severity?

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

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

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

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

20 MS. CARSON: You want to look at  
21 unrestricted reports where charges were not  
22 preferred?



1 CHAIR BASHFORD: Where charges were  
2 not preferred. Can we find that out?

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

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

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

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

20 SGT MARKEY: I would support the fact  
21 that we need to really look at not just those  
22 cases that are going into the system to either

1 charge or not charge but when you show the  
2 numbers of what they believe, 26,000 cases, and  
3 then you look at the numbers that actually made  
4 it into the court system, the process -- and I  
5 apologize for the term that I am using -- there  
6 is a very large gap.

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

17 And are there concerns, gaps, that the  
18 prosecutor says I just don't have a good  
19 investigation; I just can't move this forward?  
20 And maybe the ones that are being moved forward  
21 because of those gaps are not getting appropriate  
22 dispositions.

1                   So I would love to grab the  
2                   investigative case files. And that would include  
3                   everything from the first contact response, every  
4                   documentation. And I don't know. It has got to  
5                   be a massive number of cases that investigations  
6                   have been opened up on but I would like to be  
7                   able to see is there something within that  
8                   investigative process that we need to look at to  
9                   improve the quality of that investigation to make  
10                  a better determination on whether that is an  
11                  appropriate case to move forward on the charge.  
12                  Because folks are making decisions. I hear a lot  
13                  of decisions that are being made whether to move  
14                  cases or not and what information do they have  
15                  that they are making that decision on? I mean  
16                  what facts or what circumstances have they been  
17                  given to make that decision?

18                         And so I think it is important to kind  
19                         of go back upstream a little bit to look to see  
20                         if there are some gaps and considerations in that  
21                         process that would be appropriate for us to look  
22                         at investigatively prior to the prosecutorial

1 position on these cases.

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

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

20 CHAIR BASHFORD: And apart from a  
21 Service-by-Service comparison, it probably would  
22 be interesting to look at, if you can drill down

1 that far, to a base-by-base or jurisdiction-by-  
2 jurisdiction in the civilian world. You see some  
3 police departments with a volume rate of like 65  
4 percent and others with 5 percent.

5 DR. SPOHN: Five percent, yes.

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

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

15 And so I am thinking about the fact  
16 that we don't consistently have the medical exams  
17 being conducted within military hospitals. Some  
18 of them are sent out to the civilian component,  
19 depending on either what Service it is or the  
20 jurisdiction or installation. On top of that, in  
21 places like Asia or Europe where you have folks  
22 having exams done on the economy there and the

1 differences, we know that these sorts of things  
2 impact the quality of the evidence, the quality  
3 of the testimony, the willingness of people to  
4 participate in the process to begin with, their  
5 understanding of restricted versus unrestricted  
6 and their general options.

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

16           CMSAF MCKINLEY: Ma'am, I would be  
17 interested in one of the questions I have there  
18 is the RAND study had 26,000 victims who said  
19 they were raped, 26,000 in a year. That is an  
20 enormous number. But that statistic comes from  
21 the fact that they were able to report that  
22 without anything happening to them, whether they

1 said this happened to me while I was active duty.  
2 Now then there is only 550 that went to general  
3 court-martial and then the big thing is why?

4 But I think probably a lot of the  
5 victims, they look at what has happened to other  
6 victims that they had seen before. And those  
7 victims were forced to separate from the  
8 military, or maybe go to another unit, or cross-  
9 train into another career field and they become a  
10 victim again.

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

18 CHAIR BASHFORD: I mean I think we have  
19 to look at -- when you are looking at an  
20 institution, are there structural impediments in  
21 place that disincentivize reporting? But there  
22 is also a cultural component, too. And I think

1 somebody had referenced ostracism. You know  
2 ostracism by peers, that is a very hard thing  
3 culturally to fix. It is easier to fix it in the  
4 command structure I think.

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

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

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

21 CHAIR BASHFORD: Very similar to  
22 college campuses.



1 CMSAF MCKINLEY: Yes, and it can tear  
2 a squadron and the mission and morale apart. It  
3 really can.

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

6 MS. LONG: Oh, I'm sorry.

7 CHAIR BASHFORD: Go ahead.

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

19 DR. MARKOWITZ: The other challenges  
20 that I would see is that I mean I do think that  
21 we need to decide whether we are looking at just  
22 adult sexual assault, if we are going to look at

1 child, because it is a very, very different beast  
2 altogether. And so we need to be thinking about  
3 what are we talking about when we are talking  
4 about an effective response to child sexual abuse  
5 versus adult, versus intimate partner assault.  
6 There are different services that are available  
7 to military members, depending on which one of  
8 those the victimization falls under.

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

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

18 DR. MARKOWITZ: Right.

19 CHAIR BASHFORD: Obviously, I would  
20 think you would want to look at intrafamilial  
21 cases, where one person is not a member of the  
22 Service. But do we look at cases where somebody

1 has gone off base and assaulted a civilian? A  
2 lot of that I think would probably be handled  
3 with the civilian courts but I actually don't  
4 know.

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

8 CHAIR BASHFORD: Yes.

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

21 HON. WALTON: Yes, I think one  
22 challenge you always have when you deal with the

1 issue of sexual assault is whether the reports of  
2 sexual assault really reflects the magnitude of  
3 the problem. Because when I was Chair of the  
4 Prison Rape Elimination Commission, there was a  
5 number out there of how many assaults were  
6 purportedly taking place but the reality was that  
7 many of them were not being reported.

8 Now this may be beyond the scope of  
9 our mission but that is a major challenge because  
10 the 26,000 figure sounds bad but that may not be  
11 the real nature of the problem. It may be the  
12 tip of the iceberg. Because that is what we  
13 found in the Prison Rape Elimination issue is  
14 that we thought there were about 50,000 and then  
15 there was a survey done and it was estimated in  
16 2014 there were about 100,000.

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

20 BGEN SCHWENK: Let me just say my  
21 thoughts on one of the issues was what do we  
22 think the statutory scope of our charter is? And

1 being a guy in an executive branch person, I will  
2 read this as broadly as possible. So I admit  
3 that freely up front.

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

15 The case review, I believe, is the one  
16 we shall have to do. We have to do the case  
17 review. We have to figure out what we can learn  
18 from that and maybe that we learn that the data  
19 is insufficient to support getting to the whys  
20 and DoD needs to change its system, but whatever  
21 it is. But I don't think that is only. It is  
22 just one thing.

1                   And I think when Jen O'Connor was here  
2                   today as the DoD General Counsel, her issues she  
3                   wanted us to look at were all really broad --  
4                   training, resources, affect broadly -- affecting  
5                   the deployed environment, civilian best practices  
6                   that DoD doesn't do. Why not? Is there a reason  
7                   because of our deployable nature or what have  
8                   you? Or should we adopt that civilian best  
9                   practice? Just a whole bunch of things that lead  
10                  me to conclude we really do have a broad charter.  
11                  We can make it as broad as we want. The one  
12                  thing we have to do is the case review.

13                  So I don't know how we want to start  
14                  on that. I was tempted --when I said earlier we  
15                  need subcommittees, I was tempted to say the  
16                  first thing, I would start by trying to wrap our  
17                  heads around this and see what is there and read  
18                  things, and to give us something to do, start on  
19                  the cases. Because at least we can figure out  
20                  what data is available in the Army; what data is  
21                  available in the Navy; what data is available in  
22                  the Marine Corps.

1                   And in keeping with my broad charter,  
2                   I agree with those of you who think we start at  
3                   the allegation and we start right, what is the  
4                   data on allegations. And if we want to go to the  
5                   26,000 figure, which is the best extrapolation if  
6                   you believe that the statisticians can do  
7                   extrapolations from a more limited survey. It is  
8                   their extrapolation of well, if that data holds  
9                   factored for this or that, the estimate is about  
10                  26,000 types of sexual assault, not rapes but  
11                  sexual assaults in much broader definition, a  
12                  year in DoD and then here is the number we know  
13                  get reported and stuff.

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

19                  And for subcommittees, nothing against  
20                  DoD, but I will bet we will find out the data is  
21                  different in every Service of what you can find  
22                  and what you can't find. So that is a natural

1 way for us to get started and get our feet wet.  
2 We have an Army Subcommittee, and a Navy-Marine  
3 Corps Subcommittee, and Air Force Subcommittee,  
4 and they sit there and they start figuring out  
5 what information is here. Give ourselves a  
6 couple of months to do it and we come back  
7 together.

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

17 It gives us a way to get our feet wet  
18 while we are doing something productive. And  
19 also it does take a while to get authority to do  
20 Subcommittees. I mean it is, unfortunately, not  
21 under the Federal Advisory Committee Act, not  
22 something that is automatic. The Chair has got



1 to go back and ask for it. And then they are  
2 going to ask questions about do you want only  
3 your people or do you want other new people that  
4 we have to appoint because they can do that for  
5 us. Who is going to be the Chair of each one of  
6 these things? Have you given them names?  
7 Although I think the name we gave the JPP  
8 Subcommittee was very clever -- Subcommittee.

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

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

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

19 CHAIR BASHFORD: Just one thing I want  
20 to add is that my understanding is that the  
21 Secretary of Defense can ask this committee to  
22 provide advice on issues of interest to him as

1 well. So far, we have no request that I am aware  
2 of. But that is something that could be in the  
3 future.

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

13 What we would have to decide is when  
14 we do -- first of all, what type of materials are  
15 we going to need to do an effective review and  
16 develop what sort of metrics. What sort of data  
17 are we asking or what are we looking for in that  
18 case review? So we have a logical pattern of  
19 what things we need to look for. And we all have  
20 a degree of expertise that we can look at, which  
21 is great. We can look at it with 20 different  
22 sets of eyes with their experience.

