

UNITED STATES DEPARTMENT OF DEFENSE

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DEFENSE ADVISORY COMMITTEE ON INVESTIGATION,
PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT
IN THE ARMED FORCES (DAC-IPAD)

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PUBLIC MEETING

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FRIDAY
APRIL 28, 2017

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The Panel met in One Liberty Center,
875 North Randolph Street, Suite 1432, Arlington,
Virginia, at 10:00 a.m., Martha Bashford, Chair,
presiding.

PRESENT

Ms. Martha Bashford, Chair
MG(R) Marcia Anderson
Hon. Leo Brisbois
Ms. Meg Garvin
Hon. Paul Grimm
Dean Keith Harrison
Mr. A.J. Kramer
Sgt.(R) James Markey
CMSAF(R) Rodney McKinley
BG(R) James Schwenk
Dr. Cassia Spohn
Ms. Meghan Tokash

WITNESSES

Ms. Elaine Crowley, Office of the General
Counsel, U.S. Department of Defense
Colonel Christopher Kennebeck, U.S. Army, Chair,
Criminal Law Department, The Judge
Advocate General's Legal Center and School
(TJAGLCS)

Ms. Patricia Sudendorf, Professor and Special
Victims' Litigation Expert, Criminal Law
Department, TJAGLCS

Major Kristen Fricchione, U.S. Army, Associate
Professor and Special Victims' Counsel
Course Manager, Criminal Law Department,
TJAGLCS

Major Iain Pedden, U.S. Marine Corps, Associate
Professor, Criminal Law Department,
TJAGLCS

Dr. Nathan Galbreath, Deputy Director, Sexual
Assault Prevention and Response Office,
U.S. Department

STAFF:

Captain Tammy P. Tideswell, U.S. Navy - Staff
Director

Mr. Dwight Sullivan - Designated Federal Official

Ms. Meghan Peters - Attorney Advisor

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Major Kristen Fricchione, U.S. Army, Associate Professor and Special Victims' Counsel Court Manager, Criminal Law Department, TJAGLCS

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

2 10:00 a.m.

3 MR. SULLIVAN: Good morning, I'm
4 Dwight Sullivan, the Designated Federal Officer
5 of the Defense Advisory Committee for the
6 Investigation, Prosecution and Defense of Sexual
7 Assault in the Armed Forces.

8 The second meeting of the Committee is
9 now open.

10 Ms. Bashford, as they say in the Navy,
11 you have the com.

12 CHAIR BASHFORD: Well, thank you, Mr.
13 Sullivan.

14 Good morning. I'd like to welcome the
15 Members, participants and everyone in attendance
16 today to the second meeting of the Defense
17 Advisory Committee on Investigation, Prosecution
18 and Defense of Sexual Assault in the Armed
19 Forces, or DAC-IPAD.

20 The Secretary of Defense appointed 16
21 Members to the Committee, 12 Members are present
22 here today.

1 The DAC-IPAD was created by provisions
2 in the National Defense Authorization Act for
3 Fiscal Years 2015 and 2016.

4 And, our mandate is to advise the
5 Secretary of Defense on the investigation,
6 prosecution and defense of allegations of sexual
7 assaults and other sexual misconduct involving
8 members of the Armed Forces.

9 Please note, today's meeting is being
10 transcribed and a complete written transcript
11 will be posted on the DAC-IPAD website.

12 We will begin today's meeting with a
13 presentation by members of the Criminal Law
14 Faculty from the U.S. Army Judge Advocate
15 General's Law Center and School on the Mechanics
16 of a Military Sexual Assault case.

17 In the afternoon, the Committee will
18 receive a briefing by Committee Member, Dr.
19 Cassia Spohn, a distinguished criminologist on
20 military sexual assault case adjudication data.

21 Followed by a presentation by the
22 Deputy Director of the Department of Defense's

1 Sexual Assault Prevention and Response Office, or
2 SAPRO, on its sexual assault data collection and
3 policy role within the Department.

4 For the final session of the day, the
5 Committee will discuss our strategic plan and
6 next steps.

7 Each public meeting of the DAC-IPAD
8 will include time to receive input from the
9 public. The Committee received no requests for
10 public comment at today's meeting.

11 We are ready to begin the meeting and
12 our first presenter is Colonel Christopher
13 Kennebeck, Chair of the Criminal Law Department
14 at the Army's Judge Advocate General's Legal
15 Center and School in Charlottesville, Virginia.

16 He is accompanied by three professors
17 from the Criminal Law Department, Ms. Patricia
18 Sudendorf, a Special Victims' litigation expert,
19 Army Major Kristen Fricchione, a Special Victims'
20 Counsel Course Manager and Marine Corps Major
21 Iain Pedden, Instructor in the Criminal Law
22 Department.

1 Thank you all for joining us today and
2 we look forward to hearing from you.

3 COLONEL KENNEBECK: Good morning, Ms.
4 Bashford. Thank you.

5 CHAIR BASHFORD: Good morning.

6 COLONEL KENNEBECK: Thank you.

7 CHAIR BASHFORD: You have the com.

8 (Laughter)

9 COLONEL KENNEBECK: Colonel Chris
10 Kennebeck, it's a pleasure to meet you. Thank
11 you for inviting us from the Army's Judge
12 Advocate General's Legal Center and School.

13 I'm happy to have four of my faculty
14 members here to help answer questions and I built
15 this presentation with, you know, a frame of
16 reference of answering your questions.

17 So, I've put a few slides together to
18 talk about the court-martial process that I would
19 like to talk through the first 15 or 20 minutes
20 and answer your questions from the overview
21 perspective.

22 And then, we have a fact pattern that

1 we can talk about, to talk about the different
2 ways a court-martial is handled from the top to
3 the bottom.

4 And, then, a bunch of forms that you
5 will see, if we take a look at a record of trial,
6 some typical forms that you're going to see in
7 those records. So, you can get some
8 familiarization with what those documents will
9 look like.

10 And then, I would like, I might as
11 well have the rest of my faculty, you know,
12 introduce themselves because I would like them to
13 feel free to interject and add or answer your
14 questions based on the question asked.

15 So, go ahead.

16 MS. SUDENDORF: Good morning, ladies
17 and gentlemen, it's such an honor and pleasure to
18 be here.

19 My name is Patty Sudendorf, Patty. I
20 come from the Cook County Prosecutor's Office in
21 terms of my background as a prosecutor and have
22 been with the JAG School now for two years.

1 I've interacted with all of the
2 professors here and part of my learning curve was
3 learning all the acronyms and learning the
4 policies and procedures that were different from
5 the civilian practice.

6 So, we hope that we're able to make
7 this as understandable and comprehensible to
8 everyone. Seeing the variety of folks who have
9 already practiced in Military Justice and those
10 who have maybe been in the civilian sector, so
11 hopefully, we can make that comprehensible for
12 everybody.

13 MAJOR FRICCHIONE: Good morning,
14 ladies and gentlemen. My name is Major Kristen
15 Fricchione. I am also a member of the Criminal
16 Law Faculty.

17 I've been on the faculty now for
18 almost a year. Before that, I went to the
19 graduate course that we have at the Judge
20 Advocate General's Legal Center School.

21 For all those who are promoted to
22 Major, we continue on in the JAG Corps.

1 Before that, I was a prosecutor at
2 Fort Drum in New York for about three years. And
3 then, I was also a prosecutor in Germany and a
4 defense counsel in Germany as well, most
5 recently.

6 It's a pleasure to be here and thank
7 you so much for having us. Oh, I'm also the SVC
8 Course Manager over at the school. So, if you
9 have any questions about that, both Patty and I
10 are co-course managers there as well.

11 And, I handle the portfolio processing
12 sex assault cases as well as fraternization.

13 MAJOR PEDDEN: Good morning, ladies
14 and gentlemen. My name is Major Iain Pedden.
15 I'm also a member of the faculty in the Criminal
16 Law Department of the JAG School, regrettably,
17 winding up my third year there in the haven known
18 as Charlottesville.

19 My portfolio is evidence. I also
20 teach Sixth Amendment Confrontation, particularly
21 relevant to your discussions here today, I teach
22 the rules with respect to the rape shield

1 statute, Military Rule of Evidence 412 and also
2 the law of privileges.

3 I also manage the Intermediate Trial
4 Advocacy Course which is a two-week intensive
5 advocacy course that has cross disciplinary and
6 leverage with the University of Virginia.

7 I've been on active duty for about 15
8 years. Prior to entering active duty, I did
9 death penalty appellate prosecution work at the
10 Office of the Illinois Attorney General in
11 Chicago.

12 And, thank you very much for hosting
13 us today.

14 COLONEL KENNEBECK: So, I'm ready to
15 go to the slides whenever you want to bring those
16 up.

17 CHAIR BASHFORD: We're still trying.

18 COLONEL KENNEBECK: Okay, good. Well,
19 while you're doing that, I'll just talk.

20 CHAIR BASHFORD: Colonel, can you see
21 if your mic is on? I'm not sure if it's actually
22 --

1 COLONEL KENNEBECK: Yes.

2 CHAIR BASHFORD: -- turned on.

3 COLONEL KENNEBECK: I think it is. I
4 can get closer to it.

5 The Judge Advocate General's Legal
6 Center and School, the Army's JAG School, is in
7 Charlottesville, Virginia, has been since the
8 '70s, actually, before that.

9 And, we've partnered with UVA, that
10 was really the reason for going to that location.
11 And, I want to talk a little bit about it.

12 I have ten faculty, counting myself,
13 in the Criminal Law Department. We have other
14 departments in this school, Administrative Law,
15 Contracts and International and Operational Law.

16 In that school, we generally run about
17 10,000 people through that building annually.
18 And, that includes commanders who come for a
19 legal orientation week.

20 It includes our basic course, Officers
21 who will become Judge Advocates in the Army.

22 And, our graduate course, which is

1 really our flagship enterprise there. We are an
2 ABA accredited school that provides LLM to our
3 very senior Captains or baby Majors, right about
4 the seven year mark for your average JAG will
5 come back to JAG School for one year to get their
6 LLM.

7 And then, of course, very short
8 courses throughout the year to include the
9 Special Victims' Counsel course, the Special
10 Victims' Counsel child course, the International
11 Trial Advocacy course.

12 And that's given to, you know, younger
13 Captains who've been trying cases for, hopefully,
14 at least six months and give them some advocacy
15 skills, standup. It's basically identical to the
16 training you would find at the National Advocacy
17 Center.

18 Something else that Patty did was work
19 with the National Advocacy Center. And, I went
20 to that center for training myself.

21 So, I just wanted to give you some
22 idea of how many people go through that building,

1 who we talk to.

2 And so, what we do is we teach
3 criminal law to all these audiences.

4 Sir?

5 BG SCHWENK: Do you have a course for
6 commanders that you have a chance to talk to
7 commanders?

8 COLONEL KENNEBECK: We do, we have
9 two. There's a SOLO, the Senior Officer Legal
10 Orientation course and the GOLO, the General
11 Officer Legal Orientation course. The GOLO is a
12 one-day intensive one on one GO to faculty, eight
13 hours or nine hours of training.

14 And, the SOLO is a one-week course,
15 it's almost 40 hours. And, it's brigade level.
16 Our Army Chief of Staff just required it for
17 Brigade Commanders starting this next fiscal
18 year.

19 But, some of the Battalion Commanders
20 are in it. Brigade Commander, I'll show you a
21 slide here in a second what that is.

22 It is a Colonel that's been in the

1 Army about 20 or 25 years and, you know, commands
2 a unit that's 3,000 to 5,000 soldiers.

3 And so, all the Colonels come through
4 for their week long course and, you know, Kristen
5 has the extreme privilege of teaching them the
6 sex assault policy of which there isn't much.
7 And which changes quickly.

8 And so, that is always an intensive
9 time for them because they all have their
10 experiences having dealt with sexual assaults in
11 the ranks.

12 So, it's good for us because we know
13 where the commanders' heads are, we've been out
14 in the field and interacted with them and then
15 we're teaching the Judge Advocates as well. So,
16 we kind of -- we have to adjust our curriculum to
17 talk to lawyers and to talk to commanders.

18 And, we'll do some of both of that
19 today in the meeting, describe the process to
20 you.

21 Did that prompt any comments from --
22 oh, and, Iain is in charge of our Trial Advocacy

1 course. This fact pattern that you have today is
2 our Advocate Fact Pattern that we just developed
3 about a year and a half --

4 MAJOR PEDDEN: Almost two years now.

5 COLONEL KENNEBECK: Almost two years
6 now.

7 It's a much -- it's a more complicated
8 fact pattern that opens the door for 513
9 psychotherapist records issues which are
10 prevalent in the trial of sexual assault cases.

11 You know, we're fortunate to have
12 Iain, he's an evidence guru and DoD's fortunate
13 that he's going to the Joint Committee next, his
14 next duty. So, that will help us all, I think.

15 Okay --

16 CHAIR BASHFORD: They all have the
17 slides, you can begin with them.

18 COLONEL KENNEBECK: Oh, oh, good.
19 Okay, then let's just -- we can go through the
20 slide paper first.

21 So, as I explained earlier a little
22 bit, we're going to talk about the overview of

1 the process, the prevention and response strategy
2 and the multidisciplinary approach to giving care
3 to victims.

4 So, the first slide, I really just
5 wanted to show you a picture that illustrates not
6 only the relationship between JAGs and
7 commanders, but the different levels of
8 commanders.

9 So, on the left side, you see the
10 column from bottom to top are the size of our
11 unit. This is Army centered, so, when you talk
12 to different Services, it might not look exactly
13 the same, but for the most part, a Battalion
14 level commander, that's someone who's had about
15 18 to 22 years in, commands 400 to 600 soldiers.

16 Okay? That's usually the second time
17 someone's been in command. So, if you're a
18 Battalion Commander, you've been a Company
19 Commander before, you've been a Platoon Leader
20 before, so it's a decent amount of command
21 experience. And, it's someone who's been in the
22 Army about 20 years.

1 The Brigade level commander in the
2 Army commands 3,000 to 5,000 soldiers. That
3 person has 20 to 25 years of service and has now
4 commanded for the third time.

5 This is where the Secretary of Defense
6 puts the withhold policy for sex offenses. This
7 is the lowest level of commander who has the
8 authority to make a decision -- disposition
9 decision about a sexual offense, a penetrative
10 sexual offense. Okay? We'll talk more about the
11 different types of sexual offenses later.

12 But, it's important that you keep that
13 in mind, Brigade, Special Court-Martial Convening
14 Authority, that's what that acronym stands for.
15 So, the Battalion Summary Court-Martial Convening
16 Authority, the Brigade is the Special Court-
17 Martial Convening Authority.

18 And then, the GO, the General Officer
19 who commands that unit is the General Court-
20 Martial Convening Authority. And, it's the GCMCA
21 who has the authority to refer cases to court-
22 martial, general court-martial which your sex

1 offense must go through, the penetrative sex
2 offenses.

3 For the General Officer, these are
4 usually Two-Star Generals. They're usually in
5 commanding a division or an equivalent unit. It
6 could be as small as 3,000, as many as 15,000
7 soldiers. And, this is someone who's been in the
8 service 25 to 30 years.

9 So, it's a very decent amount of
10 experience, lots of command experience and a good
11 amount of interaction with previous sexual
12 assault victims and crimes.

13 So, if you look to the right then, you
14 see the ranks that are commensurate with those
15 levels of command. And, if you look at the right
16 column there, we also -- we parallel the command
17 structure in that we give a trial counsel, that's
18 a prosecutor, it's what we call a prosecutor or a
19 trial counsel, to each Battalion or to each
20 Brigade.

21 Each Brigade will have a prosecutor.
22 Some Brigade's will have a Brigade Judge Advocate

1 as well, a Major who works on the Brigade staff,
2 but it's usually going to be a Captain
3 prosecuting the cases out of that Brigade.

4 That Captain will be the one who gives
5 legal advice to those commanders about, you know,
6 whether a case should be administratively
7 separated or whether it should go to court-
8 martial. That prosecutor is the one advising the
9 command about where -- how cases should be
10 disposed of.

11 Above that is the Staff Judge
12 Advocate. That is the Senior Legal Advisor,
13 usually on an installation. It's usually an O-6,
14 sometimes an O-5, so a Colonel or a Lieutenant
15 Colonel.

16 That Colonel will run the JAG Office,
17 the Office of the Staff Judge Advocate which will
18 include legal assistance, your Special Victims'
19 Counsel, your Administrative Law issues, your
20 International and Operational Law issues and your
21 criminal law shop.

22 So, that Senior Legal Advisor is

1 responsible ethically for all of those lawyers on
2 that installation to ensure that they're trained,
3 to ensure that, you know, they have the right to
4 fill, the right person in the right job and
5 replace them if they don't.

6 So, that Staff Judge Advocate owns
7 that. And, the Staff Judge Advocate gives advice
8 to the General Court-Martial Convening Authority.

9 So, just like all the commanders work
10 for that GCMCA, all of the JAGs, except for
11 defense counsel, work for that Staff Judge
12 Advocate.

13 The Staff Judge Advocate, though, does
14 give support to defense counsel.

15 And then, of course, we have our
16 senior leaders. We have three One-Stars and a
17 Two-Star Deputy Judge Advocate General and a
18 Three-Star Judge Advocate General.

19 They give advice to the senior
20 leadership at the Pentagon.

21 Article 6 of the UCMJ basically was
22 built to ensure that commanders talk to their

1 legal advisors about legal decisions. And then,
2 commanders have the freedom to discuss where a
3 case should or shouldn't go.

4 That could be a closed door
5 discussion. And, although the advice that's
6 coming from the lawyers is for the benefit of the
7 client, which is the Military, you know, the
8 commander is the agent of that Military. So, it
9 is a lawyer/client like relationship when you
10 discuss how to dispose of cases.

11 And, usually, there's just a JAG and
12 a commander in the room.

13 And, while we don't want commanders,
14 especially superior commanders, telling
15 subordinates how to dispose of cases, the tech
16 chain, the lawyers, can talk up and down, from
17 the Captain up to the SJA, about where cases
18 should or shouldn't go.

19 And, that discussion, that
20 conversation, is okay. It's protected by Article
21 6, we want that conversation so that the Senior
22 Legal Advisor and the prosecutor in the case are

1 on the same page.

2 But, then they go out and talk to the
3 commanders and let the commanders make their
4 decision independently.

5 And, the way that works is, if a lower
6 commander is doing something that the senior
7 commander doesn't want him to do, the senior
8 commander can reach down and grab the case and
9 pull up to his or her level. It's called
10 withholding. And, that's how the system works.

11 Did that spawn any questions on that
12 slide?

13 BG SCHWENK: You said that -- oh, go
14 ahead.

15 CHAIR BASHFORD: I wasn't clear, is it
16 at the Brigade level or the Division level that
17 the commander has dispositional authority for
18 penetrative offenses?

19 COLONEL KENNEBECK: It's the Brigade
20 level.

21 CHAIR BASHFORD: The Brigade?

22 COLONEL KENNEBECK: In the Army.

1 The important part, what the SECDEF
2 withhold policy says, it must be a Special Court-
3 Martial Convening Authority who is in the rank of
4 O-6. And, for the Army, that's Brigade.

5 For other Services, it might not be a
6 Brigade, it might be different, so O-6 Special
7 Court.

8 BG SCHWENK: You said that the SJA
9 works for the commander and all the lawyers
10 except defense counsel work for the SJA.

11 COLONEL KENNEBECK: That's correct.

12 BG SCHWENK: The defense counsel then
13 has a stovepipe organization?

14 COLONEL KENNEBECK: They do.
15 Stovepipes are the --

16 BG SCHWENK: Chain of command?

17 COLONEL KENNEBECK: -- chain of
18 command. They have Regional Defense Counsel
19 who's a Lieutenant Colonel. He's kind of like
20 the SJA for the Region. And then, it's
21 headquartered in D.C. at the Senior Trial Defense
22 reside in D.C.

1 BG SCHWENK: How about the SVCs?

2 COLONEL KENNEBECK: Special Victims'
3 Counsel work for the Chief of Legal Assistance
4 and they work for the SJA.

5 BG SCHWENK: Do you know whether that
6 arrangement is similar in the other Services?

7 COLONEL KENNEBECK: I do think that
8 there's some, you know, I'm going to let Kristen
9 chime in here, but I think the Services are kind
10 of slightly different.

11 MAJOR FRICCHIONE: Yes, sir. In the
12 Air Force, they have a stovepipe organization as
13 well as in the Marine Corps.

14 BG SCHWENK: For SVCs --

15 MAJOR FRICCHIONE: For SVCs, yes,
16 that's right, sir.

17 So, you know, we're a little bit
18 different in the Army, but part of that stems
19 from the fact that we're --

20 BG SCHWENK: That's what I think
21 they've said.

22 (Laughter)

1 MAJOR FRICCHIONE: We're a larger
2 organization, too. And so, the ability to place
3 SVCs within the Legal Assistance Office allows us
4 to kind of have a forcible deploying effect.

5 So, if there's an increase in cases in
6 a local jurisdiction, we both have full-time SVCs
7 that only take cases dealing with sex related
8 offenses.

9 And then, we have part-time SVCs in
10 that Legal Assistance Office who can kind of
11 share, you know, training and information with
12 the Chief of Legal Assistance and they have that
13 backup there as well.

14 And so, because of the size of the
15 Army, that's the way we've set it up. It also,
16 of course, the Special Victims' Counsel program
17 is nested within 10 USC 1044(e) which that's the
18 Legal Assistance regulation as well. So, we're
19 following that as well.

20 BG SCHWENK: Okay, thank you.

21 CAPTAIN TIDESWELL: Sir, in the Navy,
22 it's also stovepipe and we have a different name.

1 The name is called Victims' Legal Counsel, VLCs.

2 HON. GRIMM: Right. So, there are two
3 acronyms that describe these people, so VLCs, is
4 it just Navy or is that what you call them in the
5 Marines, too?

6 HON. GRIMM: That's Marine Corps, too.

7 COLONEL KENNEBECK: Yes, VLC for Navy
8 and Marines, SVC for Army and Air Force. That is
9 the lawyer for the victim.

10 And, I would add on to what Kristen
11 said, I've been a Deputy SJA before and I found
12 the relationship with our Special Victims'
13 Counsel to be very helpful.

14 I don't think that they feel fear to
15 say, no Government, I don't want to help you out.
16 No, I don't want to go to trial. Or, your -- my
17 victim, my client, is having problems with the
18 unit that looks like or smells like retaliation.

19 That usually, you know, they're a
20 canary in the mine and it's a fantastic asset to
21 have.

22 I think that having that connection to

1 the SJA is beneficial to the system.

2 But, on the flip side, I can also see
3 some benefits from having a stovepipe because,
4 you know, you have someone to go to with your
5 concerns if you don't -- if you have a technical
6 issue that you don't want to discuss with your
7 SJA.

8 That's why we put them under the Chief
9 of Legal Assistance who's really a senior Captain
10 or sometimes a young Major in the larger offices,
11 and they serve as that sounding board for the
12 Special Victims' Counsel.

13 It does come down to a manpower issue,
14 building that infrastructure and the stovepipe in
15 the Army would cost us a decent number of bodies.

16 MR. KRAMER: And then, defense
17 counsel, is that also stovepiped in the other
18 direction in the Services?

19 COLONEL KENNEBECK: It is and it has
20 been pretty much since the '80s.

21 Okay, if there are no questions on
22 that slide, I'll move to the next one.

1 So, reporting and disposition process,
2 this is the picture I'd like you to have in your
3 mind.

4 It's always on in the background and
5 we talk about how we dispose of offenses. So,
6 disposition is the term that we use under the
7 Rules for Court-Martial 306.

8 Commanders have the authority to
9 dispose of offenses.

10 The way the system was built was to
11 allow the lowest level commander to make the
12 disposition decision.

13 So, as you look at this slide, we
14 start on the left with the report, which I'll
15 describe more in a second.

16 You know, it's the Company level
17 commander, so lowest level of commander, the
18 Captain, is usually the one who gets the first
19 vote on what we're going to do with the case.

20 That's not true for sex offenses.
21 Okay? It's been withheld up to the Brigade
22 level. And, that's to have someone who's got a

1 little more maturity, take a look at the facts of
2 that case and make a decision about that.

3 So, the commanders below that have
4 some responsibilities to provide care for the
5 victim, but they don't get to make a disposition
6 decision in sex offenses.

7 For other offenses, that is how it
8 works. So, if there's a fight over the weekend,
9 usually that Company Commander gets to decide,
10 okay, well, this looks like a court-martial to me
11 because you knocked the guy's teeth out.

12 Or, no, this isn't a court-martial,
13 this is just an Article 15. We'll talk about
14 those alternative disposition choices in a
15 minute.

16 So, graphically, on the bottom left,
17 you see an unrestricted report. So, there, you
18 know, for sex offenses, there are two types of
19 reports, restricted and unrestricted.

20 Restricted means, you don't tell the
21 command. The investigators don't know, but all
22 of the caregivers do know. So, your sexual

1 assault nurse, your Sexual Assault Response
2 Coordinator, your SARC, or your Victim Advocate.

3 Those folks can know, they provide
4 care to the victim. And, in my opinion, the goal
5 is to make the victim feel like they have some
6 choice, that they exercise some control over
7 what's happening in their life.

8 And, maybe, if they feel stronger
9 about it later, they can convert to unrestricted.
10 It allows us to collect a sexual assault medical
11 forensic exam, a SAMFE. And that gets saved for
12 50 years.

13 So, if they decide to go unrestricted
14 later, they can get that kit and use it perhaps
15 in a subsequent prosecution.

16 CMSAF MCKINLEY: Sir?

17 COLONEL KENNEBECK: Yes?

18 CMSAF MCKINLEY: Is there a time limit
19 on when they can go from restricted to
20 unrestricted?

21 COLONEL KENNEBECK: No, no, there's
22 not.

1 So, if it's five years later, they
2 want to come back or 20 years later, okay, this
3 happened to me when I was in and I didn't want to
4 talk about it, but now I do. We're going to have
5 that -- the 2910 that we're going to talk about
6 later will be on file, if they went and reported
7 quickly after and there's some forensic evidence
8 to be gathered, that will be on file.

9 So, you know, that's the idea behind
10 the restricted reporting. The goal, in my
11 opinion, would be to get them to go unrestricted.

12 But, there is a huge invasion of
13 privacy that comes with that. It's a heavy
14 weight.

15 So, assuming we have an unrestricted
16 report, the person can call all of these entities
17 I have listed in the bottom left corner, you
18 know, to tell them something's happened to me,
19 whether it's the SAFeline, the SARC, a legal
20 person, CID, your Military Criminal Investigator.

21 I'm on the fifth slide, I think.

22 Eventually, backup one, right there,

1 that's the slide I'm on right now.

2 Eventually, the Military Criminal
3 Investigation will find out about it. It's
4 required in all the Services that as soon as
5 someone reports a sexual assault, when it's
6 unrestricted, that you let your MCIO know.

7 So, for the Army, that's CID. And, in
8 my mind, that's a great policy right there. It
9 takes all the discretion out of everybody's hand.
10 As soon as somebody official knows that there has
11 been a complaint, an alleged sexual offense, it
12 gets reported to CID.

13 We do that for contact offenses and
14 penetration offenses in the Army.

15 And then, let CID decide if it's an
16 issue, if it's just a touch, if it's just a
17 contact offense, a lot of times the CID will say,
18 no, you can handle that at your own level. But,
19 they get the first look.

20 So, that's how business works in the
21 Army. And, I think that's been a huge help to
22 making sure that we take a look at every single

1 one.

2 And then, as soon as CID does open an
3 offense, you're going to have a tracking number.
4 So, on your Abbott case, you're going to see a
5 CID number. Every one of your sex offenses that
6 you see is going to have a tracking number and
7 that helps marry up our data on the annual report
8 which Nate Galbreath will talk to you about later
9 this afternoon.

10 After CID conducts its -- while CID's
11 conducting its investigation, you can see these
12 other loops of information.

13 So, there's a trial counsel up there
14 in red. All of the red are lawyers and legal
15 events. So, the trial counsel, that person's
16 giving advice to the Company, Battalion or
17 Brigade level commands.

18 That trial counsel talks to the SVP,
19 Special Victims' Prosecutor. We have 22 or 23 in
20 the Army. They are required to participate in
21 every reported sex offense and domestic. I think
22 we have a former SVP that can talk about that if

1 you would like.

2 But, that Special Victim Prosecutor is
3 a more senior litigator who has already litigated
4 trial and/or defense before they've taken the job
5 as an SVP.

6 And, they either run the court-martial
7 or they sit second chair and help the trial
8 counsel make decisions and prepare for that
9 court-martial. So, there's discussion between
10 the SVP and the trial counsel.

11 And then, of course, you have the SJA
12 up there at the top giving advice to the GCMCA.

13 The lawyers are figuring out what does
14 the evidence look like? What do we think we can
15 do with this case?

16 So, that conversation is happening
17 throughout the investigation.

18 On the bottom in the blue, you can see
19 the trend, green is command, blue are all the
20 Services, I have the victims in red are
21 attorneys.

22 Down at the bottom you have your SVC.

1 So, most of our clients take a Special Victims'
2 Counsel and they start getting the legal advice
3 right away.

4 So, that is happening while the
5 investigation is happening.

6 So, this is a snapshot of who's
7 talking to whom and eventually, it'll be a
8 description of the process. Because normally, it
9 goes up the chain of command to that Brigade
10 Commander who eventually, once we have an
11 investigation, we have a legal opinion about what
12 we can do with this case, that Brigade Commander
13 will make a disposition decision.

14 This is going to court-martial, and
15 that's what these words are on the right, it can
16 go up to a court-martial or he can forward it to
17 the General and let the General decide or he can
18 dispose of it alternatively with nonjudicial
19 punishment, that's NJP, with an administrative
20 action, which I'll describe here later, it could
21 be something administrative that we do to the
22 Soldier, to no action, maybe no action is

1 warranted or that Brigade Commander can push it
2 back down and say, hey, Company or Battalion
3 Commander, you can handle this at your level.

4 For sex offenses, that doesn't happen
5 that often, but that's how the rules are built.

6 So, this is meant to be a snapshot of
7 the process and the communication between these
8 players.

9 And then, the top right, you'll see,
10 you know, eventually, the data that we push
11 through the system gets reported up to Congress,
12 every CID report is tracked.

13 Now, we have a requirement that every
14 administrative investigation that has a finding
15 of a sexual offense also goes in our NPF. So, we
16 track these offenses to get a better snapshot of
17 someone who stays in the Military.

18 Any questions on this slide?

19 Anyone want to add anything to my
20 slide? Don't be shy.

21 MAJOR PEDDEN: Sir, I think the only
22 distinction I might draw, and pardon me if you're

1 going to get to this in a moment, but the
2 disposition determination is not necessarily the
3 same as the form selection.

4 So, for example, an Officer serving in
5 the grade of Colonel may be a Court-Martial
6 Convening Authority, the disposition
7 determination that she makes could be to forward
8 those charges to a higher convening authority for
9 referral to a general court-martial.

10 The Colonel ordinarily does not have
11 the authority to convene a general court-martial
12 and so the disposition determination that she
13 takes is simply to give it to someone with that
14 authority for a determination as to how to
15 proceed.

16 COLONEL KENNEBECK: Right.

17 MAJOR PEDDEN: So, disposition and
18 placing it actually in a court aren't always the
19 same thing.

20 COLONEL KENNEBECK: Right, but it --
21 okay, so some questions here.

22 Ma'am?

1 CHAIR BASHFORD: If you're going to
2 get to this later just tell me you're going to
3 get to it later, I see when the Special Victims'
4 Counsel comes in, when does the defense attorney
5 get assigned during this procedure?

6 COLONEL KENNEBECK: By the time CID
7 finds out about it. The MCIO, the accused is
8 probably going to go to defense and that's
9 typically how it plays out.

10 CHAIR BASHFORD: Okay.

11 COLONEL KENNEBECK: As soon as the
12 accused has been called in to give a statement,
13 there go the TDS next. And, sometimes maybe
14 before that.

15 CMSAF MCKINLEY: So, once the case
16 comes forward and CID gets involved or OSI, I
17 assume there were some things that are automatic
18 for the alleged perpetrator and those are things
19 like probably pull the PRP, probably suspend
20 security clearance, probably ineligible for
21 promotion, probably ineligible for a PCS,
22 probably ineligible for re-enlistment.

1 So, are there any other -- are those
2 true and is there anything else that goes with
3 that?

4 COLONEL KENNEBECK: All those
5 probablys are true. I don't know if PRP is.

6 CMSAF MCKINLEY: Personal Reliability
7 Program procedure.

8 COLONEL KENNEBECK: Okay, yes, we
9 don't have that in the Army, but that's
10 operational.

11 Yes, administrative leave, we call it
12 a flag. And so, as soon as someone is listed as
13 a subject of an offense, they're flagged, which
14 means no promotion, no PCS, you don't move,
15 everything stops for that person.

16 You do need to keep in them in work.
17 You can't just take them out of their job and
18 make them walk around in circles in the parking
19 lot. You have to keep them employed in a type of
20 work that's commensurate with their rank while
21 the investigation is pending.

22 But, yes, all of those things happen.

1 Yes?

2 DEAN HARRISON: Colonel, if an offense
3 takes place or an alleged offense takes place in
4 a civilian community, is there any effort to
5 coordinate the investigation with civilian
6 prosecutors?

7 COLONEL KENNEBECK: Absolutely. So,
8 the lawyers on an installation have relationships
9 with the prosecutors, obviously. And, the NCI,
10 CID for us, on the installation has a
11 relationship with law enforcement, regularly, you
12 know, regular interaction.

13 So, if the offense happens off post
14 and the civilian police are investigating, CID's
15 going to go with them sometimes or at least get
16 the facts afterwards and they'll share the
17 report. That goes both ways really.

18 So, if there's an investigation on the
19 installation that involves a civilian, let's say
20 he's in trouble for other stuff off the
21 installation, that CID will share that
22 information with that law enforcement.

1 DEAN HARRISON: So, if the convening
2 authority makes a decision not to prosecute, the
3 civilian prosecutor will be notified so they can
4 exercise their discretion as well?

5 COLONEL KENNEBECK: Yes and vice
6 versa.

7 We generally try to maximize
8 jurisdiction. If we can try it, we want to try
9 it. But, sometimes, the civilian community has
10 a greater interest and they want it worse than we
11 do and we'll let them take it.

12 And then, of course, new RCM-306(e),
13 Rule for Court-Martial 306(e) says that a
14 civilian Military Servicemember who has been
15 sexually assaulted can ask for -- is this just
16 sex offenses or is it --

17 MAJOR FRICCHIONE: Sex-related
18 offenses.

19 COLONEL KENNEBECK: Sex-related
20 offenses, the broad categorization, can ask that
21 the case be tried in the civilian jurisdiction
22 which requires then communication between the

1 lawyers and the local prosecutor to decide
2 whether the local prosecution wants to take the
3 case or not.

4 DR. SPOHN: How does the process
5 differ when the victim is a civilian making an
6 accusation against a Member of the Military
7 Services?

8 COLONEL KENNEBECK: So, the process
9 isn't different in the investigation. Whether
10 that civilian person can get counsel or not might
11 be an issue. But, as far as how the case is
12 investigated and who would prosecute it, that
13 doesn't change.

14 If the perpetrator was a Soldier, then
15 we could try it or the civilian, depending on
16 where it happened.

17 So, one example where the civilians
18 can't prosecute it is, if the crime happens on a
19 Military installation that has exclusive federal
20 jurisdiction. Then, the local state court can't
21 try that case because they don't have
22 jurisdiction.

1 HON. GRIMM: When you have concurrent
2 jurisdiction if the state -- if the local
3 prosecutor takes the charge first because there's
4 some other interest, and the result is one that
5 the Military believes is not the proper outcome
6 since they're separate sovereigns, does the
7 Military have the right, if they chose to do so,
8 to bring charges notwithstanding the fact that
9 there was a disposition at court in the civilian
10 community?

11 COLONEL KENNEBECK: We do have the
12 right and we do do that occasionally. It's not
13 that common.

14 HON. GRIMM: I wouldn't think it would
15 be.

16 COLONEL KENNEBECK: But, we absolutely
17 do consider that, especially for the more serious
18 offenses. Sexual assault, rape, murder, all the
19 primary offenses.

20 If there's been an unsuccessful
21 prosecution off the installation, we're going to
22 take a really good look at it and decide if we

1 can try it at a court-martial.

2 MAJOR PEDDEN: If I could just address
3 one further point on that, sir.

4 There is, Your Honor, a particular
5 provision, Judge Advocate General's Manual for
6 the Navy that applies both to the Navy and the
7 Marine Corps.

8 There is a principle of comity
9 involved. So, as is the case with the Army,
10 we'll take a close look at it, more often in the
11 event that the Military elects to proceed with
12 some disposition on that same offense, it's
13 likely related to the other uniquely Military
14 aspects of the case, for example, rank and pay
15 and other things that the commander might want to
16 influence.

17 COLONEL KENNEBECK: Sir?

18 HON. BRISBOIS: So, just to kind of
19 double back on something you said, the flagging
20 is an administrative process, but that's not the
21 only pre-trial, you know, circumstance. There
22 are circumstances where someone could be held in

1 pre-trial confinement.

2 COLONEL KENNEBECK: Yes, yes. So,
3 flagging is required. So, it's triggered
4 automatically when an investigation is open, even
5 at 15-6 investigation. If someone's on an
6 investigation for a potential UCMJ offense,
7 flagging is required.