1 I just finished or I am in the process  
2 of doing a review with a civilian law enforcement  
3 agency. And as I am doing these case reviews, I  
4 am identifying some of these concerns like data  
5 collection, like it is not being appropriately  
6 documented and it is not being collected. I can  
7 tell by some of these investigations there is a  
8 lack of training and experience by the  
9 investigator or the first responders. I can say  
10 that there are practices that you could see  
11 within an investigative review or a case review  
12 to say hey, you know what, I know of a practice,  
13 policy or best practice in the civilian world  
14 that would apply very well for that.

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

22 DR. MARKOWITZ: I would just add to

1 that, though, that if we are interested in  
2 understanding the general issues related to what  
3 is happening with restricted reports and why  
4 people aren't coming forward, and, obviously, we  
5 don't really have a whole lot of data, except for  
6 raw numbers in terms of just the sheer number of  
7 folks who are not reporting, then one of the  
8 other things, while I agree very much with you,  
9 we may also want to look at convening focus  
10 groups with folks who are able to take restricted  
11 reports within the military, so chaplains,  
12 medical, our SARCs, and then the VLCs and SVCs,  
13 and actually have a focus group with those folks  
14 to say what are you hearing from victims about  
15 their reticence to report. Why aren't they  
16 reporting? What is causing people to flip their  
17 reports to unrestricted, potentially, or when  
18 they are considering whether -- you know what are  
19 the thought process behind it? What are you  
20 hearing as first responders? To be able to give  
21 us at least some illustration of what is  
22 happening on the restricted side of the fence.

1 CHAIR BASHFORD: It would also be  
2 interesting to find out is that a truly informed,  
3 voluntary decision of the person --

4 DR. MARKOWITZ: Yes.

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

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

17 So I think there may be as much  
18 pressure, potentially, that we don't recognize to  
19 not report because of the perception on the part  
20 of professionals who are interacting early on  
21 with victims about the utility of doing so. And  
22 that is just not something that we have ever

1 talked about. And so I think both of those  
2 things are worth exploring.

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

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

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

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

14 CHAIR BASHFORD: Sorry. I take that  
15 back.

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

18 CMSAF MCKINLEY: Sure.

19 DEAN HARRISON: Is there a way to --  
20 I'm not sure if there is an organization of  
21 command enlisted advisors or if there is a way to  
22 communicate because it seems to me that the

1 command enlisted advisor would have his or her  
2 finger on the pulse of whether or not a young  
3 victim of sexual assault perceived reporting as  
4 detrimental to career advancement.

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

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

21 DEAN HARRISON: I speak because I had  
22 occasion this week to a young woman -- well not

1 young anymore but a woman who had spent a career  
2 in the Army. And I was asking her to speak to  
3 some women who were thinking about enlisting and  
4 she refused to do it. I asked her why and she  
5 said that she had been the victim of sexual  
6 assault on several occasions in her military  
7 career and not reported it because she wanted to  
8 stay in the Army.

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

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

22 And so it is easier to say I am out of



1 here. And that is a shame because well they are  
2 a valuable resource. We have spent hundreds of  
3 thousands of dollars training them and they  
4 should have the opportunity to still have a  
5 career but they give it up because they were a  
6 victim. And we have got to fix that.

7 MS. TOKASH: This is Meghan Tokash  
8 speaking again. I am also just going to throw  
9 this out here but we are in a pretty nice  
10 position, since we are here for five years, to be  
11 able to follow the life of an actual case. And  
12 that is probably something that the two  
13 predecessor Panels had not been able to do. They  
14 had been following statistics and cases. And I  
15 understand that is part of our charter as well  
16 but I think we would really be missing an  
17 opportunity if we didn't take advantage of that.  
18 And obviously, at some point when the case  
19 evolves into a public trial, that would be a real  
20 opportunity for us, as Members, to comment on and  
21 observe how the process is played out. So, I  
22 think that that might be something we should

1 consider as well. And that might entail a site  
2 visit or several site visits but that might be a  
3 very worthy cause.

4 MS. LONG: That's a great idea.

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

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

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

22 MS. GARVIN: I will echo that. On the

1 victims that can be, we did site visits, and they  
2 were incredibly useful because we learned things  
3 that we didn't learn in the formal testimony.

4 BGEN. SCHWENK: Right.

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

22 CHAIR BASHFORD: Mr. Kramer, we

1 haven't heard anything from you yet.

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

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

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

22 It seems to encompass almost

1 everything everybody has brought up is, "Does it  
2 include this?" because that's an allegation  
3 involving a member of the Armed Forces.

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

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

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

1 "allegations."

2 CHAIR BASHFORD: It's very broad.

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

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

10 CMSAF. MCKINLEY: 2013?

11 DR. SPOHN: 2014?

12 CHAIR BASHFORD: So not that long ago.  
13 No, we're not talking about something from -

14 (Simultaneous speaking)

15 MS. GARVIN: And was the RAND -

16 BGEN. SCHWENK: They used to always  
17 roll them out in the Spring when the Sexual  
18 Assault Prevention and Response Office did them,  
19 and then RAND did them afterward, say right  
20 around in the Spring, and they were based on the  
21 prior year's numbers. So if last Spring was  
22 2016, it would have been 2015 numbers. Whether

1 fiscal year or calendar year, I don't know, but  
2 2015 would have been that.

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

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

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

22 DR. SPOHN: A good place to start

1 would be the response. The RSP had waterfall  
2 slides from each of the Services that sort of  
3 depicted the flow of cases from the allegation to  
4 completion, and so those should be available.  
5 Those waterfall slides should be available on the  
6 website, I would think.

7 CAPT. TIDESWELL: Yes, ma'am.

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

14 CHAIR BASHFORD: Adult.

15 MS. GARVIN: Yeah, so we have a gap  
16 also if we include, and I - our charge allows us  
17 to include children, and I would say that it is  
18 something that should be looked at, then we have  
19 a gap in data, a different gap in data there.

20 CHAIR BASHFORD: But that doesn't mean  
21 that the Services haven't -

22 MS. GARVIN: Correct.



1 CHAIR BASHFORD: They might have  
2 collected that.

3 MS. GARVIN: They might have. Ms.  
4 Anderson, you haven't said anything.

5 MG ANDERSON: I've been listening. In  
6 part of our presentation this morning, and it may  
7 have been new to some of the folks in the room  
8 who are not in the military, but there is a  
9 disparity in consequences for enlisted and  
10 officers when you may have very similar facts and  
11 circumstances.

12 And I don't know that that's going to  
13 fall within our charter, but I can't help but  
14 think at some point we may find someone asking us  
15 that question. Why is there an instance where  
16 you will find an enlisted soldier who is busted  
17 to E-1, and you will find an officer who doesn't  
18 suffer the same fate?

19 I think these days, it's probably a  
20 fair question, and there may be some history  
21 behind that, but I think we took a similar oath,  
22 and I think we have a similar ethos, or we should

1 have a similar ethos when it comes to our fellow  
2 Servicemembers.

3 So having, I think, that disparity  
4 between how - the outcomes for officers and  
5 enlisted, I think it's a question we may want to  
6 consider, maybe not at this point, but as we  
7 review cases, we may find ourselves looking at,  
8 as I said, similar fact patterns, and finding  
9 very different outcomes.

10 CHAIR BASHFORD: I think there's very  
11 little that doesn't fall under our charter. One  
12 thing I personally would like some clarification  
13 on, one of the earlier speakers talked about the  
14 - in the civilian world, we call them plea  
15 bargains. I thought it was, what, negotiated  
16 plea in secret.

17 BGEN. SCHWENK: Pre-trial agreements.

18 CHAIR BASHFORD: And well, but then I  
19 thought they said they went to court-martial  
20 anyhow. Is that correct?

21 BGEN. SCHWENK: Mm-hmm.

22 CHAIR BASHFORD: So that's - how is

1 that a plea if you're still going to a  
2 court-martial?

3 HON. BRISBOIS: It's a sentencing  
4 trial only, and that's adversarial, just as is  
5 the guilt and innocent phase, and that's what  
6 they referred to as "beating the deal."

7 CHAIR BASHFORD: Yeah.

8 HON. BRISBOIS: So the incentive for  
9 the defense is to get the military judge or the  
10 panel to come in below what the convening  
11 authority agreed to.

12 BGEN. SCHWENK: So you go to trial.

13 HON. BRISBOIS: Right.

14 BGEN. SCHWENK: And under the  
15 pre-trial agreement, the accused has agreed to  
16 plea to certain offenses, all of them, some of  
17 them, whatever, and so the judge takes the pleas,  
18 then you go right into sentencing.

19 And when they go into sentencing after  
20 the pleas, the defense puts on its "why I'm a  
21 good guy" and the Government is "why you're not a  
22 good guy" and the judge or the members, whoever

1 is doing it, usually it's a judge alone in a  
2 pre-trial agreement, announces a sentence, and  
3 then they open the magic pre-trial agreement and  
4 decide whether you get the benefit of the  
5 pre-trial agreement, or if the sentence was lower  
6 than the pre-trial agreement, so you get the  
7 sentence.

8 CHAIR BASHFORD: But if there's a  
9 plea, there's still not a fact finding? Is that  
10 correct?

11 BGEN. SCHWENK: Right, there isn't.

12 CHAIR BASHFORD: Okay.

13 BGEN. SCHWENK: It's a plea. It's  
14 just a plea.

15 LT. COL. STINGL: If I could just  
16 interrupt for a moment, we still have the benefit  
17 of having this morning's first speaker who is the  
18 renowned expert on military justice.

19 BGEN. SCHWENK: But we're tired of  
20 hearing from him.

21 (Laughter)

22 LT. COL. STINGL: If you'd like to

1 weigh in on relevance or any of the -

2 BGEN. SCHWENK: You're welcome, Dwight.

3 LT. COL. STINGL: - any of that, I'm  
4 sure -

5 HON. BRISBOIS: I'm sure it hasn't  
6 changed that much since I was a trial counsel, at  
7 least in terms of once you're in front of a  
8 judge. The pre-trial agreement's usually  
9 accompanied with some stipulated fact record that  
10 the fact finder gets to, you know, assess all of  
11 the good conduct/bad conduct character evidence.