8 There are a few other things that
9 trigger flagging in the Army. And, I imagine the
10 sister Services have similar provisions to where
11 administrative -- favorable administrative
12 actions are stopped when an investigation is
13 pending.

14 In addition to that, there is, you
15 know, safety issues for the victim and control
16 issues for the alleged accused.

17 And, the command will decide, usually
18 early on, if it's a violent offense that we're
19 talking about or there is a chance that the
20 accused might flee, then the Military has the
21 option to put that person in pre-trial
22 confinement or try to restrict them lawfully.

1 Our problem is, the challenge there is
2 that we don't have a bail. We don't have bond,
3 we don't have other methods of controlling.
4 You're in jail or you're at the unit.

5 And, if you're at the unit and you're
6 the type of person that likes to go AWOL, that
7 means the unit's doing a lot of work to try and
8 control you and stop you from going AWOL.

9 But, if I put you in pre-trial
10 confinement, now the bar is really high and my
11 speedy trial clock is ticking away. I need to
12 get my charge sheet ready whether or not the
13 investigation is ripe.

14 So, it's a tough choice to make. But,
15 commanders do it, commanders love pre-trial
16 confinement because it gets problem children out
17 of the ranks.

18 We generally tell them, no, you can't
19 do it, you don't have enough here. That's
20 generally the case, we don't have a whole lot of
21 really violent crimes in the Military.

22 Yes?

1 CMSAF MCKINLEY: You know, the side
2 effect of this is also suicide prevention. And,
3 I've been in cases where we've had the alleged
4 perpetrator take the route of suicide versus
5 going to court.

6 COLONEL KENNEBECK: Yes.

7 CMSAF MCKINLEY: So, you know, we've
8 got to make sure we do everything we can for the
9 victim, also the perpetrator to make sure that we
10 take care of them mentally to also prevent
11 suicide.

12 COLONEL KENNEBECK: I would say that
13 the amount of time we spend thinking about how we
14 take care of the victims and accused is private.

15 Because, you know, accused are under
16 a great amount of pressure during the
17 investigation. And, the more senior the person
18 is, the closer they are to 20 years, you know, at
19 least the historical part of this, that might not
20 be as meaningful ten years from now because
21 retirement changes.

22 But, somebody's close to 20 years, you

1 know, that person's under a great deal of stress
2 and some of them do commit suicide.

3 So, we are -- whatever's happening,
4 the unit's working hard to take care of the
5 accused and the victim.

6 MS. GARVIN: Can I clarify access to
7 the SVC? Military personnel get it, but do
8 contractors and civilian employees also get
9 access to SVCs and just civilian?

10 COLONEL KENNEBECK: Yes.

11 MS. GARVIN: Is that accurate?

12 MAJOR FRICCHIONE: So, actually, as a
13 follow up to your question as well, sir, and the
14 provisions services, there is a couple different
15 levels of civilians that we deal with.

16 We have civilians who have no -- any
17 sort of contact with the Military. Then we have
18 civilians who are dependents, who are already
19 receiving benefits in the Military. And then, we
20 have DoD civilian employees as well and
21 contractors.

22 And so, at those three levels, each

1 level has a different level of provided services
2 across what we have in our SHARP program which is
3 the acronym for the SAPRO program in the Army.

4 And, then the provision of SVC
5 services.

6 Right now, the DoD civilians do have
7 access to SVC counsel. However, the program
8 manager needs to approve it.

9 Dependents also have access to SVC
10 services.

11 But, civilians who have no contact
12 with the Military will not.

13 Same principle applies with SHARP
14 services. There was a recent Army directive that
15 just came out in 2017, so that's earlier this
16 year, that deals with the provision of SHARP
17 services, primarily the ability to make a
18 restricted report for DoD civilian employees.
19 So, that was a new development that just happened
20 earlier this year.

21 And, dependents will also have access
22 to make those restricted reports as well, which

1 is really the critical component of SHARP
2 services.

3 Medical services will always be tied
4 to whether or not you are due those medical
5 services in the first place. So, DoD civilian
6 employees may not get those medical services
7 unless they already had access to them through a
8 dependency status.

9 COLONEL KENNEBECK: I'd like to add a
10 couple of things to that.

11 One, this becomes a question, so the
12 number of Special Victims' Counsel that we have
13 on the street right now, and I'm sure this is
14 true across the Services, is -- it can be tapped
15 pretty quickly if you broaden the service base.

16 That doesn't mean I don't want to do
17 it, it just means that it will have an impact.
18 So, typically, I have three Special Victims'
19 Counsel at JBLM, Fort Lewis, that's about, you
20 know, 25,000 soldiers on that installation. And,
21 those three were maxed out.

22 By the time you end up taking 20 or 25

1 clients, you don't have enough time. They're
2 calling a lot of times on the weekends and the
3 evenings, it's a very taxing job.

4 So, if we broaden the base, it really
5 will have an impact quickly to the point where
6 our other legal Servicemembers might go away all
7 together.

8 So, we're -- we watch that and we're
9 concerned about that.

10 On the flip side, within SHARP, SAPRO,
11 all together, the victim advocates on every
12 installation generally have a very healthy
13 relationship with other victim advocates off the
14 installation. And, that's a growing industry,
15 that's getting better over time.

16 And, those relationships matter
17 because, if you have a victim who's off the
18 installation not entitled to SVC services, you
19 can find something maybe close off the
20 installation, some provider who can help that
21 victim out off the installation.

22 And then, we do our best to fill the

1 gaps.

2 MEMBER FRICCHIONE: And, that civilian
3 will have access to our VWL program. And so, our
4 SVWL will kind of serve that role as the victim
5 advocate.

6 BG SCHWENK: And that is?

7 MEMBER FRICCHIONE: Oh, sorry, sir,
8 our Special Victim Witness Liaison who is
9 actually housed in the OSJA, so the Office of the
10 Staff Judge Advocate where all the lawyers are.

11 COLONEL KENNEBECK: I'll talk about
12 VWLs. Army calls them VWL. I think the Navy and
13 Marines call them VWAPs, Victim Witness
14 Assistants Personnel.

15 And, they basically work for the
16 Government, for the prosecution and they ensure
17 that victims and witnesses get all the
18 information they need related to the prosecution
19 of the case so they can show up at the court-
20 martial, they know what happened, they can get
21 information after the court-martial is done.

22 So, they're not victim advocates,

1 they're not neutral, they work for the
2 Government, but they definitely provide a lot of
3 information and some care and feeding to victims
4 and witnesses.

5 That used to be the person that was
6 there for victims before the SVC. So, these were
7 non-lawyers, typically paralegals, but they were
8 there for the victims before the SVC program came
9 on board.

10 BG SCHWENK: Does the SVC program in
11 the Army extend beyond sex assault cases? Like
12 somebody attempted murder case that had -- we all
13 had to be -- and they -- she got touched on the
14 rear end and has an SVC and I got beat to heck
15 and going to the hospital for three months, where
16 is my SVC? Do they get one?

17 COLONEL KENNEBECK: That hasn't
18 happened yet, to my knowledge.

19 MAJOR FRICCHIONE: No, no, sir, not in
20 the Army. I believe the Marine Corps does
21 provide their VLCs to special crimes just like
22 that on a case by case basis. They pick and

1 choose which cases may deserve a VLC in that
2 instance. But, we do not, it's only sex related
3 offenses in the Army.

4 MS. SUDENDORF: Also, I believe some
5 of the other Services, not the Army, has SVCs in
6 domestic violence cases. So, with DV cases,
7 they've also provided the services and the client
8 representation in those cases as well.

9 Some of it is, Colonel Kennebeck
10 indicated, has to do with manning. You know, the
11 ability to cover all of those types of cases.

12 COLONEL KENNEBECK: Okay, so next
13 slide is just a quick graphic of, you know, the
14 disposition process.

15 So, if you look at Rule for Court-
16 Martial 306, it tells commanders, these are what
17 you get to do.

18 You can do -- make a decision of no
19 action, take no action, take administrative
20 action, NJP or Article 15, you can forward the
21 charges to a subordinate or a senior commander or
22 you can forward for court-martial.

1 And, bottom line, you know, for sex
2 offenses, that decision is made by the Brigade
3 level at an O-6 Special Court-Martial Convening
4 Authority, and when the prosecutor sits down with
5 that Colonel or Captain, that O-6 and briefs the
6 case, they're generally going to have all of the
7 information that they need from the investigation
8 and they will have done the math.

9 Okay, we think this case is triable,
10 here's why or we don't think this case is triable
11 at a court-martial and here's why. What would
12 you like to do, sir or ma'am?

13 And, that's the conversation that's
14 had between the attorney -- sometimes the
15 investigator is in the room, sometimes they're
16 not. But, the investigation is definitely there.

17 And, by that time, the prosecutor will
18 have done a prosecution memo to break down all of
19 the evidence required to prove all of the
20 elements of the offenses that are to be charged
21 and the strength or weaknesses of that evidence.

22 The prosecution memo wouldn't be

1 shared with the commander, it's a work product,
2 but it would be discussed so that the commander
3 has an understanding of why a case should or
4 shouldn't be tried.

5 And then, that commander owns the
6 decision. So, we inform the commander, tell him
7 the risks, the benefits and then the command
8 says, okay, this is what I want to do.

9 Next slide?

10 This next slide is a repeat picture on
11 the top left, you've seen that before. But, what
12 I wanted to lay out on the bottom right are some
13 of the policies that have been implemented in the
14 last six years or more related to sexual
15 offenses. I would call them checks and balances.

16 For instance, if you look at command,
17 MCIO mandatory. So, MCIO, or Military Criminal
18 Investigative Organization, that's CID and NCIS,
19 reporting is mandatory. That definitely had an
20 impact.

21 You know, commanders now are calling
22 the CID immediately. As soon as the Squad Leader

1 comes in and says, hey, First Sergeant, somebody
2 told me something happened last Saturday in the
3 barracks. What happened?

4 Well, you know, she was drunk, he was
5 drunk and they had sex and she said she didn't
6 want to. Okay, call CID.

7 That's the dialogue that happens at
8 the command level now. They don't waste any
9 time. Get the victim to the SARC, let's call
10 CID, let's start talking about victim care.
11 Who's the alleged -- who's the bad guy? Is he
12 mine or is he someone else's? Let's find out,
13 you know, and I use the word bad guy, I don't
14 presume innocent.

15 But, you know, commanders take this
16 stuff seriously and they want to make sure that
17 someone's been alleged to have committed the
18 crime, that they are implementing control
19 measures as required.

20 Okay, the SAIRO is a mandatory report
21 within how many days?

22 MAJOR FRICCHIONE: Eight days, sir.

1 COLONEL KENNEBECK: Eight days. So,
2 SAIRO, you have eight days to report. It's a
3 heavy 5 W's, who, what, when and where on the
4 victim and victim care that goes from the lowest
5 level of command up to the General in that
6 footprint. Okay?

7 That policy's been in place long
8 enough that every command knows what a SAIRO is,
9 not to mention, the way these play out in
10 reality, as soon as the command hears about it,
11 they're sending the spot report up to the boss.
12 So, the boss being the Commanding General, GCMCA.

13 So, that initial report's going up
14 right off the bat. And then, within a couple
15 days, we'll fill in the gaps of is there an SVC?
16 How's the victim doing? What -- has the victim
17 asked for an expedited transfer?

18 You know, all those questions about
19 the victim in that email or report will go up
20 without identifying information. So, there's no
21 PII, that's just a report that an incident's
22 happened and it lets the Commanding General know

1 that the subordinate commanders are on it.

2 You're tracking the withholding policy
3 up to the Brigade level. They must update the
4 victim's regularly, so within the first ten days,
5 they're supposed to talk to victims and then
6 every 30 days thereafter.

7 The Battalion level commander, one
8 below the O-6, so Lieutenant Colonel, is supposed
9 to meet with the victim monthly to give them an
10 update on what's going on with their case.

11 Then, there's the SARB, that's the
12 Sexual Assault Review Board. It's the
13 administrative meeting with the Commanding
14 General and all those O-6's who work in that
15 installation. I would call that a woodshed
16 possibility moment when we don't want them
17 talking about justice, don't want unlawful
18 command influence, but they talk about victim
19 care in the SARB.

20 How's the victim doing? Without
21 divulging PII, without talking about mental
22 health care, whether the victim is or isn't

1 receiving it, it's a description of are they
2 going to work? Are they -- do they need an
3 expedited transfer? How, you know, how is the
4 victim doing?

5 And, they go case by case pending at
6 that installation in that SARB. That's a monthly
7 event.

8 And then, 4833, that's a form which we
9 didn't give you, just occurred to me. It's a
10 Department of the Army form. I'm sure the other
11 Services have one similar.

12 When a CID investigation is closed,
13 they close it with, what did the command do?
14 What action was taken? And, that way, we can
15 keep track by CID report number what happened at
16 the end of the case.

17 So, a 4833 is another way of managing
18 accountability.

19 MG ANDERSON: You said that the
20 commander meets monthly with the victim?

21 COLONEL KENNEBECK: No, no, no.

22 MG ANDERSON: No?

1 COLONEL KENNEBECK: Oh, yes, yes. I'm
2 sorry, the Battalion commander, the Lieutenant
3 Colonel is supposed to meet monthly with the
4 victim, yes.

5 MG ANDERSON: And they're -- and so
6 the Victims' Counsel or VLC, depending on the --
7 is also present at that update?

8 COLONEL KENNEBECK: They can be. They
9 can be, it's really up to the victim. If the
10 victim wants them there, they can and if the
11 victim is okay with it, then.

12 Generally, if there's a Victims'
13 Counsel, the Victims' Counsel is going to talk to
14 the victim about that and say, hey, what do you
15 want? And, they'll be there if the victim wants
16 them to be there and they won't if they don't.

17 CHAIR BASHFORD: So, your 4833
18 describes what action was taken?

19 COLONEL KENNEBECK: Yes, ma'am.

20 CHAIR BASHFORD: Does it describe why
21 certain action was taken or not taken?

22 COLONEL KENNEBECK: Well, if it's been

1 carefully filled out, maybe, maybe. And, a lot
2 of times, it will be a very generic description.

3 You know, it might say evidentiary
4 challenges prohibited, depending. It really
5 depends on what you get. It doesn't prescribe a
6 justification.

7 I said the word UCI, that acronym UCI,
8 that's unlawful command influence. That is
9 prohibited by Article 37 of the UCMJ and that
10 prevents superior commanders from telling
11 subordinates what to do or negatively influencing
12 the process, so deterring people from testifying
13 on behalf of the accused or anybody else.

14 Or, impacting a panel, the jury, that
15 would be unlawful command influence. So, that's
16 something that we build the system to avoid that.

17 DEAN HARRISON: Excuse me, Colonel.

18 COLONEL KENNEBECK: Yes?

19 DEAN HARRISON: You mentioned flagging
20 of an alleged perpetrator file --

21 COLONEL KENNEBECK: Yes.

22 DEAN HARRISON: -- for administrative

1 purposes. Is there anything done for a Military
2 victim to make sure that she or he is not
3 penalized for reporting an allegation of assault?

4 COLONEL KENNEBECK: Well, I would say
5 that the SVC solves that. There is no process
6 that would, you know, that would be a litmus test
7 for that, prescribed that I'm aware of. But,
8 that's what the SVC will be the first person to
9 hear about this.

10 So, I don't know if you want to add to
11 that?

12 MAJOR FRICCHIONE: Sir, yes.

13 What comes to my mind would be the
14 burgeoning area of retaliation and responses to
15 retaliation.

16 So, specifically, if there are any
17 actions by a supervisor or commander against a
18 victim after a report of sexual assault would
19 certainly be perceived as a retaliatory action or
20 reprisal which is the more specific term for it.

21 And so, right now, we do have a number
22 of ways to report retaliation. There is, across

1 the board, not even just professional reprisal
2 retaliation, but also social or ostracism from
3 the victim's peers. So, if they feel like
4 they're being excluded, that is also included in
5 retaliation as well.

6 So, that, I think, is close to
7 answering your question, sir, is that --

8 DEAN HARRISON: Well, yes, I'm just
9 wondering, for example, if the victim is a
10 student at a military school and the alleged
11 perpetrator is, you know, an NCO instructor. Is
12 there anything done to make sure that that
13 student's progress or the school is not somehow
14 or another hampered or --

15 MAJOR FRICCHIONE: Yes, and that would
16 be -- and that falls under the reprisal aspects.

17 So, if anyone withdraws a favorable
18 action in any way, shape or form, or imposes a
19 negative personnel action, that could be seen as
20 reprisal.

21 Traditionally, reprisal is then
22 forwarded to the IG, so the Inspector General

1 will then look at that allegation and investigate
2 it.

3 Right now, reprisal is also a bigger
4 issue. We have, actually, an Army Directive that
5 makes it a punitive offense as well. It's Army
6 Directive 2014-20.

7 And, that makes it -- it enables the
8 command to potentially take action if there has
9 been a reprisal following a report of any crime.

10 But, we also have the new Article 132
11 that is coming out after the 2017 NDAA that is
12 specifically a reprisal against any individual
13 taken by any Member who is subject to the UCMJ.
14 So, that is going to be coming out, but it will
15 be effective in 2019.

16 DEAN HARRISON: Thank you.

17 COLONEL KENNEBECK: And, I think the
18 SARB might be the -- the Sexual Assault Review
19 Board that occurs monthly might be another venue
20 where challenges to the victim might be
21 discovered or illuminated. SVCs do attend those
22 meetings and if something negative is happening

1 to the victim's like --

2 You know, an example would be a
3 promotion. Let's say the victim was getting
4 ready for a promotion and then the sexual assault
5 happened. Promotion Boards are stressful.
6 You're standing in front of folks who are, you
7 know, challenging you, questioning you, making
8 you do drill ceremony, whether it's PT test,
9 whatever's required for that Board.

10 So, the first line supervisor of this
11 victim says, you know, let's not do your Board.
12 Let's push that off a month or two, let's let
13 this settle down a little bit.

14 The victim might perceive that as, you
15 know, punishment or losing something that she
16 otherwise would have had.

17 And so, you know, what is retaliation
18 is the first question really. But, I don't think
19 that's the big part of retaliation. I think
20 retaliation is what happens as soon as the unit
21 knows there's been a report and what happens to
22 those friends. That's the thing that I think, as

1 much control as we can exert over that and we
2 talk to commanders a lot about that.

3 You know, back in the late '90s when
4 we had the Don't Ask, Don't Tell policy and
5 someone said, I, you know, want to be chaptered
6 out as a homosexual, we would put a clamp down on
7 discussion of that. The only person who talks
8 about that is the First Sergeant and Company
9 Commander, nobody else does. If you hear
10 scuttlebutt about it, then people would get in
11 trouble.

12 That's the same level of effort we
13 need to apply here where there's a report, all
14 the rumors stop because, what happens in social
15 media, the things you can't see until later, are
16 the more damaging. And, this is all anecdotal on
17 my part.

18 MAJOR FRICCHIONE: Yes, and I could
19 have missed the main event here, too.

20 But, there's also an Army Directive
21 that came out in 2015 that talks about the
22 command's responsibilities to prevent

1 retaliation.

2 And so, at the SARB, the chair of the
3 SARB who's usually the senior commander at every
4 SARB will ask everybody who's in attendance, has
5 anybody involved in this case experienced
6 retaliation of any kind?

7 So, I talked earlier about
8 professional and social, it's everything.

9 If anybody who's involved with the
10 case to include witnesses, the SARC, the Victim
11 Advocate, the victim, anyone's who's reported,
12 anyone who's intervened in the case, if anyone
13 has experienced retaliation and anyone around the
14 table knows of, then it'll be reported and
15 tracked through the SARB.

16 That reporting and tracking through
17 the SARB will extend past the time when the
18 accused court-martial could be done. That's
19 going to be tracked until it's complete.

20 Additionally, the O-5 Battalion level
21 commander who is the commander for the individual
22 who's being retaliated against, will have to come

1 back with a plan to address it. And now, that's
2 kind of where you get to the informal resolution
3 that Colonel Kennebeck was talking about.

4 That's really kind of the more common
5 reaction as opposed to the investigation and
6 prosecution side.

7 If we are talking about, you know, the
8 perception of retaliation from any one of these
9 individuals, usually a commander can take action
10 to make sure that there's some mitigation there
11 that all parties are impacted.

12 CMSAF MCKINLEY: I'd like to add, you
13 know, a couple intentional consequences to the
14 victim. For instance, say, a victim is a Staff
15 Sergeant and the Staff Sergeant is due to be
16 testing for Tech Sergeant, but during this whole
17 period of time, they have this sexual trial going
18 on and they're under -- and they can't study or
19 anything else.

20 So, promotion to Tech Sergeant would
21 have to take two tests and it's an intensive
22 study period.

1 Well, they can't study, they can't
2 concentrate. So, therefore, when they go to take
3 the test, they may lose out on that promotion to
4 Tech Sergeant because, you know, they could not
5 focus.

6 So, that's an unintended consequence
7 there.

8 Now, for a senior NCO, an E-7, E-8
9 testing, you know, part of it, is we review your
10 records and we look at during that period of
11 time, say that one year period of time, what are
12 the promotion bullets that you have, the great
13 accomplishments that you did, that's going to
14 warrant you to be promoted.

15 Well, if you're in this whole case for
16 many months, your performance reports may not
17 reflect really good things.

18 So, therefore, your Board score toward
19 the promotion is not going to be there. You
20 know? And, there's nothing to the Board that
21 says, you know, this happened during this period
22 and this is why.

1 So, there are some unintended
2 consequences toward promotion on the victim that
3 I don't think there's anything out there right
4 now to really help them out.

5 Does that make sense?

6 COLONEL KENNEBECK: I totally agree.
7 I actually think life stops for the victim and
8 the accused. You know, even if the accused is
9 later vindicated, it's the same on both sides.

10 But, I do think people don't think
11 about the victim aspect because, a lot of times,
12 they're going to appointments, they're trying to
13 get their life back together. They're trying to
14 put this back in the box and live their life.

15 And, meanwhile, you know, they might
16 not be going to all the formations everyone else
17 is going to. They're gone a lot because they're
18 going to a doctor's appointment or something and
19 perception over time among peers and the lower
20 level leadership is, they're not towing the line
21 like the rest outside the group.

22 And, that is a dynamic that's

1 difficult to manage.

2 Okay, I'd like to fly through the next
3 couple slides so we can get talking about one
4 case.

5 (Simultaneous speaking)

6 COLONEL KENNEBECK: Yes?

7 SGT. MARKEY: First of all, thank you
8 so much for your presentation, you do a great
9 service.

10 You talked about the retaliation, do
11 you collect data on that?

12 MAJOR FRICCHIONE: Yes, we -- through
13 the SARB, that's how we're collecting the
14 retaliation information. So, it's going to be
15 through the SHARP program mostly, from the SARC
16 and Victim Advocate we do.

17 Also, the SVCs collect data on
18 retaliation as well.

19 And so, SVCs will be pulled and
20 there's tracking through that program as well as
21 to what retaliation reports are coming in from
22 the field.

1 COLONEL KENNEBECK: And, IG manages
2 all formal investigations and they're going to
3 track. I think tracking is going to be huge and
4 there's probably going to be more policies
5 forthcoming from the Big Army or Big DoD on what
6 we count, what does count. But, I think those
7 systems about what needs to be tracked and who
8 tracks will be quite fixed and so they're
9 forthcoming. Because the policy's growing quite
10 a bit.

11 SGT. MARKEY: Thank you. I know we've
12 been given a lot of data to look at. Do you know
13 where that information is? What reports those
14 are in?

15 MR. SURIAN: DoD SAPRO has them, sir.

16 SGT MARKEY: SAPRO?

17 MR. SURIAN: DoD SAPRO collects the
18 retaliation data from IGs and the Military
19 Criminal Investigative Organization and the
20 commanders.

21 SFT. MARKEY: And then -- okay, thank
22 you so much.

1 CHAIR BASHFORD: Sir, do you mind
2 identifying yourself, sir?

3 CAPTAIN TIDESWELL: Guy Surian from
4 CID.

5 SGT. MARKEY: Thank you.

6 And so then, the next thing is once
7 that that's collected, what happens to it? Once
8 that data is collected, what happens to it?

9 MR. SURIAN: You need to ask Mr.
10 Galbreath this afternoon, sir --

11 SGT. MARKEY: Okay.

12 MR. SURIAN: -- when he comes in to
13 talk to you about that.

14 SGT. MARKEY: Okay, thank you.

15 MS. VAGHELA: Hi, this is Asha Vaghela
16 from the Air Force.

17 So, last year, there was a DoD
18 Retaliation Prevention Response Strategy that was
19 signed at the DoD level. All the Services
20 coordinated on it, all the Services have a
21 process in play, it's different in each Service.
22 I think that's very important to keep in mind.

1 So, I can certainly speak to the Air
2 Force. There are different entities from whom
3 retaliation data is collected.

4 So, there is a process by which
5 retaliation data is collected in the SAPRO world
6 working with the advocate and SARCs and Sexual
7 Assault Response Coordinators.

8 We also collect retaliation data, if
9 you will, that generates -- that's generated from
10 CDIs which are Commander Directed Investigations,
11 investigations that the command might do based on
12 the allegation of retaliation or reprisal or
13 ostracism and that treatment.

14 We also get data from our respective
15 MCIOs, the Military Criminal Investigative
16 Organization, but in the Air Force, it's OSI,
17 which is the Office of Special Investigation.

18 So, currently, due to the prevention
19 strategy that was signed last year, the
20 Department of Defense collects retaliation data
21 on a quarterly basis.

22 And so, that data is collected

1 quarterly. It's then sent up to the Department
2 of Defense and they collate it, collect it and
3 then it will be reported yearly in the annual
4 report.

5 And, this is all due to Congressional
6 mandate based on the National Defense
7 Authorization Act. There were several years
8 where there was a retaliation mandates that were
9 legislative and so, that's kind of the universe
10 of data.

11 Sometimes, I don't know about the
12 other Service, sometimes, SVCs can also provide
13 communication, but it really, again, it depends
14 on the SVC and for the VLCs, it depends on that
15 particular organization's philosophy as to
16 whether or not they should be recording this data
17 or not.

18 COLONEL KENNEBECK: Well, and it
19 depends on the client, too. If the client
20 doesn't want the attorney to divulge, then the
21 attorney can't.

22 MR. KRAMER: Sorry. So, what's the

1 difference between retaliation and reprisal?

2 COLONEL KENNEBECK: I honestly think
3 we might want to table that for another time.
4 That could -- I mean, unless you can answer that
5 -- go ahead Fricchione, go for it.

6 MAJOR FRICCHIONE: Well, retaliation
7 is the umbrella term that just talks about
8 hostile acts and that are made by anybody in
9 response to somebody reporting or believe to have
10 been reporting a crime of any kind. That's the
11 umbrella term.

12 Reprisal is the specific type of
13 retaliation. It has to do with a supervisor or a
14 commander or really anybody, who has authority
15 over another individual in an organization who
16 takes a negative personnel action or withholds
17 the personnel action from an individual.

18 So, it's pretty specific as to it has
19 to be, kind of in the workplace environment.

20 MR. KRAMER: So, that's more than the
21 chain of command?

22 MAJOR FRICCHIONE: Yes, that would be,

1 you know, a chain of command, say, a First
2 Sergeant taking action against one of the
3 soldiers within his company.

4 So, and that's why it gets a little
5 confusing as to what we're talking about is
6 potentially a decline in work performance where,
7 you know, maybe the First Sergeant says, listen,
8 we should really pull this individual from their
9 other duties.

10 And then, that really does feel like
11 a reprisal. It feels and is perceived as a
12 reprisal or retaliation, in general.

13 And so, that's where we get into this
14 area where the SVC can step in and start
15 negotiating and saying, okay, what is the purpose
16 behind, you know, pulling them from the Board,
17 pulling them from their duties.

18 And, that's where that conversation
19 happens.

20 BG SCHWENK: So, reprisal sounds like
21 it's a 10 USC 1034 whistleblower applied to
22 sexual assault.

1 MAJOR FRICCHIONE: Yes, yes, well,
2 yes. So, there's 10 USC 1034 that is the Federal
3 Whistleblower Protection Act, but we also have
4 the Military Whistleblower Protection Act and
5 then we have now the codification of that same
6 language within the new enumerated Article 132 as
7 a punitive --

8 BG SCHWENK: So, that's standard
9 policy --

10 MAJOR FRICCHIONE: Yes.

11 BG SCHWENK: -- whatever now applied
12 to --

13 MAJOR FRICCHIONE: Yes, exactly.

14 BG SCHWENK: Thank you.

15 COLONEL KENNEBECK: Okay, let's move
16 to the next slide.

17 The next slide is intended to be a
18 snapshot of some of the commander's options or
19 disposition starting with the left side, the less
20 severe to the right side, the more severe.

21 So, on the left side, we see
22 administrative actions, could be an on the spot

1 correction which is basically making someone do
2 something better than they're doing it,
3 corrective training, counseling, you can revoke
4 their pass, you can bar them from continuing
5 service.

6 You can reprimand them, which is
7 something that could go in their file and, you
8 know, that can be very damaging, especially in
9 days when the Army or the Military's trying to
10 shrink, a reprimand can be the basis for
11 separation or, administrative separation.

12 And, you notice in yellow, those are
13 the types of discharges you can get from an
14 administrative separation. Those are nonpunitive
15 discharges, OTH is other than honorable, the most
16 severe. Then there's general -- called general
17 under honorable conditions and then there's
18 honorable.

19 All right? And, I wanted to stress
20 that because, other than honorable discharge is
21 damning to someone who has Military Service.
22 It's very difficult to get a job if you admit you

1 served. You're better off just not admitting you
2 served.

3 You also don't get VA benefits. So
4 OTH can be very -- it's a damaging outcome.

5 So, then you move to the middle
6 column, we're kind of to the right now, these are
7 punitive. Nonjudicial punishment is meant to be
8 rank and grade, it's meant to be a corrective
9 action for minor offenses.

10 I'll let you continue to serve, but
11 I'm going to let you serve at a less rank or I'm
12 going to take some money from you for minor
13 offenses.

14 The difference between the left and
15 the right there is the burden of proof.

16 So, for administrative actions, burden
17 of proof is the preponderance, standard due
18 process. And the burden is higher if we move
19 into something punitive.

20 BG SCHWENK: Is that true in all the
21 Services?

22 COLONEL KENNEBECK: That's true in all

1 -- now, that's not required by the Manual for
2 Courts-Martial, that's required by policy of the
3 Services.

4 So, Army policy requires beyond a
5 reasonable doubt for nonjudicial punishment. I
6 don't know if the Navy and Marines do that.

7 MAJOR PEDDEN: We do not, sir.

8 COLONEL KENNEBECK: I know, see,
9 you're lucky because you can also give NJP when
10 you're afloat, when you're at sea.

11 MAJOR PEDDEN: Yes, sir. Marines who
12 are attached through a part-time Naval vessel
13 will not have the right to demand trial by court-
14 martial instead of nonjudicial punishment.

15 For us, the burden of proof and
16 nonjudicial punishment is a preponderance of the
17 evidence.

18 BG SCHWENK: And that exception may be
19 going away, right, in the FY17 NDAA?

20 MAJOR PEDDEN: Wouldn't express a
21 personal opinion, sir, but I've seen NJP be used
22 afloat and it is remarkably effective.

1 COLONEL KENNEBECK: It would be nice
2 if it wasn't -- if you weren't able to turn it
3 down. It's a powerful tool, it's a wake up call,
4 but I think it would be good.

5 BG SCHWENK: But, in the Marine Corps,
6 is it a preponderance for NJP?

7 MAJOR PEDDEN: Yes, sir, that's
8 correct.

9 COLONEL KENNEBECK: And it is sort of
10 administrative, I mean, it's a rank reduction or
11 money. So, we're not really taking it light.

12 MS. TOKASH: I have a follow up to
13 that.

14 COLONEL KENNEBECK: Yes?

15 MS. TOKASH: This is Meghan Tokash
16 speaking.

17 So, RCM 306, I mean, I left the
18 Service three years ago, but the discussion
19 section --

20 COLONEL KENNEBECK: Yes.

21 MS. TOKASH: -- lays out factors for
22 commanders to consider in making the disposition

1 decision.

2 Wouldn't it make sense to have the
3 burden of proof included there? That's my first
4 question.

5 The second question is, in the most
6 current MCM, is RCM 306 discussion section still
7 listing factors for the commander to consider
8 that include bias of the reporting victim and the
9 character and Military Service of the accused?

10 COLONEL KENNEBECK: Sad to admit that
11 I showed up here without an MCM.

12 (Laughter.)

13 COLONEL KENNEBECK: We just got our
14 new two thousand --- oh of course he has it, Mr.
15 Reliable.

16 (Laughter.)

17 COLONEL KENNEBECK: We'll look it up
18 and I'll tell you exactly.

19 But I know that the character of the
20 accused is removed all together. The discussion
21 is still in there, the factors are listed in
22 there as well.

1 I don't know that the Services agree
2 what the state of proof should be in NJP. I'd be
3 a fan of something less than beyond a reasonable
4 doubt.

5 MS. TOKASH: And, I'm less concerned
6 about NJP as I am for prosecutable cases.

7 COLONEL KENNEBECK: Yes. Right, and
8 that's where 306 kicks in anyway. I mean, 306 is
9 on your way to preferral of court-martial
10 charges.

11 So, moving on to the right column,
12 then, court-martial.

13 Iain, why don't you, yes, go ahead.

14 MAJOR PEDDEN: I'm almost there.

15 COLONEL KENNEBECK: You're looking,
16 let me know when you're ready.

17 So, court-martial in the right column,
18 the Summary Court-Martial is kind of like NJP.
19 In that, a Servicemember can turn it down and
20 demand trial by court-martial.

21 So, it's not a real conviction, it's
22 a paper conviction.

1 The real court-martial are Special and
2 General. And, in practice, in the Army anyway,
3 we have GCMCA's refer these. We don't generally
4 have Special Court-Martial Convening Authority,
5 those Brigade Commanders don't refer cases to
6 court-martialal.

7 If it's going to go to court-martial,
8 it goes up through the General at the time and
9 it's either a Special or a General Court-Martial.

10 As you know, or maybe don't know,
11 penetrative sex offenses must be referred to a
12 General Court-Martial. That was a rule change,
13 that's actually statutorily prescribed in one of
14 the NDAA's, I don't remember which one.

15 But, it must be a General Court-
16 Martial.

17 And then, you know, a Special Court-
18 Martial has a maximum punishment of one year.
19 So, those are meant to be minor offenses. You
20 know, maybe assault or maybe a drug offense could
21 be put in a Special Court-Martial.

22 But, in reality, if it's worthy of

1 going to court-martial, almost always in the Army
2 now a days, they're going to General Court-
3 Martial.

4 As you know, a good percentage of our
5 cases are sex offenses anyway, so they're going
6 to General.

7 And then, I put Chapter 10 right below
8 that because that is something that an accused
9 can request. So, after charges have been
10 preferred, the accused can say, hey, give me the
11 administrative separation and other than
12 honorable discharge instead of the court-martial.

13 So, I'll walk away with an OTH, you
14 don't have to prove my guilt at trial and I'll be
15 gone in a week.

16 Sometimes that's warranted.
17 Generally, for sex offenses, you know, I don't
18 think that's a common outcome and I don't think
19 it's warranted. But, it's an option. And it
20 gives you that bad paper that I was talking to
21 you about before, the other than honorable
22 discharge.

1 Then, you can see on the bottom right
2 in yellow, those are the discharges that can be
3 adjudged punitively.

4 So, there's dishonorable or a bad
5 conduct discharge for enlisted or a dismissal for
6 Officers.

7 So, back to your question, Ms. Tokash,
8 the Rule for Court-Martial 306 which talks about
9 disposition decision, I showed you the slide with
10 the options, lists some factors that the
11 commander should consider.

12 It's the nature and circumstances
13 surrounding the offense, the extent of harm
14 caused by that offense and the offense's effect
15 on morale, health, safety, welfare and
16 discipline.

17 B, when applicable, the views of the
18 victim.

19 C, existence of jurisdiction, that
20 would be important.

21 D, availability and admissibility of
22 evidence.

1 E, the willingness of the victim or
2 others to testify.

3 F, cooperation of the accused and the
4 apprehension of prosecution.

5 G, possible or improper motives or
6 biases of the persons making the allegations.
7 So, that is still a listed consideration.

8 H, availability and likelihood of
9 prosecution of the same or similar and related
10 charges against the accused.

11 And, I, appropriateness of authorized
12 punishments.

13 Those are the factors listed.

14 But, I should point out that this is
15 merely a discussion paragraph accompanying the
16 rule for court-martial.

17 So, you know, it's guidance to
18 commanders and to judges, but it's not
19 authoritative.

20 MAJOR PEDDEN: If I might add one
21 thing on that point. As to your question, and
22 particularly with regard to the consideration of

1 good Military character of the accused and the
2 victim position, you'll note that it's been
3 removed from the discussion in RCM 306.

4 In the fiscal 2015 National Defense
5 Authorization Act also modified Rule of Evidence
6 404 to preclude the consideration in order to
7 prove the probability of innocence of general and
8 good Military character.

9 So, there are some character traits
10 that are still relevant on some offenses, but in
11 particular, with respect to Article 120, that is
12 no longer relevant and, therefore, is
13 inadmissible.