12 BGEN. SCHWENK: All the aggravation  
13 that the government wants will be in there.

14 HON. BRISBOIS: So there will be some  
15 factual record. It's usually a stipulated record.

16 LTC. LEWIS: I'd like to add, ma'am,  
17 the judge actually has to question the accused to  
18 make sure that he is agreeing with the terms of  
19 the charges to which he is allegedly pleading  
20 guilty, so we go through a providence inquiry and  
21 he is asked.

22 He goes through each charge and he

1 says, "Did you do this?" and he has to explain to  
2 the judge exactly how and why he did what he did.  
3 And if the judge finds him to be provident, then  
4 they go into the sentencing. He'll accept the  
5 plea of guilty. Because there are times when,  
6 based upon his explanation, he's not provident.  
7 He's not pleading to the actual charges.

8 CHAIR BASHFORD: But is there an  
9 analogous system as there is in the civilian  
10 world? I'm a prosecutor. I'm looking at this  
11 case. I don't like the case. I don't like the  
12 victim. The defendant seems like a - the accused  
13 seems like a good person.

14 Is there a way to, as part of a plea,  
15 to lower the charges? "So you're charged with  
16 this, but I'm going to let you plead to this."

17 MS. GALLAGHER: Yes, ma'am, they can  
18 plead to a lesser offense.

19 CHAIR BASHFORD: Okay.

20 MS. GALLAGHER: Absolutely, yes.

21 CHAIR BASHFORD: So I think that's  
22 something we would want to see as well,

1 particularly when you brought up the difference  
2 between enlisted and officer, not just in  
3 outcomes, but during the progress of a case. Are  
4 they being offered a better outcome, not just  
5 getting a better outcome?

6 DEAN HARRISON: But I think the - this  
7 is Keith Harrison. I think the vision might be  
8 even further in the upstream when you compare it  
9 to the civilian world, because as a civilian  
10 prosecutor, you're just handling the criminal  
11 sphere, whereas the convening authority, and in  
12 the military that's the person that supplies the  
13 prosecutory discretion who is not necessarily a  
14 lawyer, might want to disclose -

15 For example, the perception might be  
16 that officers get to end their careers without  
17 going to any type of criminal arena for  
18 misconduct. I'm not just talking about sexual  
19 assault, whereas an enlisted person who engaged  
20 in the same conduct, again not just sexual  
21 assault, does not have that option of resigning  
22 and going home, so to speak. It's gotten quiet.

1 CMSAF. MCKINLEY: I would like to  
2 gather the information. Get all of the data sent  
3 to us from the RSP and the statistics from RAND  
4 or whatever, and I'd like to have enough time to  
5 digest it to see what questions that I have of  
6 it, and then with that, send an email to the  
7 group.

8 Each one of us does that. We send an  
9 email on what our concerns are, and then we  
10 possibly have a conference call and we combine  
11 those, and in that conference call, we kind of  
12 set the agenda for when we meet in person again,  
13 and then possibly have a couple of cases that we  
14 review, and that way we have a road ahead, and  
15 we've all - we have something set for when we  
16 come the next time.

17 MS. CANNON: Can I ask you a question?

18 CMSAF. MCKINLEY: Sure.

19 MS. CANNON: When you say "the data,"  
20 you're talking about these other two panels that  
21 have done a lot of work?

22 CMSAF. MCKINLEY: Yeah, that, plus all



1 of the statistical of each branch of Service and  
2 how many we've had and all. Yeah, so if we just  
3 had a time to digest that, and especially for  
4 those who have not been in the military, to  
5 really, you know, see what's out there.

6 HON. GRIMM: I have a question just in  
7 terms of availability of the information, where  
8 and how to access it. Is it possible to have a  
9 website that we all have access to so it's a  
10 shared cloud environment that we can go and click  
11 on it, rather than each one of us getting the  
12 same stuff, having to open it up, figuring out  
13 where we're going to file it, and how we're going  
14 to read it, where it's going to be.

15 If we could set up - if we had access  
16 to a site that was just simply the data  
17 repository that we're all looking at, so that if  
18 we had 15 case files and the reports from the  
19 other two committees that had already provided  
20 their reports, we could look at it whenever our  
21 schedules allow us to do it as long as we have on  
22 site access.

1 I'm sure it's not difficult to get  
2 password protection so that it's not - so there's  
3 adequate security, and we all have the same  
4 ability to see that shared source access to  
5 information.

6 LT. COL. STINGL: In accordance with  
7 the Federal Advisory Committee Act, any  
8 information that you all review, and any - if  
9 there's a meeting, a Committee meeting, I'll just  
10 offer the definition that FACA offers.

11 It's, "any gathering of Advisory  
12 Committee members, whether in person or through  
13 electronic means, held with approval of an agency  
14 for the purpose of deliberating on the  
15 substantive matters upon which the Advisory  
16 Committee provides advice or information." So we  
17 could definitely make the information available  
18 to you, but at the same time, any information  
19 that's made available to you also has to be -

20 HON. GRIMM: I have no problem with it  
21 being available to anybody who wants to see it.  
22 I just want to have a shared location where we

1 can look at it so we don't have to click, and  
2 save, and do all of that. It would just make it  
3 easier to look at.

4 DR. MARKOWITZ: I have concerns.  
5 Yeah, if we're looking at whole cases, that  
6 includes things like medical evidence, and  
7 genital photos, and like all - everything is  
8 losing in my mind right now.

9 So I agree that it would be nice to  
10 have like a central place you can get  
11 information, but I do think as we proceed, and  
12 again, that's why we need to talk about are we  
13 going to talk about kids?

14 I mean, there are some very specific  
15 privacy concerns related to review of cases and,  
16 you know, safety of individuals, and things like  
17 that that we, I think, need to be mindful of.  
18 Even for cases that have been adjudicated, we  
19 can't - I mean, we need to be thinking about sort  
20 of the second and third order of effects here.

21 So I understand, like, from an  
22 expediency perspective, but if we cannot have a

1 central place that's just ours, then I would  
2 really want to make sure that we're very careful.

3 HON. GRIMM: Well -

4 BGEN. SCHWENK: Okay, all the  
5 information that we're going to get is going to  
6 come from somewhere else, right? We're not going  
7 to generate it ourselves. So when a Federal  
8 Advisory Committee gets information from the  
9 outside and it comes from the Government, it's  
10 marked.

11 It's either unmarked, which means it's  
12 open to the public and by law, we have to let the  
13 public have access to it, so that's that, or it's  
14 classified, in which case we can get access to it  
15 if we get clearance, and we won't in this  
16 Committee need it, but we could get access, but  
17 we couldn't let the public see it.

18 But the other one is for official use  
19 only kinds of stuff, the privacy stuff, the  
20 medical stuff, the - and that's supposed to be  
21 marked by whoever's delivering it to us. So  
22 let's say we heard about the Smith case from five

1 years ago and it was a big deal, and there are a  
2 lot of lessons learned supposedly, and we asked  
3 the Service involved to send us the Smith case.

4 They should send it to us and either  
5 say, "Look, this has been released to the public.  
6 Everybody has already got it," in which case our  
7 obligation, regardless of what's in there, is  
8 released to the public.

9 It's already been out there for them,  
10 or they would send us something and say, "This is  
11 all public and this ain't, and we are denying  
12 Freedom of Information Act requests for this  
13 information for these reasons," and so then we're  
14 obligated to follow that.

15 So we don't have to make those  
16 decisions. We just have to make sure whoever is  
17 providing us the information remembers -

18 DR. MARKOWITZ: Okay.

19 BGEN. SCHWENK: - to mark it  
20 appropriately before they send it.

21 DR. MARKOWITZ: Great.

22 BGEN. SCHWENK: And then we follow

1 what they tell us.

2 HON. WALTON: Can I add something?  
3 Whenever you talk about criminal justice issues,  
4 there's always the elephant in the room that  
5 sometimes people don't want to talk about, and  
6 that's the issue of race.

7 And I know in the civilian world,  
8 there's significant disparity when it comes to  
9 race when it comes to conviction rate, when it  
10 comes to sentencing, when it comes to charging  
11 decisions, and if it's a reality in the civilian  
12 world, it has to be a reality also in the  
13 military world.

14 And it's something that we can't hide  
15 from, and it's something that needs to be looked  
16 at because I would suspect that if it hasn't been  
17 looked at, it's just like we have found in the  
18 civilian world, that there are problems along  
19 those lines.

20 MS. CANNON: A similar note would be  
21 sexual orientation.

22 MR. KRAMER: Can I ask a logistical

1 question? When we talk about either a case file  
2 or an investigative file, where - are they in an  
3 electronic form or hard copy form, and where are  
4 they kept? Are they kept at the location or are  
5 they in a central repository somewhere also?

6 CAPT. TIDSWELL: I would argue that  
7 typically they are not electronic. I believe a  
8 majority of the records would be in a hard copy.  
9 If they were investigative files, they probably  
10 rest at the various investigative agencies. So  
11 for instance, with the Navy, it would be with the  
12 Naval Criminal Investigative Service.

13 Records of trial, I think are based on  
14 where they are in the particular court process.  
15 There is sort of an end stop for them where they  
16 come to sort of, I'll call it the headquarters  
17 for the various Services within the JAG Corps,  
18 you know, either at the appellate level, or, you  
19 know, there's a repository. Everybody has their  
20 own offices if the trial is over at the end of a  
21 trial.

22 And so, but I would argue that a

1 majority of these documents are not electronic.  
2 They are in hard copy.

3 MR. KRAMER: And do you have any feel  
4 for like an average? Is it like a red wall? Is  
5 it a banker's box?

6 CAPT. TIDESWELL: I would argue, sir,  
7 that sexual assault cases are very voluminous.  
8 It would take hours to go through.

9 SGT. MARKEY: Madam Chair, then I  
10 guess I would ask for some guidance on what would  
11 be the best logistical process for trying to  
12 actually review a case, and I don't just think of  
13 written documentation.

14 I think of audio, video tapes,  
15 photographs, crime scene diagrams, witness  
16 written statements. I'm sure those are all part  
17 of a case file, and I'd love for you to mail me  
18 all of those case files. I think your budget  
19 would probably go over on that one.

20 So logistically, you know, do we need  
21 to think about, how can we actually do that? And  
22 I can tell you with the cases that I reviewed, it



1 took me six months to go through all of these  
2 cases, and some were thick. Some were very thin.  
3 I also did review of listening to audio and  
4 watching videotapes.

5 You know, if you want to do a complete  
6 and thorough review, it's more than just reading  
7 the report. And I'd also charge that we do  
8 really need to know what's going on in the field.  
9 They are the ones on the front line. They're the  
10 ones that are in the trenches. They're the ones  
11 that are having to work with these  
12 recommendations and work with these changes, and  
13 is it working or not?

14 And that's where I think we'd break  
15 down, and I think we would see, you know, is it  
16 working? And if it's not, are there other  
17 recommendations or other things that we need to  
18 look at? And we really present this as we're  
19 from the government, we're here to help, right,  
20 as opposed to we're going to audit, and we're  
21 going to assess, and we're going to evaluate.

22 I think what we want to present this

1 as we're really looking for, what do you need to  
2 help do your job better and to help serve the  
3 victims of sexual violence in the military?

4 These are no different in communities, in  
5 universities and colleges, on Indian  
6 reservations. It's all these core set of  
7 barriers and concerns and issues that are going  
8 on within sexual violence.

9 So I kind of digress, but I'm thinking  
10 of logistically how this group would take a file  
11 that's 12-inches thick and do a real good  
12 technical review, and then the question is how  
13 many of those cases do we do, and what's the  
14 sample of cases that we look at?

15 And so, I think we got to decide  
16 logistically how - what that would look like.  
17 And I totally get the privacy and the information  
18 in there that, you know, we could have somebody  
19 go and redact.

20 MS. TOKASH: I mean, there are also  
21 going to be portions that are going to be sealed,  
22 I'm assuming, M.R.E. 513 hearings, genital

1 photos, psychotherapist/patient records, things  
2 like that that we will never have access to.

3 So this is Meghan Tokash again  
4 speaking. You know, there are going to be some  
5 portions of cases that we review historically  
6 that we'll never have access to because they've  
7 been judicially sealed.

8 DR. MARKOWITZ: If they went that far.

9 MS. GARVIN: And I would also, while  
10 I know there are processes in place to ensure the  
11 transfer of information, that the person on the  
12 sending end marks things appropriately. I always  
13 have concerns about that, so that the moment it  
14 hits us, it is public, and again with a spotlight  
15 on it that is really problematic.

16 And so before we say we want a case,  
17 I think we need to have really detailed, through  
18 our future meetings, what do we need? Where does  
19 the anonymizing happen? When does it make its  
20 way here, and how are we sure that we have not  
21 put someone in jeopardy to the best of our  
22 ability by having it here?

1 CHAIR BASHFORD: Could we get some  
2 clarification on the FACA rules, I guess?  
3 Because clearly when you are doing site visits  
4 and you're gathering information, that is not  
5 public. It's not open to the public.

6 BGEN. SCHWENK: Right.

7 CHAIR BASHFORD: So if we -

8 CAPT. TIDESWELL: Yes, ma'am, the key  
9 to that was the subcommittee.

10 CHAIR BASHFORD: Okay.

11 CAPT. TIDESWELL: So if you broke  
12 yourselves off, if you so desire, into  
13 subcommittees, that would give you perhaps the  
14 level of sort of -

15 BGEN. SCHWENK: That's one of the  
16 advantages of using subcommittees.

17 CAPT. TIDESWELL: Yes.

18 CHAIR BASHFORD: Then I think we have  
19 to do that for records.

20 (Simultaneous speaking)

21 BGEN. SCHWENK: - but it's not open to  
22 the public. You can - now, the subcommittee

1 doesn't have any authority to do anything except  
2 one thing, report back to the big Committee.

3 LT. COL. STINGL: And I'll just -

4 BGEN. SCHWENK: And that's it. So in  
5 the big Committee, so you have to work out what  
6 to do next.

7 CHAIR BASHFORD: Lieutenant Colonel?

8 LT. COL. STINGL: For reference, I'll  
9 just read into - for the definition for  
10 subcommittee would be probably useful and  
11 helpful, "A group, generally not subject to the  
12 Federal Advisory Committee Act, that report  
13 reports to an Advisory Committee and not directly  
14 to a Federal officer or agency, whether or not  
15 its members are drawn in whole or in part from  
16 the parent advisory committee."

17 MR. KRAMER: Can I ask another  
18 logistical question? I know from MEJA cases that  
19 there's a fair number of sexual assault cases or  
20 misconduct cases that happen overseas. The cases  
21 we saw, is there a feel for how many of those  
22 occurred domestically and how many of them

1 occurred over - outside of the United States?

2 CAPT. TIDSWELL: I do not have that  
3 feel, sir. We could see if it's been parsed down  
4 within the RAND study.

5 MR. KRAMER: Because I guess there  
6 were about 500 general court-martials, right, on  
7 sexual assault cases, and I'm just curious how  
8 many of those were alleged in the United States  
9 and how many overseas.

10 CAPT. TIDSWELL: That would be easy  
11 to determine if you wanted us to go back and look  
12 at the 500. That's a data point we could - we'd  
13 just have to look at the charge sheet where the  
14 offense occurred.

15 MR. KRAMER: And then did the overseas  
16 installations, if it's just an allegation and it  
17 stopped at the investigative stage, did they -  
18 they would have a file on that, but it would be  
19 in the overseas - on the base or wherever, the  
20 installation?

21 CAPT. TIDSWELL: Or the Headquarters  
22 might be tracking that, so in other words, NCIS

1 Headquarters would probably know what's happened  
2 out in their various field offices.

3 DEAN HARRISON: Do we have any data on  
4 sexual assault instances where one of the parties  
5 was in the military, but that was handled by  
6 state and local prosecutors for whatever reason?

7 CAPT. TIDSWELL: Yes, sir. I believe  
8 we would be able to determine that, yes, sir.

9 MG. ANDERSON: This may have already  
10 come up in our discussion and I may not have been  
11 following it, but do we know - I think you were  
12 kind of going in that direction.

13 Do we know how many people who were  
14 victims who elected to leave the military, how  
15 many have decided to say, and maybe, as you said,  
16 maybe have gotten reclassified?

17 But we probably need to look at that  
18 as well, and also break that down into restricted  
19 and unrestricted. I don't know if you could pull  
20 that data, Doctor, but there may be some way to  
21 do that.

22 DR. SPOHN: I don't have any data on

1       unrestricted.

2                   CAPT. TIDSWELL:   So General, one of  
3       the options you all have available is something  
4       we all refer to as an RFI, which is a Request for  
5       Information, and it's something that the staff  
6       would develop based on sort of the answers you  
7       were - the information you were looking for, and  
8       then we can send it to the various Services just  
9       inquiring, "What data do you have? Do you keep  
10      it? Do you parse it out?" and you know, just to  
11      find what it is you all are looking for, and we  
12      typically go through our Service representatives  
13      that each Service provides to the panel and give  
14      them a timeline, and so we could at least ask the  
15      question if you so desire.

16                   MS. CANNON:   Off of what Rodney had  
17      said about how to go forward, I think that one  
18      suggestion of doing this background review to see  
19      how we go forward, what do we know? What don't  
20      we know? What are our questions?

21                               Before we look at a file and don't  
22      know what we're doing with that file, perhaps we



1 could break down, because we need subcommittees  
2 apparently, break down into areas of concern and  
3 look at this history.

4 Put together some questions that we  
5 think need to be answered or investigated further  
6 under those concerns, because I've written down  
7 11 concerns that have been raised here, and if we  
8 have, like, I don't know, four or five that we  
9 want to delve into, maybe we'd learn a lot.

10 CHAIR BASHFORD: When we form a  
11 subcommittee, which I understand the process you  
12 have to go through, does - is there a specific  
13 task or agenda given to the subcommittee or can  
14 it change over time?

15 CAPT. TIDESWELL: Typically, the Chair  
16 of the Committee, you all come up with what you  
17 expect of the subcommittee, and it's written  
18 down, so it's a formal document tasking them with  
19 whatever it is you would like them to be tasked  
20 with.

21 BGEN. SCHWENK: But it's internal to  
22 the -

1 CAPT. TIDSWELL: It is.

2 BGEN. SCHWENK: -Committee that owns--

3 CAPT. TIDSWELL: Yes.

4 BGEN. SCHWENK: - the Chair.

5 CHAIR BASHFORD: And if the Chair - it  
6 could be very broad.

7 BGEN. SCHWENK: So you run that.

8 CAPT. TIDSWELL: And it's flexible,  
9 and if, you know, monthly we want to change it,  
10 then you just issue another -

11 MS. CANNON: You could just number  
12 them.

13 CHAIR BASHFORD: Given the process  
14 that needs to go forward, it would seem to be  
15 trying to establish a certain number of them,  
16 even if we don't have at the moment exactly what  
17 they're going to do. It might be helpful to just  
18 start the process if the Secretary of Defense has  
19 to approve it. Is that like a 48-hour turnaround?

20 LT. COL. STINGL: I guess what would  
21 be helpful to you is again, in the definition of  
22 subcommittee, and like General Schwenk was great

1 to point out, if you want to, it's a much easier  
2 approval process if you just want to form a  
3 subcommittee from the parent Advisory Committee,  
4 because then we're not approving new members.

5 So that's quicker, but of course if  
6 you want to add some subcommittee members, yes,  
7 they have to go through the whole approval  
8 process like you all did to be appointed as well,  
9 so that would take a bit more time.

10 LTC. LEWIS: Although you all did your  
11 approval period in record time.

12 LT. COL. STINGL: This is true. This  
13 is very true.

14 MR. KRAMER: Well, one of the reasons  
15 these other committees, they were much smaller,  
16 so they needed outside people on their  
17 subcommittees. I guess we have to figure out  
18 whether we can staff the subcommittees ourselves.