14 MS. TOKASH: Thanks.

15 DR. SPOHN: So, I wanted to go back to
16 your outcome of do nothing or no action.

17 So, in the civilian world, law
18 enforcement can unfound a case if it's determined
19 to be false or baseless. Is there a similar
20 process? I mean, is that your do nothing or no
21 action, would that be an unfounded, false or
22 baseless case?

1 COLONEL KENNEBECK: Well, no. So, do
2 nothing is what the commander does after we know
3 whether an offense is false or baseless or
4 whether there's just probable cause or whether
5 there's better evidence than that, what can I
6 prove and to what degree.

7 So, let's say you have the offense of
8 an assault and the person who started the fight,
9 who's charged with assault, also got beat up.
10 The commander might decide in that case, okay,
11 I'm going to do nothing. I think the lesson's
12 been learned, that's a do nothing option.

13 So, I have good evidence, I could give
14 this person a nonjudicial punishment or send them
15 to court-martial, but I choose to do nothing.
16 That's what do nothing is meant to be.

17 It's not tied to founded or unfounded.

18 DR. SPOHN: Who makes that decision?

19 COLONEL KENNEBECK: That happens
20 between the lawyers and the investigators before
21 they advise the command.

22 So, generally, what happens is, once

1 the Military Criminal Investigation Organization,
2 or the MCIO, is close to done with this case or
3 done with the case, it'll ask the prosecuting
4 attorney for an opine.

5 And, there will be a conversation
6 between the investigator and the prosecutor, do I
7 have probable cause for these offenses or don't
8 I?

9 We don't found or unfound right now,
10 but essentially, in practice, it's very similar
11 decision. You know, do I have probable cause or
12 not?

13 And, that is generally the moment in
14 time, you know, along the continuum where, you
15 know, the investigation's wrapping up. We kind
16 of have a good idea of what we think we can do
17 with this case. And, that conversation is had
18 between the investigators and the prosecutor.

19 And then, you're going to see a
20 recording of that discussion in the CID report or
21 the NCIS report when the report's finished.

22 Major Carlton's here.

1 MAJOR CARLTON: This is Major Harlye
2 Carlton, I'm a Judge Advocate Division of the
3 United States Marine Corps.

4 And, it's a little bit different in
5 the Marine Corps. I know all the Services do it
6 a little differently.

7 But, in the Marine Corps, it's
8 actually the Commanding Officer who makes the
9 decision about whether a case is founded,
10 unfounded, probable cause, and what levels.

11 And the Commanding Officer does that
12 with the advice of his or her Staff Judge
13 Advocate and with the input of the investigating
14 officers, lead preliminary hearing officer if
15 there's an Article 32, the attorneys that worked
16 on it along the way.

17 COLONEL KENNEBECK: That makes a
18 difference in how this looks in the annual
19 report. But, the commander makes the decision or
20 the lawyer and investigative agency makes a
21 decision.

22 In practice, the difference is, in my

1 opinion, nonexistent, you know, the same players
2 are having the discussion. The commander wants
3 to know what's happening with the case in the
4 Army just as well as it would in the Marines.

5 But, the conversation about whether
6 there is or isn't PC seems very legal. So, the
7 Army treats it as a legal discussion.

8 BG SCHWENK: The CID stops the
9 founded, unfounded?

10 COLONEL KENNEBECK: It's probable
11 cause now, so yes. But, the definitions are tied
12 to similar ideas. You know, if it's baseless, if
13 you don't have any -- so you're not going to get
14 to see if it does, it's not true or unprovable.

15 BG SCHWENK: You know, as more MCIOs
16 applied, whatever, however you want to count
17 them.

18 COLONEL KENNEBECK: Yes.

19 BG SCHWENK: If some of the MCIOs just
20 do the investigation and deliver their report and
21 make themselves available to answer questions and
22 do follow on and don't make any conclusion about

1 whether there's probable cause or not or founded,
2 they just -- their job is investigating and
3 that's what they do.

4 There used to be in the Army, CID
5 wanted to go beyond that and render an opinion
6 and they did. So, they're still doing that?

7 COLONEL KENNEBECK: They're still
8 doing that. But, as I understand it --

9 BG SCHWENK: I should say found
10 probable cause.

11 COLONEL KENNEBECK: Yes, as I
12 understand it, that's to help drive the database
13 entry really. Do I have enough to enter this
14 offense against this person in our database or
15 not? And, that does become important because
16 when you're titled for an offense, it stays with
17 you for a long time.

18 So, this has to do with titling and
19 how it's recorded. And, I'm not, you know,
20 saying one way or the other is better, but that
21 is one of the driving factors.

22 BG SCHWENK: So, it's kind of the --

1 COLONEL KENNEBECK: Yes, there is a
2 difference.

3 Sir?

4 CMSAF MCKINLEY: Colonel, I have a
5 concern and hopefully through some of the
6 committee members that this helps them understand
7 the process is, sometimes you'll have a person
8 that is accused of a sexual assault or even
9 possible sexual rape and they chose or are
10 allowed to have a separation in lieu of court-
11 martial with an other than honorable discharge.

12 Now, also with an other than honorable
13 discharge, they have the opportunity later on to
14 do an appeal to have that other than honorable
15 discharge upgraded to an honorable which doesn't
16 happen a lot, but it does happen.

17 But, my concern is, do we have any
18 statistics on the Branches of the Service on
19 sexual -- possible sexual assaults and so forth,
20 how many cases do we allow to take a separation
21 in lieu of a court-martial?

22 Because once they do that, we have a

1 possible person of sexual assault that's now in
2 the civilian community without any follow on
3 records. They are not registered as a sex
4 offender and basically, the command has just kind
5 of washed their hands of the subject.

6 And, do we have any statistics or
7 thoughts on that?

8 COLONEL KENNEBECK: So, I do have
9 thoughts.

10 Sometimes, Chapter 10s are a helpful,
11 powerful tool for sex offenses, like I said, it
12 would be quite a case if it's a good one. But,
13 it could be used, especially if you have a bad
14 evidence challenge or a victim who says suddenly,
15 I don't want to participate anymore but I still
16 want to get this guy out with bad paper.

17 So, sometimes your hands are tied as
18 the prosecutor. And, in those cases, maybe a
19 Chapter 10 is not a bad thing.

20 The possibility for upgrade is
21 extremely low when they have agreed to take a
22 Chapter 10 in lieu of court-martial or a Chapter

1 in lieu court-martial because, you know, that
2 means the person who made the decision made with
3 an attorney signed a form that says I understand
4 all of these things that I'm giving up by signing
5 and waiving myself and taking an OTH and I'm
6 fully cognizant and I accept it.

7 So, that makes it very difficult to
8 upgrade if not impossible. That's anecdotal, but
9 I don't think that's an issue.

10 I think Chapter 10's a better outcome
11 than no prosecution. So, in those cases where I
12 can't get a conviction but I want to do something
13 with this accused, then I will take a Chapter 10
14 in that case.

15 And, the fact that he's not a
16 registered sex offender, I'm not going to lose
17 sleep over that.

18 In fact, I think we, by policy, have
19 broadened our definition of what requires, what
20 triggers registration for sexual offense so broad
21 that, first of all, it's almost without meaning.

22 If you look up sexual offenders in

1 this area right here, the whole area would be
2 covered with red dots. I don't know how useful
3 that is.

4 But, number two, it ties my hands in
5 making an appeal. If I have an accused who's
6 willing to plead guilty to a sexual offense,
7 saving the victim the pain of testifying and
8 being cross examined by defense counsel and get
9 to the guilty plea without having that sexual
10 registration, in a case by case, if I had the
11 authority to make that decision, I'd have more
12 people pleading guilty.

13 Now a days, people are going to roll
14 the dice because I don't want to be a registered
15 sex offender, so I'm going all the way. I'm
16 going to trial and we're going to rake that
17 victim over the coals, we're going to do our best
18 to win this case.

19 And, I think that there's probably a
20 happy medium in there about who needs to register
21 and who gets to decide who must register. I
22 think that's something that maybe this Panel can

1 take a look at because that ties hands.

2 So, I guess just my two cents there.

3 Okay, next slide?

4 This is meant to be just an overview
5 of really the prevention and response effort.

6 You see lots of slides on these with lines of
7 effort in the middle.

8 I wanted to just paint this picture
9 for you that, you know, there's a victim -- after
10 we have a report.

11 So, assuming the green arrow fails,
12 education and prevention didn't work, something
13 happened. Then you've got the justice arm and
14 the victim care arm kicking into overdrive. And,
15 that's what we're going to talk about in the next
16 hour or two.

17 But, in the end, you know, we want
18 these three lines of effort to work together,
19 first, to prevent and to educate. But, if that
20 fails, we need to respond quickly and provide the
21 victim care so that people feel that they can
22 report and trust the system.

1 This is just a picture of that idea.

2 Next slide?

3 This next slide is meant to be a
4 picture of all of the people who interact with
5 the victims. There's a lot. There's more than
6 these bubbles, you know, reflect.

7 This is good and bad. It's good in
8 that it shows you just the number of people and
9 entities that are there to support victims.

10 It's bad because a lot of these people
11 will need to hear the story and you have your
12 victims telling this over and over again to the
13 command sometimes, to CID, to the prosecutor, to
14 their SVC.

15 So, to the degree that we can make
16 this a multidisciplinary effort and reduce the
17 number of touch points, so we unify the effort of
18 these people, reduce the number of touch points,
19 we found we have victims who walk away, I think,
20 happy and more comfortable and more trusting
21 through this.

22 The environment in which they have to,

1 you know, show and talk about what happened is
2 reduced.

3 But, the key players on this slide,
4 you'll see that most of them are blue. You see
5 the SARC and the Victim Advocate, Special
6 Victims' Counsel really has taken a pronounced
7 role in this process since the program has come
8 into play.

9 You know, I was skeptical at first,
10 but I really like the program a lot.

11 I still am concerned about what's
12 going to happen if we move toward full on third-
13 party at a court-martial. I don't know that our
14 American jurisprudence is ready for that.

15 We would -- we're already progressive
16 in that regard. And, I think in a healthy way,
17 but how that plays out against the constitutional
18 protections of the accused, you know, I think
19 there's some growth and understanding that needs
20 to be addressed.

21 Then you have your legal assistants.
22 They can have -- be provided regular legal

1 assistants, medical care, behavioral health.
2 There's always the SAFE Helpline, social
3 services, that are off the installation or on the
4 community services on the installation or
5 whatever the service is.

6 And, in the red, you see the
7 prosecutors, the Special Victim prosecutor in the
8 Army, the other Services have roles that are very
9 similar or the trial counsel who works for the
10 command.

11 The Victim Witness Liaison, they work
12 for the Government but they are, you know, a
13 contact point for victims and witnesses.

14 The MCIO, the investigators and of
15 course, the command on the top.

16 Next slide?

17 This next slide shows those who hold
18 privilege. So, these people, the victim talks to
19 the SARC, the Victim Advocate, the SVC or the
20 chaplain, there is a privilege that protects that
21 communication.

22 And that privilege, sometimes we

1 litigate and that's why I wanted to mention it
2 because it sometimes comes up at court-martial
3 whether something that was said to, oh it's
4 behavioral health or she had another, because if
5 you talk to your psychotherapist, that's another
6 privilege, that's MRE 513 which we'll talk about
7 later.

8 So, that's the good and the bad.
9 That, you know, the bad is the number of people
10 and the good is just a tremendous amount of
11 support being provided to that victim.

12 Okay, I think that those are all my
13 introductory slides and next, we're going to move
14 into a discussion of this case.

15 And, on the bottom, you see sort of
16 the time line. These are the different spots of
17 the process, the different times in the process I
18 would like to stop and discuss, the
19 investigation, preferral, referral, pre-trial,
20 trial and post-trial.

21 Throughout this process, you'll see
22 these lines of effort, these different players

1 along the top are sort of the key players.

2 CHAIR BASHFORD: Captain Tideswell, do
3 we have time for like just a five minute rest
4 break?

5 CAPTAIN TIDESWELL: Absolutely, yes,
6 ma'am.

7 CHAIR BASHFORD: Great, thank you.

8 COLONEL KENNEBECK: I'll stop there.

9 (Whereupon, the above-entitled matter
10 went off the record at 11:25 a.m. and resumed at
11 11:33 a.m.)

12 CHAIR BASHFORD: Okay, we're back in
13 session. Colonel, please continue.

14 COLONEL KENNEBECK: Yes, ma'am. Okay,
15 so I was describing the players along the top,
16 you know. This is meant to represent throughout
17 the preparation, the investigation and the
18 decision about the court.

19 And if there is a court-martial, these
20 are the players who are supporting the victims,
21 you know, the SARC who continues to interact with
22 the victim, especially with the counsel,

1 throughout medical and mental counseling
2 services.

3 The law enforcement will continue
4 interacting until the investigation is done. And
5 then if there is a court-martial, they're
6 probably going to testify. And then as we near
7 the court-martial, the SVP or the trial counsel
8 really become the communication hub, obviously.

9 They're gathering the witnesses,
10 they're responsible for bringing everybody to
11 court. So they become sort of the center of
12 effort if we end up at a court-martial. Next
13 slide.

14 So this is our time we're going to get
15 into the Abbott Fact Pattern and really just talk
16 about the case as though it's proceeding along.
17 I do want to go back, we had talked about MCIOs,
18 founding and unfounding, probable cause/no
19 probable cause.

20 I do think I misspoke. You know, the
21 titling decision is separate from whether the
22 investigation is complete or not. The titling is

1 earlier and the standard is lower. And you know,
2 the founding and unfounding has gone away, but
3 there still is a discussion about probable cause,
4 and that is recorded, that's not dispositive.

5 Every investigation, once complete,
6 goes to the commanding arm, just like it does on
7 their MCIO. But as I understand it, there might
8 be a meeting with MCIOs later you can ask deeper
9 questions. But I just wanted to clarify that, I
10 think I misspoke a little bit earlier.

11 So, the U.S. v. Abbott fact pattern.
12 We designed this for our trial advocacy course.
13 This is a case, it is fictional, but some of the
14 players have facts, or part of their bios are
15 consistent with the cases you might typically
16 see.

17 This case is meant to be very
18 difficult to decide because it allows advocacy on
19 both sides of the issue. So we built this for a
20 school purpose of training advocacy, not really
21 for this purpose, to talk about a case. But it's
22 already built, and so therefore we used it.

1 And, I'm going to pass on. What else
2 do you want to say about Abbott?

3 MS. SUDENDORF: So a couple things.
4 Major Pedden and I worked on it two summers ago,
5 and what we wanted to do is try to fold in as
6 many of the issues that the litigators would be
7 facing when they're out there in the practice
8 doing the court-martial, whether it's motions
9 practice, or at the trial at court-martial.

10 We tried to weave in as many of the
11 issues that were currently blossoming out in the
12 field, and we continue to do so. When different
13 issues come in, we fold them into the fact
14 pattern itself.

15 But we wanted to demonstrate victims
16 who report early, and a victim who maybe has a
17 restricted report, and then unrestricts, you
18 know, maybe a year later, to have them understand
19 that dynamic as well and how they use that.
20 Whether they're going to charge with both
21 victims.

22 All these discussions or all these

1 issues foster discussions that we do in our
2 workshops. We also thought that bringing the
3 Abbott problem here to you all could show the
4 various procedures, at least through the trial
5 process, and the Article 32, which we'll talk
6 about a little bit later on.

7 But will allow us to talk about
8 Article 32, will allow us to talk about
9 restricted versus unrestricted reporting, allows
10 us to talk about 412-513 issues, allows us to --
11 I'm so sorry.

12 COLONEL KENNEBECK: So 412 is MRE 412,
13 it's the rape shield evidence rule that prevents
14 discussion of sexual predisposition for victims.
15 And then 513 is psychotherapist-patient
16 privilege, and 514 is victim advocate-victim
17 privilege. And those are evidentiary issues
18 commonly raised in sexual assault court-martial
19 for litigation pretrial.

20 MS. SUDENDORF: Sure. And takes all
21 that all the way through to a final trial at the
22 end. We've tried to create that fact pattern

1 that it's fair for a trial counsel or a defense
2 counsel.

3 We've also included the SVC in the
4 last three or four iterations, to have them also
5 as part of the dynamic, as part of that motions
6 practice. Again, reflecting what is happening in
7 the courts-martial process.

8 But I did want to go back, just to one
9 of the slides that you saw earlier concerning the
10 sex assault victim, and they had all the
11 different individuals that are connected with the
12 victim.

13 The SVC is a critical component of
14 that, because sometimes a victim can be
15 overwhelmed with the amount of people that they
16 may have to speak with if they make an
17 unrestricted report. And it's the SVC or VLC
18 that really can kind of run interference, can
19 translate for that victim the different people
20 that she or he will be speaking with.

21 And so they do provide that buffer, so
22 to speak, or really that translation piece to

1 allow the victim some time, and to reflect upon
2 whether they're going to forward and unrestrict,
3 as an example.

4 But even if they are a restricted
5 reporting victim, they still receive all of those
6 services that are in light blue. So that is
7 still available to that victim of a sexual
8 assault. Major Pedden, did you want to add
9 something to that?

10 MAJOR PEDDEN: Want to talk more about
11 that Abbott pattern?

12 MS. SUDENDORF: Yeah, please.

13 MAJOR PEDDEN: So Ms. Sudendorf and I
14 developed the Abbott fact pattern really as a
15 wicked problem. It is designed to tax the mind
16 of even a very well experienced jurist, because
17 it includes at least some problem under almost
18 every single rule of evidence.

19 In some cases, many rules of evidence.
20 The problem that's illustrated in the Abbott fact
21 pattern doesn't have a precise answer in either
22 the rule or in the judicial decisions

1 interpreting those rules.

2 And I know that we win when we design
3 a fact pattern that keeps very experienced
4 litigators arguing with each other over lunch.
5 If you can distract them from a sandwich, you're
6 doing it right.

7 BG SCHWENK: But they're not a federal
8 advisory committee.

9 MAJOR PEDDEN: So in the Abbott fact
10 pattern you see, the basic facts are simply that
11 it's a multiple victim sexual assault case. So
12 two different victims at two different times,
13 with alleged the same perpetrator.

14 Both of these victims have clinical
15 profiles. And one of the things that's unique
16 about the Abbott case, and we use it during the
17 intermediate trial advocacy course, is that it
18 was built, at least in part, by experts from all
19 of the relevant fields that are represented in
20 the fact pattern itself.

21 And so, for example, the psychotherapy
22 notes that are notional that we use during the

1 intermediate trial advocacy course were developed
2 by a clinical psychiatrist at the University of
3 Virginia. Those are actually composite patients
4 of his, some 35 years of clinical experience.

5 The digital forensic evidence package
6 that's used during the intermediate trial
7 advocacy course was developed by CID agents. We
8 bought phones, we gave them a script, mailed them
9 the phones and the script. They turned the
10 phones on, used the script, sent in the messages,
11 and then ran the digital forensic programs on
12 those phones and sent us all of that information
13 back.

14 And so everything that you see in that
15 fact pattern is actual evidence developed by the
16 relevant experts in the field. What makes Abbott
17 difficult as a fact pattern is because you have
18 professionals, like psychotherapists, and because
19 you have more than one victim, you have issues of
20 privilege, you have issues of propensity at issue
21 in the same case.

22 And it's a difficult, difficult fact

1 pattern. In fact, we use it not just for ITAC,
2 but we also use it, at least in part, in the
3 graduate course in my advanced evidence analysis
4 electives and things like that too. So it's a
5 complex fact pattern, which isn't to say that's
6 entirely uncommon.

7 I mean, as you all well know, we often
8 encounter these issues in litigating sexual
9 assault cases. Which is why we redesigned the
10 ITAC, of course, a couple of years ago, to
11 incorporate those four relevant fields, so that
12 counsel would have an opportunity to be trained
13 to that standard and get a chance to litigate.

14 COLONEL KENNEBECK: So the slide
15 that's up now describes our two victims in this
16 Abbott fact pattern, Patterson and Wells.
17 They're both young, they're both 20 at the time
18 of the events. Both assaulted in a parking lot
19 behind a bar. Both penetration cases, both had
20 been drinking.

21 And one reported immediately and one
22 reported late with restricted -- so Wells had a

1 restricted report first. When she hears about
2 the next victim's attack, Patterson, she decides
3 to go unrestricted.

4 And it was a SAFE report made for
5 Wells at the time, so we do have two SAFE
6 reports, or SAMFES, it's the acronym, it's
7 interchangeable, sexual assault forensic exam.
8 They each went to mental health providers, and
9 they each have SVCs. Slide.

10 I want to put this up quickly, just
11 because when we talk about sex offenses, you'll
12 see differing -- there's a lot of policy, a lot
13 interest and a lot of legislative activity with
14 regard to sexual offenses within the last five or
15 six years. And the challenge is that sex
16 offenses can be very broad, it can be very
17 narrow.

18 Right now, if you say the words sex
19 assault to your average person, they're going to
20 everything from touch to a penetrative offense,
21 and that's a problem. So when we talk about
22 sexual assault, as judge advocates, as

1 prosecutors, defense attorneys, we, or special
2 victim counsel, we think about penetrative
3 offenses.

4 Article 120, and currently 125, which
5 is going to go away, it's just going to be 120.
6 120 will cover all offenses. These are
7 penetrative sex offenses, all right.

8 Also within 120, though, are the
9 sexual contact offenses. Those are touching
10 offenses. Aggravated sexual contact and abusive
11 sexual contact. Those are adult cases.

12 And the other sexual offenses are,
13 they're the child rape cases, 120(b), there's
14 stalking, 120(a), and then of course the indecent
15 viewing, indecent exposure in 120(c), and
16 attempts.

17 So when we talk about sex assault,
18 when we talk about the Abbott fact pattern, we
19 talking about a penetrative sexual offense,
20 sexual assault, Article 120, which is meant to
21 include rape or sexual assault.

22 Anything to add on that slide?

1 Everything in the blue is SVC-eligible, right?

2 Right. So for all sex offenses.

3 Okay, so I broke up the court-martial
4 into its different steps, and thought I would
5 talk the Abbott fact pattern and just answer your
6 questions at these different phases of the
7 investigation and lead up to court-martial.

8 So, during the first week in your
9 typical case, a lot of things are going to
10 happen. You know, the command machinery is going
11 to jump into action here. You know, you're going
12 to have a SARC involved, or whoever receives the
13 report is going to refer that victim to a sexual
14 assault response coordinator.

15 And one of the first things that the
16 victim is going to be asked, whether they've told
17 anyone else or not, is do you want this to go
18 restricted or unrestricted. And that is a form
19 that they're going to look at called the 2910,
20 which we provided in your materials, we'll look
21 at it later, that allows the victim to make that
22 choice, restricted or unrestricted.

1 While DoD, and I think Congress, wants
2 to give the right to a victim to decide whether
3 they're going to go restricted or unrestricted, a
4 lot of times, victims tell their friends first.
5 Or a third party will see something or hear
6 something, and then report.

7 And what's happening is, the victim
8 tells a friend, the friend goes to tell someone
9 in the command, the victim makes his or her way
10 to the SARC and is going to fill out the 2910.
11 Meanwhile, the command hears about it from
12 somebody and calls the MCIO.

13 So now you have the investigation
14 brewing and the victim talking to the SARC at the
15 same time. DoD policy says, Whoever gets to the
16 2910 first wins.

17 So if the victims goes to 2910 and
18 says, I want this to be restricted, even if the
19 MCIO finds out, you can't really stop the MCIO
20 from investigating. But if you go restricted,
21 that means that the victim's not going to give a
22 statement, the command's just got to pretend like

1 they don't know about it.

2 In most cases, they don't. In most
3 cases, a victim can go to a SARC, sign a 2910,
4 and say restricted, and the command doesn't know
5 that that victim's reported. They will know that
6 someone reported, right.

7 MAJOR FRICCHIONE: Yes, it'll be
8 counted as a number. The SARC collects data as
9 to how many restricted reports there are, and
10 we'll report that to the command. But the data
11 of course can't be used for any investigative
12 purpose in any way, shape, or form. It can only
13 be used for education and training overall.

14 COLONEL KENNEBECK: Sort of have some
15 visibility in what's happening in the formation.
16 So that restricted/unrestricted decision usually
17 happens in this early phase of the case, you
18 know. And obviously it's a first step.

19 For those cases that are unrestricted,
20 then all the rest of the machinery kicks into
21 place. The investigation with the MCIO, the, you
22 know, victim is offered a special victim counsel.

1 Many, most times, they'll take that special
2 victim counsel. They'll talk to a SARC and/or a
3 victim advocate.

4 They'll be taken and offered medical
5 care. If the event happened within two or three
6 days, you know, there's going to be a lot of
7 effort to try to get them to see a SANE right
8 away.

9 If it's older, you know, if it's a
10 month, a year, several years, then, you know,
11 that's less important and it's really going to be
12 a matter of you need to talk to an investigator
13 and say what happened.

14 So they'll be interviewed by the MCIO.
15 Sometimes, they'll already have an SVC and want
16 the SVC to be present. And generally that can
17 happen without issue. The victim might request
18 an expedited transfer.

19 So as this all blows up in the
20 victim's life, they might say, I just don't feel
21 safe here, I want out of here. Expedited
22 transfer is, they're strongly encouraged. Well,

1 I shouldn't say strongly encouraged. They are,
2 to say no to it is a difficult decision.

3 That authority is withheld to the
4 first general officer by policy. So it takes a
5 general to say, No, I'm not going to let you move
6 from this installation.

7 But there are some secondary, tertiary
8 effects that I think are important about
9 expedited transfer. Let's say if you're in Korea
10 or Germany and you say, I want an expedited
11 transfer. The likelihood that you're going to
12 get that victim back to try that case decreases
13 exponentially when that victim leaves.

14 And that's true even when you're in
15 the United States. But if you're outside, you
16 know, it can be damning to a case.

17 So if you have a really good case, you
18 have, you know, an allegedly really bad
19 perpetrator that the command thinks something
20 really needs to happen in this case, but you have
21 a victim who wants an expedited transfer, the
22 command's in a tough spot.

1 They definitely don't want to say no
2 to that victim, but they also don't want to, you
3 know, let somebody off the hook that maybe
4 shouldn't be off the hook. So those are very
5 difficult decisions.

6 Your trial counsel and special victim
7 prosecutor might start talking to the victim at
8 this early stage. But generally that would
9 happen a little bit later. What else on this
10 slide?

11 MS. SUDENDORF: I think you also want
12 to cover the fact that the victim is entitled to
13 a protective order. So that would be in a
14 unrestricted environment only. In a restricted
15 environment, of course not. So that's something
16 that the SVC oftentimes will talk with the victim
17 about in terms of arranging a protective order.

18 Because if you're restricted, you
19 can't get it. Because by the nature of it being
20 confidential, the commanding general is who signs
21 off on the military protective order. So that's
22 not available to you, right.

1 And also on the expedited transfer,
2 that is also not available to the victim of
3 sexual assault who files under a restricted
4 reporting.

5 COLONEL KENNEBECK: I think that's
6 intuitively obvious. If you have command
7 involvement, then they have to know. So it's got
8 to be unrestricted.

9 So I mean, I think the three biggest
10 things that happen the first week is referral to
11 MCIO, so the investigation happens. Victim
12 safety, do your best to take care of the victim.
13 And make decisions about the alleged perpetrator.

14 You know, are there safety concerns,
15 is that person going to be in pretrial
16 confinement, or do I need a protective order?
17 Those are the three big muscles moves when an
18 investigation first is reported, or first kicks
19 off. Ma'am?

20 CHAIR BASHFORD: One of the JPP, I
21 believe, subcommittee reports had indicated that
22 there seemed to be some substantial delays

1 occurring before that first MCIO interview that
2 might be involved with getting the SVC assigned.
3 But that they weren't happening necessarily in
4 that first week. Do you have any experience to
5 share on that?

6 COLONEL KENNEBECK: Well, I mean, only
7 anecdotal, and it's a little bit dated. I've
8 been in the school for a couple of years, but
9 before that, I was in the field. And you know,
10 if you have a special victim counsel who is
11 attending a court-martial at a remote location,
12 so let's say that the victim's met the counsel.

13 Now the counsel's in Alaska for three-
14 four days, and the victim wants the special
15 victim counsel to be there when they're
16 interviewed, that can cause a delay. And, you
17 know, the more people you give that sort of right
18 to, obviously, I would say there's some truth to
19 delays.

20 Generally, they're driven by
21 logistics. Whether the MCIOs are stretched thin
22 and investigating other cases, that's generally

1 not an issue. They can find the right people
2 when they need them. This might be SVC-related.

3 But once again, I'd say that's
4 anecdotal. I don't have any data to back that
5 up, but I don't see that as a pervasive problem.
6 Want to add to that?

7 MAJOR FRICCHIONE: No, sir, that's, I
8 understand.

9 COLONEL KENNEBECK: Okay. Any other
10 questions on this slide or this phase of a
11 report? Okay, next slide.

12 So through the investigation, this can
13 take, you know, a few weeks, a few months.
14 Interviewing people that, you know, maybe were
15 present the night of, figuring out who was there,
16 who's willing to talk.

17 A conversation or maybe more with the
18 victim. An interview with the accused and
19 sometimes more. Usually there's two or three in
20 my experience. This is not uncommon for the MCIO
21 to go back more than once to talk to an accused.
22 That is all happening now.

1 Throughout, the command has ensured
2 the victim's safety. So this is your monthly
3 battalion commander meetings. You know, the SARB
4 is happening monthly. The victim is meeting with
5 the SVC and getting mental and medical health
6 care as required.

7 Again, through this process, maybe the
8 victim didn't want an expedited transfer, but
9 things got worse in the unit or the pressure's
10 increasing and the victim decides now, okay, I
11 want to move on.

12 Or they talk to the special victim's
13 counsel, who explains the process, explains, you
14 know, what the options are. And the victim says,
15 I do not want to participate. I don't want to
16 give CID a statement, I don't want to go to
17 court-martial. I just want to get back to my
18 life.

19 That makes the prosecutor in me want
20 to stand up and say, no, don't do that. How are
21 you going to feel about this five years from now?
22 But that is a right a victim has, and that does

1 happen in some cases. That could impact our
2 ability to, you know, dispose of the case in the
3 way that we might prefer.

4 And then of course, collateral
5 misconduct will be discussed. So not only is the
6 sexual offense withheld to the special court-
7 martial convening authority who is oversight, so
8 is all the collateral misconduct. And collateral
9 misconduct is fairly common in our cases.

10 This would include underage drinking
11 on the part of the victim, or maybe drug use, or
12 some other violation of the UCMJ, usually a more
13 minor offense that happened the night of, or
14 around the time of the offense.

15 All of that disposition decision is
16 withheld to that brigade-level commander, and
17 usually dealt with simultaneously with the sex
18 offense. This is tricky, this is a very
19 difficult decision for a commander.

20 Let's say you have three underage
21 females drinking at a party. One of them is
22 sexually assaulted, and you find out the next

1 week. Within the next few weeks, the other two
2 females underage were given Article 15 by the
3 battalion commander for drinking underage.

4 But the third one is the victim of the
5 sexual assault. Do you give her the Article 15?
6 Do you take rank from that person? Or do you
7 delay it till after the court-martial? If you
8 delay it till after the court-martial, that's
9 great fodder for cross-examination by defense.

10 If you give that Article 15 to that
11 victim before the court-martial, you're just
12 adding more pressure to a person who's already
13 undergoing a pretty stressful thing in her life.

14 So this collateral misconduct decision
15 is very difficult, you know. I definitely think
16 that there's a desire on the part of, you know,
17 big Army or DoD to take care of the victims,
18 maybe delay the disposition decision on
19 collateral misconduct till we know what we're
20 doing with the sexual assault.

21 But like I said, that can have a cost
22 when it comes to testifying and cross-

1 examination. So these are case by case and
2 difficult decisions. Anything to add to this
3 slide?

4 MAJOR FRICCHIONE: Yeah, just to
5 follow up on that, sir, I mean, and it also has
6 an impact on the victim in the way where it
7 appears that there's favoritism too. So that can
8 make things more difficult for them with their
9 peers in the unit as well.

10 So most of the time with these cases,
11 I think as we've kind of touched on a number of
12 times, the command decisions have a great effect
13 on just the everyday life of the victim within
14 the unit. And so that's what we're trying to
15 balance.

16 Things that could look like a good
17 idea, like deferring the Article 15, could
18 actually make the life of the victim of sexual
19 assault so much more difficult than just by doing
20 something. So that's, again, where the SVC steps
21 in.

22 And this is another area where the SVC

1 has really proven that their role is so much
2 bigger than just a court-martial. It really is
3 something where they can step in and figure out
4 what the negotiated solution, an informal
5 resolution could be in these types of situations.

6 DEAN HARRISON: Colonel, with regard
7 to the possible cross-examination, if you
8 withhold the Article 15 punishment. Wouldn't the
9 members of the court-martial, who are mostly
10 officers, some senior enlisted, by this time,
11 wouldn't they understand what that process was
12 all about in terms of, you know, so what?

13 COLONEL KENNEBECK: Yes. I'm not
14 saying that that is going to win the day. I
15 would say that that causes more pain for the
16 victim, to have to suffer through that cross-
17 examination.

18 If there is any question about
19 credibility, and these cases are often always
20 about credibility because consent generally comes
21 up, it must be addressed in these cases, in many
22 of them. Not all of them, but many of them. And

1 when that happens, credibility is key.

2 And if you attack it a little bit with
3 a minor collateral offense issue, that really can
4 undermine the victim's testimony. So I agree
5 with you that people who are hearing this cross-
6 examination get it. But that doesn't mean it's
7 not effective. Okay, slide.

8 So this is really the sort of the time
9 in the case where it comes together. The
10 investigation is closed or complete. We know
11 what we can or can't prove. So throughout the
12 investigation, you know, the government, the
13 prosecution is working carefully to figure out
14 what should I charge, the theme and theory of the
15 case, you know.

16 What's the ground for the defense
17 here? What are the elements of the offenses that
18 I must prove beyond a reasonable doubt? How am I
19 going to prove it? Build our prosecution memo.

20 That prosecution memo's going to
21 contain, you know, the strengths and weaknesses,
22 the challenges to our evidence. This is where

1 you have your special victim prosecutor, a
2 seasoned litigator. Your trial counsel, a
3 younger litigator, and then in some cases, your
4 SJA.

5 If there's a case where those two
6 think, I don't think we can prove this beyond a
7 reasonable doubt. You know, appear that we have
8 some evidentiary challenges and I don't think we
9 can try this case. That conversation generally
10 includes the staff judge advocate as well.

11 And that prosecution memo then, you
12 know, it captures the ideas behind why a case
13 can't be prosecuted. All right. Treat that as
14 more product, keep that in the file. But if that
15 happens, then, you know, every unit handles this
16 a little bit differently.

17 There's not a formal policy on how
18 this is managed. But if the decision is made
19 that this case cannot be prosecuted, then that
20 is, you know, recommended to the brigade
21 commander, that O-6, who generally is going to
22 say, Really? Why?

1 They want to know, they want you to
2 explain it in great detail why a case can't be
3 prosecuted. It's very frustrating to those
4 commanders in most cases. And you have yourself
5 a little mini-trial right there where you're
6 talking about, you know, your evidentiary
7 challenges to that command.

8 Sometimes the command might say, You
9 know what, Government, thank you for your
10 opinion, but I think this looks like a court-
11 martial. Let's send it. And that can happen.
12 And rarely will you be in a situation, but I
13 suppose it's possible, where a prosecutor says, I
14 can't ethically try that case.

15 If that happened in my office, I would
16 just find the next prosecutor and say, you look
17 at this case and tell me what you think about it.
18 Can you ethically try it? And if that person
19 said, no, then I guess I'd find I'd have a
20 problem here. I haven't seen that. Generally
21 the line is fairly clear.

22 I have a case that I can't try or a

1 case that I can. As clear as it can be. It's
2 very difficult to determine whether you can prove
3 something beyond a reasonable doubt when you're
4 just at the investigation phase. You haven't
5 interviewed everybody. So there's a lot to be
6 learned there. You want to add to this?

7 MAJOR PEDDEN: Sir, I think, at least
8 with respect to the credibility issue that you
9 mentioned, sir, these are issues that are so
10 commonly addressed and so firmly rooted in rules
11 of evidence that I guess I tend to doubt that
12 we're able fully to escape them at all.

13 The way in which a commander elects to
14 dispose of collateral misconduct includes those
15 factors that we spoke about earlier. I would
16 think that it would be inappropriate for a
17 commander to very strongly consider deferring
18 taking action in the right kind of case, under
19 the right kinds of circumstances.

20 But as you probably see from the
21 factors that Colonel Kennebeck read off earlier
22 today, there are a lot of different details that

1 go into that very discretionary decision,
2 including but not limited to, personal and
3 professional care and concern for the victim at
4 issue and that Soldier under that officer's
5 command.

6 So how that crops up at trial, there
7 are as many ways to determine that as there are
8 trials themselves. We deal with that very
9 frequently.

10 COLONEL KENNEBECK: But I don't think
11 the nature of this discussion or the nature of
12 the decisionmaking process is much different from
13 a civilian prosecutor in a state office.

14 What can I prove, what can't I prove,
15 what experts am I going to need, you know, should
16 we try this case or not. That conversation is
17 really the same, I think, or very similar.

18 MS. SUDENDORF: Yeah, no, no,
19 absolutely. We talked about that on the way here
20 in the terms of the prosecution memo, you know.
21 Because like in Cook County, we had a felony
22 review memo.