19 BGEN. SCHWENK: Do it ourselves with  
20 what we have.

21 MR. KRAMER: Yeah, there's 16 of us.  
22 The other biggest one, I think, was nine, right,

1 and one was five, so I think -

2 CHAIR BASHFORD: Well, 16 divides into  
3 four very nicely. It would seem to me that if we  
4 could set up four with a very broad agenda,  
5 because I take what Judge Brisbois said to heart,  
6 that you can't know what you're going to do until  
7 you don't know what you don't know, although he  
8 said it much more eloquently.

9 But if we got that approval process,  
10 we would then have a vehicle by which we could,  
11 when it's time to do so, actually look at cases.

12 CMSAF. MCKINLEY: You know, another  
13 side thing that, when you talk about sexual  
14 assault and rape, a side effect of all of this is  
15 what it does to our national security interests.  
16 And many of you know about cases in Okinawa where  
17 we've raped, you know, there have been rape cases  
18 military against civilian in another country,  
19 Korea, and I could name several other countries.

20 And now, you know, very possibly, we  
21 may have to move out of those countries or, you  
22 know, change our agreements with them. So the

1 impact of military sexual assault is not just,  
2 you know, on that local base or whatever. It's a  
3 national security issue.

4 MS. LONG: I guess I would just say I  
5 agree with forming the subcommittees, but I've  
6 been listening to the concerns, but is there a  
7 way to form the subcommittees, but to just get  
8 some consensus around the concerns to make sure  
9 that they're organized right before they get  
10 assigned to a committee? I guess, Martha, I'm  
11 asking you because you're the Chair, before we  
12 commit to -

13 CHAIR BASHFORD: Is our membership  
14 fluid as long as it's within the committee  
15 itself? Can we change subcommittees?

16 CAPT. TIDESWELL: Yes, ma'am.

17 LT. COL. STINGL: Yes, ma'am.

18 CHAIR BASHFORD: So I wouldn't be that  
19 concerned about it yet -

20 MS. LONG: Okay.

21 CHAIR BASHFORD: - because -

22 MS. LONG: Okay.

1 CHAIR BASHFORD: I would just like to  
2 get the legal authority to be able when necessary  
3 to get cases to review, and then as we decide  
4 that maybe we want to look at an investigation  
5 here, or maybe we want to look at different  
6 things here, we can, I think then we could -

7 MS. LONG: That's all I meant.

8 CHAIR BASHFORD: - just change it.

9 MS. LONG: Yeah, just -

10 CHAIR BASHFORD: The less we have to  
11 decide right today, I think the better.

12 MS. LONG: Perfect, yeah.

13 MS. CANNON: It seemed that the  
14 documentation that was generated by the other  
15 panels was pretty voluminous, and it would be  
16 good if we could kind of break that down into  
17 different areas of interest, some people looking  
18 into one thing, some people looking into others.

19 There have been different things  
20 raised here, and then coming back with the  
21 suggestions in those areas. Otherwise, we're all  
22 reading everything, and I'm not sure if that's as

1 helpful. So I would suggest that we maybe break  
2 it down into three areas or something.

3 CHAIR BASHFORD: The only problem I see  
4 with that since I don't know what it is, is like  
5 how do we - I think we sort of have to take a  
6 high altitude look at it and then break it down.

7 MS. CANNON: Okay.

8 CHAIR BASHFORD: It's just hard to  
9 say, "Let's have a group look at this part of  
10 it," since I don't know what it is.

11 MS. CANNON: Okay.

12 CHAIR BASHFORD: Unless somebody is  
13 much more familiar with it.

14 BGEN. SCHWENK: Maybe, well, I'm  
15 thinking off the top of my head. If we're going  
16 to start by reviewing what's already there so we  
17 can get to wrap our - one subcommittee might  
18 start by being the RSP subcommittee, and their  
19 job is go through all of the RSP data, all of  
20 their reports, all of everything, and make sense  
21 out of it all in a condensed version to brief the  
22 rest of us that are not on that subcommittee.

1                   Another one does that for the JPP.  
2                   Another one does that for other data that's  
3                   available. You know, go to the Services and see  
4                   what's there starting from the beginning to the  
5                   end, and so they can come and say, "This is what  
6                   - and you're never going to get this," or, "They  
7                   don't collect that," or - so when we got back  
8                   together as the big Committee, at least we'd have  
9                   those in for us all to look at and start  
10                  analyzing.

11                  And if the subcommittee wrote little  
12                  summary reports, they could send those out to  
13                  everybody before we showed up, like the  
14                  read-ahead, which would give us a chance to read  
15                  it a week ahead of time, and think about it, and  
16                  come here ready to discuss how we want to then  
17                  proceed based on what they've done in the past.

18                  SGT. MARKEY: Madam Chair?

19                  CHAIR BASHFORD: Well, it's better  
20                  than reading it all.

21                  SGT. MARKEY: I was going to say are  
22                  there not in some ways executive summaries, I'll



1 call them that, with those subcommittees already  
2 that they've compiled? Do we know?

3 CAPT. TIDSWELL: Each of the reports,  
4 the first couple of pages is literally the  
5 executive summary of the findings and  
6 recommendations.

7 SGT. MARKEY: Yeah, but I'm wondering  
8 how comprehensive that is compared to if we were  
9 to go through it, we'd find other things, okay.

10 BGEN. SCHWENK: It's like any  
11 executive summary. It's good for most reasons,  
12 but not if you really care about what's in it.

13 SGT. MARKEY: Okay, okay.

14 DR. SPOHN: It's just going to be the  
15 highlights.

16 SGT. MARKEY: Okay.

17 MS. CANNON: I move to what he said.

18 CHAIR BASHFORD: Yes, I think the  
19 executive summary is not going to be sufficient  
20 for our purposes.

21 SGT. MARKEY: Okay.

22 BGEN. SCHWENK: I mean, it is a good

1 start, but I think we want more.

2 DR. MARKOWITZ: The other question I  
3 have is have we taken a look at what the  
4 scientific literature has to say about  
5 experiences with sexual violence in the military  
6 in terms of, I mean, there have been some - I  
7 mean, there is a body of research that's out  
8 there that looks at, you know, obviously the  
9 short and long-term consequences health-wise and  
10 things like that, but there are also some studies  
11 that take a look at, you know, decisions around  
12 reporting, and involvement with the justice  
13 system, and that sort of thing, and has anybody  
14 taken a look at that so that we have that  
15 literature also available to us to -

16 I mean, it's wonderful to have RAND  
17 and have the internal stuff, but there is some  
18 publications within the peer reviewed literature,  
19 the scientific literature.

20 CHAIR BASHFORD: That are specific to  
21 the military?

22 DR. MARKOWITZ: That is specific to

1 the military. I'm familiar with all of the stuff  
2 from the healthcare side of things, but I know  
3 that there is other stuff as well because, you  
4 know, I mean, we've turned to that in terms of  
5 curriculum writing and whatnot.

6 So I do think that if we're going to  
7 take a look at the literature and the statistics,  
8 we probably do need to look at the stuff that's  
9 been published, you know, externally as well.

10 BGEN. SCHWENK: Which, if we had a  
11 subcommittee for the RFP, the JPP, and internal  
12 DOD information, the fourth one could be external  
13 information -

14 SGT. MARKEY: External, yeah.

15 BGEN. SCHWENK: - Bureau of Justice  
16 statistics, what's available there, you know, so  
17 that we had a listing, and when we got back  
18 together, we could say, "Yeah, number six on that  
19 list, number," you know. That's what we need to  
20 have.

21 SGT. MARKEY: Yeah.

22 HON. BRISBOIS: I'm still a little bit

1 at a loss for in order to put parameters around  
2 those reports, how do you identify the relevant  
3 material to report back without a clear  
4 definition of what as a group we have decided our  
5 charter is going to be? We'll end up making  
6 decisions. The different parameter set will have  
7 four different charter decisions without a  
8 unified one.

9 So, I mean, it seems to me our - we  
10 had five years to work on this, and the next six  
11 months, certainly the next quarter before the  
12 next meeting, the real meat and potatoes of what  
13 we should be doing ought to be to define that  
14 specific part.

15 "Review cases," what does that mean,  
16 and then how much of that broader authority do we  
17 want to exercise, and how? Without that, we're  
18 all going to be coming up with different  
19 priorities and different relevant reporting, and  
20 we won't be meshing.

21 So I'm seeing some inefficiencies in  
22 just going out and gathering data with

1 preliminary reports without that threshold being  
2 clearly established.

3 CHAIR BASHFORD: My understanding, and  
4 maybe I'm wrong, is that this would not be to in  
5 any way define our task, but just to have a  
6 better understanding of what has preceded us.

7 HON. BRISBOIS: But everybody's going  
8 to be making relevancy determinations on what to  
9 include in their reports based on what they think  
10 the priority of the Committee as a whole is going  
11 to be, and so, you know, each Committee is going  
12 to be making different priority decisions.

13 And then once, if we wait until after  
14 the subcommittee work to come up with a unified  
15 mission statement for ourselves, some of that  
16 subcommittee work is going to have to be redone  
17 because the priorities will shift.

18 BGEN. SCHWENK: Which may be happening  
19 for five years.

20 HON. BRISBOIS: Well, certainly.

21 BGEN. SCHWENK: You know, as we  
22 refocus from one thing to another.

1           HON. BRISBOIS: But those shifts then  
2           are efficient shifts because we're redefining  
3           saying that our original foundation needs to be  
4           tweaked for a legitimate reason. You know, in  
5           this case, we're saying, "Well, we didn't really  
6           have a foundational idea or a goal, you know, and  
7           so here are all of our reports."

8           Now we get a foundation and it turns  
9           out that we were wrong about what to report on,  
10          we've got to go back and redo that work. I just  
11          see sort of a cart and a horse problem right now.