1 And it was just that vetting process,
2 where you went through and analyzed the case when
3 it was coming from your investigating arm,
4 whoever it would be, Chicago Police Department or
5 one of the suburban police departments.

6 But you had a prosecutor who would go
7 through it and look at all, are the elements
8 satisfied, what are the witnesses? What are the
9 strengths, what are the weaknesses? What motions
10 are we anticipating, you know, would the motions
11 kick out this case? Is the victim wanting to
12 participate in this? Is she hesitant?

13 All these issues that would come
14 forward. And it's the same type of data or
15 information that we're trying to glean for
16 purposes in the civilian capacity of going
17 forward or not with a particular case.

18 MS. GARVIN: Can I ask a question?
19 Because you just said something of interest,
20 which is part of it includes the analysis of what
21 experts you might need. Is there a budgetary
22 analysis at this point with regard to how much

1 you have per expert testimony?

2 COLONEL KENNEBECK: No, it's not a
3 limitation, let's put it that way. The
4 expectation would be if the government wants an
5 expert, then we're going to expect that defense
6 is going to need one, and factor that in. We
7 have plenty of budget to try the courts that
8 we're trying.

9 But actually, budget is not enough of
10 a limitation, really, and it's never going to be
11 a limitation. I think civilian prosecutors are
12 probably more concerned about that than we are.

13 MS. GARVIN: Very much so.

14 COLONEL KENNEBECK: Yeah.

15 MS. TOKASH: Just, this is Meghan
16 Tokash speaking again, just a comment. I would
17 say the one difference is as a federal civilian
18 prosecutor, once you meet those determinations
19 within your own office, you have a grand jury
20 either bill or no bill it, not a commander.

21 So I think there is a little bit of
22 difference, or probably a great difference there.

1 But my question is, What is the current standard
2 operating procedure when the staff judge
3 advocate's written pretrial advice to the general
4 court-martial convening authority differs from
5 the GCMCA's decision? Is there discussion about
6 that?

7 COLONEL KENNEBECK: Yes.

8 MS. TOKASH: What happens?

9 COLONEL KENNEBECK: So just to talk
10 about terms. Preferral in the military means
11 when you draft charges, they're preferred.

12 Referral is when the general court-
13 martial convening authority says, okay, this case
14 is going to court-martial. And signs a document,
15 creates a court-martial convening order, and
16 gives it to a military judge.

17 Now a court-martial has been created
18 and would try the case. So preferral, charges.
19 Referral, send the case to court-martial. And
20 the standard is probable cause. So Article 34 of
21 the UCMJ defines when you can refer a case, all
22 right.

1 That is when the staff judge advocate,
2 usually the colonel, gives advice to the general
3 court-martial convening authority, usually a two-
4 star. Sir, ma'am, here's the case. Do we have a
5 -- can we look up Article 34 here? Read it to
6 you.

7 But, you know, Article 34 just
8 basically says, if you have offenses, there's
9 probable cause to believe the accused committed
10 these offenses, and, you know, I recommend this
11 go forward in court-martial. So the standard is
12 probable cause, which I think is true for grand
13 jury. Is that right?

14 MS. TOKASH: For my district's
15 practice, it's you need four indictments and
16 proof beyond a reasonable doubt.

17 COLONEL KENNEBECK: Okay, all right.

18 MS. TOKASH: So that's the standard
19 for the grand jury. Grand jury is probable
20 cause.

21 COLONEL KENNEBECK: Yes.

22 MS. TOKASH: Sorry, I thought you were

1 talking about --

2 COLONEL KENNEBECK: Yes, I'm talking
3 about grand jury.

4 MS. TOKASH: Yeah, grand jury is PC.

5 COLONEL KENNEBECK: So I think, so the
6 Article 34 standards charges in their
7 specifications allege an offense under the UCMJ,
8 number one. Number two, the allegations and the
9 specifications are warranted by the evidence.
10 And number three, there is court-martial
11 jurisdiction over the accused and the charged
12 offenses.

13 The standard's probable cause, and if
14 the SJA writes that advice to the CG, the CG
15 agrees, signs the back of the document, you're
16 going to find this in your record of trial when
17 you see it, the case has now been referred to a
18 court-martial. And a court-martial will be
19 created to hear that case.

20 If the SJA recommend that a case go
21 forward and the GCMCA says no -- is that, what
22 you handed right here?

1 MS. TOKASH: Oh, that's 34.

2 COLONEL KENNEBECK: Oh, that's 34. So
3 if the SJA and the CG disagree, by policy now,
4 that's elevated up to either the next higher
5 GCMCA, or the secretary of the service, okay.
6 And I'd need to find exactly where that -- go
7 ahead.

8 MAJOR FRICCHIONE: Yeah, well it's
9 through the, I think it was the 2015 NDAA 1744.
10 The Army Directive 2014-19 talks about the review
11 of those referral decisions. If the SJA says no
12 charges and the GCMCA agrees, says, No charges
13 are going to be referred to court-martial, that
14 gets sent up to the next highest commander.

15 If the SJA says, Yes, charges should
16 go forward to a general court-martial, and the
17 GCMCA says, You know what, no, we're going to
18 refer charges here, and there's a disagreement,
19 that's when it goes up to the secretary of the
20 Army, according to that policy.

21 COLONEL KENNEBECK: And I'm sorry,
22 that's not policy. It's actually legislation.

1 MAJOR FRICCHIONE: But, yeah,
2 legislation.

3 COLONEL KENNEBECK: Right, but it's
4 been implemented through the services by policy.
5 So Army Directive 2014-19 lays that out.

6 DEAN HARRISON: Are there statistics
7 about how often there's disagreement?

8 COLONEL KENNEBECK: Yeah, you know,
9 the JPP just asked for that data, what's left of
10 the JPP just asked for that data. And it's very,
11 very low. I mean, I have never seen one where
12 the SJA recommends go to court and the CG says
13 no.

14 Anecdotally, I've never seen it. I
15 suppose they're out there, and there's probably a
16 reason for it, but I don't see a great many.

17 BG SCHWENK: Yeah, they did get that
18 data.

19 COLONEL KENNEBECK: Yes, okay.

20 BG SCHWENK: I mean, I think it was
21 zero cases where the SJA said, Go forward, and
22 the convening authority said no. So no cases had

1 ever gotten a service secretary. 21 or 22 or
2 something where they checked, the SJA said, Don't
3 go, and the convening's already said, Okay, we're
4 not going.

5 And they sent it up to the next higher
6 authority. And in none of those cases did the
7 next higher authority send it to a court.

8 HON. GRIMM: And if the SJA says no,
9 and the convening authority says yes, it goes?

10 BG SCHWENK: It goes. They didn't
11 care about the ---

12 COLONEL KENNEBECK: So can you flip to
13 the next slide. So I wanted to talk about, you
14 know, Ms. Tokash just made reference to the grand
15 jury. We don't have a grand jury, but what we do
16 have is an Article 32, it's a preliminary
17 hearing.

18 It used to be a little bit more robust
19 with more discovery. But it's now limited,
20 really, to just what did the statement say, you
21 know, what's the paper say, do we have probable
22 cause. It is a review by another party. So the

1 32 officers call the preliminary hearing officer,
2 a PHO, that is a judge advocate in the rank
3 usually of captain or major, O-3 or O-4, who has
4 a hearing. The victim can opt not to testify and
5 just go with statements. And that hearing
6 officer then produces a report. You'll also find
7 this in your record of trial when you look at a
8 court-martial.

9 So before it gets to the GCMCA level,
10 you will have had that 32. And the 32 officer
11 will recommend, yes, there's probable cause to go
12 forward, or no, there's not. So that there is a
13 vetting after that brigade-level commander.

14 So in practice, it's ideal if you have
15 a case that you just don't think can be tried,
16 you're confident it cannot be tried, then that
17 brigade commander can say, okay, no, we're going
18 to do something else. And it doesn't have to go
19 through the 32.

20 But if a brigade commander is at all
21 hesitant, the brigade commander says, no, let's
22 just send this to a 32 and see what the 32

1 officer says. So on the on-the-fence cases,
2 that's typically how they play out. Send it to a
3 32, let's see what that looks like, and then
4 we'll make a decision.

5 But that 32 will have happened before
6 the GCMCA and the staff judge advocate get
7 together to decide whether the case should be
8 referred.

9 BG SCHWENK: Do you think that might
10 change since the, when it was a preliminary
11 investigation, there was ample reason to give it
12 to an Article 32 investigating officer, because
13 he had access to everything and could call
14 witnesses. He really couldn't get into the case.

15 COLONEL KENNEBECK: Right.

16 BG SCHWENK: So now he's given a
17 couple pieces of paper and said, there it is. He
18 knows almost nothing about the case and has no
19 ability to get into it.

20 The idea that you're going to send it
21 and get an independent outside observer's in-
22 depth review seems to me like maybe you've lost

1 that part of that aspect of using the 32 for that
2 purpose.

3 COLONEL KENNEBECK: Well, I agree it
4 has changed in scope. I think for the cases that
5 are on the fence, where the command just can't
6 viscerally give it up or just thinks that we need
7 to know more before I can make my decision,
8 that's at least another look by another person to
9 say, Yes, we have probable cause, or no you
10 don't.

11 And if you have a preliminary hearing
12 where the 32 officer said, you don't have
13 probable cause here, that is a good indication
14 that you're not going to prove beyond a
15 reasonable doubt your offense. So it's
16 something. It is an aid.

17 It's certainly not what it was. And
18 I think there's pros and cons to that. That's a
19 philosophical and a policy debate. I do think
20 that the change to the 32 hurt the accused,
21 because it was used as a discovery tool, and it
22 was used to sort of test the strength of the

1 case. And that has gone away. So it has changed
2 the system a little bit.

3 BG SCHWENK: But the judge advocate's
4 general expecting to help out by providing that
5 independent investigator so they can make up for
6 that shortfall with their own ---

7 COLONEL KENNEBECK: It is good. At
8 least it's an attorney, who has a legal advisor,
9 so it's something. Okay, so next slide.

10 So that's just a reminder of the
11 disposition process. Next slide.

12 So assuming then that a case is
13 referred, so let's just talk for a second. Let's
14 say when it comes up, the advice from the
15 prosecutor is, no, you don't have enough to go to
16 trial. This is one of the times when the
17 commander would say, well, what are my other
18 options then?

19 And then we would talk about
20 alternative dispositions. If you have a case
21 that's, let's say it's not a great case, it's a
22 very decent case with a victim with decent

1 credibility but no good forensics. And maybe the
2 victim and the accused were friendly beforehand,
3 and you just don't really have a great case to
4 prove.

5 And the victim says, I'm out. I don't
6 want to participate. Now you're really stuck
7 with what else can I do. These are the cases
8 where alternative disposition can be very
9 powerful. And that's when, you know, you'll see
10 commanders pursue a reprimand or pursue an
11 administrative separation.

12 Generally, if there's a penetration
13 offense, you know, there's other misconduct
14 around it most commonly, on both sides of the
15 equation, either a collateral misconduct or other
16 things that could form a basis for some other
17 action. Or an alternative disposition. That's
18 when commanders will make that call. You want to
19 add to that?

20 MAJOR PEDDEN: Just on the alternative
21 disposition piece?

22 COLONEL KENNEBECK: Yeah, please.

1 MAJOR PEDDEN: Well, I mean, it seems
2 remote in most cases to me. I'm just speaking
3 from my experience as an SJA. Commanders are
4 generally not inclined to entertain alternative
5 disposition, not unless there's some compelling
6 reason to do so.

7 Or commanders feel certain that there
8 is probable cause that an accused committed an
9 offense, that there's a disciplinary basis there.
10 Ordinarily, the election is to move forward.
11 Obviously that's anecdotal from my perspective,
12 but.

13 COLONEL KENNEBECK: I think that's
14 fair. I mean, I don't think commanders want to
15 pursue, if it's a penetrative sexual offense,
16 alternative disposition, unless there's really no
17 option. But that's when an alternative
18 disposition can have some power.

19 It's another option other than a
20 criminal conviction when one can't be obtained.
21 Generally, commanders are going to want to pursue
22 a criminal conviction if it's pursuable.

1 CHAIR BASHFORD: Colonel, is a
2 victim's decision to say, I'm out, is that
3 dispositive? Does it matter at what stage that
4 happens? Is it a matter of how egregious the
5 actual offense was, or whether the accused was
6 held in without liberty?

7 I mean, can they at any step in the
8 process say, I'm out, and that's it?

9 COLONEL KENNEBECK: So I would say
10 first, a victim could, at any stage in the
11 process, say, I no longer want to cooperate with
12 the prosecution. And that can, and it does
13 happen. Usually less frequent if you've moved
14 towards a court-martial.

15 By then, the victim kind of knows
16 what's coming. It's less likely. It happens
17 earlier in most cases. But it can happen at any
18 time. And when it does, it's not dispositive.

19 But that puts the commander in a very
20 difficult position of, do I need the victim to
21 testify? Usually you do. And if you do that,
22 now you're going to compel somebody who said, I

1 don't want to participate in this prosecution to
2 be a witness and probably be cross-examined,
3 that's a very difficult decision to make.

4 So it's not dispositive, but in
5 practice, I think it's very limiting to the
6 command's options.

7 MR. KRAMER: Is the accused told of
8 the victim's saying that they don't want to
9 testify or cooperate any longer?

10 COLONEL KENNEBECK: As far as I'm
11 tracking, there's no formal mechanism for that.

12 MAJOR PEDDEN: I'm not aware of a
13 precise rule that requires that, sir. Obviously,
14 as a practical matter, that's something that's
15 going to come to the attention of the accused
16 during the process of preferring charges and
17 moving forward in the event the command does
18 elect to do that.

19 The one thing I might add too is that
20 the ITAC fact pattern that we provided to you,
21 Abbott, sort of begs this question, right.
22 Because on the one hand, we have Ms. Dawn Wells,

1 who after leaving the military service, goes to
2 Canada and makes no bones about the fact that she
3 does not wish to participate in the process and
4 just leaves.

5 And that gives rise to a problem for
6 a convening authority as to whether or not you
7 might elect to pursue the charges. Because you
8 might have some other compelling reason to do so.

9 Sort of a backstory with Ms. Wells in
10 that fact pattern is that part of the reason she
11 comes forward after Sharon Patterson makes her
12 allegation is that she is crushed, as a matter of
13 conscience, and feels partially responsible that
14 this second assault happened because she didn't
15 say something about the first one.

16 That would be very difficult for a
17 commander to struggle with also. When would you
18 proceed with a charge even when the victim
19 doesn't want to, perhaps out of a need to protect
20 other Soldiers under your command?

21 COLONEL KENNEBECK: So I thought maybe
22 we could talk through -- well, it's a quarter

1 after 12. Is that the time you intended to stop
2 for lunch, or?

3 CHAIR BASHFORD: We did, but you have
4 one more slide, or are you done?

5 COLONEL KENNEBECK: No, I have a few
6 more. I'd say we're a little bit behind. But I
7 think we can get to the documents pretty quickly
8 at the end. And you know, I think we'd be happy
9 to come back up and walk through a record of
10 trial with you if you wanted to refresh --

11 CHAIR BASHFORD: Okay, so why don't we
12 adjourn till, I think we're -- till one o'clock?
13 We'll come back.

14 (Whereupon, the above-entitled matter
15 went off the record at 12:16 p.m. and resumed at
16 1:01 p.m.)

17 CHAIR BASHFORD: Apparently you have
18 an hour. I understand you were feeling a little
19 stressed for time. Use it as you see fit, but if
20 you could allow like five minutes at the end if
21 there's any follow-up questions, I would
22 appreciate it.

1 COL KENNEBECK: Perfect. I will do
2 that.

3 I thought what we'd do is, you know,
4 in the next two slides, really start talking
5 about the Abbott case, practical applications of
6 where we are in the process and how these cases
7 typically play out. And one correction, I
8 mentioned a SAFE exam that, you know, anything
9 more than three days probably wouldn't be. I
10 think the cutoff is really closer to seven days.
11 If you report it up to seven days after, a SAFE
12 exam can still be conducted. Note that obviously
13 the forensic material you collect will be less
14 and less valuable over time, but it's not as
15 short as three days.

16 Having said that, so in the pre-trial
17 phase here, this is where some of the issues have
18 come up: what are we going to do with collateral
19 misconduct? Do we have motions, 412 and 513? I
20 will tee it up there and let you take -- take it
21 off -- take off with that.

22 MAJ PEDDEN: Yes sir. So we talked a

1 little bit about 412 and -- and the rules of
2 privilege before we adjourned for lunch, ma'am,
3 and at the risk of -- of kind of going on at too
4 great a length on this, because I am pretty
5 passionate about these rules, I think it is fair
6 to say that the Abbott case and this fact pattern
7 is somewhat typical, and it was really built
8 around some of these very significant legal
9 issues.

10 And so just by way of background, Rule
11 of Evidence 412 precludes the introduction of
12 evidence at trial of the prior sexual conduct of
13 a victim in a sexual assault case or evidence of
14 the victim's sexual predisposition, unless one of
15 three specific exceptions is met. And prior to
16 disclosing that evidence in open court, the
17 military judge has to hold a hearing. That
18 hearing has to be closed. There are notice
19 requirements and some other things. And also, in
20 2015, the National Defense Authorization Act
21 amended the language of the rule to specify that
22 the victim has a right to be heard, including a

1 right to be heard through counsel, including
2 Special Victims' Counsel, at this hearing, which
3 is not only vitally important for the victims,
4 but also vitally important for the justice
5 process so that the judge can make an appropriate
6 determination on the admissibility of evidence
7 during this closed hearing.

8 Rules 513 and 514 are different, so
9 when you look at Rule 412, that is about what is
10 and isn't relevant at trial, whether or not it is
11 admissible. These other rules that start with
12 "5" are privileges. That means that unless and
13 until the court holds this closed hearing, the
14 court does not even have the authority to order
15 production of those materials from their ordinary
16 custodian. Policy considerations are different
17 there, but really it is built around the sanctity
18 of what a patient tells a psychotherapist in
19 order to facilitate adequate mental health
20 treatment.

21 These issues are litigated in -- I
22 couldn't give you a number, but I would say it is

1 fair to say most sexual assault cases, because
2 oftentimes, this information is not relevant, and
3 that needs to be preserved properly for the
4 record. So during the intermediate trial
5 advocacy course and in the fact pattern, what you
6 see are some pretty well-developed facts that try
7 to flesh these issues out at trial so that the
8 attorneys can argue about them and get a military
9 judge to issue a specific ruling that then
10 governs the admissibility of evidence after that,
11 and then there are arguments about that evidence
12 at the end of the trial.

13 So in the Abbott case, you see both of
14 these victims, both Ms. Dawn Wells and Sharon
15 Patterson, they both have sexual history material
16 that is in the case file. They both have a
17 clinical history. In the case of Ms. Wells, she
18 had gone to her therapist, and these notes were
19 inadvertently spilled, and that's kind of a law
20 school problem we built for those so they would
21 have something to talk about.

22 (Laughter.)

1 MAJ PEDDEN: These notes are
2 inadvertently spilled by the SVC, who
3 accidentally leaves them behind in the trial
4 counsel's office. The trial counsel does not
5 know. The paralegal non-commissioned with the
6 Services --

7 HON. GRIMM: Do you have as part of
8 the Military Rules of Evidence what is Federal
9 Rule of Evidence 502, which is the non-waiver of
10 attorney-client protected information?

11 MAJ PEDDEN: We do, sir.

12 HON. GRIMM: All right. So that would
13 not apply because these are not attorney-client
14 prior privilege, right?

15 MAJ PEDDEN: Yes, and your Honor, we
16 have actually two other rules that really govern
17 the disposition of what we refer to in this case
18 as kind of an accidental spillage of this --

19 HON. GRIMM: Okay.

20 MAJ PEDDEN: -- privileged information
21 --

22 HON. GRIMM: Okay.

1 MAJ PEDDEN: -- Military Rule of
2 Evidence 510 and 511 that govern waiver and --

3 HON. GRIMM: Okay.

4 MAJ PEDDEN: -- disclosures where the
5 patient was not afforded an opportunity to assert
6 the privilege.

7 HON. GRIMM: So inadvertent disclosure
8 would not vitiate the privilege under the
9 ordinary circumstance?

10 MAJ PEDDEN: That is right, your
11 Honor. And so this issue is pretty well
12 litigated. What Private Wells tells her
13 psychotherapist in those notes that are
14 accidentally served on defense counsel, by the
15 way, is -- and I am using my magic quotes here --
16 "I am afraid that this could have been because I
17 am sick or because of my medication. I don't
18 want Sergeant Abbott to get in trouble for
19 something he didn't do."

20 And so on the one hand, you could
21 interpret that as an absolute denial by the
22 victim that this thing ever happened. On the

1 other hand, in a clinical context, you would
2 interpret this as a statement of a victim who is
3 under an exceptional amount of pressure and is
4 having doubts about whether or not she properly
5 perceived these things, and a great many
6 clinicians will tell you that that is a common
7 occurrence for victims. And so that is why we
8 built ITAC this way and the Abbott problem in
9 this way, is to afford counsel an opportunity to
10 litigate these issues as they come up at trial.

11 I couldn't -- I mentioned earlier I
12 couldn't give you a number as to how often
13 psychotherapist-patient privilege is litigated,
14 but as kind of a general metric, I would offer
15 that right now, we are hosting the military
16 judges course at the Judge Advocate General
17 School in Charlottesville, and there's about 60
18 students in the course, all senior judge
19 advocates and litigators. All of them have tried
20 cases involving these issues and litigated in
21 many cases the new version of the Rule, and I
22 mentioned earlier that this version of Military

1 Rule of Evidence 513, the psychotherapist-patient
2 privilege, was just modified by the Fiscal '15
3 National Defense Authorization Act.

4 That change, very victim-focused, and
5 it made it exceptionally difficult even to order
6 production of these records, even to get an in-
7 camera review. In-camera review just means that
8 the judge is going to review this material in
9 chambers or otherwise in secret outside the
10 presence of the parties to make an independent
11 determination as to whether or not the
12 information should be disclosed, and it is very,
13 very difficult to get that review now. It's the
14 subject of extensive litigation. There are
15 multiple matters pending before I think all of
16 the Service courts of criminal appeals, some of
17 which are on their way to the Court of Appeals
18 for the Armed Forces. Sir, please?

19 HON. GRIMM: So Major, I had chatted
20 with you about this, but maybe for the benefit of
21 the Committee, I would like to -- if it's not the
22 time now, when you start talking about 412, I do

1 have a question about how that plays out, given
2 the fact that you probably have more sexual
3 assault cases go to trial in the military. You
4 certainly have more than the federal courts do
5 because unless we have a sex trafficking case,
6 you're almost never going to see a sexual assault
7 play out, so you're never going to see much
8 instances in which that rule in the federal
9 context is actually litigated in a criminal case.
10 It may come up in a civil case.

11 But as you well know, under Rule
12 412(b)(1), you have three circumstances where the
13 otherwise prohibited evidence under 412(a), the
14 prior sexual behavior and predisposition, can be
15 allowed in. One is to show identity of the
16 assailant. Second to show consent, so
17 presumably, if there were prior conversations
18 made about -- that would be relevant to consent,
19 that would be an exception to what the otherwise
20 protection of 412(a) would be.

21 But the third is that very ambiguous
22 "or otherwise required by the Constitution," and

1 the fact that you built in have the defense
2 attorney for the defendant saying this is
3 constitutionally required that I have access to
4 this -- I had a sex trafficking case in federal
5 court a couple years ago where the issue came up.
6 I could find one reported case in the federal
7 reporting system about what is meant by
8 constitutionally required, about a half a dozen
9 in the military cases.

10 It could be a -- a clever defense
11 attorney could certainly say my confrontation
12 clause rights, because that is constitutional, my
13 Sixth Amendment confrontation clause rights trump
14 the protections under 412(a). I could go right
15 in there and get that otherwise protected
16 information. Have you not seen that happen in
17 real practice in cases, or is that given the fact
18 that you have this -- you more frequently deal
19 with this and it is litigated so often, are the
20 defense attorneys finding success in doing an end
21 run around the protection that the rape shield
22 rule affords under the 412(a)(1) and (2)

1 prohibited areas by arguing that this is
2 constitutionally required by the confrontation
3 clause?

4 MAJ PEDDEN: So Your Honor, a couple
5 of things. The Military Rule of Evidence very
6 closely parallels the Federal Rule of Evidence
7 that you just described, and those three
8 exceptions are roughly the same.

9 In short answer to your last question,
10 I would say no, that --

11 HON. GRIMM: Good.

12 MAJ PEDDEN: -- generally, counsel are
13 not making an end run around the first two
14 requirements by pleading the third, the
15 constitution-required section, and I think it is
16 important in that connection to remember that at
17 its basic level, this is a rule of exclusion.

18 HON. GRIMM: Right.

19 MAJ PEDDEN: The default position
20 under this rule is not just that it isn't
21 admissible, but it is not relevant --

22 HON. GRIMM: Right.

1 MAJ PEDDEN: -- at all, unless it is
2 one of these three exceptions. And there is a --
3 we are very fortunate in the military context to
4 have a robust executive and legislative history
5 that shows the development and implementation of
6 this rule, and I recommend to you reading an
7 article by Colonel Fredric Lederer --

8 HON. GRIMM: Yes, yes.

9 MAJ PEDDEN: -- that talks about the
10 judicial implementation and interpretation of the
11 MRE, but the bottom line is it's not coming in.
12 So if there's these three exceptions, then they
13 -- the Sixth Amendment right of confrontation, or
14 any fundamental constitutional right for that
15 matter, will necessarily bend a Rule of Evidence.
16 It must. That said, what we're also seeing in
17 military justice litigation is very careful
18 consideration of this issue by military judges
19 who are well-trained on the matter.

20 I say that with confidence, not just
21 because I am doing it, but --

22 (Laughter.)

1 MAJ PEDDEN: -- but because, as I
2 mentioned to you, your Honor, I get special
3 dispensation today to be absent from the military
4 judges course in which I am both teaching and
5 sitting as a student right now. The object of
6 our motions exercise this week was 412 and 513.
7 In that connection, military judges will issue a
8 written ruling, and it will very clearly specify
9 what counsel are permitted to ask and what
10 evidence is admissible. To the extent that it's
11 not specified in that ruling, it is not
12 admissible.

13 HON. GRIMM: Excellent.

14 MAJ PEDDEN: These are robust
15 protections. They are well-litigated. Military
16 judges hear from the victim through SVC. In
17 court during these closed hearings, the hearing
18 is closed pursuant to a requirement in the Rule,
19 and that requirement is there to safeguard the
20 privacy and the dignity of the victim. In the
21 context of that closed hearing, you will
22 necessarily be exploring some likely embarrassing

1 details. Even if they are not embarrassing, they
2 are still private, and so that hearing is closed.
3 At the conclusion of those proceedings, the judge
4 issues that ruling and narrowly tailors it to
5 precisely what is required.

6 I -- the last thing I would offer you,
7 Your honor, on that is simply that I think the
8 most commonly litigated is the third exception
9 because the first two are somewhat less likely.

10 HON. GRIMM: Right.

11 MAJ PEDDEN: You might consider
12 412(b)(1)(b), which is --

13 HON. GRIMM: Consent.

14 MAJ PEDDEN: Yes sir, evidence of
15 consent between this accused and this victim.

16 HON. GRIMM: Right.

17 MAJ PEDDEN: Not that she has
18 previously on other --

19 HON. GRIMM: Yes.

20 MAJ PEDDEN: -- occasions consented to
21 sexual activity with other people --

22 HON. GRIMM: Right.

1 MAJ PEDDEN: -- which is plainly
2 irrelevant under the rules, and that is --

3 HON. GRIMM: Right.

4 MAJ PEDDEN: -- widely agreed upon
5 across the field of military justice --

6 HON. GRIMM: Right.

7 MAJ PEDDEN: -- litigation. There is
8 one other exception for the prosecution in those
9 cases where, for whatever reason or another, it
10 is necessary for the government to prove a lack
11 of consent. 412(b)(1)(b) also permits the
12 government to use in a very limited way some
13 contact to prove a lack of consent on a
14 particular occasion so they can prove up the
15 offense at trial.

16 HON. GRIMM: Thank you very much.

17 MAJ PEDDEN: Yes sir.

18 MS. SUDENDORF: Just to piggyback a
19 little bit on that, just talking about the judges
20 course that is going on right now, they just had
21 some very vibrant conversation about who should
22 be allowed present during a closed hearing.

1 MAJ PEDDEN: Right.

2 MS. SUDENDORF: And some went so far
3 as to say, you know, the bailiffs shouldn't be
4 there. There shouldn't be any supervisory
5 attorney. It should really just be the
6 litigants, and that's it. So they are very
7 protective and cautious about who should be
8 present in that closed hearing.

9 COL KENNEBECK: And the record is
10 sealed after that as well so it can only be
11 opened by certain personnel at certain times for
12 certain purposes, and then I think what is
13 interesting about 412 is it does allow the judge
14 to tailor specifically, in an effort to protect,
15 obviously, the victim.

16 So if you -- you have proven up by
17 constitution required, I have satisfied it, that
18 doesn't mean I get everything I want. The judge
19 is still going to limit what I can and can't ask
20 and can and can't say, which I think is a boon
21 for the -- for the victim. So if there is a
22 constitutional need, I can protect it, but still

1 protect the victim.

2 MR. KRAMER: Can I ask, on the same
3 thing, how often does it come that there may be a
4 pre-trial ruling or not on 412, and then the
5 victim testifies, and then there is litigation
6 because of what they said on direct, litigation
7 about what could be asked on cross-examination?
8 Does that happen in the middle, too?

9 MAJ PEDDEN: Well, in theory, it
10 shouldn't, sir, for the simple fact that the
11 military judge's pre-trial ruling is binding on
12 everyone who testifies, including the victim, and
13 so to the extent that counsel begin to ask
14 questions that sound like they might encroach on
15 the judge's ruling, the judge is going to stop
16 them. And there are occasionally objections in
17 that regard. I think it is fair to say that
18 based on the written ruling issued by the judge
19 prior to commencement of trial, everybody knows
20 precisely what is and is not admissible, and as a
21 general matter, they are pretty scrupulous about
22 not pushing those boundaries.

1 MR. KRAMER: But I mean, if the -- if
2 the victim says something on direct, does it ever
3 happen that the defense lawyer says wait a
4 minute, now this testimony on direct is --

5 MR. KRAMER: You have opened a door,
6 you have opened a door.

7 MAJ PEDDEN: I am pressed to imagine a
8 situation where that would be permitted, sir,
9 simply because the judge has already considered
10 those issues pre-trial. Now, if some other fact
11 became known that gave cause for the judge to be
12 required to revisit the issue of whether or not
13 some response to a question were constitutionally
14 required, then they might go back into closed
15 session to address that, obviously outside the
16 presence of the members of the court, and, you
17 know, removing everyone from the gallery and
18 closing the hearing again. They might have to
19 reexamine that constitutionality question. As a
20 general matter, that is not the case.

21 And the last thing that I would offer
22 on that third exception, the constitutionally

1 required exception under Rule 412, is that if you
2 sort of step back and view the constellation of
3 cases in the military appellate courts, I think
4 what you see is that protection becoming more
5 robust over time, and so the -- the Rule is more
6 strictly construed in favor of victims now than
7 it was, say, 15 years ago, and to be fair, we
8 have had the Rule for 32, 33 years, so -- .

9 HON. GRIMM: Does the military version
10 of 412 require advance notice by the defendant 15
11 days before the trial?

12 MAJ PEDDEN: Not 15, sir, but it does
13 require advance notice.

14 HON. GRIMM: Are they required to
15 identify the specific purpose for which it's
16 offered so you don't get this sort of mushy kind
17 of a -- and that I imagine tailors what the
18 judge's ruling is, when they have to specifically
19 identify the purpose for which it is being
20 offered.

21 MAJ PEDDEN: Not only specifically
22 identify the purpose, but it is in fact the --

1 the moving party on the motion who bears the
2 burdens of both proof and persuasion --

3 HON. GRIMM: Right.

4 MAJ PEDDEN: -- and so the defense in
5 that case, if they brought the motion, would have
6 to observe the notice requirements contained in
7 the rule and then convince the military judge by
8 a preponderance of the evidence that one of those
9 three exceptions does apply, and not until then
10 is any of that evidence admissible. And after
11 having met that burden, it is only admissible to
12 the extent that the military judge's order
13 specifies.

14 HON. GRIMM: And a judge who is
15 required to give notice to the victim will
16 consider the victim's views when making the
17 ruling?

18 MAJ PEDDEN: Yes, your Honor. The
19 plain language of the rule expressly requires the
20 judge to at least afford the presence and
21 opportunity to hear from the victim through the
22 SVC.

1 HON. GRIMM: Excellent. Thank you.

2 MAJ PEDDEN: Yes sir.

3 MS. SUDENDORF: One more component
4 that I want to talk about for the 412 and 513
5 motion, both in the ITAC course and in the
6 judge's course, is the SVC presence, right? So
7 there is an SVC motion that is brought too that
8 is not exactly aligned with the trial counsel
9 position. She wants everything excluded,
10 basically, you know, in terms of the victim's
11 background.

12 And so we addressed that right away
13 not only in written format in terms of argument,
14 but also this past week we did a demonstration in
15 front of the judges with all three of those
16 parties arguing to show how that plays out in the
17 court system.

18 COL KENNEBECK: There is of course,
19 Article 6(b) gives the SVC the right to file a
20 petition as well, so if the military judge isn't
21 granting the rights that should be afforded to
22 the victim or is doing something not following

1 and complying with 513 procedure, which is pretty
2 prescriptive, then the writ goes up and can be
3 granted and has been granted.

4 HON. GRIMM: Okay, and they've done
5 it, right?

6 COL KENNEBECK: Yes.

7 HON. GRIMM: Oh, I'll be darned.

8 MAJ PEDDEN: Yes sir, and we might
9 actually just pause to expound on that a little
10 bit.

11 HON. GRIMM: Right.

12 MAJ PEDDEN: So let's sort of follow
13 the trail through 412 on a hypothetical case, and
14 I am imagining here from a Court of Appeals for
15 the Armed Forces case called Ellerbrock, and in
16 that case, the issue was whether or not the
17 accused ought have been permitted to cross-
18 examine the victim about details surrounding a
19 prior extramarital affair that she had had.

20 And the theory of admissibility there
21 was based on she would have a bias or motive to
22 fabricate the allegation against the accused

1 because, as CAAF put it, it is, you know,
2 substantially less likely that a marriage
3 survives two affairs than one. And so in that
4 case, the court found that very few, limited
5 details about that extramarital affair and the
6 husband's response to it could have given rise to
7 a motive to fabricate, and so the defense should
8 have been allowed to cross-examine a little bit.
9 It doesn't permit cross-examination on all the
10 intimate details of that prior affair --

11 HON. GRIMM: Right, right, right.

12 MAJ PEDDEN: -- or anything else,
13 simply that there was a prior affair, and that
14 they went through a period of marital discord.
15 She promised to remain faithful, and they came
16 back together.

17 Assume for the sake of argument that
18 Article 6(b) had been in place when the trial
19 judge originally decided the motion in the
20 Ellerbrock case. That would have permitted the
21 victim through counsel to petition the Service
22 court of criminal appeals for a writ of mandamus

1 to the trial court enjoining the trial court from
2 permitting that cross-examination, and the
3 standard that is stated under Article 6(b) is a
4 very, very important one, and I spent a fair
5 amount of time on this at the schoolhouse.

6 Here is why: the standard in Article
7 6(b) is entirely subjective. What the statute
8 says is if a victim believes that what the trial
9 judge has done violates the victim's rights under
10 a list of rules, including 412 and 513, then the
11 victim may petition the court of criminal appeals
12 for a mandamus. That means that the entire
13 question of whether or not the victim has the
14 right to petition is resolved in the mind of the
15 victim.

16 That is a very, very powerful statute,
17 and I would submit also that it is being employed
18 rather judiciously. You don't see tons of writs.
19 You don't see writs in every case. You don't see
20 irresponsible writs being taken. Rather, what
21 you see are I think pretty well-considered writs
22 that are based on substantial questions where a

1 victim is committed to that privacy right and is
2 willing to litigate.

3 HON. GRIMM: How quickly do they turn
4 those around?

5 MAJ PEDDEN: They have priority at the
6 court of criminal appeals, sir. Some in as -- in
7 as quick as a few days. Others taken longer
8 because they present more complex issues, and
9 depending on the briefing schedule of the judges
10 from the panel who get it for the relevant court
11 of criminal appeals, it could take more or less
12 time. Generally quickly, and as I mentioned,
13 they do take precedence over the other matters
14 before the court, and I think that is significant
15 too.

16 HON. GRIMM: Right.

17 MAJ PEDDEN: So --

18 HON. GRIMM: They generally stay the
19 court-martial submitted. They are trying to rush
20 a stay in that case.

21 MS. SUDENDORF: Without those speedy
22 trial, civil ones.

1 MAJ PEDDEN: So that Article 6(b)
2 right also applies to the privileges under
3 Military Rule of Evidence 513 and 514, and also
4 Military Rule of Evidence 615, which precludes
5 the military judge from excluding the victim from
6 the proceedings unless the military judge first
7 finds that the testimony of the victim would be
8 altered. Again, a very robust statutory right.

9 The way we generally talk about them
10 at school is to describe these as the enforcement
11 mechanisms for victims of these rules, and -- and
12 they are robust enforcement mechanisms. A fair
13 amount of litigation on this. I think there is
14 always policy discussion across the field as to
15 the prudence of the rules that we're litigating
16 here and the scope of the privilege, and we
17 should expect to see that.

18 The last thing I would offer, your
19 Honor, is for the benefit of the other Members of
20 the Committee based on our discussion during the
21 last recess, was that unlike the federal district
22 courts and the federal civilian courts under

1 Article 3, military courts construe privileges
2 narrowly because we have them specifically
3 enumerated. I would submit that that is a good
4 thing, that we have very clearly articulated
5 rules of an attorney-client privilege, a clergy
6 privilege, a spousal privilege, right on down the
7 list, so that -- and the theory there is that
8 many years ago, we depended on a great many
9 laypersons to administer military justice --

10 HON. GRIMM: Right.

11 MAJ PEDDEN: -- and those laypersons
12 required the benefit of clearly articulated rules
13 because they didn't have the knowledge of the
14 commandant. Now we've got lots of lawyers in the
15 room, and we are still grateful for having
16 clearly articulated rules because they specify
17 perhaps better than a collection of court
18 decisions what -- the scope of these privileges.

19 All of those issues are present in the
20 Abbott case to one degree or another. All the
21 counsel that come through the JAG school at the
22 intermediate trial advocacy course and our

1 graduate students get exposed to it, and military
2 judge students certainly are exposed to it in
3 depth. They all study these issues very closely.

4 COL KENNEBECK: What we're not doing
5 really is applying the Abbott facts to what we're
6 talking about right now. I think we're talking
7 about things generically, which probably, given
8 the time constraints, is about as good as we're
9 going to get.

10 The one last comment I would make on
11 this slide then is the offer to plead guilty: so
12 in the military, a guilty plea is not the same as
13 in civilian court. You make an offer. A deal is
14 struck between the accused and the general court-
15 martial convening authority. They generally sign
16 an agreement that places all communications
17 within that agreement, and then they will sign a
18 separate document which agrees to the limit of
19 confinement or punishment, and that is called the
20 quantum.

21 And then there will be a stipulation
22 of fact drawn up. The accused and the government

1 would agree these are the facts. At the guilty
2 plea, the accused will have to go through those
3 facts and be provident to pleading guilty, so
4 there is no, you know, nolo contendere. There is
5 no Alford plea. You have to admit what you did
6 and walk through it, convince the judge beyond a
7 reasonable doubt that you did those things, and
8 then move into sentencing.

9 And after sentencing, the judge will
10 look at the quantum page. He doesn't know what
11 the quantum is. So the accused has the ability
12 to beat the deal. So if the deal is for five
13 years, they go through trial and sentence, pleads
14 guilty, goes through the sentencing, and he gets
15 four years from the panel or the judge, four
16 years is the sentence. If he gets eight years
17 from the panel or the judge, then the deal, five
18 years, is the sentence, and that is kind of how
19 things play out.

20 So I want to explain that generally so
21 you understand how things work in the military.
22 Ask questions about that if you would like.

1 Otherwise, let's move on to the next slide.

2 MS. SUDENDORF: And briefly too, there
3 was a request for some of the different forms
4 that are -- encompass what we're talking about,
5 and so we didn't want to necessarily spend a lot
6 of time talking about the forms. If there is
7 time, we will. But the materials that you did
8 receive from us, there is a table of contents,
9 and it reflects a lot: the offer to plead guilty,
10 the stip to facts, process memo, all these pieces
11 that you're requesting, they are here for your
12 resources as well.

13 COL KENNEBECK: Okay. So in the trial
14 and sentencing phase, obviously, we've made it
15 this far. We have a victim who is going to
16 testify. We have no guilty plea. We -- or maybe
17 we -- we're going to get to trial here, either
18 contested or not contested.

19 This is when we pick our panel. So
20 you will see also in your documents a court-
21 martial convening order. That is the document
22 that, you know, basically creates the court-

1 martial, and it will identify names of the panel
2 members who are selected by the general court-
3 martial convening authority from that
4 installation or from the units that that general
5 court-martial -- that general owns.

6 So Article 25 requires that the
7 general choose those who are most qualified by
8 age, experience, and the criteria are spelled out
9 in Article 25. They typically are more senior
10 folks because you want someone with age and
11 experience. That is a factor. It tends to be
12 captains, majors, lieutenant colonels, and
13 colonels, and first sergeants, master sergeants,
14 so E-7s, E-8s, E-9s. And their names are listed
15 on the court-martial convening order.

16 And then the military judge will take
17 over, and the case will be docketed. Motions
18 will be argued. A trial date will be set, just
19 like any other trial you are familiar with. Go
20 ahead.

21 MS. SUDENDORF: Yes. For the Abbott
22 case, what we do with our ITAC course is we

1 provide a panel, and we go through a mock
2 demonstration with the students, going through
3 panel selection. Once that court-martial
4 convening order has been signed, determine who is
5 out there, we kind of go through a mock panel
6 selection with the students, both defense
7 counsel, SVC, and trial counsel. Anything else?
8 Okay.

9 COL KENNEBECK: So, and then the last
10 bullet there is victim can make an unsworn
11 statement, as can the accused. That is in
12 sentencing, all right?

13 MAJ FRICCHIONE: Yes.

14 COL KENNEBECK: So --

15 MAJ FRICCHIONE: Yes, that is right.

16 Under -- under RCM 1001(a), which is a new
17 provision, it provides for the victim to be able
18 to make an unsworn statement, which is usually in
19 addition to the government's case and
20 presentation of victim impact evidence.

21 It -- it provides an interesting new
22 area for us to practice in because, much like the

1 accused, the victim's unsworn statement can be
2 rebutted by the defense with additional evidence
3 afterwards, and usually, it's in written form and
4 provided to the defense or parties, so the judge
5 and defense, beforehand. So the -- that unsworn
6 statement, because of the notice requirement
7 under 1001(a), is usually in written form, but it
8 can either be written or an oral statement.

9 COL KENNEBECK: While defense cannot
10 cross, they can rebut --

11 MAJ FRICCHIONE: That is correct, yes.

12 COL KENNEBECK: -- other evidence,
13 right?

14 (Pause.)

15 MAJ PEDDEN: So in the -- sort of the
16 life cycle of the Abbott case, what happens, and
17 I think I mentioned previously that one of the
18 victims ends her military service and moves to
19 Canada. They did that purposely to make her
20 unavailable at the subsequent proceeding.

21 Prior to doing that, she testifies
22 during the Article 32 proceeding. There was a

1 verbatim transcript produced of that. In theory,
2 you could admit that verbatim transcript at the
3 trial later. But the Private Wells persona, as
4 placed in the Abbott fact pattern, based on our
5 experience and the many discussions that we've
6 had in the schoolhouse about it, is somewhat
7 typical, and I hesitate to use that word, but
8 somewhat typical in that there was a lot going
9 on, because she's a person.

10 And -- and so she leaves the country,
11 and Ms. Patterson remains in the military, and we
12 proceed to trial with charges, and then we have
13 some discussion about whether you would charge a
14 case as to both of these victims, whether or not
15 you might get a propensity instruction or other
16 things like that. And we proceed to trial on the
17 facts that way, with charges for both of these
18 victims, and then some other charges as well.

19 Both of the victims, I think I
20 mentioned, have a clinical history, and that is
21 pretty well developed in the record because we
22 want them to litigate the 513 issue. I don't

1 think we have ever drafted a resolution to the
2 Abbott case in terms of sentence or anything like
3 that. It is only a two-week course, and we don't
4 get that far.

5 COL KENNEBECK: But we take it to a
6 mock trial, and, you know, they go all different
7 directions in the mock trial.

8 MS. SUDENDORF: But, you know, as
9 Major Pedden brought in before, the other thing
10 that it affords us to do, the Abbott fact
11 pattern, is to allow experts, so we have a lot of
12 experts that we pull in from UVA, from Fort
13 Bragg, and they are actual experts in their
14 field, and so it affords not only the trial
15 counsel and defense counsel and SVC opportunity
16 to conduct direct and cross-examination, but it
17 actually works to the -- the betterment of the
18 experts too because they bring their students,
19 and their students get an opportunity to be
20 crossed and -- cross-examined and direct examined
21 by folks, so it actually works on both ends.
22 They are both getting the exposure in that court-

1 martial procedure, so -- .

2 COL KENNEBECK: So what is consistent
3 with Abbott and typical cases you would see, you
4 might have witness availability problems,
5 especially after an expedited transfer. That can
6 by itself indicate -- you typically are going to
7 have a 412 issue, whether it's a prior
8 relationship or a prior sexual activity with the
9 accused or with someone else. Those are
10 consistent for a lot of our tried cases --

11 HON. GRIMM: Colonel, the implication
12 of the unavailable witness is that prior
13 testimony under 804(b)(1) comes in because it has
14 been cross-examined at the Article 32?

15 COL KENNEBECK: Yes. That is one
16 aspect that we want to drive home, you know, get
17 some sworn testimony. But I am trying to draw
18 parallels between our hypothetical case and the
19 kinds of cases that we see.

20 HON. GRIMM: Right.

21 COL KENNEBECK: A lot of times, your
22 unavailability will occur before we get any sworn

1 testimony, before --

2 HON. GRIMM: I see.

3 COL KENNEBECK: -- the 32. In this
4 case, we made it at the 32 so that we could drive
5 on and take this case, you know, to the end with
6 the students.

7 MS. SUDENDORF: But we can still talk
8 about those issues, right? So what happens if it
9 were to happen before --

10 COL KENNEBECK: Right.

11 MS. SUDENDORF: -- if she was
12 unavailable before? So we provide discussion
13 workshops as well as presentation workshops to
14 have exactly those type of discussions.

15 COL KENNEBECK: Let's go to the next
16 slide.

17 So assuming there is a conviction,
18 there will be a sentence, and that will -- the
19 next one after this. Yes. There will be a
20 sentencing hearing for the -- you know, unlike
21 the federal practice, there is not a delay.
22 There is not a gap between the end of trial on

1 the merits and the sentencing.

2 We get right into the sentencing, and,
3 you know, there will be some witnesses who
4 testify on behalf of the government about the
5 impact of the crime, typically the victim, maybe
6 some others. And then the accused will probably
7 testify or do an unsworn statement, commonly
8 unsworn. Family members might testify or unit
9 members might testify on behalf of the accused,
10 and then either the panel or the judge will
11 render a sentence.

12 Once that is done, then we move into
13 the post-trial phase, and this is sort of the
14 paternalistic long tale that belongs to the
15 Uniform Code of Military Justice. It has been
16 there from the beginning, to really give a second
17 look at what happened in that court-martial.
18 It's another second bite of the apple for the
19 accused because you generate a record of trial,
20 it is typed up verbatim. This takes a few weeks.
21 It is reviewed by trial and defense counsel for
22 error. It is reviewed by the military judge for

1 error. And then it is served on the accused, who
2 may be in confinement, and that means it has to
3 be redacted, it has to go through the process,
4 so, you know, weeks go by.

5 It is also served on the victim, and
6 the accused has a certain window of time to
7 provide matters back to the convening authority,
8 because now the decision is back to the general.
9 The judge is done with it. Now the general gets
10 the case back. So we -- we try to get victim
11 input first because I want the accused to see
12 what the victim has to say. If I get input from
13 the victim after the accused has submitted their
14 input, now I have a new matter that the accused
15 does not know about, and I am injecting error
16 into my case, so I have to make sure the accused
17 sees everything.

18 So I try to get my victim input first,
19 which we are getting pretty good at now. Give
20 that to the accused, get the accused matter
21 submitted, and then we put together the record of
22 trial, which you're going to see. It is a blue,

1 generally blue covers, you know, with the form.

2 MS. SUDENDORF: Report of result for
3 trial --

4 COL KENNEBECK: No --

5 MS. SUDENDORF: -- 2707?

6 COL KENNEBECK: No. It is the 490.

7 MS. SUDENDORF: 490?

8 COL KENNEBECK: So the record of trial
9 is covered with the 490. If you see record of
10 trial on there, you will flip it open. It will
11 have a chronology of when the case started and
12 when it ended. It will have dates, along with
13 post-trial too, and, you know, they will have
14 usually the MCIO investigation, all of the
15 submitted pieces of evidence that were admitted
16 or offered, and other documents related to the
17 case that may or may not have been used.

18 Any sealed material will be in that
19 record of trial, the transcript of the Article 32
20 preliminary hearing will be in there, so all of
21 those documents. Usually a record of trial will
22 be four or five volumes of 200 pages.

1 So that record of trial is generated
2 then, after we get input from the accused, and
3 that is when the staff judge advocate drafts up
4 the recommendation, right, will make a
5 recommendation to the convening authority what
6 the sentence should be, after reading, you know,
7 the clemency matters from the accused and the
8 input from the victim. And, you know,
9 statutorily, Article 60 has been amended. That
10 gave the convening authority previously power to
11 disapprove findings of guilt or reduce sentences.
12 That has been severely limited, but the convening
13 authority still can grant some clemency.

14 Typical clemency that you would see in
15 these cases is an accused who might be married
16 and have a child, and asks, hey, can you forfeit
17 my -- or waive my forfeitures for a period of six
18 months so that the money I would have made can go
19 to my family members for that long? That is the
20 longest it can be waived, is up to six months
21 after action. And sometimes, those are granted.
22 That is case-by-case. They have to justify it,

1 and the convening authority has to agree with it.

2 But as far as disapproving a finding
3 of guilty, that has been severely limited. There
4 are a few offenses for which a conviction could
5 be undone, but not really anymore.

6 So the staff judge advocate will draft
7 a recommendation, usually do that before the
8 record of trial has been done, have a
9 recommendation, and then they get the 1105
10 matters, and the staff judge advocate will draft
11 up an addendum saying basically I have read the
12 clemency matters, I have read the victim input.
13 Based on all of this, and addressing the legal
14 error in the record if it needs to be addressed,
15 and then put a recommendation to the commanding
16 general.

17 That whole packet goes to the
18 commanding general, and he signs a document
19 called the action, and that action really is an
20 approval of what the sentence and findings are.
21 It is a paragraph, but it's an important document
22 because it is the -- statutorily, it is the

1 document that approves the sentence as adjudged.
2 That starts the appellate process.

3 Okay. Comments on that?

4 MAJ PEDDEN: No sir.

5 MS. SUDENDORF: No sir. They are all
6 under post-trial. If you go to the table of
7 contents in the materials, it's all under post-
8 trial, so you can see what that documentation
9 looks like.

10 COL KENNEBECK: The Abbott fact
11 pattern doesn't really get that far because we
12 really just take this up to trial in our two-week
13 course, but the Abbott fact pattern is really
14 just a set of facts that is like other sex
15 assault cases to open the door for these 412,
16 513, and other proof issues that we typically see
17 in a sexual assault court-martial.

18 Okay. That went faster than I
19 thought. Ma'am?

20 CHAIR BASHFORD: This is going back a
21 bit, but you had a slide that was called Victim
22 Care: A Multi-Disciplinary Approach, and one of

1 the -- that you listed was law enforcement MCIO.
2 And while I think obviously anybody investigating
3 a sexual assault should be sensitive, I am not
4 sure I would agree that law enforcement is part
5 of victim care. Shouldn't they be investigating
6 the facts of a case? Is this -- is this really
7 considered to be part of the victim care?

8 COL KENNEBECK: Yes. The lens through
9 which I was looking was really oriented on
10 accountability and adjudication, and, you know,
11 that matters to the victim, that it is
12 investigated and that a decision is made. And in
13 that regard, I view law enforcement as a player
14 in helping move the process along. But you're
15 right, yes.

16 CHAIR BASHFORD: Okay. I just wanted
17 to make sure that -- okay.

18 COL KENNEBECK: That is accurate.

19 BG SCHWENK: First off, I would like
20 to thank all four of you for coming. I really
21 enjoyed that presentation, and it gave me a lot
22 to think about. And my wife last night, Major

1 Pedden, I told her that, hey, there is this
2 Marine on this panel tomorrow, and he was the
3 judge advocate for 2-8, 2nd Battalion, 8th
4 Marines. And she said give him my best, because
5 her dad was the commanding officer of Company G,
6 2nd Battalion, 8th Marines, Guadalcanal, so --

7 MAJ PEDDEN: I am honored to be even
8 mentioned.

9 (Laughter.)

10 MAJ PEDDEN: And please give her my --

11 BG SCHWENK: I don't know about that.
12 He bombed out as a major general.

13 (Laughter.)

14 BG SCHWENK: What are you going to do,
15 you know? So anyway, anyway, she said to say hi.

16 Here is a question to help us as a
17 panel think about issues for us to look at: so
18 you guys have, you know, the basic course. They
19 don't know anything, but you have what is now the
20 graduate course. It used to be the advanced
21 course. It is more formal now, the graduate
22 course, the two-week course, the judges course,

1 you have all the one-week courses that come
2 through, and because none of those are federal
3 advisory committees, those people are allowed to
4 talk at lunch and in the evenings about what has
5 gone on.

6 And it would seem to me, people being
7 people, that you would hear things about --
8 probably less about what is going well in the
9 system, and more about what, in their perception,
10 is not going well. And so since our job is to
11 look at the system, I was wondering if you all
12 had any thoughts on things you have heard from
13 people out in the field that are actually
14 practicing about things that are not going so
15 well that we might want to look at in the next
16 couple of years.

17 And if you want, you can disguise your
18 own personal views by saying --

19 (Laughter.)

20 BG SCHWENK: That is why I phrased it
21 that way. Feel free to --

22 COL KENNEBECK: Well, I think it is

1 safe to say none of us are speaking for the
2 school or for our Services, but maybe some
3 observations. Go ahead.

4 MAJ FRICCHIONE: Well, this -- I am
5 going to mention this only because it came up
6 over the last couple days, so it is recent. But
7 -- but it is -- it is an overarching issue with
8 Article 6(b) and the rights of victims at trial,
9 which is the -- it is kind of -- Article 6(b) has
10 very broad rights in there, and we put the
11 enforcement provision that allowed for petition
12 up to the ACCA right now.

13 Actually, it is only ACCA because
14 there was a case that came out, Martinez, and the
15 CAAF said that they were not going to look at the
16 -- the rulings on those petitions from ACCA, that
17 6(b) was clear that -- that it only went to the
18 courts of criminal appeals and not to CAAF.

19 So that case came out. Now, those
20 petitions only go up one level, but really, the
21 issue when you actually go into trying to apply
22 that enforcement mechanism at trial and try to

1 determine what rights victims actually have
2 during courts-martial, what ends up happening is
3 that you have many judges across all the
4 jurisdictions trying to determine what those --
5 those rights actually are, because we have got
6 the rights written, the right to be heard and to
7 counsel, 412, 513, and 514, not in 615.

8 And then you have got that enforcement
9 provision that allows victims to petition the
10 rulings of the judge, but no clear guidance on,
11 you know, what is and is not a right, and so just
12 like Major Pedden said, you know, it is what is
13 in the belief of the victim that made the appeal.
14 So there are procedural issues that mean that the
15 integration of victims and their counsel through
16 SVCs into courts-martial has meant that each
17 jurisdiction has to kind of take each case on its
18 own and try and figure out how to apply the rules
19 as they are.

20 So that -- that is what we have been
21 seeing, and I know that SVCs can be a little bit
22 -- they feel a bit like, as I put it, you know,

1 they feel a bit like an alien because they are
2 walking into a new ecosystem, and so when these
3 rules are brought, what ends up happening is that
4 they are -- the uncertainty can -- you know,
5 makes the efficiency of -- of the court-martial
6 maybe not as efficient as it could be at the end
7 of the day.

8 So that affects the SVC practice.
9 That affects the way judges practice, and trial
10 counsel, defense counsel with the -- the
11 introduction of the SVC also, we're all trying to
12 figure out exactly how to integrate the SVC. It
13 has only been a couple years. I think -- I think
14 overall, we're doing an excellent job on trying
15 to figure out how this -- this new advocate is --
16 is going to be operating within the actual court-
17 martial system.

18 BG SCHWENK: Now would that concern
19 extend to -- would that concern extend throughout
20 the trial, like during -- during the -- on trial
21 on the merits direct and cross, and the SVC
22 trying to figure out where do I sit and how do I

1 --

2 (Simultaneous speaking.)

3 MAJ FRICCHIONE: That is -- that is --

4 BG SCHWENK: -- question?

5 MAJ FRICCHIONE: Yes, that is --

6 BG SCHWENK: Am I allowed to object if

7 I don't --

8 (Simultaneous speaking.)

9 MAJ FRICCHIONE: That is what I am
10 talking about, yes, yes sir.

11 BG SCHWENK: Okay.

12 MAJ FRICCHIONE: So I -- in -- in some
13 ways. So right now, if the -- you know, the
14 victim is not a party at the court-martial. Like
15 you said, there is no table in front of the bar,
16 so they are standing -- or they are sitting
17 behind the bar. And so to make an objection that
18 would be efficiently answered before any, you
19 know, either privileged or other information
20 would come out from the witness, what they --
21 they have to do is stand silently and wait for --
22 to be recognized by the judge and walk in front

1 of the bar, or pass notes to the government
2 counsel.

3 Each judge may have different rules
4 about, you know, how that is going to be
5 accomplished, but so that is -- that -- you know,
6 that is something to think about when it comes to
7 objections during motions which are accepted, and
8 then we all understand when that is reasonable
9 versus merits, which is --

10 BG SCHWENK: A more developed process.

11 MAJ FRICCHIONE: Yes. So anyway,
12 we're all learning on the ground --

13 BG SCHWENK: Okay.

14 MAJ FRICCHIONE: -- but Article 6(b)
15 is very broad, and it also includes the rights of
16 all crime victims, and so that is something
17 where, you know, we have to take a step back and
18 figure out exactly what that means, and we're all
19 learning, you know, taking it one step at a time,
20 but anything that you would want to do to look
21 into that --

22 BG SCHWENK: Okay, great.

1 MAJ FRICCHIONE: -- and then the
2 appellate rights. I know that that has already
3 been through the JPP, but -- but the appellate
4 rights of victims as well.

5 (Pause.)

6 MAJ PEDDEN: Just one minor piece of
7 what Major Fricchione just mentioned: so in
8 response to your question, with regard to the
9 Martinez case, the other difficulty we might see
10 as a result of that is some dissonance between
11 the Services, because if this petition stops in
12 its appellate route at the Service court of
13 criminal appeals, then that sort of disaffords
14 the Court of Appeals of the Armed Forces the
15 opportunity from granting a discretionary appeal
16 in one or more of these cases in order to
17 harmonize this practice across the Services. So
18 just to extend on Major Fricchione's capable
19 explanation there, that might be something to
20 look at too.

21 BG SCHWENK: Thank you.

22 MAJ PEDDEN: Yes sir.

1 MG ANDERSON: I had a question about
2 the Special Victims' Counsel and the VLC in other
3 Services. In terms of your assignments, where
4 does this fall in the spectrum? Because we all
5 know that there's certain career -- I won't say
6 enhancing, or some that are, you know, okay
7 assignments, but where does this fall in the
8 developmental, you know, range for, you know --

9 COL KENNEBECK: That's a great
10 question. Captains talk about this a lot.

11 So in the Army, and I will speak just
12 for the Army, generally, the policy has been that
13 we want you to have litigated before you are
14 Special Victims' Counsel. It's hard to give good
15 advice if you haven't been in a courtroom and you
16 don't know the process. So that happens pretty
17 consistently. There are a few where maybe people
18 had civilian litigation experience, so that is
19 good enough, and, you know, we need the bodies,
20 so we have to fill these buildings.

21 So that is one prerequisite. And I
22 think at first, it wasn't necessarily a popular

1 idea, but given the amount of time that these
2 folks are spending in court, that they are
3 spending working on cases where there is a victim
4 who really -- whose life has been altered and
5 they are helping these people, there is a benefit
6 derived from that. It is also very difficult to
7 manage that, but there are benefits that derive
8 from that, and it feels like a crim law job,
9 which, you know, a lot of young JAGs want to do a
10 crim-law-related job, so it has that feel.

11 So I think over time, what I am seeing
12 anecdotally are people who aren't opposed to the
13 job, and maybe even some who like it, and I think
14 that trend will continue, you know, especially if
15 you -- if -- if we all start looking at this job
16 as a litigation-like. If it is perceived as
17 litigation-like, it is going to become something
18 that everybody wants, and that is where I see it
19 going.

20 MG ANDERSON: Is it a three-year
21 assignment?

22 COL KENNEBECK: No. It really just

1 depends.

2 MG ANDERSON: Okay.

3 COL KENNEBECK: I mean, we have -- I
4 think we're trying to -- we have given a lot of
5 jobs to captains --

6 MG ANDERSON: Yes.

7 COL KENNEBECK: -- so --

8 MG ANDERSON: Yes.

9 COL KENNEBECK: -- you know, adding
10 this new job in the mix has made the rotation
11 increase, so the length of time they get to spend
12 in a job has been smashed a little bit. I think
13 we're normalizing that, probably. That is a
14 difficult personnel management issue.

15 MG ANDERSON: Yes.

16 COL KENNEBECK: But I think, you know,
17 two years is probably about right because --

18 MG ANDERSON: Okay.

19 COL KENNEBECK: -- three years of a
20 job that emotionally taxing would really wear you
21 down, so --

22 MG ANDERSON: And they still have to

1 get a professional military education squeezed in
2 there somewhere --

3 COL KENNEBECK: Right.

4 MG ANDERSON: -- and maybe --

5 COL KENNEBECK: Right.

6 MG ANDERSON: -- another billet, so --
7 (Simultaneous speaking.)

8 CHAIR BASHFORD: Given that, what is
9 the turnover? I mean, how often do you have to
10 replace a trial counsel in a sexual assault case,
11 an SVC in a sexual assault case, or the defense
12 attorney?

13 COL KENNEBECK: So Special Victim
14 prosecutors, senior litigators, are typically
15 three-year assignments, so they will be in a
16 region for a period of three years and have
17 oversight over all those cases, some of which
18 they will try themselves, some of which they will
19 manage.

20 Trial counsel are typically in the job
21 either 12, 18, 24 months. It really just depends
22 on what is going on in that unit. Are they going

1 to deploy? Are they just coming back from
2 deployment? You know, has the person already
3 been on the installation for two years, and now
4 in their third year, they are prosecuting for a
5 year so they need to PCS after that? There are
6 so many factors that there really is no normal
7 answer.

8 The goal would be to keep prosecutors
9 for 18 to 24 months. The goal would be to keep
10 SVC for a couple years because there is a
11 learning curve to that job, just like defense.
12 We want defense, you know, in that job two or
13 three years as well. So the goal is to aim for
14 two-year gigs I think overall, but that -- I
15 don't want to speak for the -- this is anecdotal.

16 MG ANDERSON: Sure.

17 MS. GARVIN: So I have two questions.
18 One is because it relates to issues that both
19 Majors have raised. So what is the -- well, the
20 Article 6(b) rights are very broad, right? And
21 there is no appellate case law -- not much
22 appellate case law in the military right now.

1 What is the precedential value of civilian case
2 law on 18 U.S.C. 3771, since those rights have
3 been around since 2004 and are nearly identical?
4 Is there any precedential value? Is it just
5 persuasive authority?

6 MAJ PEDDEN: Yes. I think as a
7 general matter, it is persuasive authority,
8 ma'am, and given that, again, these are
9 specifically enumerated in the Uniform Code of
10 Military Justice, I would consider it a duty of
11 the court to first look to that body of law
12 because it is specifically enumerated there. I
13 don't mean that to suggest that it is -- it is
14 fully complete or shouldn't be amended or
15 anything else, but simply that it is probably
16 best to go first to the language of our law
17 before examining other authorities.

18 MS. GARVIN: And then cross-branch
19 appellate courts, what is the precedential value?

20 MAJ PEDDEN: They are generally cited
21 as persuasive authority but not binding from
22 other courts of criminal appeals, and decisions

1 from the Court of Appeals of the Armed Forces are
2 binding on all of the Services.

3 COL KENNEBECK: It is much like
4 circuit courts in the states.

5 MS. GARVIN: So the fact that it can't
6 be appealed one more level, we are stuck with
7 persuasive authority across branches?

8 MAJ PEDDEN: Yes ma'am, and I think
9 you generally see them cited as persuasive
10 authority. Ordinarily, for -- especially in this
11 context, right, so the 6(b) context, there are a
12 few cases out there that some are addressing
13 precisely what 6(b) means and how far it goes.
14 Other cases are addressing the substantive issues
15 that are presented as part of the 6(b) petition
16 for the writ, right? So Martinez is a case that
17 interprets Article 6(b), whereas Kitchen, which
18 is a Coast Guard Court of Criminal Appeals case,
19 interprets the scope of the privilege under MRE
20 513, standing on the fact that it was presented
21 in the 6(b) writ.

22 So all of them are fruitful, and I

1 think when -- when for example the Army Court of
2 Criminal Appeals looks to the Coast Guard, they
3 are doing that to say, okay, this is or is not
4 persuasive, and we're going to adopt it or we
5 won't.

6 MS. GARVIN: So my second question was
7 since 6(b) rights apply to all victims, not just
8 those who have access to SVCs, barring Marines,
9 of course, have you seen many civilian lawyers in
10 court -- in military court helping protect the
11 6(b) rights of non-sexual-violence crimes?

12 COL KENNEBECK: Not yet. I mean --

13 MAJ FRICCHIONE: No, we haven't.

14 COL KENNEBECK: Yes.

15 MAJ PEDDEN: It's unusual, but it does
16 happen. There's not a particular requirement.
17 So for example, if you're going to appeal -- or,
18 excuse me, appear as counsel in a trial at a
19 court-martial, you have to appear on the record
20 and state your qualifications and whether you're
21 certified and sworn, and if you're not certified
22 and sworn UCMJ, you know, are you a member of a

1 bar? If so, what bar? Are you a member in good
2 standing? And things of that nature.

3 And those qualifications suffice for
4 the present time. There is not an independent
5 statutory certification specifically required for
6 SVCs, and occasionally, there are civilian
7 counsel who appear in that capacity.

8 MS. GARVIN: And just so folks know
9 why I ask the question relevant to this
10 proceeding is because, right, that if there were
11 those counsel, there would be another whole body
12 of precedent that might be developed somewhere
13 else within the military structure, so they were
14 tied together. It wasn't a random question.

15 (Laughter.)

16 COL KENNEBECK: Yes. No, I think it
17 is great, and it exposes the other side of the
18 argument, which, so we have graduate students who
19 write theses or research papers. A lot of the
20 topics lately have been, you know, has the
21 pendulum swung too far? What is happening with
22 the accused? What has, you know, the injection

1 of another attorney who is going to represent the
2 interest of the victim done to the system? I
3 don't know that anybody has any answers.

4 I also think it begs a deeper
5 philosophical question: you know, whose rights
6 are we protecting or injecting? Is it the state
7 and prevention of crime and, you know, assuring
8 that if you commit a crime, we're going to punish
9 you for it? Or is it the victim, making the
10 victim whole again at the other end?

11 And I think we're in the middle of
12 this philosophical debate over who gets to
13 decide. Should it be the commander or should it
14 be the victim? And, you know, the victim doesn't
15 want prosecution: shouldn't that trump
16 everything? So we -- we have a lot of debates
17 about this topic, and -- and we are obviously
18 pretty -- leaning forward by giving victims
19 attorneys in all of these offenses.

20 I don't know of any other jurisdiction
21 that really does that, so it's kind of new, and
22 there's a lot of concern about that. I wouldn't

1 say fear. I would say -- and actually, it has
2 worked out pretty well so far. But there is a
3 lot of discussion about where are we, and where
4 are we going?

5 And then two other things I will
6 inject: one, this is something that I have always
7 found interesting. This is Kennebeck and not
8 anybody else: data. We collect a lot of data,
9 and you're probably going to be looking at a lot
10 of it. We have our annual report to Congress,
11 and I don't remember when it was built or why it
12 was built. Nate could probably talk about that,
13 so I don't want to steal your thunder, Nate.

14 But I wonder if we're collecting data
15 that is useful. And then when we do have data,
16 what are we comparing it to? How useful are
17 prosecution rates? How useful are acquittal
18 rates? We don't really have another jurisdiction
19 that tries similar kinds of cases to compare it
20 to, and we don't, really. So we don't know if
21 we're doing well or not doing well. Every number
22 is either a good number or a bad number,

1 depending on who is talking.

2 So data has been something that I
3 would be interested in, you know, having someone
4 assess the value of it. And then the other one,
5 we have -- we, broadly, have a great relationship
6 with our law enforcement personnel, and we work
7 closely together. We investigate these cases
8 aggressively. But I wonder if there is room for
9 growth there in how investigators work with
10 government, and now you hear a lot about defense,
11 and defense says, hey, I need an investigator.
12 Somebody help me out.

13 I don't know that we have answered
14 that. I know there is a lot of discussion about
15 that, and that is an important question about how
16 we get after that, whether it is with some
17 government entity or with funding. But I do
18 think that there is, you know, probably some room
19 for growth there. We have probably learned some
20 lessons over the last ten years. Sir?

21 DEAN HARRISON: Two questions, then.
22 This might be something that you can only answer

1 on behalf of the Army and the Marine Corps.

2 What are the resources available and
3 the training levels of defense counsel? You have
4 got --

5 COL KENNEBECK: It's a great question.

6 DEAN HARRISON: And can you describe
7 the --

8 COL KENNEBECK: Yes.

9 DEAN HARRISON: -- training required
10 for the senior counsel prosecuting in these
11 cases?

12 COL KENNEBECK: So defense attorneys -
13 - so at the school, we -- we stay in the middle.
14 We train everybody. They come through advocacy
15 courses, defense, SVC, prosecutors. We train the
16 basic course, grad course. We teach both sides
17 of the argument.

18 At Belvoir, the Army has Trial Counsel
19 Assistance Program and Defense Counsel Assistance
20 Program. They have HQEs. They have captains and
21 majors, and they have funding. They go out and
22 provide training at installations or in larger

1 groups. That training is oriented towards either
2 the prosecution or the defense of all crimes.
3 Sexual assault obviously is floating to the top
4 because it is tried quite often, so there is
5 typically sex-assault-focused training that
6 you're going to get from those entities, and they
7 train every single week of the year.

8 And, you know, the defense counsel,
9 defense bar is really tight. They network well,
10 they communicate well. I have been defense
11 counsel, and that is one of their biggest
12 strengths. As soon as someone has a motion in
13 California that works and is -- you know, was
14 successful, it is used throughout CONUS and Korea
15 and Germany. It is out there like that. They
16 communicate effectively.

17 They train equally effectively, and
18 they like to manage their training, so we just
19 give them -- I think, once again I speak -- give
20 them the funds they need and the time they need,
21 and they manage it the way they want to manage
22 it. The same with the trial counsel side. So I

1 think the training is robust. We do the, you
2 know, the neutral institutional level at the
3 school to get in the functional level.

4 DEAN HARRISON: And is there any
5 effort -- because I understand that each court-
6 martial is unique and has a beginning and an end.
7 There is no standing court. Are there any
8 efforts to make sure there are not sentencing
9 disparities, either within a Service or across
10 the Services?

11 COL KENNEBECK: So the Military
12 Justice Act of 2016 was just passed, and it will
13 be implemented, you know, late next year
14 sometime. And originally, it had sentencing
15 parameters as part of the construct. That was
16 changed to allow sentencing by panel or judge
17 alone, but required a four-year study over types
18 of sentences, amounts of sentences, so that
19 question can be revisited at the end of the four-
20 year study. So it is injected in the plan so
21 that in 2023, you can take a good look at what
22 our sentencing looked like and then make a

1 decision then about whether parameters are
2 appropriate, whether judge alone is appropriate,
3 whether panel -- you know, answer some of those
4 questions.

5 (Simultaneous speaking.)

6 BG SCHWENK: -- making investigation,
7 or somebody else?

8 COL KENNEBECK: Sir?

9 BG SCHWENK: Who is doing the review?

10 (Simultaneous speaking.)

11 COL KENNEBECK: Well --

12 BG SCHWENK: -- Committee, or we don't
13 know yet? Judge Sullivan?

14 COL KENNEBECK: It is --

15 (Simultaneous speaking.)

16 COL KENNEBECK: -- it is prescribed by
17 I think Article 146 in the new Military Justice
18 Act, so I think Article 146 gets after it, but I
19 can't remember. Probably you guys.

20 BG SCHWENK: All right.

21 (Laughter.)

22 CHAIR BASHFORD: Well, Colonel

1 Kennebeck, Ms. Sudendorf, Major Fricchione, and
2 Major Pedden, I think we have come to 2 o'clock.
3 Thank you so much. You teed it up beautifully
4 for Dr. Spohn about collecting a lot of data, but
5 what are we going to do it for? And I don't want
6 to cut into her time, but thank you so much.
7 This was very informative.

8 COL KENNEBECK: Thank you.

9 MS. SUDENDORF: Thank you.

10 (Applause.)

11 (Whereupon, the meeting went off the
12 record at 2:00 p.m. and resumed at 2:06 p.m.)