12          BGEN. SCHWENK: Well, you could use my  
13          definition that everything is relevant.

14          HON. BRISBOIS: Well, but -

15          BGEN. SCHWENK: I have this really  
16          broad -

17          (Simultaneous speaking)

18          HON. BRISBOIS: And that gives us the  
19          flexibility in the second part of the mission  
20          statement that we develop to pick the things that  
21          we want to talk about, racial disparities,  
22          enlisted versus officer disparities, overseas,

1       you know, versus domestic disparities, you know,  
2       and prioritize those things in a way that those  
3       important issues of our own identification fall  
4       into that broad language.

5                   But until we decide those fundamental  
6       foundational goals, then we don't have anything  
7       to make our relevancy determinations on as we're  
8       looking at source data.

9                   DR. SPOHN: I tend to agree because  
10       there are some foundational issues that will  
11       really determine even just looking at data or  
12       looking at prior research. For example, if we're  
13       going to include children, there's a whole  
14       different literature out there on prosecution and  
15       investigation of child sexual assault.

16                   HON. BRISBOIS: And some of those  
17       general courts-martial are going to be child  
18       sexual assault.

19                   DR. SPOHN: Right, and if we're going  
20       to - I mean, it seems like everyone is in  
21       agreement that we should start with an allegation  
22       of a sexual assault, but what does sexual assault

1 mean? Are we going to only include the  
2 penetrative offenses, or are we going to include  
3 the contact offenses as well? So it does seem  
4 that there are some sort of foundational  
5 questions that we need to answer about what a  
6 case is if we're going to do case review.

7 DR. MARKOWITZ: So I'll just go ahead  
8 and sort of step into the fray. I personally  
9 don't think we should tackle children.

10 BGEN. SCHWENK: It's an undertaking.

11 DR. MARKOWITZ: Yeah, I think that  
12 this is a - I think that the services provided to  
13 children are very, very different. I think that  
14 there are ethics and privacy issues related to  
15 looking at child victims that may be more than we  
16 want to tackle.

17 So I just, that would be my personal  
18 preference. I can be talked around on that, but  
19 I just put that out there that if we want to try  
20 to keep things, you know, pretty straightforward  
21 in terms of where we've been and where we're  
22 moving forward, it may be easiest to keep it



1 focused on adult victims.

2 HON. GRIMM: Did the earlier ones  
3 differentiate? Because I think I agree with you  
4 that we could always move to that once we get our  
5 arms around the one that is the most - what was  
6 the focus of the other two studies first.

7 DR. MARKOWITZ: The previous ones were  
8 both adults.

9 HON. GRIMM: So it seems like that's  
10 not a bad starting place, and then that might  
11 take us -

12 MS. GARVIN: Right, I would just want  
13 to make sure that we're not precluding it  
14 downstream.

15 DR. MARKOWITZ: Yes.

16 MS. GARVIN: Because I actually have  
17 a strong opinion we should go there, but not  
18 first, because the research to date - the work to  
19 date has been in adult, but so many other  
20 processes being put in place, including the SVC  
21 and VLC are now representing kids, and so if  
22 we're going to start evaluating that intervention

1 at some point, we need to also look there.

2 DR. MARKOWITZ: Yeah, I agree, going  
3 forward, I absolutely 100 percent agree.

4 HON. GRIMM: Yeah, to start.

5 DR. MARKOWITZ: We need to start - it  
6 just seems like if we need to sort of focus  
7 ourselves, that we leave kids off the table until  
8 we really have a handle on the processes for  
9 safeguarding privacy and all of that kind of  
10 thing.

11 CHAIR BASHFORD: And I agree, at least  
12 at this point, and it seems to me that the  
13 biggest concern I've heard expressed around the  
14 table is that people should be able to serve in  
15 the military without being sexually assaulted,  
16 which doesn't mean we can't ever get to the issue  
17 of children, but if the big focus is how do we  
18 prevent this, and how do we keep military  
19 cohesiveness, and a path forward, and just  
20 results, we're really looking at adults.

21 That's not to say we're not going to  
22 look at also members of the Service who are doing

1 domestic violence, sexual assaults on civilian  
2 spouses, but the bulk of this should be how can  
3 we keep people in the Service without being  
4 sexually assaulted?

5 MS. LONG: Well, I wanted - I have a  
6 differing opinion because I think adults who are  
7 out of the Service should also be included  
8 because of the victimization. And because of  
9 what we know about reporting and perpetration,  
10 I'm not sure that the people perpetrating against  
11 the non-military are not also perpetrating  
12 against military, but we're not hearing it.

13 CHAIR BASHFORD: I just didn't follow  
14 you, adults who are not in Service?

15 MS. LONG: Who are not in Service. So  
16 when you were saying - so looking at the victim  
17 pool that we're looking at -

18 CHAIR BASHFORD: Right.

19 MS. LONG: - not only military, but  
20 also other civilians who are victims, just to  
21 make sure that they're included in the original  
22 pot, okay.

1 DR. MARKOWITZ: My sense is that as we  
2 delve into the issues related to adults, that  
3 will really help us sort of focus up our  
4 questions about how things may differ with  
5 children or, you know, where the gaps are there  
6 and things like that, so.

7 HON. WALTON: But when you say "adult  
8 victim" though, you're saying adult victims who  
9 have some association with the military or any  
10 adult? Because aren't those who are non-military  
11 dealt with in the civilian world?

12 DR. MARKOWITZ: Not necessarily, no.

13 CMSAF. MCKINLEY: I'll give you an  
14 example. I know cases where, you know, the  
15 military member is deployed. The spouse is home  
16 living in base housing, and she is sexually  
17 assaulted by another military member on base in  
18 her own house, and that stuff happens, but that  
19 is on a military installation, a military member  
20 on a civilian. You know, so those are things I  
21 think we should look that.

22 CHAIR BASHFORD: And those reports

1 would be handled -

2 CMSAF. MCKINLEY: Though the military.

3 CHAIR BASHFORD: - simultaneously with  
4 the civilian prosecution or just in -

5 CMSAF. MCKINLEY: No.

6 CHAIR BASHFORD: - courts-martial?

7 CMSAF. MCKINLEY: That would go  
8 through court-martial.

9 HON. GRIMM: So it would be in the  
10 data pool that we're looking at?

11 CHAIR BASHFORD: Yes.

12 DR. SPOHN: In the data from 2012 to  
13 2014, a quarter of the victims were civilians.

14 HON. GRIMM: Yes.

15 CHAIR BASHFORD: A quarter?

16 DR. SPOHN: Yes.

17 BGEN. SCHWENK: You know, I sort of  
18 agree with Leo's point about we do need to get a  
19 focus on this, but I guess my thought was that we  
20 don't all know enough yet to be able to really do  
21 a focus. So I think he's absolutely right that  
22 we need to give ourselves a focus.

1           I just thought that if we gathered up  
2           the RFP, JPP data stuff, and we each had, as  
3           whatever subcommittee we were on, dig into it and  
4           think about things in the big picture, and read  
5           reports, when we got together the next time, it  
6           would be a lot easier to go directly to what he  
7           said which is, "All right, now that we have our  
8           feet wet and we know some things, more than we  
9           did three months ago or whatever the time  
10          difference is, what are we going to focus on?  
11          What is going to be the parameters we're going to  
12          go after for this year?" and then - so I guess I  
13          do agree with you. I was just trying to give us a  
14          chance to get our feet wet first, and you'd  
15          rather -

16                   HON. BRISBOIS: But I think -

17                   BGEN. SCHWENK: - analyze it first.

18                   HON. BRISBOIS: - Judge Grimm's point  
19          of having a central place where we can review  
20          that source data, the RFP and JPP report, and the  
21          RSP report, I mean, you know, that gives us all  
22          three months to do that when we can do it with

1 the number one agenda topic for the next  
2 quarterly meeting being finalized.

3 You know, enabling legislation gives  
4 us a lot of discretion. So at the next meeting,  
5 we exercise that and say, "This is what we're  
6 going to do for the next four-and-a-half years,  
7 four-and-three-quarter years."

8 BGEN. SCHWENK: Or even one year.

9 HON. BRISBOIS: Or one year.

10 CHAIR BASHFORD: I mean, I think it's  
11 preferable if all of us start out with the same  
12 knowledge base.

13 BGEN. SCHWENK: I agree.

14 CHAIR BASHFORD: The only question is  
15 is it feasible that we can all get through those  
16 two, what there is out there on JPP and the Joint  
17 Response Systems. If it's feasible, I think that  
18 would be preferable that we have all looked at  
19 it.

20 HON. BRISBOIS: I mean, if we have  
21 three months to do that background work, that  
22 seems to me, you know, feasible. I mean, we

1 don't - you know, how deeply into the source  
2 data, but - and beyond the executive summary, but  
3 into the report itself. I think I can get  
4 through two reports in three months.

5 BGEN. SCHWENK: I agree with that 100  
6 percent. I just thought there was a value added  
7 to the discussion, to the exchange of ideas which  
8 you can't get if you're not in a meeting. Even  
9 if we do phone calls, you know, we can conference  
10 the meetings where you talk about the data, but I  
11 do better -

12 I mean, I can read, but I don't  
13 assimilate as well as when I hear somebody else  
14 who read the same thing and said, "I can get that  
15 out of that," or, "What about this?" and I didn't  
16 even think of that issue.

17 I don't know, so that's why I thought  
18 start earlier with the subcommittee meetings  
19 rather than later, but I certainly agree with you  
20 that in three months, most of us ought to be able  
21 to get through the bulk of that stuff and have  
22 some good ideas for when we come back.



1                   CHAIR BASHFORD:  If we all start with  
2                   the same knowledge base, I think that's  
3                   preferable.  I think we're very uneven right now,  
4                   and mostly that has to do with the  
5                   military/non-military experience, so if we could  
6                   all look at that, I think that's better.  We're  
7                   almost out of our time for this meeting.  Is  
8                   there a way to upload those that we could all  
9                   have access to them?