13 CHAIR BASHFORD: So Dr. Spohn and Ms.
14 Peters, in 15 minutes, please walk us through
15 adjudication data analysis.

16 MS. PETERS: All right. Thank you,
17 ma'am. Good afternoon, Committee Members. My
18 name is Meghan Peters.

19 I would like to start with a brief
20 overview of what the Staff collected in order to
21 arrive at adjudication data for sex assault
22 offenses relative to 2015. The JPP had three

1 statutory tasks to answer that it had to examine:
2 information on case -- or, I am sorry, case
3 dispositions, meaning whether or not it went to
4 court-martial; the outcomes of those cases; and
5 the punishments rendered at courts-martial. It
6 also had to look at appellate decisions, the
7 reviews of sex assault convictions, and to
8 compare punishment data in military courts with
9 punishment data in civilian, federal, and state
10 courts.

11 Relative to today's presentation, what
12 the Staff did was collect court-martial case
13 documents, key documents that chart out the
14 procedural history of each case from the military
15 Services. So we went to the military Services
16 last year and said we would like all of the sex
17 assault cases that were tried or dismissed or
18 resolved in Fiscal Year '15, and our body of
19 cases reflect cases in which at some point, a
20 charge of sexual assault was preferred. It
21 wasn't necessarily preferred in '15. It could
22 have been preferred in '14. But the case for us,

1 the end of the case was when findings were
2 adjudged, sentence was adjudged, or the case was
3 dismissed sometime in FY15.

4 So we are encapsulating the end result
5 of the case, and then going back to the
6 beginning, we have the charge sheet. We recorded
7 each charge and what happened to it. The Staff
8 collected hundreds of cases. Again, we used
9 court-martial documents to record each charge and
10 what happened to it in that case, and then we
11 recorded the outcome, the punishments into an
12 electronic database that we built, and we
13 uploaded the case documents there so that we have
14 a case document to mark the timing of the trial
15 and the result for each case that we entered.

16 This database produced an Excel
17 spreadsheet, and we provided that Excel
18 spreadsheet to Dr. Spohn so she could analyze raw
19 data without personal information that would be
20 contained in documents and whatnot and so she
21 could run an analysis that supported the JPP's
22 tasks.

1 In the end, we had 738 cases that were
2 resolved in FY15. I think each of the Services
3 might have identified more cases than what we
4 received, but in the end, we found there were
5 some duplicate counts in their -- in their case
6 lists, or, in a few cases, we couldn't get a full
7 set of case documents, so if a case didn't have a
8 report of result of trial in the file, and we
9 couldn't tell what the final outcome was, we
10 didn't know whether the outcome reflected a pre-
11 trial agreement or not, we neglected to enter
12 that case into our database just because then we
13 couldn't have a complete set of consistent
14 information.

15 But we are a document-based database
16 so that we can back up all of our case results
17 with a document behind it from the trial, and we
18 keep that as the Staff. That is given to us by
19 the Services. It is not public. It wasn't
20 redacted. But the -- the Services agreed to
21 provide that to the Staff so that we could do
22 this analysis for you.

1 DR. SPOHN: Good afternoon. So I have
2 been working with the JPP for a number of years:
3 initially analyzed the 2012-2014 data, and then
4 most recently did the data analysis for the 2015
5 cases.

6 And as Meghan said, we looked at all
7 cases involving a preferred charge of sexual
8 assault that were completed in 2015, 738 cases
9 total. 530 of these were penetrative offenses,
10 and 208 were cases in which the most serious
11 charge was a contact offense.

12 About two-thirds of the cases were
13 from the Army or the Air Force, and you can see
14 that the other Services had a smaller number of
15 cases, and I really caution us from drawing too
16 many conclusions about the Coast Guard given the
17 small number of cases that the Coast Guard
18 disposed of in 2015.

19 I will go through this really quickly.
20 What I am going to do is provide some descriptive
21 data on the accused, the victim, and then the
22 disposition of the case, and depending on how

1 much time we have, we may be able to talk about
2 the correlates or the predictors of case
3 outcomes.

4 But in terms of the accused, the
5 typical accused was an enlisted Servicemember.
6 Almost all of them were male, and most of them
7 were assigned to units in the United States or
8 its territories when charges were preferred.
9 This is not necessarily where the case occurred
10 or where the incident occurred, but where the
11 accused was stationed at the time that charges
12 were preferred.

13 Victims: we had pretty limited
14 information on victims, but we did have some data
15 on victims. The number of victims ranged from 1-
16 15. Most of the cases involved either one or two
17 victims, but there were cases with more victims
18 than -- than two.

19 The typical victim was female. There
20 were some cases in which the victims were male,
21 and there were a handful of cases in which both
22 males and females were victims. The typical

1 victim was also a member of the Military
2 Services. It was about two-thirds to one-third
3 who were civilians. And this year, we had data
4 on the relationship between the victim and the
5 accused, and about 82 percent of the victims were
6 not the spouse or intimate partner of the
7 accused, so 82 percent were either some other
8 relationship or no relationship at all.

9 So these are the case dispositions, or
10 how the cases were disposed. Almost three-
11 fourths of the cases were referred to a court-
12 martial, and of those cases, 16 percent received
13 an alternative disposition, and 12 percent were
14 dismissed without further action -- excuse me,
15 the 16 percent and the 12 percent are the cases
16 that were not referred to court-martial.

17 So of the 526 cases that were referred
18 to a court-martial, most went to a general court-
19 martial, with the remainder going to either a
20 special court-martial or a summary court-martial.
21 There were 39 cases that went to a summary court-
22 martial, and that is reflected also in the fact

1 that there were 39 cases that were decided by a
2 summary court-martial officer. The other cases
3 were almost evenly split between cases that were
4 decided by a military judge and those that were
5 decided by a panel of military members.

6 All right. So these are the -- the
7 case outcomes for the cases in which the most
8 serious charge was a penetrative offense. Again,
9 there are 530 such cases, and of these cases,
10 25.8 percent were convicted of at least one count
11 of a penetrative offense. Very few were
12 convicted of a contact offense, 2.5 percent, but
13 a fairly large number were convicted of a non-sex
14 offense only. And you can see that 21 percent
15 were acquitted at trial, and then 14.2 percent
16 received an alternative disposition, and 14.7
17 percent were dismissed without further action.
18 So if you add up the first three columns on the
19 graph, the conviction rate for preferred cases in
20 which the most serious charge was a penetrative
21 offense was 49.8 percent, so just about half of
22 those cases resulted in a conviction for

1 something.

2 So moving on to the contact offenses,
3 the most common outcome for these cases was
4 conviction for a non-sex offense. Almost 41
5 percent of the cases in which the most serious
6 charge was a contact offense were in fact
7 convicted of something other than a sexual
8 offense, but 17.8 percent were convicted of a
9 contact offense, and that leads to an overall
10 conviction rate for contact offenses of 58.6
11 percent.

12 So the conviction rate for the contact
13 offenses was somewhat higher than it was for the
14 penetrative offenses, and you can see the other
15 outcomes there. Acquittals were 13 percent.
16 Alternative dispositions, 22 percent, and then 6
17 percent of those cases were dismissed without
18 further action.

19 So another way to think about case
20 outcomes is to look not at cases where charges
21 were preferred, but -- next slide -- to look at
22 cases that were referred to trial. So these

1 graphs do not include the alternative
2 dispositions or the cases that were dismissed
3 without further action, so these are the ones
4 that actually went to trial. And you can see the
5 numbers there. About a third of the penetrative
6 offenses resulted in conviction for at least one
7 count of a penetrative offense. 3.4 percent were
8 convicted of a contact offense only, and then
9 again about a third were convicted of a non-sex
10 offense, with 30 percent of the cases that were
11 referred to trial resulting in an acquittal at
12 trial.

13 So looking just at those cases that
14 went to trial, the conviction rate was 70 percent
15 for the penetrative offenses. And for the
16 contact offenses, again, we see a pattern whereby
17 those who are charged with contact offenses are
18 more likely to be convicted of a non-sex offense.
19 57 percent of the cases that were referred to
20 trial resulted in a conviction for a non-sex
21 offense. And so the overall conviction rate for
22 the contact offenses is just about 82 percent.

1 Moving on to sentences, these are not
2 mutually exclusive categories because the third
3 column there is confinement and separation, and
4 so that 52.1 percent where they got both
5 confinement and separation is subsumed in the
6 first two columns. But the -- 71 percent of the
7 cases resulted in some type -- or some length of
8 confinement. Almost 60 percent resulted in a
9 punitive separation, and then just over half
10 resulted in both confinement and punitive
11 separation.

12 Length of sentence -- yes?

13 HON. GRIMM: Are those years or months
14 by the sentence there? You have the mean of
15 43.04. Are those months?

16 DR. SPOHN: Months.

17 HON. GRIMM: Months.

18 DR. SPOHN: Yes.

19 MG ANDERSON: And is that for contact
20 and penetrative?

21 DR. SPOHN: These are --

22 MG ANDERSON: Okay. Thank you.

1 DR. SPOHN: -- and I will provide the
2 data for each a little bit later.

3 So the adjudged sentences ranged from
4 0.57 months to life in prison. The approved
5 sentence ranged -- this range was the same. The
6 mean sentence for those who -- or the mean
7 approved sentence was slightly less than the
8 adjudged sentence, a difference of about seven
9 months.

10 I feel like I am racing through this.
11 So this presents a diagram of case outcomes by
12 the military Service of the accused. The bottom
13 bar, the green -- sort of the Army green bar,
14 presents the conviction rate for each of the
15 Services. The blue bar is the acquittal rate.
16 The sort of mustard yellow is alternative
17 dispositions, and then at the top are the
18 dismissals.

19 And you can see that the Coast Guard
20 had the highest conviction rate at I think it is
21 73.7 percent, but as you'll see in a moment, most
22 of those were convictions for non-sex offenses as

1 opposed to sex offenses. The Army had a
2 relatively high conviction rate, as did the
3 Marine Corps. The Air Force had the lowest
4 conviction rate of all of the Services.

5 So this, again, breaks it down by --
6 when we did the bivariate analysis of case
7 outcome by the Military Service of the accused,
8 we found that there was a statistically
9 significant relationship between case outcomes
10 and the Military Service, but only for the
11 penetrative offenses.

12 And as you can see here, recall that
13 the Coast Guard had a relatively high conviction
14 rate, but as you can see in this chart, most of
15 those were convictions for non-sex offenses, and
16 again, there is a very small number of cases in
17 that category, so -- . The Army and the Navy had
18 relatively high conviction rates for -- I mean
19 relative to the other Services -- for penetrative
20 offenses, and the Marine Corps and the Coast
21 Guard had relatively high rates of convictions
22 for non-sex offenses.

1 So this is just presenting that -- the
2 data for the cases that were referred to trial,
3 showing the conviction versus the acquittal
4 rates. Again, the Coast Guard had the lowest
5 rate of acquittal, followed by the Army, and then
6 the lowest rate -- or the highest rates of
7 acquittal -- rate of acquittal was found for the
8 Air Force.

9 So we did some analysis where we
10 looked at the relationship between sentences and
11 a variety of factors and found that there were
12 significant relationships between the likelihood
13 that the accused would receive a confinement
14 sentence and then some of the characteristics of
15 the case and the characteristics of the victim,
16 and this shows that the likelihood of confinement
17 was greater if the victim was a civilian or if
18 there were both civilian and military victims
19 than if the victim was a military -- a member of
20 one of the Military Services. Now I think the
21 fact that the confinement rate is the highest for
22 those cases in which there is both military and

1 civilian victims reflects in part the fact that
2 by definition, those cases involve more than one
3 victim.

4 So the sentences also varied not
5 surprisingly by the type of conviction charge,
6 with confinement being much more likely if the
7 accused was convicted of a penetrative offense
8 than if the accused was convicted of either a
9 contact offense or a non-sex offense. So 90
10 percent, just over 90 percent of those who were
11 convicted of penetrative offenses received some
12 term of confinement.

13 We also found that the likelihood of
14 confinement varied by the type of court-martial,
15 with cases involving summary court-martials being
16 much less likely to result in confinement. And
17 again, those are the less serious cases that are
18 referred to -- to the summary court-martial, so
19 that is not surprising either.

20 In terms of the trial forum, we found
21 that cases that were adjudicated by a military
22 judge had a higher rate of confinement than those

1 that were tried by a panel of military members,
2 with the lowest confinement rate again reflecting
3 the summary court-martial officer.

4 In terms of the length of the
5 confinement sentence, we found that the -- many
6 of the factors we looked at affected the length
7 of the sentence that was imposed. The
8 significant predictors were the status of the
9 victim -- cases involving civilian victims
10 resulted in longer sentences than cases involving
11 military victims; the relationship between the
12 accused and the victim -- cases in which the
13 victim was the spouse or intimate partner
14 received substantially longer sentences than
15 cases in which there was either no relationship
16 or some other type of relationship; type of
17 conviction charge -- again, the penetrative
18 offenses resulted in longer sentences than either
19 contact or non-sex offenses; and then the type of
20 court-martial and type of trial forum, with cases
21 that went to a general court-martial and that
22 were decided by a military judge resulting in

1 longer sentences.

2 Length of confinement sentence was not
3 affected by I think that should say the Military
4 Service of the accused, the rank of the accused,
5 or the gender of the victim.

6 So this just displays graphically some
7 of the relationships that I have just talked
8 about. So the sentence in months is on the
9 vertical axis, and again, you can see that cases
10 involving military and civilian victims resulted
11 in longer sentences than those that involved only
12 civilian victims, and those who involved -- those
13 cases that involved only military victims
14 resulted in the shortest sentences.

15 This displays the relationship between
16 the victim and the accused and the length of the
17 sentence. Consistent with what I just talked
18 about, if the victim was a spouse or intimate
19 partner, the sentence was substantially longer
20 than if the victim was not the accused's spouse
21 or intimate partner. Not surprisingly, the
22 penetrative offenses resulted in substantially

1 longer sentences than those who were convicted of
2 non-sex offenses or contact offenses.

3 Shall I just conclude here? Because I
4 know we are over time.

5 CHAIR BASHFORD: We will reserve our
6 questions for another time.

7 DR. SPOHN: Okay.

8 CHAIR BASHFORD: Don't --

9 DR. SPOHN: Oh, do you want me to go
10 through the rest of it?

11 CHAIR BASHFORD: Yes, conclude your --

12 DR. SPOHN: Okay.

13 CHAIR BASHFORD: Sorry.

14 DR. SPOHN: All right.

15 CHAIR BASHFORD: That sounded like
16 "conclude."

17 DR. SPOHN: So the last stage of the
18 analysis was to do a multivariate analysis that
19 controlled simultaneously for several different
20 factors, and so this analysis allows you to say
21 for example whether the relationship between the
22 victim and the accused affects the outcome,

1 whatever it might be, controlling for the type of
2 conviction charge, the status of the accused, and
3 so on. So this analysis simultaneously controls
4 for factors.

5 So through all of these analyses, the
6 strongest predictor of outcomes was whether the
7 accused was charged with or convicted of a
8 penetrative offense, but the results were not
9 necessarily what you might expect. So compared
10 to those who were charged with contact offenses,
11 those charged with penetrative offenses were less
12 likely to be convicted, more likely to be
13 acquitted, and more likely to have all charges
14 dismissed, suggesting I guess that these cases
15 are more difficult to prove and that the
16 evidentiary hurdles are higher when the charge is
17 more serious.

18 Compared to those who were convicted
19 of non-sex offenses, on the other hand, those
20 convicted of penetrative offenses were more
21 likely to be sentenced to confinement, more
22 likely to receive a punitive separation, and

1 faced longer confinement sentences. So even
2 though these penetrative offenses or more serious
3 offenses were more likely to fall out of the
4 system than the other kinds of offenses, if they
5 did result in a conviction, they were treated
6 more punitively.

7 Neither the rank of the accused,
8 whether the accused was an enlisted member or an
9 officer, nor the gender of the victim affected
10 any of the outcomes we looked at, so there were
11 no differences based on those two factors in any
12 outcome examined.

13 The other variables had less
14 consistent effects. There were some differences
15 based on the Military Service of the accused, and
16 most of these involved differences between the
17 Army and some of the other Services, but there
18 was not a real clear pattern there.

19 The number of charges affected some of
20 the outcomes, so that cases that had more
21 preferred charges, which ranged from I think I
22 indicated 1-43 was the range for the number of

1 charges, and the mean was about seven. So they
2 had a higher likelihood of conviction, a lower
3 likelihood of acquittal or dismissal, and
4 resulted in longer confinement sentences, that
5 is, the more charges that were preferred or --
6 more charges that were preferred.

7 Cases that had more victims had a
8 higher likelihood of conviction and a higher
9 likelihood of a confinement sentence. The status
10 of the victim, if the victim was military rather
11 than civilian, the likelihood of conviction was
12 lower, acquittal was higher, length of
13 confinement sentence was lower, and the
14 likelihood of punitive separation was lower.

15 We also found some effects based on
16 the relationship between the accused and the
17 victim. At least for some of these outcomes, if
18 the victim was the spouse or intimate partner of
19 the accused, the likelihood of conviction was
20 lower, the likelihood of case dismissal was
21 higher, but the confinement sentence was 31
22 months longer.

1 So the overall conclusions based on
2 the 2015 data is cases involving penetrative
3 offenses have higher rates of case attrition, but
4 conviction for these offenses results in harsher
5 punishment. There are some significant
6 differences based on the Military Service of the
7 accused, and I think that maybe one of the things
8 that this Committee could look into is trying to
9 tease out those differences and whether they
10 reflect differences in policies and practices or,
11 you know, what is it that results in the
12 differences that -- that we see in the data?

13 Status of the victim, military versus
14 civilian, seems to be an important factor in the
15 analysis, and then the relationship between the
16 victim and the accused is a somewhat consistent
17 predictor of how the case will be handled and the
18 sentence that will be imposed. And that is it.

19 CHAIR BASHFORD: Well, thank you so
20 much. I don't think we have time for questions
21 now. Luckily, we have access to you.

22 DR. SPOHN: I will put on my other

1 hat.

2 CHAIR BASHFORD: But while we're
3 changing over to Dr. Galbreath, just one thing
4 that -- two things that stuck out to me.

5 One is if military victims have higher
6 rates of attrition, I think that is something we
7 might want to look at --

8 DR. SPOHN: Yes.

9 CHAIR BASHFORD: -- to see if that is
10 a result of retaliation. And I am also curious
11 that we can look at another time if the more
12 serious penetrative cases, because they tend to
13 have more evidence than -- than a groping would,
14 if there is somehow a reluctance to convict
15 because the consequences are so serious.

16 CMSAF MCKINLEY: Ma'am, could I ask
17 for one other thing to look at?

18 CHAIR BASHFORD: Of course.

19 CMSAF MCKINLEY: It is all branches of
20 the Service follow the same UCMJ, but yet we have
21 very different conviction rates. Can you give us
22 some type of reasoning analysis of why this

1 happens?

2 CHAIR BASHFORD: I think that is one
3 of our tasks.

4 (Laughter.)

5 DR. SPOHN: The data -- the data
6 really do not speak to that.

7 CMSAF MCKINLEY: Thank you.

8 MR. KRAMER: I noticed that too.
9 There is quite a striking difference in the
10 rates, and the other thing that strikes me is
11 there seems to be a very different
12 conviction/acquittal rate between civilian courts
13 and this, and I know that is very difficult to
14 quantify, but in the federal system, the
15 conviction rate of cases that go to trial, which
16 includes from some Indian reservations a fair
17 number of sexual assault cases, the conviction
18 rate is well above 90 percent.

19 So -- and in state courts, it is not
20 quite that high, but it is similarly high when
21 most sexual assault cases are tried, and it seems
22 -- it was quite striking to me how low relatively

1 the conviction rate or conviction rate on the
2 most serious charges and how high the acquittal
3 rate was.

4 DEAN HARRISON: Did you collect data
5 on the race of the victim or the defendant?

6 MS. PETERS: We did not have that
7 available to us, and in looking at the procedural
8 outcomes of cases, the information that the Staff
9 collected tended not to include a lot of
10 information about the facts of individual cases
11 or the demographics in detail about the accused
12 or the victim, so that is something you all may
13 want to build upon, but we were focused on case
14 outcomes for the most part. And --

15 PARTICIPANT: Did --

16 (Simultaneous speaking.)

17 DEAN HARRISON: Sorry.

18 MS. GARVIN: From the male victims,
19 did you have the cross-gender aspect of this? So
20 for the smaller number that are the male victims
21 that you have captured here, was it male-on-male,
22 was it female-on-male? Was that part of the

1 multivariate? Is that --

2 DR. SPOHN: I think there were only
3 five cases involving female offenders.

4 MS. TOKASH: Did you -- did you all --
5 this is Meghan Tokash speaking -- did you all
6 consider the Service courts overturning
7 convictions for insufficient evidence?

8 MS. PETERS: We did. The Staff -- and
9 that is something the JPP Staff -- and that is in
10 the -- the JPP's April 2016 report, and coming
11 out in the JPP's next report looking at '15
12 decisions, but what we did basically was look at
13 every issuance from each Service criminal court
14 of appeals that involved a conviction on an
15 Article 120 or 125 offense or an attempt, and
16 looked at was there relief granted in any of
17 those cases?

18 We could at least look at a concrete
19 group by year. These appellate decisions didn't
20 tie to the cases we were analyzing, necessarily.
21 They were just decisions issued on cases that
22 might have been in the system for years. But we

1 found very few, and I mean largely single digits
2 each year, maybe, where the -- number of cases
3 where there was a conviction overturned. What
4 was more likely was there was unitary sentencing
5 in the military. Some other defects in the trial
6 affected the entire sentence, and you ended up
7 getting sentencing relief which would affect the
8 sentence served for the sexual assault, but it
9 may not have had anything to do with the sex
10 assault offense or the sentencing phase related
11 to the sex assault offense, and that is mostly
12 what we saw.

13 But where we did see convictions
14 overturned, there was in each Service probably at
15 least one or two insufficient evidence, or
16 factually insufficient cases, and I think there's
17 probably more -- a few more of those in the 2015
18 time frame than in previous years. But I would
19 -- we can supplement with the actual data for
20 you, just calling to mind what a summary is,
21 because we just kind of went through this as a
22 staff. But that is how we looked at appellate

1 decisions.

2 CHAIR BASHFORD: Thank you so much.

3 MS. PETERS: Yes.

4 (Pause.)

5 DR. GALBREATH: Hi. Thank you. Thank
6 you. I appreciate that.

7 CHAIR BASHFORD: Welcome.

8 DR. GALBREATH: Thank you. It is nice
9 to be here. I even saw some familiar faces. All
10 right. Perfect. Thank you.

11 CHAIR BASHFORD: I am going to
12 suggest, since we're running a little behind, if
13 any of the Members need to use the facility, you
14 just excuse yourself rather than taking a break.

15 (Pause.)

16 DR. GALBREATH: Shall I begin?

17 CHAIR BASHFORD: Please.

18 DR. GALBREATH: Oh, okay, very good.

19 Thank you all for having me today. Appreciate
20 it, and I look forward to working with you in the
21 forthcoming years as you all take a look at this
22 problem that is very, very important to both the

1 Secretary of Defense and a lot of the senior
2 leadership that we work with. And -- hey, how's
3 it going? Like I said, lot of familiar faces
4 here.

5 The -- as we go forward today, what I
6 thought I would do is give you a high-level view
7 about how the Department views this problem. It
8 is a -- and I know that the Committee here is
9 very much focused on investigation, prosecution,
10 and defense. Some of the materials that I think
11 that I have -- that I bring today might not
12 immediately come to your mind as -- as being
13 focused on those areas, but they do, and I will
14 try and show you what I mean as we go through
15 some of this material. There is quite a bit, so
16 I would be happy to stop as we go if you have
17 questions and -- and answer those as -- as we
18 progress.

19 A little bit about my background, just
20 so that you know where I am coming from on this:
21 I started out as an Air Force Office of Special
22 Investigations special agent. I worked for OSI

1 for 12 years. I was a forensic science
2 consultant and also a detachment commander at a
3 couple of different bases in New Mexico, Utah,
4 and Colorado.

5 After that, I won the education
6 lottery and went to Uniformed Services University
7 of the Health Sciences, and once I got there,
8 they informed me that this was a -- going to be a
9 health psychology program, and I said well how
10 about health psychology with sex offense
11 research? And they went, no thanks. But
12 nonetheless, I was able to convince them that
13 that was very important for the Department, and
14 so I spent a lot of my clinical time working with
15 Dr. Fred Berlin in Baltimore, Maryland at the
16 National Institute for the Prevention, Treatment,
17 and -- Prevention, Assessment, and Treatment of
18 Sexual Abuse there in his clinic that is in
19 downtown, and it is affiliated with the Johns
20 Hopkins University.

21 And so worked there for about five
22 different -- five years assessing and treating

1 sex offenders, kind of on the defense side of the
2 house as well. I also testified in a number of
3 court-martials and things as I got that
4 experience.

5 I then went there, and the Air Force
6 rewarded me by sending me to Minot, North Dakota.
7 Oh, yeah, you betcha. So I was up there for
8 three years. I was the mental health flight
9 clinic chief, and so I oversaw both the mental
10 health, family advocacy, and drug demand
11 reduction, so worked on a lot of that, and then I
12 got rescued by this small policy office that they
13 were standing up at the Pentagon called the
14 Sexual Assault Prevention Response Office, so I
15 didn't have to do four winters in North Dakota.

16 And so I have been with SAPRO in some
17 form ever since, for about 10 years now. So I
18 have -- a little bit of my history goes into a
19 little bit of the SAPRO history, and I will --
20 and I will try and touch base with that as we go
21 through the slides. So I will -- I will go to
22 slide number two.

1 The DoD SAPRO is -- is the
2 representative of the Secretary of Defense on
3 this issue. We are kind of the center -- the
4 central point of authority with regard to
5 advising him on what we do with regard to
6 response and -- and prevention and oversight of
7 this issue within the -- within the Department.

8 We -- our mission is to promote
9 military readiness through sexual assault
10 prevention advocacy and execution of the program,
11 and we do see sexual assault prevention response
12 as a readiness issue. We know that any number of
13 folks that might be called upon to deploy may not
14 be deployed because of their involvement in the
15 investigation/prosecution process, and so we look
16 at this very very closely. In addition to that,
17 whether they are the accused or whether they have
18 been a Servicemember who has experienced this
19 crime, we want to make sure that our -- our role
20 is to ensure that the Services are out there to
21 support victims as they go through the process as
22 well as work with the Services on their -- on

1 their prevention. So we certainly are
2 prevention-focused, with a commitment to victim
3 care.

4 Next slide. Where we are located is
5 if you follow that, this was -- this was -- I had
6 to do this real quick last night, so I apologize,
7 but it's Secretary of Defense at the top. We
8 fall under the Undersecretary of Defense for
9 Personnel and Readiness, and then underneath the
10 Assistant Secretary of Defense for Readiness.
11 That is Dr. Elise Van Winkle, who has been
12 working with us in a prior role as the head of
13 the Defense Manpower Data Center survey
14 operations, and so she knows these -- these
15 issues exceptionally well. I am sure you might
16 have her out at some point.

17 But we are there with some of the
18 other offices that handle challenging behaviors,
19 such as the Defense Suicide Prevention Office,
20 Drug Demand Reduction and Alcohol Reduction, and
21 Office of Diversity Management and Equal
22 Opportunity that handles sexual harassment, so we

1 have -- we have just -- we were all put together
2 there about a year ago, and we have been working
3 together to kind of figure out how do we share a
4 collaborative process going forward to get after
5 some of these issues together? And I will tell
6 you a little bit more about that as we go on.

7 In my office -- next slide -- office
8 is run by a two-star general officer, flag
9 officer. We have our brand new Director onboard,
10 all of two weeks. Her name is Rear Admiral Ann
11 Burkhardt. She used to run the 21st Century
12 Sailor Office in OPNAV for the Navy. That is the
13 Navy -- Navy office that handles a lot of these
14 issues as well with family advocacy, sexual
15 harassment, sexual assault, suicide prevention,
16 and so that is certainly an approach that a lot
17 of the Services have taken with regard to a lot
18 of these issues, understanding that while the
19 problems all might have different appearance,
20 some of the solutions that we would put together
21 to prevent these are common. There is no silver
22 bullet, but they do share some common pathways

1 towards prevention.

2 We -- I am the Deputy Director. I am
3 an SL, which is a flavor of senior executive, but
4 the kind that is more of a technical advisor. In
5 addition to that, I have got a chief of staff and
6 a senior enlisted advisor. We have five branches
7 in the office, and that is Prevention, Victim
8 Assistance, Assessment, Policy, and Operations.
9 Next slide, please.

10 So rather than read you some of these
11 slides that you all can take a look at, but
12 largely what we do are the policy and the
13 planning pieces. We are the coordinating
14 function of the Department of Defense that issues
15 the policy. Our policy documents are on
16 www.sapro.mil, and those are -- we have three
17 main policy documents. One is a directive which
18 essentially establishes the who and what
19 everybody is -- and who is responsible for
20 things, and then we also have an instruction,
21 which is responsible for the what and how the
22 program is supposed to run.

1 It is one of the most detailed
2 instructions in the Department, and very very
3 long, and because this -- this program only
4 benefits if we have a concerted effort to get
5 this right and work together. So what I would
6 tell us is that we also run -- we're a little bit
7 different policy office than what you would see
8 in the Department because we run operations as
9 well.

10 One of the operations that we run is
11 Safe Helpline, and that is administered through
12 us through our contract with the Rape Abuse
13 Incest National Network. And they -- that is
14 where you can call 24/7, or you can text or you
15 can go online and chat with someone who can get
16 you assistance and care, and that is anywhere in
17 the world. And so we often -- what
18 Servicemembers can do is call in, find out who in
19 their area, how do they get a hold of their --
20 how do they get a hold of their victim advocate,
21 and what kind of community services might be
22 there available, and that is what Safe Helpline

1 does to us. It also has some chat rooms and some
2 things that are monitored and assisted by
3 specially trained personnel.

4 We also have a certification program
5 for our sexual assault response coordinators and
6 our victim advocates. That is D-SAACP that you
7 see there. We all live in acronyms. I am sure
8 you are used to that if you have been around the
9 Department for a while.

10 D-SAACP is again a credentialed
11 program so that we can ensure that the folks that
12 are serving our victims are trained and ready and
13 prepared to be able to do that, and once you
14 receive your certification, that allows you to
15 sit in front of a victim and provide support and
16 assistance as well as capture data and enter
17 things into the next operation that we run, which
18 is the Defense Sexual Assault Incident Database,
19 or DSAID. And that is a congressionally mandated
20 database that we -- that we stood up starting in
21 FY12, and it now captures all of the restricted
22 and unrestricted reports in the Department, as

1 well as case disposition information, which
2 you're going to hear a little bit more about
3 today, and that is where we get a lot of our
4 data.

5 Finally, we have an area that is kind
6 of a social media area behind a protected wall
7 called SAPR Connect, and this is where a lot of
8 our professionals that work in this area, our
9 sexual assault response coordinators, our victim
10 advocates go for resources and information about
11 what's some of the emerging things that are out
12 there in the field and share good ideas, and so
13 one way that we try to make common practices best
14 -- excuse me, best practices across the
15 Department.

16 Next slide, please. We also work very
17 closely with the offices that handle all of the
18 sexual assault programs in the Army, Navy, Air
19 Force, Marine Corps, and also the -- it's not up
20 there, but Coast Guard as well, and also the
21 National Guard Bureau.

22 We have a number of core elements

1 behind us, and of course I think you might know
2 that there is the -- one of the first things that
3 we did in the Department is have the ability for
4 people to make a restricted report, and I will
5 tell you a little bit more about that as we go.
6 But we -- there are some things that as we have
7 gone forward in time, that we begin to add, and
8 we think that this is part of a really good way
9 to demonstrate our commitment to folks who have
10 experienced this crime, what we're going to do
11 for them and get them on the pathway to
12 restorative care.

13 We -- you want to go to the next
14 slide, please? So this is a bit of an eye chart,
15 and I apologize for it, but we have been in
16 existence for about since the fall of 2005.
17 Essentially a brief history of the last 12 years,
18 just to kind of give you an idea of where we came
19 from, in 2004, Secretary Rumsfeld at the time
20 began to hear reports coming from down range from
21 Iraq and Afghanistan that folks were deployed
22 experiencing sexual assault and not having

1 anywhere centralized to go, and no one to help
2 them through that process.

3 As a result, he initiated a 90-day
4 task force that took a look at what the
5 Department did for sexual assault prevention and
6 response, and after the course of 90 days, he
7 joined a task force. That Care for Victims Task
8 Force offered up a report recommending a number
9 of things. Chief among those was a centralized
10 office that would oversee things going on in the
11 field, as well as people at every installation
12 that could receive a report and then advocate for
13 victims as they went through the justice process,
14 and those became our sexual assault response
15 coordinators and our victim advocates.

16 In addition to that, one of the
17 options that they recommended was the restricted
18 reporting option because we understood that
19 victims would rather suffer in silence at times
20 than come forward and face the scrutiny that one
21 gets in the criminal justice system. Restricted
22 reporting is a pathway to care, and it allows

1 folks to obtain that care in a way that wasn't
2 available before 2005 that ensures their
3 confidentiality, that they can talk to a mental
4 health provider, they can talk to a SARC, a
5 victim advocate, and they can be -- and any
6 medical provider or mental health provider, they
7 can be assured that their confidentiality under
8 that restricted report will be respected.

9 So over the next couple of years, we
10 kind of thought -- at least what was told to me
11 when I got here, we were ran at that time by a
12 GS-15 and a small cadre of GS-14s, and the
13 military deputy was the single military person in
14 the office for a while, and we thought that what
15 we would be doing is largely monitoring policy
16 and doing what other policy offices do in the --
17 in the Department, but clearly, this problem was
18 out there, and it deserved additional attention,
19 and I think that a lot of -- a lot of concern
20 came from folks that had experienced this crime
21 and gone to members on the Hill.

22 In addition to that, there was a --

1 there was a documentary that you might have heard
2 of called The Invisible War that came out in
3 2012. In addition to that, there were a number
4 of -- we, as I will tell you about shortly, we
5 surveyed regularly to establish the depth of the
6 problem of sexual assault in the force. We got a
7 good estimate that way, and that year, in 2012,
8 we received -- our estimate was that there had
9 been 26,000 folks experiencing some form of
10 sexual assault, from a penetrative crime like
11 rape to touching crimes like abusive sexual
12 contact, groping and touching and things like
13 that.

14 That got a lot of folks' attention,
15 including the Secretary of Defense, Mr. Panetta,
16 and at that time, in December 2011, for the first
17 time in SAPRO's history, we were called up to the
18 Secretary of Defense's office to explain what is
19 going on and what are you all doing to get after
20 this? And from that point on, we appreciated
21 very much the fact that Mr. Panetta assisted us
22 in getting this issue to the forefront, and from

1 that time on, we have made rapid, rapid change in
2 how the Department approaches and responds to and
3 prevents sexual assault, and some of those I am
4 going to tell you a little bit more about today.

5 Some of the -- one of -- another
6 meaningful thing that happened shortly thereafter
7 was the White House got involved and was very
8 interested in what we were doing, and so in
9 December of 2013, the President told us that we
10 had a year to show progress in how we prevented
11 and responded to sexual assault, and that he
12 wanted a report by December of 2014. So we got
13 together, we developed a suite of metrics to
14 understand and better report on this issue and
15 understand how we might be able to show progress
16 to the President, and when we did, we worked
17 together, us and the Services, very very closely
18 in that time. We delivered that report on time
19 in 2014, and my boss at the time, General Jeff
20 Snow, got to brief the President alongside of
21 Secretary Hagel and -- and the Chairman of the
22 Joint Chiefs.

1 Since that time, in addition to that,
2 we have also added a number of key features to
3 the program. Secretary Hagel directed in 2014
4 that we would -- that by 2014, that all Services
5 would have a Special Victims' Counsel program.
6 That was piloted by the Air Force in 2013, and
7 the initial response was so favorable that we
8 decided that that was a best practice that we
9 would make a common practice as well.

10 And in addition to that, something
11 that is very relevant to what you all are doing
12 here, we also stood up at his direction a special
13 victim investigation and prosecution capability,
14 which took a look at not only sexual assault, but
15 child abuse and domestic violence and training
16 our agents, our prosecutors and -- and other
17 folks involved in the legal system to better
18 understand this crime and to be -- and to better
19 investigate and -- and identify and understand
20 the evidence and the implications therein.

21 So it has been a -- it has been a
22 short ten years in some -- in some respects. In

1 other respects, it has been very long because we
2 are a learning organization, and every single
3 time that we stumble or that we don't get
4 something right, we learn from it, and we try to
5 do better the next time.

6 Next slide, please. So when we talk
7 about sexual assault in the Department of
8 Defense, one of the things that people often
9 don't understand is that we are actually talking
10 about a range of crimes that constitute sexual
11 assault in the Department of Defense. Most are
12 housed these days under Article 120. We have one
13 other, forcible sodomy, that is housed under
14 Article 25 -- 125. But again, when we -- when I
15 talk to you about sexual assault today, I am not
16 talking about just the penetrative crime or a
17 contact crime. I am talking about the full range
18 unless I say otherwise. And that is something
19 that is sometimes -- get lost -- gets lost in
20 here.

21 Next slide, please. DoD offers a
22 whole host of different kinds of resources for

1 folks that are trying to recover from sexual
2 assault. Those resources have a lot of nexus on
3 every installation between the sexual assault
4 response coordinators, the victim advocates, the
5 Special Victims' Counsel, the medical providers
6 that might be conducting the sexual assault
7 forensic exam, the criminal investigators that
8 might be looking at the unrestricted reports and
9 investigating those, as well as the trial counsel
10 and the defense counsel. All of those folks we
11 hope that we have done right by in ensuring that
12 they get the latest, greatest, up-to-date stuff
13 about sexual assault and what -- what is -- and
14 what are the thoughts there.

15 Certainly, some of the -- the most
16 important things in this area are the emerging
17 research in the neurobiology of trauma. As a
18 clinical psychologist, this is something that I
19 heard a little bit about, but it is so new that
20 it -- in my school, but it is emerging so much,
21 and the research has really been brought to the
22 fore point by folks like Jim Hopper from Harvard

1 University and others in -- in this realm, and
2 talking about how certain behaviors are largely
3 influenced by one's traumatic experiences, and
4 being able to explain why victims of sexual
5 assault don't necessarily recall all the details
6 behind what happened during the -- their
7 incident, and why memory is -- is often
8 influenced not only by trauma, but also the
9 influence of alcohol or drugs that might have
10 been there at the time as well.

11 I would highly recommend that you all
12 invite Dr. Hopper and -- and -- or some of his
13 colleagues to talk to you about the neurobiology
14 of trauma because it forever has changed how
15 criminal investigators should approach this. As
16 a criminal investigator myself, I can tell you
17 that I fell -- I fell to some of the assumptions
18 that are commonly made in criminal
19 investigations, which is you can't trust a
20 victim, or somebody walks in, if their lips are
21 moving, they're lying to you, you've got to find
22 out for yourself. These are all shortcuts that a

1 lot of the -- that a lot of us criminal
2 investigators used to make.

3 But what is better, and what is more
4 interesting, and what is more helpful, is
5 understanding that trauma impacts everything with
6 regard to a victim's experience, and until you
7 understand that, and until you have that
8 perspective, then you will never understand why
9 victims don't want to come forward, why victim
10 testimony is often difficult to pull out in a
11 sequential order in a time sequence fashion, and
12 why it is -- and why they don't want to engage
13 the justice system. All of that is -- is
14 tremendously important, and I highly recommend
15 you all hear from those folks on that issue.

16 Next slide, please. Some of the other
17 things that we do is right now, we have a policy
18 for -- for looking over sexual assault forensic
19 examination policy. We work with the U.S. Army
20 Criminal Investigation Laboratory as well as
21 representatives from the Surgeon General's Office
22 that are training our -- our sexual assault

1 medical forensic examiners, our SAMFES, and this
2 just is information that we have tracked ever
3 since I got to DoD in 2007 when we -- and it is
4 with regard to the sexual assault forensic exams
5 that we do each year.

6 Next slide, please. Another --

7 CHAIR BASHFORD: On the restricted --

8 DR. GALBREATH: Yes ma'am.

9 CHAIR BASHFORD: -- reports, do you
10 send the kits for analysis on a restricted
11 report?

12 DR. GALBREATH: We do not, unless the
13 victim requests and changes their report from
14 restricted to unrestricted. Those are held in --
15 by different organizations in the Services.

16 CHAIR BASHFORD: But isn't one of the
17 things that might help a victim make that
18 decision if the kit hit to say four other kits?

19 DR. GALBREATH: Agreed, and that is
20 one of the things that we have been looking at to
21 see what we might be able to do. There are a
22 number of -- we had conversations with the U.S.

1 Army Criminal Investigations Lab to kind of see
2 what is within the realm of the possible there,
3 and so that is still a -- that is still -- those
4 talks are still underway to see what we might be
5 able to do.

6 We want to make sure that we preserve
7 the victim's confidentiality in sending that --
8 sending that -- that kit forward because, again,
9 their materials and their information is in that
10 kit, and so how we would have to do that would be
11 with a lot of care, and so that is -- that is
12 some of the sticky wickets that we're trying to
13 get through. Yes ma'am.

14 DR. SPOHN: So one of the problems
15 that has been identified in the civilian justice
16 system recently is the untested kits.

17 DR. GALBREATH: Yes.

18 DR. SPOHN: Does DoD have a similar
19 problem, or do they have a back load -- backlog
20 of untested kits?

21 DR. GALBREATH: Not like what you see
22 in the civilian world. Almost every kit that

1 they have -- as a matter of fact, USACIL has the
2 capability now to test single-person kits, in
3 other words, victims only, and then to pull out
4 the -- what might -- what might have been
5 contributed by the offender and then put that
6 into CODIS and to have the national system check.
7 So almost in every unidentified suspect case, at
8 the close of that, each of the three military
9 criminal investigative organizations has their
10 own procedures for sending those kits to USACIL
11 to have that done.

12 Another thing that we put in place in
13 2011 -- or, excuse me, in January of 2012, was
14 expedited transfers. We found very early on that
15 folks that were experiencing sexual assault often
16 were feeling trapped, that they didn't have a
17 good way to -- to begin their healing process,
18 that sometimes they had to continue to work with
19 the accused, that -- and that there was no way
20 around that, that there was no mechanism to make
21 -- make that change.

22 So we enacted the expedited transfer

1 process, where you can request a transfer across
2 the base or permanent change of station in order
3 to -- for whatever reason you want it. We have
4 -- we set the bar exceptionally low by only
5 asking that the Services determine if it's a
6 credible report, and those credible reports, it's
7 not a -- it's not a level of probable cause or
8 anything like that, but if a victim comes in and
9 requests an expedited transfer, that they grant
10 them any time that they possibly can.

11 And so this has been something that,
12 as you see the numbers here, it has been growing
13 every year. What we find is that we did this so
14 that folks could begin the healing process
15 because I will tell you, if you are every day in
16 the same climate, and the climate is unfriendly
17 to you for one reason or another, whether you're
18 perceiving it to be or other things are going on,
19 you've got to get out of there, and this is one
20 way that we help people do that, not only for
21 their healing process, but in case that folks
22 were also experiencing retaliation for making a

1 report of sexual assault.

2 And I will talk a little bit more
3 about retaliation as we go forward because this
4 is something that we think has been helpful. We
5 are now collecting some data on is this truly
6 helping folks out? And that is something that
7 we're -- that we're looking at in the -- in our
8 most recent survey that is going to come out on
9 Monday. I will tell you a little bit more about
10 that.

11 BG SCHWENK: Who decides on -- you
12 have two categories here --

13 DR. GALBREATH: Yes.

14 BG SCHWENK: -- I guess one is on the
15 same installation but a different unit, the other
16 --

17 DR. GALBREATH: That is correct.

18 BG SCHWENK: -- is a different
19 installation --

20 DR. GALBREATH: Requesting --

21 BG SCHWENK: Is that decision the
22 victim's?

1 DR. GALBREATH: Yes, absolutely, and
2 also, in addition to that, Congress has passed a
3 law that says that the accused may be transferred
4 if that is easier or more -- easier to facilitate
5 than moving the victim as well, so Congress also
6 -- not only codified expedited transfers at the
7 request of the victim, but also gave the
8 Department the ability to move offenders if that
9 is easier and more effective in the eyes of the
10 commander.

11 Next slide, please. So one of the
12 things that was very difficult, when I got to --
13 when I got to the SAPRO 2007, as a clinical
14 psychologist, I wanted to know what were we doing
15 to report out on the progress that we were
16 making? And what we really didn't have, and, as
17 I began to look to other institutions and other
18 places that took sexual assault on as an issue,
19 there wasn't a real clear set of metrics or a
20 pathway or any way to communicate about this.

21 Largely, at the time that I arrived,
22 we were counting only reports. In 2004, we

1 received 1700 reports of sexual assault before
2 the -- before SAPRO stood up. I knew that that
3 was only part of the story because sexual assault
4 is an under-reported crime, something people
5 often talk about, but don't illustrate. And so a
6 number -- so since that time, we have put some
7 measures in place. In addition to that, we
8 experimented with metrics on this that we worked
9 with the White House to be able to develop.

10 Some of those metrics I think are
11 particularly effective. We are in our third year
12 now of tracking those. I think that it is time
13 for us to take a look and see if there is
14 something else that we might be able to do, but I
15 will show you some of our better metrics that can
16 show you what we do and how we measure progress
17 against this problem in the Department. Next
18 slide, please.

19 Like I said, if you're only counting
20 reports, well, that is what the picture looks
21 like. So you will notice that I have got us
22 started in 2007 on that, but like I said, 1700

1 reports in 2004. In 2005, we enacted restricted
2 reporting. We got one quarter's worth of
3 restricted reporting. In 2006, we had a full
4 year. Our number of reports increased
5 immediately.

6 Since that time, you can see that we
7 were slowly but surely increasing, plateaued a
8 little, and then in 2012, when Mr. Panetta and
9 the other Service leadership got behind this
10 problem, began to speak about it regularly, you
11 can see that between '12 and '13, we had a 54
12 percent increase in the number of reports being
13 received. In addition to that, another increase
14 the next year, plateaued a little bit, but what I
15 will tell you is that again, this is only part of
16 the story.

17 What is the depth of the problem? We
18 know it happens more often than -- than we ever
19 -- than we ever see coming into law enforcement.
20 So next slide, please. If I were to illustrate
21 that for you, the depth of the problem and size
22 of the problem, the whole iceberg. The tip of

1 the problem is what gets reported. So what I
2 have done is I have shown you based on our survey
3 data the point estimate that we have based on the
4 rates of sexual assault in 2014. This survey was
5 done for us by the RAND Corporation, who took a
6 look to double check that we were doing all our
7 math right and that we were doing our survey
8 procedures correctly, and they agreed we were,
9 but they said we might be able to improve our
10 measures a little bit, and I will tell you about
11 that in a second. The -- but again, our goal
12 largely is to shrink the whole size of the
13 iceberg, and hopefully until it's an ice cube and
14 very small.

15 Our other piece is that we want the
16 whole iceberg out of the water. We would love to
17 have everyone make a report. We don't think that
18 is going to happen, but we would like every
19 victim to consider at least making a report,
20 seeing what resources are out there and available
21 to them.

22 So how do I do that? How do I go

1 after that? You take the -- if you go to the
2 next slide, we use surveys that go out to the
3 active force to assess what the rates of sexual
4 assault are in the past year. In 2007, when I
5 got here, when we were only counting our reports,
6 I reached out to a couple of different locations,
7 and some of my graduate training in public
8 health. Public health and epidemiology basically
9 tells us if you want to know and really manage a
10 problem, you have to survey your population, you
11 have to gather some kind of data to understand
12 the depth of the problem, and then you have to
13 understand how much of it that you might see in
14 your official reporting capabilities or in your
15 institutions.

16 So what we did is we established that
17 we would get a -- the size of the problem through
18 a survey, and then we would follow the number of
19 reports that we get from law enforcement and also
20 through our SARCs and our VAs through our
21 restricted reports. This is an approach that has
22 been used with HIV/AIDS. It has been used with

1 colds and flu every year to understand how big
2 the problem might be through surveying the
3 nation, and then seeing how much we might be able
4 to prevent it, but also how much of it shows up
5 in our clinics and things like that.

6 MG ANDERSON: Question.

7 DR. GALBREATH: Yes?

8 MG ANDERSON: Active duty, so does this
9 include members of the Guard, Reserves across the
10 Services who are also mobilized on active duty --

11 DR. GALBREATH: No, these are just
12 active duty folks, and we survey in off-years the
13 Reserve component, the Guard and Reserves.

14 MG ANDERSON: I'm talking about the
15 ones who are on active duty as opposed to those
16 who are on inactive status.

17 DR. GALBREATH: Right. This would only
18 go to active duty folks, so someone who's not in
19 active status. So if you're a member of the
20 Reserve, or you are a member of the National
21 Guard, you would not appear in this number, you
22 would appear in our Workplace and Gender

1 Relations Survey of the Reserve --

2 MG ANDERSON: Right.

3 DR. GALBREATH: So even if you are
4 mobilized you wouldn't get --

5 MG ANDERSON: You wouldn't get --

6 DR. GALBREATH: -- in this --

7 MG ANDERSON: So if one of them reports
8 an assault where does it go? Where does it --

9 DR. GALBREATH: I'm sorry?

10 MG ANDERSON: So if one of them is
11 assaulted and ends up going through the process
12 you just described for the last couple of hours.

13 DR. GALBREATH: Right.

14 MG ANDERSON: If it's going in a
15 different place?

16 DR. GALBREATH: They -- well, their
17 report is something different. This is survey.

18 MG ANDERSON: Okay, got it.

19 DR. GALBREATH: Okay. All right. So,
20 interestingly enough, these surveys are done with
21 the idea that we -- that they are generalizable
22 to the total force, so if you look at those

1 numbers and if you were to do the math, you would
2 be able to figure out the depth of the problem in
3 the Department of Defense. So in 2006, when you
4 see 6.8 percent of women and 1.8 percent of men
5 indicated that in the past year they experienced
6 some form of unwanted sexual contact which was
7 our measure, our proxy measure for the crimes
8 that constitute sexual assault under military law
9 defined, what you would get is, you would get
10 about 6.8 percent times about 220,000 or so and
11 you'd -- at 1.8 percent times about a million or
12 so when you figure that out, the next slide will
13 show you what we found.

14 In 2006, 34,000 folks we estimated
15 experienced a sexual assault. And this is why you
16 do this math, because if we hadn't done this math
17 we would have never discovered that more men
18 experience sexual assault in the Department of
19 Defense every year than do women. In our reports,
20 men constituted at that time about 9 or 10
21 percent of what was reported, but that number,
22 34,000, that represents 20,000 men and 14,000

1 women. Why is that?

2 Well, 85 percent of the military force
3 is male, and so a very small percentage of the
4 male force ends up in a fairly large number. And
5 so even though women are at higher risk and
6 remain at higher risk than men, that actual sheer
7 number of men outnumbers women. So it became very
8 clear to us when we did this math that we have to
9 be gender neutral in the military, that we have a
10 duty to men just as much as we do women to
11 prevent and respond to this exceptionally well.

12 The other piece that's really very,
13 very important is that parentheses that 7 percent
14 above the 2,289 mark. That's my estimate, and
15 there's -- keep in mind there's fuzz in all the
16 data but that's my estimate for the number of
17 Servicemembers that chose to make a report that
18 year, so the math is very easy; 2,289 over
19 34,000, divide that, 7 percent. Only 7 percent or
20 1 in 14 decided to make a report that year.

21 If you look over time as we go to the
22 right along the chart you'll see how that's

1 changed over time. I think we learned our lesson
2 in 2010. I think people thought hey, we've got a
3 good grip on this, rates are down, and we didn't
4 see the focus that we did in the early years of
5 the sexual assault program in the Department. And
6 then 2012 showed us that if you take your eye off
7 this focus, rates can rebound at any time, and so
8 we began to look very carefully at what we can
9 do. And, of course, a lot of the reforms and a
10 lot of things that have happened since then
11 continue to produce what occurred in 2014 where
12 we experienced a decrease.

13 I can't tell you today, but on Monday
14 I'll give you -- on Monday we roll out our annual
15 report and we'll be able to tell you what the
16 next dot is across the top. So what you see
17 across the top are the survey estimates of sexual
18 assault in the past year, or what we call past
19 year prevalence or occurrence, so that's what we
20 gain off of the survey. And like I said, this --
21 in FY14 the numbers were 10,600 men and about
22 10,000, excuse me, 9,600 women due to rounding it

1 doesn't necessarily add right to 20,300, but
2 that's the numbers.

3 So last year you'll notice that we got
4 about 23 percent of victims that decided to make
5 a report of sexual assault, and that's what we
6 see as progress. More people are coming in and
7 getting care and support than they ever did
8 before. That's a function of the decrease in
9 prevalence. In other words, there's less crime to
10 report, but more people are choosing to report
11 the crime, and that's why -- that's what we want
12 to see. We want to see that pie slice get bigger.
13 We would like to see how large -- how many people
14 we can get out of that.

15 Now, I will tell you, you saw in the
16 reporting data that we had about 6,100 folks
17 report over the last three years. Okay, if we
18 never get another report, though, what I would
19 tell you is, it's that percentage of victims that
20 I want to see come to the door and get clearance
21 for it. That's what I would like to see, so as
22 that -- we would like to see that proportion

1 grow, but we'd also like to see more people at
2 least desire, at least considering reporting.

3 Across the bottom again, those are
4 just the number of reports by Servicemembers.
5 Something that was interesting that I'll talk to
6 you a little bit about; every year -- the numbers
7 that you see on Slide 16 as far as the number of
8 reports go don't match with numbers that you see
9 on Slide 13; the reason being is that every year
10 the Department receives reports from civilians
11 that have been sexually assaulted by military
12 folks. And in my top line number, Congress has
13 told us that we count sexual assaults by and
14 against Servicemembers, and so that's why I have
15 that -- a different top line number. But what I'm
16 showing to you on this slide is Servicemember to
17 Servicemember, Servicemember across the top,
18 Servicemembers across the bottom.

19 The other modification I've done to
20 this is that every year about 9 percent of our
21 reports involve Servicemembers that are coming
22 forward to make a report of sexual assault for

1 something that occurred to them prior to their
2 service. We thought that was very important. We
3 think that's a good measure of trust, largely
4 because they don't have to tell us. They don't
5 have to tell us anything, but if they trust us
6 enough to come in and see what kind of services
7 and support that they can get, we think that's a
8 very good thing. So a lot of times those will
9 come in as a restricted report, but sometimes if
10 they do come in as an unrestricted report, all
11 three MCIOs connect that individual with the
12 jurisdiction where the sexual assault may have
13 occurred and try to make sure that they get the -
14 - that they can go and make a report to the
15 appropriate authority in that location, something
16 that I often do as the detachment commander at my
17 different bases in OSI.

18 Any questions about that? This is the
19 reporting -- this is the public health piece, the
20 reported versus prevalence is kind of the
21 epidemiological work. This is how we measure
22 progress. Our goal is to reduce the prevalence

1 over time through prevention work. Our goal is to
2 increase the proportion of Servicemembers that
3 choose to report every year.

4 Interestingly enough, there's a
5 different story in these numbers. There's one
6 more story that I'd like to tell you a little bit
7 about, and that's on the next page.

8 I told you about how men report --
9 that we have more male victims than female
10 victims. They also report at different rates, so
11 in 2014, the last year's worth of data that I can
12 share with you at this point today, men reported
13 at a rate of about 10 percent, and women report
14 at a rate of about 38 percent. And that's, again,
15 an estimate based on the reporting along those
16 lines but we feel very strongly that we've got to
17 hear from more men on this, so for the past two
18 years we've been focusing -- we and the Services
19 have been focusing on what we can do to help
20 bring more men in, help folks understand that if
21 you're a lawyer, you already know how to report
22 this kind of thing and get help when you need to.

1 Yes, sir?

2 CMSAF MCKINLEY: Sir, thanks for being
3 here.

4 DR. GALBREATH: Thank you.

5 CMSAF MCKINLEY: By the way, Minot is a
6 great base.

7 DR. GALBREATH: You betcha it is.

8 CMSAF MCKINLEY: You betcha.

9 DR. GALBREATH: Oh, yes.

10 CMSAF MCKINLEY: This slide here, the
11 man study 2014, I mean just to clear it up in
12 context here. That study was also asking the
13 question if they've ever had sexual assault in
14 their lifetime, and so it's not necessarily
15 military on military. It could be civilian on
16 military, and it could be before they even came
17 in the military.

18 DR. GALBREATH: So we made it very,
19 very clear that when we were asking about our
20 past year prevalence, RAND showed them a date at
21 the top of the screen saying in the past year,
22 and we mean this date here, did you experience

1 any one of these behaviors? And so we're very
2 focused with this number, and we have very good
3 confidence that this is kind of what happened
4 within that 12-month period in the year prior to
5 being surveyed.

6 Now, what you're asking about is
7 another question that RAND had on the survey
8 which said after they got through the measure of
9 past year prevalence, we also said have you
10 experienced anything like what you just told us
11 at any point in your life? And that gave us what
12 we would call a lifetime measure.

13 CMSAF MCKINLEY: That's where you got
14 the 26,000 from.

15 DR. GALBREATH: No, no, the 26,000 --
16 the 20,000 for this year came from the past year
17 prevalence, only what happened in the past year.
18 I don't have a point estimate for the lifetime
19 prevalence number which had to be larger
20 percentages because we're talking about someone's
21 entire life. Right? Don't quote me but it's
22 around 6 or 7 percent for men -- excuse me, 4

1 percent for men, and about 23-25 percent for
2 women. That's the lifetime measure, and that's
3 very consistent with what we see in the civilian
4 community, as well.

5 You might have heard when the White
6 House stood up their task force, they were
7 talking about one in four, and that's very -- one
8 in four women will experience a sexual assault
9 when they go to college or a university. That's
10 lifetime measures. Got it?

11 CMSAF MCKINLEY: Got it.

12 DR. GALBREATH: Great, very good.

13 Any other questions about that before
14 we press on? Okay, next slide, please.

15 Again, another way just to look at
16 that data, like I said is, our goal is to get a
17 larger proportion of Servicemembers to report,
18 and that's -- and if you take a look at that 11
19 percent versus 23 percent, that's what we're
20 looking for. We really do want folks to
21 understand what their options are and come in and
22 have a conversation, come in and talk about what

1 might be their options and what's available.

2 Again, men and women experience sexual
3 assault differently in the DoD. Next slide,
4 please.

5 A little bit busy slide, but what I
6 can tell you is, is that men oftentimes are more
7 likely to experience sexual assault at the hands
8 of multiple offenders. Men are more likely than
9 women to experience it during their duty hours.
10 They're also more likely to describe what they
11 experienced as hazing, so what I would tell you
12 is, is that men often don't even consider the
13 sexual nature of what they experienced as a
14 sexual assault, that they would probably say oh,
15 yes, I got hazed the other day, and yes, it might
16 have involved somebody touching their genitals or
17 something along those lines but they would never
18 even think that that was a sexual assault. They
19 discount the sexual nature of it, just what --
20 kind of how men have been socialized to do. So
21 this was something that we thought very closely
22 that hey, this is something that requires

1 attention.

2 In addition to that, you'll notice
3 there's a lot that men are more likely to not
4 have been drinking, and that also aligns -- all
5 these behaviors aligns with kind of a workplace
6 experience that men have with either hazing or
7 things along those lines.

8 With women, it's a little bit more
9 along the lines of they experience it off the
10 installation or at somebody's home or residence,
11 less likely to happen at work or during duty
12 hours, less likely to call it hazing, but more
13 often to involve alcohol, and that might be due
14 to an offender trying to use alcohol as an
15 incapacitator. Next slide, please.

16 Again, a lot of times what's
17 interesting is for 30 years this country had
18 prevention programs that told women, women, you
19 need to stop walking in dark alleys, you need to
20 dress more appropriately, and you need to watch
21 out for the guys behind the bushes that jump out
22 and are going to attack you. And men you've got

1 to quit raping. Thirty years, that's what our
2 prevention stuff sounded like. We're changing
3 that. And thank goodness we have people that have
4 kind of looked at this, but in the military this
5 -- that approach makes no sense whatsoever
6 because 90 percent of sexual assaults in the
7 military occur between people that know each
8 other. They're inside the wire, they're an
9 insider threat, so it doesn't matter if you
10 locked your door, it doesn't matter if you locked
11 your windows, if you walk in lighted spaces and
12 what you dress like because at the end of the day
13 none of that has to do with whether or not that
14 offender is going to choose not to sexually
15 assault you and run because you know them and you
16 trust them. And this is why it causes such a huge
17 readiness issue for the Department because if I
18 had to go to war with you and you are my battle
19 buddy, and you are the person that was -- I am
20 depending on you for my -- check my six as we say
21 in the Air Force or get my back, how could I do
22 that once you've violated a huge trust area with

1 me, and you've crossed an uncrossable boundary?

2 Not acceptable.

3 And so at the end of the day, what we
4 do in the Department is substantively different
5 than what this country has done in the past 30
6 years. We didn't always, didn't always and it
7 wasn't until really the past recent couple of
8 years that we've really understood what
9 prevention is. I'll get to that in just a second.

10 Next slide, please.

11 SGT. MARKEY: Just one question.

12 DR. GALBREATH: Yes?

13 SGT. MARKEY: So the strange -- is that
14 based on the 4,700 that you know are reported or
15 is that the estimated number of total?

16 DR. GALBREATH: That's the estimated
17 number. I'm sorry, my -- excuse my acronym.
18 That's the RAND Military Workplace Survey. That's
19 the little asterisk underneath the pie chart
20 there.

21 SGT. MARKEY: Okay.

22 DR. GALBREATH: Sorry about that.

1 That's based -- but I will tell you that the data
2 that I have for reports, very similar --

3 SGT. MARKEY: Okay.

4 DR. GALBREATH: So what gets reported
5 to the Department? It's a little bit hard to show
6 you stuff across time because since I've been
7 doing this, try and help me out, how many times
8 has the UCMJ changed, three times, 2007, yes. So
9 -- and for all of the reasons that Dwight will
10 explain to you and I can't, all the difference --
11 we still receive a number -- charging decisions
12 are based on the UCMJ at the time of the offense,
13 and so as a result we track a number of different
14 offenses that no longer exist, but the vast
15 majority of them fall into three categories, and
16 you'll see them there; abusive sexual contact,
17 rape and aggravated sexual assault or sexual
18 assault.

19 Aggravated sexual assault went away in
20 2012 and now it's just sexual assault. We used to
21 track forcible sodomy quite a bit because sexual
22 -- Article 120 under rape was not gender neutral.

1 Only women could be raped under Article 120 for
2 the longest time, and in the most recent rewrite
3 in 2012, any penetration no matter how slight,
4 orally and/or vaginally, now constitutes a rape
5 or a sexual assault depending on the evidence.
6 And so that's changed. All of those things even
7 in that time have now changed and so -- and now
8 in addition to that, wrongful sexual contact,
9 indecent assault have all largely gone away, so
10 we're down to very small numbers. I do believe
11 that we'll see forcible sodomy drop off now
12 because largely all of the Bench Books are out
13 and all that kind of stuff, the instructions are
14 out for those crimes so that they can -- so that
15 folks are charged under the most recent version
16 of UCMJ.

17 You'll notice that we get very small
18 numbers reported of aggravated sexual contact.
19 Again, these are the allegations as described by
20 the criminal investigators as they're
21 investigating them. Oftentimes, the determination
22 about what kind of crime they're investigating is

1 done in collaboration with the Staff Judge
2 Advocate, Chief Military Justice. My common
3 practice was when I received an allegation, and I
4 got the basis of what I thought were the kind of
5 elements behind what I would be looking at, me or
6 my agents would go over and sit with our Chief of
7 Military Justice and track through the crime.
8 We'd develop an investigative plan to kind of
9 figure out what are we going to do to prove these
10 elements, and what kind of crime are we
11 investigating? And that's where we got a lot of
12 help and so that's what went into our system.

13 Anyway, those are the three major
14 crimes that -- or at least the three categories
15 of crimes that are reported. Again, sexual
16 assault is a lesser degree penetrating crime than
17 rape, and abusive sexual contact is a lesser
18 degree contact crime than aggravated sexual
19 contact. Next slide, please.

20 Restricted reporting conversions. I
21 thought I'd show you the number, across the top,
22 the TO line are the number of restricted reports

1 that we've gotten over time. The red line is the
2 number of restricted reports that remain
3 restricted at the end of the year. We snap the
4 chalk line every September 30 for accounting
5 purposes to report to Congress the number of
6 restricted reports that remain restricted at the
7 end of the year, but what you see in the blue
8 line across the bottom are conversions. So a
9 victim of sexual assault can convert their report
10 at any time, and they can -- and as you see
11 starting out in the early years of this program,
12 only about 13, 14, 15 percent of folks converted.
13 In the past couple of years that percentage is up
14 to about 20 to 21 percent, and we think that's a
15 good thing because that means that more people
16 are deciding to participate in the justice
17 system.

18 Why the increase? I wish I could tell
19 you. We don't make folks document the reason why,
20 just that they do. I'm hoping that that's because
21 -- well, and another thing that we also found is
22 that before FY14, I didn't have really good data

1 on this because I had to rely on what the
2 Services reported. When the DSAID database came
3 on line, I actually got to see stuff in the
4 computer and we were able to standardize how
5 everybody counted all of these cases, the terms
6 that they used. And so that allowed us a little
7 bit better visibility into kind of what was going
8 on.

9 Well, over the past three years, I can
10 tell you that people are converting their sexual
11 assaults much more quickly than they had before.

12 Yes?

13 MR. KRAMER: You're right, obviously,
14 but there's also been a very large increase in
15 the number of initial restricted reports. Do you
16 know why that is?

17 DR. GALBREATH: Well, I think that
18 people have heard us invite them to come and find
19 out what's there, what kind of options that we
20 might have. And I think that that's one way for
21 them to kind of test the waters. A lot of times
22 when -- immediately after a sexual assault occurs

1 a victim does what I call an environmental scan,
2 and they're immediately starting to look for the
3 things that -- what do I do now? What happened to
4 me? Who's going to help? Do I need help? Is this
5 what everybody else is experiencing? And so they
6 start to look for these things.

7 If folks are using our services, a lot
8 of people are very wary because they see what
9 happens sometimes in court. We've had some
10 horrific cases where people, especially at
11 Article 32 process where the rules have been a
12 little bit looser in evidence gathering, be
13 treated horrifically. That Naval Academy's, one
14 of those hallmark cases where just horrific
15 treatment of the victim by the defense attorneys
16 that was there. That's a really tough sell for
17 folks to say, come on in and let us scrutinize
18 your behavior and make you look like a dirt bag
19 to all of your friends.

20 MR. KRAMER: Can I just interrupt?

21 DR. GALBREATH: Yes, sir.

22 MR. KRAMER: And say that maybe the

1 defense lawyer was just doing their job.

2 DR. GALBREATH: They might well, but at
3 the same time, though, is that if you're trying
4 to increase reporting of sexual assault it's very
5 difficult to make that a really selling feature.
6 Right? So what I would offer to you, though, is
7 that in this way, this restricted report gives
8 you a protected way to come in and find out
9 what's going on, and what kind of things you
10 might be able to do. No offense to the defense
11 attorneys in the room. Thank you.

12 BG SCHWENK: I'm sure the Special
13 Victims Counsel will note that their program grew
14 up right at the time --

15 DR. GALBREATH: Thank you, thank you,
16 Jim. I was just going to also comment, I forgot
17 to do that. That in 2014, our Special Victims
18 Counsel program took over and have been inviting
19 -- has been providing confidential legal advice
20 to victims when they come in the door.

21 Because of the change that I've seen
22 in the average amount of time that people are

1 converting reports, I don't have any evidence,
2 but I believe that that probably has something to
3 do with it, that people are able to come in and
4 get better advice quicker than they were ever
5 able to do before. Now they know if they have a
6 case, or if they want to press forward and what
7 the legal pitfalls might be if they do press
8 forward, so I do see that. So if you're going to
9 convert, you're going to convert within the first
10 30 to 60 days.

11 This last year you're going to convert
12 a little bit quicker. The average is closer to
13 about a month. And not only that, but what I also
14 see in the data is that if you are going to
15 convert, that's the only time you do. When I go
16 back and I look at 2014, that number that you see
17 down there, that 20 percent only grew to about 23
18 percent, so not too many people come in after
19 that time, after that year goes by. And this --

20 SGT. MARKEY: Are you going to pull out
21 any points as to why there's conversion and not,
22 that process at all? Have you looked at that?

1 DR. GALBREATH: I don't because I don't
2 have a data point on that.

3 SGT. MARKEY: Right.

4 DR. GALBREATH: Like I said, when you
5 come in and you make a report of sexual assault
6 to a sexual assault response coordinator or a
7 victim advocate, you signed a DD Form 2910. And
8 that basically walks you through all of the
9 circumstances and all of the service that we have
10 available to you. If you make a restricted report
11 and you check that block at the end, there is
12 also an opportunity that you can come back any
13 time and re-sign your form and convert to a
14 restricted, I mean, to an unrestricted report. I
15 never ask anybody why are you doing this?

16 SGT. MARKEY: Right.

17 DR. GALBREATH: Just that they do.

18 SGT. MARKEY: And then the follow-up to
19 that is the cases that are converted, do we know
20 how many of those numbers are -- do move through
21 the prosecution stage?

22 DR. GALBREATH: Yes. That's also a

1 research project that I have planned now that I
2 have three years of data in the system. And I can
3 count all the cases that converted and that are
4 now unrestricted, and I just have to pull that
5 thread through the system. And that's something
6 that my team and I are planning to do. Next
7 slide, please.

8 So, again, just to give you an idea
9 ballpark about how many of our reports are for
10 incidents that occurred prior to service, there's
11 the numbers there. And what I've given you along
12 the bottom is the number of Servicemember reports
13 in the dark purple, and the light purple the
14 number of reports for prior to service. Again,
15 these people didn't have to tell us but they
16 heard that we have services and support
17 available, and so that's -- so they come in to
18 see that. Next slide, please.

19 Now, this is something I think that is
20 -- that sometimes we're looking for a little bit
21 more, is the accountability piece. So let me
22 explain to you how the system works in the DoD.

1 Every year, like I said, this last
2 year there was -- in FY15 there were 6,083
3 reports of sexual assault to the Department. A
4 portion of those, about 25 percent are restricted
5 reports, remained restricted at the end of the
6 year, and there is no investigation associated
7 with those. The remainder are cases that are
8 unrestricted reports that will receive a referral
9 for investigation.

10 At the conclusion of that
11 investigation, it goes to a commander who with
12 the advice of their Staff Judge Advocate make a
13 determination about what to do with the evidence
14 that they identified during the course of that
15 criminal investigation.

16 It presents an accounting challenge
17 that I learned when I got to the office in 2007
18 that I've tried to make as clear as I can, but
19 it's too many moving parts, and what I'll tell
20 you is this. So, when I count my numbers and I
21 show you this graph, and that is the number of
22 reports that came in to the Department of

1 Defense, you all know that this is any time
2 during the fiscal year that we're counting. It
3 takes several months to investigate. It takes
4 several months to adjudicate an allegation, and
5 so not everything gets done in the fiscal year in
6 which it was initiated. And so what I'm about to
7 talk to you about are cases that were concluded
8 in the fiscal year, and that means that they
9 reached their conclusion in FY15, and they may
10 have started in FY15, but some of them or a good
11 chunk started in years before that.

12 So when we snap the chalk line instead
13 of cases that solely involved FY15 entry into the
14 system, I'm now showing you numbers about a cross
15 section of what came in in 2015. So as far as
16 trends go, there's not a lot of trend data here
17 because every year is a different pot of cases
18 just by how long they took to get through the
19 system.

20 In addition to that, every case as my
21 friend, Dwight, always reminds me, is decided
22 based on the evidence, and every single case is

1 looked at on the evidence, and those decisions
2 about what to do with it on the evidence, and so
3 those are all individual decisions that basically
4 stack up into the numbers that you're seeing
5 before you. So I've given you some percentages
6 over time, but we always caution that they don't
7 trend, but they are just the number that they
8 are. As a matter of fact, when we worked with the
9 White House to develop our metrics we created a
10 new word, which is "non-metric," and why did we
11 do that?

12 Metrics are things that you look at
13 and you want to change behavior or change
14 outcomes by changing the inputs. Right? That's
15 what we want to do, so I want to decrease the
16 number of sexual assaults occurring every year. I
17 could do that through prevention. I want to
18 increase the number of report. I can do that
19 through encouraging -- putting together a good
20 response system, encouraging people to come
21 forward. But in Military Justice, if we were to
22 change the inputs that might constitute illegal

1 or undue command influence, and putting our thumb
2 on the scale of justice, so we don't do that. So
3 these are non-metrics, we just look at them, and
4 we don't try to change the inputs other than
5 making sure that everyone's got the appropriate
6 training and experience to investigate, and
7 prosecute, and defend these cases.

8 So if you take a look at the top line
9 there, that dark green line, this is the number
10 of cases or the percentage of cases that we were
11 able to substantiate, the allegations that we
12 were able to substantiate. What does substantiate
13 mean to the Department of Defense?

14 It means that evidence existed for
15 commanders to take some kind of action based on
16 the allegation. Evidence existed for commanders
17 to take some kind of action based on the
18 allegation; meaning, there was a preferral of
19 court-martial and non-judicial punishment, an
20 administrative action, or discharge associated
21 with -- administrative discharge associated with
22 a resulting allegation, or at least disposing of

1 the allegation, as we say in the DoD.

2 So that could be for the sexual
3 assault that was alleged, the crime that was
4 alleged, or for any other misconduct that was
5 committed by the individual. So sometimes a
6 sexual assault is alleged, but the criminal
7 investigators don't find evidence of that, but
8 instead there's evidence of other misconduct, and
9 we substantiate based on that. And I'll show you
10 how those break out. But by and large, the vast
11 majority of the numbers in there, cases in there
12 are sexual assault allegations that have been
13 substantiated.

14 SGT. MARKEY: Is that --

15 DR. GALBREATH: Sir?

16 SGT. MARKEY: Is that other misconduct
17 criminal?

18 DR. GALBREATH: Yes.

19 SGT. MARKEY: Okay.

20 DR. GALBREATH: So Article 128, Simple
21 Assault, false official statement, Article 112(a)
22 Drug use, things along those lines.

1 So the next line down is -- that light
2 blue one are subjects with command action
3 precluded. This means that largely that there's
4 evidence problems associated with these cases.
5 And in that category are the following four
6 buckets; victim declined to participate in the
7 case or the prosecutive action, insufficient
8 evidence of a crime to prosecute, statute of
9 limitations expired, and also the victim died
10 before the outcome could happen. We have only had
11 one or two of those cases ever happen in that
12 case, none in 2015.