10                  CAPT. TIDSWELL:  Yes, ma'am.  From  
11                  what I'm hearing, a lot of what you want is open  
12                  source at this point, right?

13                  CHAIR BASHFORD:  Yes.

14                  CAPT. TIDSWELL:  The reports and - so  
15                  there would be no reason why we -

16                  BGEN. SCHWENK:  Is there links to the  
17                  RSP website and a link to the JPP website?

18                  CAPT. TIDSWELL:  Or we can consolidate  
19                  it all in one place for you on the DAC-IPAD  
20                  website.

21                  BGEN. SCHWENK:  Or whatever, yeah.

22                  CAPT. TIDSWELL:  That could go live

1 in a day.

2 HON. BRISBOIS: In effect, that's what  
3 I was - if you could consolidate it for us -

4 CAPT. TIDESWELL: Yes, sir.

5 HON. BRISBOIS: Because I know if I  
6 had to go find it on my own, my calendar is not  
7 going to allow me to be there plunking away on  
8 the internet, and not between motion hearings and  
9 conferences, and, you know, occasionally a trial.  
10 I do get one once in a while.

11 But, you know, being able to go right  
12 to the source that you put together and read what  
13 I have time to read, that's what I need.

14 CAPT. TIDESWELL: Yes, sir, and it  
15 would be beneficial for the public. They would  
16 also have the same access and they could see what  
17 you all are looking at.

18 CMSAF. MCKINLEY: May I make a  
19 suggestion? I'm on another board with several  
20 professors from major colleges and no military  
21 experience, and we learned that they were, you  
22 know, overblown with all of the acronyms we use

1 in the military, and we sent them a list of  
2 familiar acronyms.

3 CAPT. TIDESWELL: Yes, sir.

4 CMSAF. MCKINLEY: So it might be a  
5 good idea for the non-military members just to  
6 get a list.

7 CAPT. TIDESWELL: Yes, sir.

8 DEAN HARRISON: I have a question  
9 about FACAs. Are we prohibited from, for example,  
10 if I had a question about something and if I  
11 called Mr. Kramer to discuss, I can't do that?

12 LT. COL. STINGL: No.

13 DEAN HARRISON: Okay.

14 LT. COL. STINGL: Not at this point.

15 DEAN HARRISON: Okay, I could call you  
16 guys. Okay, and you could call them.

17 CHAIR BASHFORD: Also, I thought I  
18 heard in the ethics lecture that when we email  
19 each other, that's public record, is that  
20 correct?

21 BGEN. SCHWENK: You can't  
22 substantively if it's communication.

1 CHAIR BASHFORD: I just wanted -

2 BGEN. SCHWENK: And that - you know,  
3 the Committee's at risk if we start breaking  
4 rules and going around the corner, so, you know,  
5 you just can't talk to one another until we get  
6 back here at some kind of a meeting, but we can  
7 talk to the staff.

8 MS. GARVIN: But the Advisory Committee  
9 is good?

10 CHAIR BASHFORD: Subcommittee.

11 BGEN. SCHWENK: Subcommittee, yeah,  
12 it's a different world.

13 CAPT. TIDESWELL: Chair Bashford, it's  
14 unfortunately that the FACA brief was not given  
15 today, and so we can either wait until the next  
16 meeting - I think what I'm hearing is a quarterly  
17 meeting in several months.

18 CHAIR BASHFORD: Yes.

19 CAPT. TIDESWELL: Or there's an option  
20 where we could try and do it over the telephone  
21 where we gather, because that's more  
22 administrative in nature, if that would be

1       beneficial, so you can sort of proceed with your  
2       work.

3                   CHAIR BASHFORD: I think that would be  
4       helpful.

5                   CAPT. TIDESWELL: So we can send  
6       something.

7                   CHAIR BASHFORD: We've been peppering  
8       you with those questions.

9                   CAPT. TIDESWELL: Yes, ma'am.

10                  BGEN. SCHWENK: Are you going to send  
11       an email out with proposed dates?

12                  CAPT. TIDESWELL: Yes, sir, I will.

13                  CHAIR BASHFORD: So we're going to get  
14       email addresses and telephone numbers, but we  
15       won't use those to contact people until we have  
16       broken up into subcommittees. I think this has  
17       been very useful. I think it's great to meet  
18       everybody in person. I think we're supposed to  
19       stop in five minutes.

20                  My sense is that what we will do is  
21       just review the open source data from the two  
22       prior Committees, and then when we reconvene,

1 we'll discuss that, see what gaps there are or  
2 where that wants to launch us in the future,  
3 because we have an extraordinary, extraordinarily  
4 broad scope of work.

5 HON. GRIMM: And the source material  
6 will be consolidated to a website or a link that  
7 you will send to us that we can then go to, as  
8 Leo says, when we have that time available?

9 CAPT. TIDESWELL: Yes, sir, and just to  
10 manage expectations, we all do have off tomorrow.  
11 Because of the inauguration, it's going to be  
12 very difficult to move about the city, so we'll  
13 hit it hard first thing Monday morning.

14 BGEN. SCHWENK: What are you doing  
15 Saturday?

16 CAPT. TIDESWELL: Thanks, General.

17 BGEN. SCHWENK: I'll meet you in  
18 church.

19 MR. KRAMER: And we've heard lots of  
20 valid problems with this, but it does say, "for  
21 purposes of providing advice, shall review on an  
22 ongoing basis cases involving allegations." I

1 think we ought to think for the next three months  
2 about how we could possibly go about that given  
3 all of the privacy.

4 I mean, there are so many concerns,  
5 but that's our main, that's our specific charter  
6 in addition to the general one, so I think we  
7 ought to think about that.

8 SGT. MARKEY: And I second that, Mr.  
9 Kramer. I really think we need to define, you  
10 know, which cases are we going to look at? I  
11 mean, are we going to look at a time frame? Are  
12 we going to look at the geographical location?  
13 How are we going to assess those investigations?

14 Are we going to do it from the point  
15 of where they were charged going through the  
16 court-martial, or is it the prior investigation  
17 where there was a disclosure and an investigation  
18 was stopped, and identify and designate which are  
19 those cases? How much information are we going  
20 to view?

21 And then I'm more than happy and  
22 willing to share my assessment and review

1 process, and this is strictly from an  
2 investigative standpoint of what I did and how I  
3 continue to review sexual assault investigations,  
4 the data metrics that I collect, and what I do  
5 with that data, and how I actually have built an  
6 online - not an online, it's a web-based system  
7 for gathering that data and I can pull it out.

8 I can also share the metrics that I  
9 used to review these cases. It may be a little  
10 bit different, but it might be a starting point  
11 for us to take a look at it say, "Okay, if we're  
12 going to review these cases from an investigative  
13 standpoint, and not from the prosecution or the  
14 court-martial, you know, what are the things we  
15 want to look at?"

16 You know, and I've defined, you know,  
17 the biographical basic information, and that can  
18 be everything standard you see in a report, and  
19 then victim interaction, what would that look  
20 like, investigative follow-up, what did that look  
21 like, evidentiary follow-up, what did that look  
22 like, and then do an overall case assessment.



1 I actually, believe it or not, I  
2 actually put a process together to do that, and  
3 so far it's been okay, and I'm willing to share  
4 that information with anybody that would like to,  
5 again, that would be on the investigative process  
6 review.

7 MR. KRAMER: Not until we get into  
8 subcommittees.

9 MS. LONG: Right, I think your  
10 attrition studies, people should read because we  
11 used them all the time, well, like the ones that  
12 were replicated.

13 DR. SPOHN: From Los Angeles?

14 MS. LONG: From Los Angeles or others.  
15 Just to look at what you looked at, I think it's  
16 really instructive.

17 CHAIR BASHFORD: We should also in the  
18 next few months start thinking to follow-up on  
19 A.J.'s suggestion, how are we going to review a  
20 case? Because even the ones where charges were  
21 preferred, that's 790. I don't think we can  
22 logistically do that.

1                   We've got to figure out a way to get  
2                   a sample, and of the ones where charges weren't  
3                   preferred, and if we can get to some sort of  
4                   sense of the restricted, at least the numbers.  
5                   How are we going to get a representative sample?  
6                   Because I'm always wary when people pick. It's  
7                   better to figure out some other way. So if we  
8                   could start thinking about what we want to do  
9                   during our adjourned time -

10                   BGEN. SCHWENK: So we have two agenda  
11                   items next time. What are we going to do for  
12                   this year, and how are we going to do a case  
13                   review?

14                   CHAIR BASHFORD: Exactly.

15                   DR. SPOHN: And just for logistics, are  
16                   we meeting again in person in two or three  
17                   months?

18                   CHAIR BASHFORD: I believe we should  
19                   meet in person in about three months. I think  
20                   more than quarterly is logistically hard for  
21                   people. Most of us, perhaps not Sergeant Markey,  
22                   have day jobs still. He's retired.

1 HON. BRISBOIS: He's got a 24/7 job.

2 SGT. MARKEY: Watching you is my job.

3 CHAIR BASHFORD: And I think less than  
4 quarterly is - things just sort of flutter away.  
5 So if that's the consensus, that would be my  
6 recommendation.

7 CAPT. TIDESWELL: Ms. Bashford, are  
8 you all comfortable with coming back to  
9 Washington, D.C.?

10 DEAN HARRISON: For now.

11 CHAIR BASHFORD: For now. I think we  
12 should at some point decide if, you know, for the  
13 convenience of the members, if a different site  
14 at some point might be appropriate, and as we  
15 have subcommittees, I do think site visits are  
16 important.

17 CAPT. TIDESWELL: Yes, ma'am.

18 HON. BRISBOIS: Or even of the  
19 Committee as a whole, eventually going other  
20 places lends access and credibility.

21 CHAIR BASHFORD: Right.

22 HON. BRISBOIS: But that's, again,

1 later this year or next year.

2 CHAIR BASHFORD: Baby steps first.

3 HON. BRISBOIS: Yes.

4 CAPT. TIDESWELL: And Ms. Bashford,  
5 the only other thing I would raise is there is a  
6 report due on the 30th of March, the bylaw. We,  
7 as the staff, will go ahead and draft the  
8 recommendation for you. It can be just very  
9 basic, you know, what's occurred today, sort of  
10 what the way ahead is as we know it so far.

11 And ma'am, I'll send that to you, and  
12 then at some point we'll have to send it out to  
13 all of the members individually because you all  
14 are not allowed to deliberate, but you're allowed  
15 to come back to me one at a time to get your  
16 concurrence on that, and that's what will be  
17 submitted as the report.

18 CHAIR BASHFORD: You have a lot of  
19 track changes.

20 CAPT. TIDESWELL: Yes, ma'am.

21 BGEN. SCHWENK: That's the report in  
22 March of what we did last year? It shouldn't be

1 hard.

2 CHAIR BASHFORD: I think we've got to  
3 conclude this meeting.

4 LT. COL. STINGL: Ma'am, did I hear  
5 you close the meeting?

6 CHAIR BASHFORD: I'm closing the  
7 meeting at 3:43.

8 (Whereupon, the above-entitled matter  
9 went off the record at 3:43 p.m. and resumed at  
10 3:34 p.m.)

11 CHAIR BASHFORD: I understand there is  
12 a request for public comment.

13 MR. CHRISTENSEN: That is correct.

14 CHAIR BASHFORD: And we would be happy  
15 to hear from you.

16 MG. ANDERSON: And I apologize, Madam  
17 Chairwoman. I thought you be - just it's on the  
18 schedule, so I thought that would be next on the  
19 agenda.

20 CHAIR BASHFORD: Could you just tell  
21 us who you are, sir?

22 MR. CHRISTENSEN: Sure, I know some of

1 you, but most of you I do not know. I am Don  
2 Christensen, Colonel United States Air Force,  
3 retired. I served 23-and-a-half years in the Air  
4 Force, all of it as a judge advocate. I have  
5 served as an area defense counsel, a circuit  
6 defense counsel, which is the defense counsel for  
7 the civilians, as a chief circuit trial counsel  
8 in Europe, which is like a chief prosecutor here.

9 I have served as a staff judge  
10 advocate, both in the United States and a  
11 deployed location. I have served as a military  
12 judge for two years, and I have served my last  
13 four years as the chief prosecutor for the Air  
14 Force, and I also was the chief of the appellate  
15 division for the United States Air Force for the  
16 government side.

17 I am currently president of Protect  
18 Our Defenders, which is an organization dedicated  
19 to reforming military justice, and we also  
20 advocate for survivors of sexual assault.

21 So my comments, briefly, I was very  
22 excited to hear the questions that were going on.

1 I had seen the briefings earlier. But one thing  
2 I wanted to clear up before you started on your  
3 deliberations and left was just a few factual  
4 things that I thought could be cleared up, and  
5 then give you what I think is something very  
6 important for you to consider as you start your  
7 deliberation over the next five years.

8 First, I've heard a lot of people talk  
9 about the RAND survey. The RAND survey was a  
10 one-time survey that occurred in 2014. Before  
11 that, the surveys were done by the Department of  
12 Defense, and now they're back to the Department  
13 of Defense by the DMDC, which stands for the  
14 Defense Manpower Data Center, so it's an internal  
15 survey again.

16 The numbers fluctuate every year or  
17 every time they do the survey. It occurs every  
18 two years. It's not an annual survey. In 2010,  
19 the numbers were 20,000. In 2012, they were  
20 26,000. In 2014, they were 20,500 more or less.  
21 That includes sexual assault and rape, referred  
22 to as rape, sexual assault and rape.

1           You will hear people discount these  
2 numbers by saying it could be somebody looking at  
3 you wrong or sexual harassment. No, it is a  
4 sexual offense by definition under the Uniform  
5 Code of Military Justice, so those are sexual  
6 assaults.

7           The important thing to understand  
8 about the RAND survey is it's only of active duty  
9 military members. It does not count or in any  
10 way catch up civilian victims, or DoD dependent  
11 victims, or DoD civilian employee victims, so it  
12 only is that group. It's what I call the soft  
13 numbers because it's a survey.

14           Every year, we get hard numbers from  
15 SAPRO. They give us the exact number of sexual  
16 assault allegations, both restricted and  
17 unrestricted, how many of those resulted in  
18 preferral charges, how many of those resulted in  
19 referral charges, and how many of those resulted  
20 in a conviction for a sexual offense.

21           The current numbers on that, okay, so  
22 the most recent numbers or the fiscal year '15



1 numbers, those were about 4,200 unrestricted  
2 reported, about 1,400 or so restricted reports.  
3 Of those 4,200 or so unrestricted reports, 918, I  
4 believe is the exact number, have referral of  
5 charges for a sexual assault offense.

6 Of those 918, about 189 were disposed  
7 of by what we call an administrative discharge in  
8 lieu of court-martial. That's for an officer and  
9 enlisted. About 550 actually went to trial, and  
10 255 resulted in a conviction for a sex offense.

11 The military will often inflate the  
12 sex offense conviction number by - so we have  
13 somebody who's charged with rape and underage  
14 drinking, gets acquitted of rape, gets convicted  
15 of underage drinking, they will count that as a  
16 conviction, but the actual numbers of sex assault  
17 convictions, 255 out of the potential 20,000 plus  
18 civilians.

19 There has been questions about how  
20 civilians have jurisdiction. Civilian - so the  
21 United States military has jurisdiction over  
22 every offense committed by every military member

1 who is active duty anywhere in the world, so it  
2 doesn't matter. They have jurisdiction. That  
3 jurisdiction is almost always shared with some  
4 other entity, whether it's overseas or here. The  
5 United States military's policy is to maximize  
6 jurisdiction.

7 So there has been a lot of question  
8 about if the offense occurred off base, civilians  
9 will handle it. Sometimes they do, but the  
10 military will always try to get jurisdiction. So  
11 as somebody said, about 20 percent of the cases  
12 last year involved a civilian victim.

13 All right, and then I'm just about  
14 done with the numbers, and then what I want to  
15 get to.

16 Somebody asked about, I believe it was  
17 the Chief asked about how many civilians or how  
18 many victims leave after they report? DoD did an  
19 IG report that came out last year that I would  
20 encourage you to read dealing with retaliation  
21 and that subject, and one-third of victims,  
22 active duty victims are discharged within a year

1 of reporting, typically within seven months of  
2 reporting the offense, so that's from the DoD  
3 numbers.

4 I recommend you look at two reports by  
5 the Human Rights Watch who did very detailed  
6 reports on retaliation in the military and the  
7 impact on survivors of sexual assault after  
8 report.

9 Finally, then I'll get to what I have  
10 to say, the role of the commander will come up,  
11 and one thing I would like to encourage for many  
12 of you who are not military members, there is  
13 often a, from all sides of this debate, a  
14 muddying of the waters to what it means to be a  
15 convening authority versus commander.

16 The United States military has 15,000  
17 commanders throughout all of their Services. Of  
18 those 15,000, about 480 are general court-martial  
19 convening authorities, the people who have the  
20 authority to send a sexual assault case to trial.

21 Of those 480, about 148, the last year  
22 we have numbers available, which I believe was

1 2014, actually referred a case to trial, so 99.9  
2 percent of the commanders do not send cases to  
3 general courts-martial, just so you know.

4 All right, my thing that I want you to  
5 understand as you go forward, and I hear this  
6 debate, and I know you're trying to decide what  
7 you are really looking at, for me as someone who  
8 has served almost exclusively in military justice  
9 for 23-plus years, what is the problem? Well, I  
10 have issues with command. I'm not going to talk  
11 about that because that's what you're looking at.

12 What is the issue that's facing the  
13 military to keep them from really getting a  
14 handle on this? That is experience, experience  
15 with investigators, experience with prosecutors,  
16 experience with defense counsel. The military  
17 has a - the JAG Corps has, and investigative  
18 services, have this view of generalists when it  
19 comes to their attorneys.

20 So for example, in the Air Force which  
21 I'm most experienced with, there is a very big  
22 push to get you out of litigation after your

1 first assignment and you may never see it again.  
2 Very few of us got to litigate for very long.

3 And what I would tell you is that  
4 these cases are too serious, too complex, too  
5 detailed to have young captains serving as lead  
6 prosecutors, the same with our investigators.  
7 The investigation experience you have would  
8 almost be the entirety of the OSI. The years  
9 that you have sums up their experience.

10 As a prosecutor, I cannot tell you how  
11 many times that the investigator I was dealing  
12 with, the lead investigator on the case, a  
13 serious case, a murder case, a child abuse case,  
14 child pornography case, rape case, that was the  
15 first time they served as a lead investigator,  
16 and it was the last time they served as a lead  
17 investigator because they were moved onto  
18 something else.

19 Within the investigative world,  
20 especially in the Air Force, what they want to  
21 get them into is counterintelligence, and that's  
22 where they send them, and so the reality of it is

1 you have really talented, dedicated  
2 investigators, defense counsel, and prosecutors  
3 who are not allowed to specialize in it.

4 Specialization is what I would  
5 encourage you to look at, and I guarantee you'll  
6 get push back from the Services on that, but I  
7 would just ask you to have an open mind and  
8 understand that if we always did what the  
9 Services said, we still wouldn't have judges.

10 We still wouldn't have appellate  
11 courts. We still wouldn't have individual -  
12 excuse me, independent defense counsel in the  
13 military because every one of those things, the  
14 Services didn't want. So good luck.

15 CHAIR BASHFORD: Thank you.

16 LT. COL. STINGL: Madam Chair, is it  
17 your desire to readjourn the meeting at this  
18 point?

19 CHAIR BASHFORD: Yes, I am readjourning  
20 the meeting at 3:54.

21 (Whereupon, the above-entitled matter  
22 went off the record at 3:54 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Defense Advisory Committee on Sexual  
Assault in the Armed Services

Before: US DoD

Date: 01-19-17

Place: Arlington, VA

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