13 So in that bucket also are a number of
14 cases in this last year that's changing our
15 numbers both last year and they're going to
16 change our numbers for this year in that blue
17 line those that were -- one of those is that --
18 and this gets very complicated very quickly, and
19 so I'm happy to kind of put in more detail if
20 need to, but cases that are unfounded, meaning
21 that the accused -- that evidence existed that
22 the accused did not commit the crime or that

1 evidence existed that the crime did not occur
2 were accounted for differently between Army CID
3 and Air Force Office of Special Investigations
4 and Naval Criminal Investigative Service, so Army
5 accounted for those cases differently than Navy,
6 and Air Force. And why is largely Service history
7 and preference behind how they used to do it.

8 Largely, Army would take the case and
9 they would get an opinion from an SJA as to
10 whether or not this case was unfounded, and then
11 they would go ahead and document it that way.
12 These cases always didn't make it in front of a
13 commander to review; whereas, in the Air Force,
14 Navy, and Marine Corps, those OSIs and NCIS hand
15 over the cases without an opinion on them. In
16 other words they don't say unfounded on them or
17 anything, they just hand them over and they leave
18 it to command to review and then for the SJA to
19 help them decide what to do with the allegation.

20 Since that time there's been changes
21 in law and policy that have brought Army in line
22 with that accounting, and so now -- so what you

1 have now is that Army is beginning to put --
2 account for their unfounded cases like everybody
3 else. Now, what we're finding is that in some of
4 those cases they were actually insufficient
5 evidence cases and not necessarily unfounded
6 cases. And that's why you see the uptick in the
7 blue line, and so that's how they follow it out
8 into our numbers. And then you see the number of
9 unfounded.

10 Now, my friend, Dwight, would also
11 like me to point out to you that some of those
12 unfounded cases may also be appearing in buckets
13 of insufficient evidence or the victim declined
14 to participate, as well. But on the whole, the
15 number of unfounded cases that we have in the
16 Department appear to be quite small compared to
17 the percentage that we're able to substantiate.
18 Next slide, please.

19 So, this is a version of what I love
20 to call the Waterfall Chart, which you will get
21 used to now. I also have a separate version
22 that's more detailed because it's a flow chart

1 and it is great for insomnia. So if you are --
2 but I will walk you a little bit through about
3 how we do it and why we do it this way.

4 Largely, what I can tell you is that,
5 again, very high level, every year I know I can
6 track now through the database how many subjects
7 I have waiting for some kind of a disposition
8 action in their case. This year in FY15 I had
9 about 2,200 cases that I didn't have any
10 disposition for. In addition to that, as I said,
11 we also have a number of civilians, foreign
12 nationals that might perpetrate crimes against
13 our Servicemembers that we can't prosecute. There
14 are a number of unknown subject cases that are
15 involved, as well. And we also have a number of
16 subjects that die or desert before we can take
17 action on them, or sometimes we'll have a
18 civilian or foreign jurisdiction decide to
19 prosecute the Servicemember and exercise their
20 jurisdiction over that person either through
21 their laws or through the SOFA agreement that we
22 have with the country. So in that -- last year I

1 think we had 60 or 80 or so. I'll be on here when
2 I show you this, 62 subjects in '15.

3 So what I show you in the dark bolded
4 number there, that 2,783, those are the
5 dispositions that I can tell you about that
6 military commanders took in FY15. Those are the
7 numbers. How does that break out? So, I have
8 1,437 commander actions in cases that could be
9 substantiated. That's that 72 percent that you
10 see there, that corresponds to the previous green
11 line, 72 percent on that line that's on the chart
12 that was before.

13 Again, if you go down a little bit
14 more you'll see that 576 of those cases were
15 substantiated for non-sexual assault offenses, so
16 those are the simple assault or false swearing,
17 things like that.

18 Underneath that 1,437 that we could
19 take action on for a sexual assault offense, you
20 can see that we had 926 court-marital preferrals,
21 303 non-judicial punishments, and 208 adverse
22 administrative actions and discharges. Down below

1 you can also see the buckets, the cases that
2 didn't go forward with 250 subjects whose victims
3 declined to participate in the system, 420
4 subjects were rated sufficient evidence, 19
5 subjects Statute of Limitations expired before
6 conclusion of the action.

7 So what I'm counting here is also --
8 too, is keep in mind that this is very difficult
9 to get through, as well. Keep in mind that there
10 are multiple subjects and multiple victims. I am
11 at the mercy of the Military Criminal
12 Investigative organizations and how they choose
13 to package their cases with regard to is it a
14 multiple victim case, is it a multiple subject
15 case? And so whatever they do, I have to count it
16 that way, but I have to be able to account for
17 everything. So what I will tell you is that there
18 are -- I am counting subject dispositions, not
19 necessarily unique subjects in here, but they
20 only differ by about 2 percent, so I've got --
21 for example in one of these cases, I've got an
22 individual, I've got 18 cases accounted for by

1 one court-martial in one Service, because there
2 were 18 different victims in that case. So in
3 that -- that being the case, that's why sometimes
4 when you go in and you start looking at the data,
5 you have to ask OSI, CID, and NCIS, are we --
6 when you're counting cases and you're counting
7 numbers, how many unique subjects? I know you
8 know those very well. How many unique subjects,
9 and how many unique cases, and how many unique
10 victims are we counting?

11 I'm trying to do the very best I can
12 with you, so I'm showing you dispositions here,
13 subject dispositions which is different from
14 unique subjects. And why am I doing that? Because
15 that's what the law tells me I've got to. I've
16 got to account for every case of sexual assault
17 that's been reported to the MCIOs because that's
18 what in our laws. Next slide, please.

19 MS. GARVIN: Before you move on.

20 DR. GALBREATH: Yes?

21 MS. GARVIN: May I ask a question.

22 DR. GALBREATH: Yes.

1 MS. GARVIN: The last bullet on the
2 prior slide, the 73 subjects allegation
3 unfounded. Could you say again the definition of
4 unfounded that you're using?

5 DR. GALBREATH: Yes. So, unfounded
6 means that evidence existed that the crime did
7 not occur, or that the accused did not commit the
8 crime. And additionally to that, as well, there's
9 a number of cases, too, that there might be some
10 baseless cases in there, as well, which is the
11 crime was improperly reported as a sexual
12 assault, and so it turned out to be something
13 else. Next slide, please.

14 So this slide answers the question,
15 when commanders have evidence of a crime,
16 evidence of a sexual assault and, again, anything
17 from an abusive sexual contact or a penetrating
18 crime like rape, when they have evidence of a
19 sexual assault and jurisdiction over the
20 individual, how do they dispose of the charges
21 against the individual? And as you can see in the
22 early days of the Sexual Assault Prevention

1 Response program, 2007, most sexual assaults were
2 disposed of through administrative actions and
3 discharges, and then non-judicial punishments and
4 court-martials were not used as much. That has
5 clearly changed over time, and this is -- I think
6 if there's anything that going forward with our
7 program we have always worked on a victim
8 empowerment model, and that is we prepare victims
9 for whatever it is that they would like to do to
10 help put their lives back together, and to
11 restore their lives. And if that's also something
12 that they want to do, is to participate in the
13 justice system, then that's what we want to help
14 them do, as well. So our Victim Advocates, and
15 certainly our Sexual Assault Response
16 Coordinators provide a certain level of being
17 able to do that, but the Special Victims Counsel,
18 the victims legal counsel have now the best folks
19 to be able to help victims make that kind of
20 decision.

21 I would also just have you draw an
22 imaginary line between FY13 and FY14, because

1 that's when my Defense Sexual Assault Incident
2 Database began to take over, and I was able to be
3 able to figure out apples to apples, and apples
4 across all three military departments. And before
5 that time, I had to just kind of sum all their
6 numbers in very complicated spreadsheets that
7 have gone the way of the dinosaur, luckily. But
8 now in the database, a lot of this information
9 comes directly from our legal officers, or SJAs
10 that are entering the results of these trials.

11 So the next slide, and I'm not going
12 to go through a whole bunch, but this is kind of
13 how cases fall out in the system. If you were to
14 ask me what happened at all 926 court-martials
15 that I had on the docket for FY15, if you go
16 across the top in the green boxes you can kind of
17 see what happened. And just pacing through very
18 quickly, I had -- I still had 113 subjects who
19 were waiting on their court-martial outcome, or
20 at least to have their case disposition reported
21 to us. If you look at the very top box in the
22 second column, you'll see that 813 subjects

1 there, if you go -- start to go to the right, I
2 can show you what happened to them. About two-
3 thirds of those guys went to -- excuse me,
4 proceeded to trial, 20 percent were given what we
5 call a discharge, a resignation in lieu of court-
6 martial. What is that?

7 This is a situation where instead of
8 going to court, the accused can offer a statement
9 essentially saying -- acknowledging that there's
10 evidence against them or a statement of guilt
11 that says yes, there's evidence there that will
12 probably make me guilty. And instead of going to
13 court, I'd like to go -- I'd like to be allowed
14 to retire or be discharged, resign or be
15 discharged instead. And that's something that --
16 it's almost tantamount to a guilty plea more or
17 less, and so we're able to discharge the person,
18 and almost in every single case when you look at
19 that, it results in an other than honorable
20 conditions administrative discharge. And so about
21 115 of those, and then for 33 subjects we didn't
22 have the nature of their discharge, but very

1 rarely have I ever seen a general discharge under
2 that as a result. So that happens for about 20
3 percent of folks. And then for 111 subjects, the
4 court charges were dismissed at some point in the
5 process, so that could have been before -- after
6 the preferral of charges, it could have been
7 after the -- before or after the Article 32,
8 could have been before they got to court, at any
9 point in that system.

10 Going across the top a little bit
11 more, as you see convicted of any charge at
12 trial. This is very important also to understand,
13 so this is a guilty conviction, I mean, a
14 conviction of any charged misconduct at trial,
15 the sexual assault or anything else. As you all
16 know that there's a number of charges that people
17 will be guilty of, or might be found guilty on.
18 So this is where our data is what I would call
19 give you the wave tops associated with what's
20 happening in the justice system.

21 The JPP, the Judicial Proceedings
22 Panel and the Response Systems Panel wanted to

1 look a little bit more closely at all of the
2 different changes in how things were charged,
3 what was charged, what fell of the charge sheet,
4 what kind of plea deals were entered into, all of
5 those inner-machinations of the Military Justice
6 System.

7 My system, DSAID, does not have that
8 fine detail. I report -- what I can tell you is
9 that -- I can tell you what happened to
10 penetrative crimes if they were convicted, that
11 was the most serious crime that they were
12 convicted of. I can tell you what -- and I can
13 tell you for non-penetrating crimes, and then
14 also for non-sexual assault types offenses.
15 That's in my data as well as the next slide I'll
16 show you in a couple of seconds. But that's --
17 so, again, this is for reporting to Congress in
18 a way that might help decision makers at that
19 level. Clearly folks that are in the legal system
20 want to see greater granularity and movement of
21 all of this stuff, and that is not in DSAID. So,
22 again, we report by wave tops information.

1 Acquitted of all charges, about 100 or
2 24 percent of folks. And then usually the top
3 four punishments awarded at court-martial are a
4 combination of confinement, reductions of rank,
5 fines and forfeitures, punitive discharge, or
6 dismissals. And then we also have sex offender
7 registration required for folks that -- for rape
8 and sexual assault, aggravated sexual contact,
9 no; just rape and sexual assault is required for
10 -- is registration for a sex offense.

11 SGT. MARKEY: I'm sorry, registration.
12 Yes, I'm sorry.

13 DR. GALBREATH: Registration,
14 aggravated as well, or just rape and sexual
15 assault.

16 MR. SULLIVAN: So, the DoD directive on
17 that is a reporting to sex offender registration
18 officials of the state, so it's not an actual
19 registration regime, rather it's a reporting
20 regime. That reporting regime will cover any 120
21 offense, as well as forcible sodomy under 125,
22 and some 134 offenses, as well.

1 SGT. MARKEY: Thank you, sir.

2 DR. GALBREATH: Next slide, please.

3 Again, not trends but just what happened. These
4 are non-metrics, again. On the lefthand side you
5 can see kind of what happened to cases as they
6 flow through the system at least pretrial. So you
7 can see across the top, these are the subjects
8 that eventually proceeded to court-martial. The
9 blue line in the middle are the subjects whose
10 cases were dismissed, and then the red line at
11 the bottom are those subjects who were allowed to
12 receive a discharge or a resignation in lieu of
13 court-martial. Discharge, the difference between
14 those two is that discharge is granted enlisted
15 folks, and resignations are officers. By far, the
16 vast majority are -- in that category are
17 enlisted. Next slide, next graph over.

18 I was just -- the percentage of
19 conviction of any charge at trial. Again, that
20 could be for sexual assault or for any other
21 charged misconduct. So next slide.

22 We want to take a look at -- this is -

1 -- think what I'll do is, because we're hitting
2 4:00 and I think that I'm going to get the hook
3 at the top ---

4 (Laughter.)

5 DR. GALBREATH: But I'll just kind of
6 explain to you what's on the rest of my slides
7 and you can look at them at your leisure.

8 So this is an analysis of folks that
9 were prosecuted for penetrating versus non-
10 penetrating cases, and you can see the outcomes
11 of those cases in the analysis that we have. The
12 next side explains to you, on Slide 30, explains
13 to you about the Defense Sexual Assault Incident
14 Database, and what we capture in there, what it
15 does. It's not just a bean counter. Our SARCs and
16 our victim advocates -- our SARCs mostly use it
17 for case management, but also our legal officers
18 report case dispositions in there. And, of
19 course, we also do a lot of business management
20 in there with Sexual Assault Office as well. Next
21 slide, please.

22 DSAID receives its information

1 directly from the Military Criminal Investigative
2 organizations that are investigating the
3 unrestricted reports, as well as from our SARCs
4 that are loading in restricted information. There
5 is no personally identifying information in the
6 system for folks making a restricted report. That
7 is to protect them because I don't want to be
8 served with a subpoena that says show me
9 everybody who started -- who made a restricted
10 report. I can't tell you because I don't know,
11 but I do have their demographics, and I do have
12 their information. I have some stuff about what
13 those cases involved.

14 SGT. MARKEY: Nathan, just -- I'm
15 sorry. I know they're about ready to give you the
16 hook.

17 DR. GALBREATH: Yes?

18 SGT. MARKEY: So DSAID, the information
19 that's in there, all the CID, OSI, NCIS, they all
20 enter data into that system.

21 DR. GALBREATH: They enter data into
22 their own systems.

1 SGT. MARKEY: And then that --

2 DR. GALBREATH: Then interface with
3 DSAID.

4 SGT. MARKEY: Is that used as an
5 investigative tool at all to link cases through
6 offenders and --

7 DR. GALBREATH: No, and the reason
8 being is that the systems of record for sexual
9 assault unrestricted reports are the MCIOs cases
10 themselves, so they use their systems for
11 intelligence purposes.

12 SGT. MARKEY: So they have a separate
13 intelligence base that they can use --

14 DR. GALBREATH: Yes.

15 SGT. MARKEY: -- for intelligence
16 analysis.

17 DR. GALBREATH: They do.

18 SGT. MARKEY: Okay.

19 DR. GALBREATH: Yes.

20 SGT. MARKEY: Okay.

21 DR. GALBREATH: Absolutely. Next slide,
22 a little bit about reprisal, mistreatment,

1 ostracism, things like that. Retaliation is an
2 issue that I will tell you is an unintended
3 consequence of trying to improve or increase the
4 number of folks that wanted to report sexual
5 assault. It's something that we've been getting
6 after. In 2014, we found that about two-thirds of
7 women who experienced the sexual assault in the
8 past year and made a report to the DoD authority
9 received a negative outcome or a negative
10 behavior associated with doing that. That could
11 have been something that might have impacted --
12 they might have seen like their career or they
13 were marked down on something, or they didn't get
14 a training opportunity, or maybe that they might
15 notice that people weren't talking to them as
16 much, or excluding them socially, might be that
17 they were mistreated or had their car keyed by
18 somebody, along those lines.

19 What's interesting, though, is that we
20 didn't ask our question very well in 2014 to
21 really, truly understand the nature of what
22 constitutes retaliation in the Department. So

1 what we did in that time, like I said, that's a
2 negative behavior, but it doesn't necessarily
3 meet the requirements for what constitutes
4 retaliatory behavior under military law and
5 policy. So we put together a strategy to deal
6 with it. Happy to come back and talk to you a
7 little bit more about that, but if you look at
8 the next slide on Slide 33, I know it's very
9 busy, the donut graphs here, but if you look at
10 the very center one, this is data from the
11 Reserve survey we did in 2014 or 2015. We tried
12 to get at this idea that can we better get an
13 approximation about not just the negative
14 behavior that people experienced that they think
15 might be retaliatory, but also under policy and
16 law were we able to align that experience with
17 the kinds of circumstances that it has to occur
18 under. In other words, it's got to be because
19 that person knew you reported the sexual assault,
20 or suspected that you did. It's also got to be
21 because they did this behavior to interfere with
22 your participation in the justice system, or

1 interfere with reporting of other crimes in the -
2 - maybe from others in the area. So what we tried
3 to do is apply that, and when we did, what we
4 found is the following.

5 So if you look at that center donut,
6 the lightest blue color there, we found that 41
7 percent of people that indicated experiencing a
8 sexual assault in the past year on our survey
9 didn't experience any negative outcome associated
10 with their making a report. The lighter green
11 side are the percentage of people, that 23
12 percent are the percentage of folks that
13 experienced the negative behavior but not any of
14 the other kind of qualifying circumstances in
15 order for it to be considered or meet survey
16 criteria for retaliation. And that 36 percent
17 down there, the darkest number, that's the number
18 of folks -- that's the percentage of folks that
19 experienced a sexual assault in the past year,
20 reported that experienced the negative behavior
21 under the circumstances that we talked about that
22 might be considered retaliatory. So that kind of

1 essentially gives you an idea that about 36
2 percent of those folks had what I would say like
3 a prima facie case for an allegation of
4 retaliation. So, we don't want to walk away from
5 that 60 percent, because if you notice, if you
6 add the 23 and the 36 percent together you get 59
7 percent, basically almost the same number we got
8 in 2014 for people perceiving the negative
9 behavior associated with reporting, and that's a
10 cultural piece. That's a cultural issue we've got
11 to get out there. Then this bucket, about 36
12 percent of folks experienced something that we
13 might say qualified for -- under policy or law
14 for retaliation.

15 All right. That being said, other
16 stuff talks a little bit about prevention and
17 other things, and our way forward on that. The
18 other document which you have is what we call our
19 Waterfall Chart. I showed this all to you pretty
20 much, but what this will do is this document will
21 track you through all the reports that came in
22 pretty much in 2015, show you how many were

1 restricted, unrestricted, and where they fell out
2 in all the different places along like we've
3 talked about, so some were civilian subjects,
4 things like that, how many got prosecuted by
5 military offenders, what were the outcomes of
6 those court cases, what were the outcomes of the
7 non-judicial punishments, things like that.

8 So thank you very much. I'm getting
9 the hook; there we go; done. Appreciate your time
10 and your attention, and certainly happy to come
11 back and talk less to you.

12 (Applause)

13 CHAIR BASHFORD: So we have an hour and
14 -- less than an hour. We have 55 minutes to
15 discuss strategy. We've received letters from Ms.
16 Cannon who couldn't be here because she is
17 getting a fantastic award today from the criminal
18 --- I forget the exact --- Defender of the Year,
19 something like that from the Bar Association. I'd
20 like to congratulate her on that, as well.

21 We also have in our materials a letter
22 from Judge Brisbois about what he thinks might be

1 a good way to go forward. So would you like to
2 just talk about that for a few minutes?

3 HON. BRISBOIS: Well, it was just a
4 brainstorming session of one.

5 CHAIR BASHFORD: That's okay.

6 HON. BRISBOIS: A very contentious
7 conversation. But my -- I guess my under -- my
8 assumption or maybe I misunderstood how much time
9 we were going to devote to strategic planning at
10 this meeting after our January meeting, but I
11 thought that we were all going to kind of come
12 back after doing our open reading and all that
13 kind of stuff with some structure ideas, so that
14 was my attempt to put my thoughts together. I
15 noticed quite a bit of it, there's -- I kept
16 seeing flashes of recognition today and what I
17 have in mind in terms of the sources of available
18 information, so maybe -- and there's some overlap
19 in the last half that the Staff had put together
20 too, and so to the extent that that's the
21 starting or the working point to start from, I
22 think it would be helpful for me, anyway, if the

1 Staff could go through the bullet points that I
2 have. There are already sources of information
3 that we can look to, to answer these questions.
4 That would help me and maybe others for strategic
5 planning discussions later. How much of it is yet
6 to be created, how much of it is already in
7 process, that kind of thing. But it really was
8 meant strictly to be --- to start the discussion
9 in terms of, you know, it's a five-year charter.

10 CHAIR BASHFORD: Actually, we were a
11 five-year charter --

12 HON. BRISBOIS: Last year, yes. That's
13 why I said four plus years.

14 CHAIR BASHFORD: No, three plus years.

15 HON. BRISBOIS: We're at three plus
16 years? Okay, well time flies when you're having
17 fun.

18 (Laughter.)

19 HON. BRISBOIS: But I think, you know,
20 the enabling legislation as I pointed out in my
21 opening paragraph, and as the opening paragraph
22 of Tab 13 shows, there's no information other

1 than review cases and report back after March
2 30th, and so we have a pretty blank slate. But
3 the one thing sort of that I -- looking at the
4 first group that had a one-year to -- I forget
5 the name of it.

6 CHAIR BASHFORD: The Response Systems
7 Panel, sir?

8 HON. BRISBOIS: Response Systems.

9 CHAIR BASHFORD: Yes, sir. RSP.

10 HON. BRISBOIS: Yes, they looked at the
11 articles, the UCMJ Articles and they made
12 recommendations for changes there. The JPP has
13 been looking more at the judicial practices,
14 prosecution and things like that. Two years
15 they're issuing reports now this spring, I think
16 -- and then the fact that Congress said we have a
17 five-year, three plus four years, that suggested
18 to me that -- and I asked for the Congressional
19 history on it, and Ms. Carson, there isn't a lot
20 there to guide us. But the five-year mark and the
21 general nature of the legislation, I think,
22 suggested to me that this group wasn't so much

1 more of the -- these are the changes to make, but
2 where to evaluate how well are those changes
3 working and functioning. So that's sort of --
4 when you see my bullet points, that's the prism
5 through which they were developed. We're
6 measuring -- I think we have a longer time frame.
7 We can take a longer view, and so we can develop
8 systems and analysis to measure how well -- what
9 are the outcomes? How well are those changes
10 affecting maybe the prevalence rate and things
11 like that, reporting rates?

12 The other part of my observations that
13 came to my mind, is this isn't -- this is an
14 issue that isn't going to be fixed by -- solely
15 by changing the Articles of the UCMJ, you know,
16 or resources for prosecutors and defense. There's
17 a considerable social, cultural aspect to this
18 whole issue, and especially when you consider
19 you're recruiting 18, 19-year olds and brain
20 science says, you know, they're not fully
21 developed until they're 20-21 years old, so they
22 have judgment skills that they haven't developed

1 yet. They're coming out of a social environment
2 in high school and in middle school where you're
3 already having misuse of social media in sexting,
4 and pictures, and contents, and unconsensual
5 publication of other material, so they're already
6 desensitized or a little bit, if you will, and so
7 there's -- you know, we train on everything from
8 how to wear your uniform to how to fire your
9 weapon. I'm wondering how much for those young
10 people who are 18, 19, 20 is our training not
11 socially oriented enough in terms of respect
12 levels and things like that. And are we just
13 assuming they're coming with those skills? And I
14 think we can't make that assumption given what's
15 happening in their high schools and their middle
16 schools, and given their own cognitive and social
17 development. So it's kind of a hodgepodge of
18 things, but it's all from that perspective of
19 measuring outcomes, checking the socialism and
20 seeing what the social contact side of it.

21 But the way to try to pick a number of
22 different things that I heard from our January

1 meeting, the materials that we already received,
2 and connect them in some unified, you know, in my
3 mind counter supportive way. And like I said,
4 it's neither exhaustive, or exclusive, and was
5 just meant to be a starting point for discussion.
6 I've already heard quite a bit, some of the
7 information is already available or it's going to
8 be shortly begin to be collected, and it's just a
9 priority from our point of view, from our -- you
10 know, what are we going to focus on? We can't do
11 everything even in three and a half years. We
12 have to make some priority decisions, and that's
13 the strategic planning part of this.

14 And I guess my suggestion would be
15 that our July meeting be almost exclusively
16 strategic planning for the whole day rather than
17 one hour.

18 CHAIR BASHFORD: One thing that was
19 apparent from the almost overwhelming amount of
20 information we got today, there's a lot of data
21 that's been collected already, and so I'm glad
22 Dr. Spohn is on this because I think you could

1 help steer us to -- we've got a lot of data.
2 You've done some analysis, now what should we use
3 that data for? Like how should we go into it.
4 Appreciate suggestions like that in that regard.
5 So we're drowning in data, everything is being
6 tracked.

7 DR. SPOHN: Well, yes. And, you know, I
8 think that there are some -- there are a lot --
9 there are more questions raised than answered by
10 the data that we've analyzed thus far. But I
11 think, certainly, the differences across the
12 Services, trying to understand why those
13 differences exist and whether they can be
14 attributed to different policies and practices or
15 to levels of resources or differential training.
16 I mean, there are -- the question is how to get
17 at that? How do we answer that question, and I
18 think those are some of the questions that you
19 raised in your bullet points, as well.

20 Civilian versus military issue, I
21 think it's something that also deserves a little
22 more analysis. And looking more closely at the

1 cases involving intimate partners and spouses,
2 and the differential outcomes that those resulted
3 in as well.

4 CHAIR BASHFORD: That was actually
5 counterintuitive to me, that the punishment for
6 the acquaintance, intimate partner ones is
7 substantially higher than the strangers. In the
8 civilian world, it tends to be the opposite.

9 HON. GRIMM: And the conviction rate is
10 lower.

11 CHAIR BASHFORD: Conviction rate is
12 lower.

13 HON. GRIMM: Which seems completely
14 skewed.

15 DR. SPOHN: Again, I think that's
16 something that the data that I have can't answer
17 that question. There's very little information
18 about the victim other than status and gender,
19 and relationship to the accused. But we don't
20 know whether victims in intimate partner and
21 spousal cases are more likely to refuse to
22 cooperate as the case moves forward, which I

1 suspect they would be --

2 HON. GRIMM: Right.

3 DR. SPOHN: -- for obvious reasons. But
4 documenting some of those things I think would be
5 important. And the data that he presented, that
6 Dr. Galbreath presented, does not include any of
7 the family cases.

8 CHAIR BASHFORD: And yours did have the
9 family members, right?

10 DR. SPOHN: Yes. Meghan could maybe
11 speak to that.

12 MS. PETERS: I'm sorry. I was getting
13 ready to follow-up on something else, so I'm not
14 sure if I can answer another question first. I
15 think it was --

16 DR. SPOHN: Well, I just mentioned that
17 Dr. Galbreath's data do not include the family
18 cases.

19 MS. PETERS: That's correct. So JPP
20 asking for all sexual assault cases, we were
21 asking for two universes. The DoD SAPRO office
22 has a big policy book and they cover just about

1 any relationship, friends, stranger, dating
2 relationship, but cases that are falling through
3 the military justice the exact same way are
4 counted differently within DoD if the
5 relationship is spousal or what they meet ---

6 what they say is an intimate partner. So, SAPRO
7 is not counting family cases or intimate partner
8 cases, but the SAPRO cases are everything else,
9 so they could be strangers, many of them are
10 acquaintances in the same unit and do know each
11 other at some level. So we kind of had a family
12 case pile, and then everything else pile, and we
13 had about 17 percent more cases than SAPRO
14 reports when we looked at the family cases. So
15 there's somewhat of a difference in the
16 relationship. We don't know how broad or really
17 how distinct those differences are when you look
18 at SAPRO cases and the family cases.

19 CHAIR BASHFORD: One thing I just
20 starred and I already don't remember, I think it
21 was the panel of four, they -- is it all Services
22 that write prosecution memos for their cases? So

1 could we do an RFI for prosecution memos for a
2 period of time where they decided they didn't
3 have enough information to go forward?

4 MS. PETERS: Yes, ma'am. Are those
5 covered by work products?

6 CAPTAIN TIDESWELL: Well, we could
7 maybe get at numbers. Are you trying to get at
8 the numbers of --

9 CHAIR BASHFORD: Oh, then that's kind
10 of --

11 CAPTAIN TIDESWELL: Are you looking for
12 the actual numbers?

13 CHAIR BASHFORD: I'm just wondering why
14 they weren't going forward, so --

15 MS. VAGHELA: I'm sorry. Can I just
16 say, all Services do not write a prosecutory
17 memo.

18 CHAIR BASHFORD: Okay.

19 MS. VAGHELA: I just wanted to say that
20 for the record.

21 MS. TOKASH: I think what might be
22 helpful -- this is Meghan Tokash speaking. Is,

1 you know, for an advisory committee on making
2 recommendations on investigation, prosecution,
3 and defense of sex assault, to me one of the most
4 striking pieces of data today was the 49.8
5 percent conviction rate, and I know A.J.
6 highlighted the disparity between that conviction
7 rate and say the DOJ conviction rate. If we have
8 these cases that the JPP and that Dr. Spohn's
9 already analyzed from 2015, I wonder whether it
10 would help us understand mechanically, you know,
11 why, what happened? I think Robbie, you asked
12 that. You know, why is that -- why do you have
13 that statistic? Is it because there are not
14 uniform standards of prosecution in the Armed
15 Services? Is it because there is a push just to
16 get sex assault cases referred -- preferred or
17 referred? We just don't know, and I think that
18 maybe that's where we could do a deeper dive by
19 making a request for commanders or counsel who
20 are involved in these cases to give us a better
21 understanding of the why, because to me that's
22 the biggest X factor at this point. And that

1 could maybe help us steer our recommendations for
2 how these cases should be investigated,
3 prosecuted, or defended. We're talking
4 substantially about rights of the accused, too.
5 If we're preferring charges and they're not
6 getting referred to cases, you have
7 Servicemembers who are flagged who are suffering,
8 you know, not getting promoted, things of that
9 nature while they're standing accused. And
10 likewise, conversely, you have a victim who is
11 believing that the system is going to deliver for
12 them. To me as a prosecutor, a 49.8 percent
13 conviction rate is not delivering results for
14 victims.

15 CHAIR BASHFORD: I wonder to what
16 extent prosecutorial discretion plays a role? You
17 had said that as policy, you want to see proof
18 beyond a reasonable doubt. And I know there's
19 civilian prosecutorial agencies that have the
20 same -- not that you won't take a hard case, but
21 you're not going to take a case that has
22 absolutely no chance of success. And I don't know

1 in the current climate if people -- again, it
2 might just be a pendulum swinging, that cases are
3 being brought that shouldn't, but it could be the
4 fact finders don't like the cases, but I think it
5 would be a good thing to look at, too. There's
6 got to be some structural reason there.

7 MS. TOKASH: And also just based on our
8 presenters today, Rule for Court-Martial 306,
9 it's -- there's some factors to consider in the
10 discussion section, but that's for the commander
11 to consider, not necessarily a set of
12 prosecutorial standards to actually lodge an
13 indictment against a Servicemember, and then
14 further refer to a trial -- tried by the highest
15 jurisdiction of court.

16 HON. GRIMM: You also have a completely
17 structurally different area, because what you
18 have is, is that one of these things that we
19 can't -- have not measured. There's no way of
20 measuring it, is what it means when you advise a
21 fact finder of proof beyond a reasonable doubt.
22 Probable cause is more likely than not, and that

1 is where there's a reasonable belief beyond mere
2 suspicion that this occurred. When you have that
3 and you go and you say you know have to find
4 beyond a reasonable doubt as a standard, and you
5 have situations where you have -- as the
6 hypothetical fact pattern that they gave us, both
7 of them drinking, conflicting comments about
8 whether they had had, you know, some degree of
9 intimacy before, and all those issues come in.
10 Then that is a distinction in the Department of
11 Justice, and in civilian prosecutors, you go to
12 the prosecutor's control of a decision. You don't
13 go to grand jury if you don't think it's a solid
14 case. If the grand jury does not give a true bill
15 you don't have a case, and if it does, even if
16 you got an indictment as you develop it, if you
17 believe that the case is shaky as you get closer
18 to trial, you can dismiss.

19 You do not have the professional JAGs
20 making the final decision. In fact, you've got a
21 command structure in which the command has been
22 told you're going to take these seriously. You're

1 going to investigate, you're going to provide
2 these services, and the decision makers, the
3 decision not to prosecute goes up to a full
4 Colonel or a General Officer who has to make that
5 decision. And what you get is you get -- and I'm
6 not saying this is right or wrong, or anything
7 else. I'm just saying that the decision as to
8 whether you go forward or not is not in the hands
9 of the lawyers the way it is in the civilian
10 system. And it is being done by individuals in a
11 command structure who have been told clearly and
12 properly, I think to a certain extent, you've got
13 to stop this stuff from happening, and you stop
14 this stuff from happening by moving forward. So
15 you have a lot of variables there going on. I
16 mean, if you had a 25 percent acquittal rate in
17 an office, in the U.S. Attorney's Office, I don't
18 think the U.S. Attorney would be in there very
19 long. That's a staggeringly large percentage of
20 cases that go to trial. So it's a completely
21 different system in terms of what goes from
22 investigation to the decision to prosecute, and

1 then you have to factor in that you've got a
2 completely different standard of proof. And at
3 least my experience with juries in the civilian
4 community, because I've talked to every jury
5 after a jury trial, is they take seriously that
6 responsibility to measure the case. And when
7 someone tells you if there is any reasonable
8 doubt you must acquit, it is a different mind set
9 than if it's like is there some evidence from
10 which we can believe that something must have
11 happened. And that's a factor, too. I don't know
12 how you measure that, but there is just simply a
13 fundamental difference in which the two systems
14 operate.

15 MR. KRAMER: I also wonder, too, about
16 the fact finders because we always talk about a
17 jury of peers. That almost never happens in the
18 civilian court. The defendant is usually much
19 different than the jurors, but in this case we
20 have fact finders who are in the same profession,
21 in the same situation.

22 CMSAF MCKINLEY: But significantly

1 different ranks. If you've got a private who is
2 being prosecuted, you're going to have a sergeant
3 major, first sergeant, or that jury is not
4 necessarily a peer either.

5 MR. KRAMER: Well, you have people from
6 the same world, let me put it that way.

7 CMSAF MCKINLEY: That's true.

8 MR. KRAMER: Most of my clients, and
9 most clients in state and federal courts all over
10 the place are not the same -- from the same
11 profession, situation, background as the jurors.

12 CMSAF MCKINLEY: That's true.

13 MR. KRAMER: So you're absolutely
14 right, of course, about the rank. But it seems to
15 me -- and I don't -- I loved the presentation,
16 all the presentations, and we have some
17 incredible data, like you said. What we don't
18 have is much explanation for any of the data
19 except anecdotally in most cases. The data seems
20 to be extremely important so, I mean, I think
21 you're right. You're both right on all levels
22 about this. This is very surprising to me. I was

1 surprised -- all the -- between Services as well
2 as --

3 CMSAF MCKINLEY: Right.

4 MR. KRAMER: -- within the entire
5 Service.

6 CMSAF MCKINLEY: I have some thoughts.
7 And, number one, with what you said there, is I
8 spent 10 years as a First Sergeant dealing with
9 non-judicial punishment, you name it, everything
10 with court-martials in between. And the thing we
11 always heard is JAGs give recommendations,
12 commanders make decisions.

13 MR. KRAMER: Right.

14 CMSAF MCKINLEY: So it's up to the
15 commanders to make the decision where you go.
16 But, you know, one of the things that I see out
17 there that I think we need to look at is, we are
18 -- our military is more purple now than ever. We
19 have joint basing, we've deployed jointly, and so
20 we're out there stuck together. But through the
21 judicial system, and especially training for the
22 judicial system, it's totally different, because

1 we really have no clue what the other Services
2 are trained to.

3 For instance, you know, for someone to
4 take command, you know, of the Air Force, say a
5 squadron of 300 people, that commander gets one
6 week of training, and in that one week of
7 training, maybe they get one hour of SARC
8 training. And the First Sergeant of that unit
9 gets two weeks of actual training at the First
10 Sergeant Academy, and then two weeks of distance
11 learning, you know. And then we put them out
12 there and they're in charge of the health,
13 morale, discipline mission of that squadron, but
14 when they get a sexual assault in that unit, are
15 they really trained to handle it? And I would say
16 from one squadron to the next squadron, to the
17 next squadron, they all do things differently
18 because there's no training that -- they haven't
19 been trained.

20 Now you go between one Service to the
21 next Service. How is the Army trained? How is
22 their commanders and First Sergeants trained? How

1 is the Navy done? And we deploy jointly, we live
2 together jointly. We should be looking at how we
3 train our commanders, and how we train our senior
4 leaders, enlisted leadership in dealing with
5 this. And I'm telling you, we're not trained.
6 When something happens, people pick it up and
7 they do the best they can. They got to the JAG
8 office, they get recommendations, but as far as
9 taking care of people, taking care of people in
10 the unit, for the victim who has to go through
11 all these different problems, for the accused for
12 all the things and all the flags that they get,
13 we're not really trained on how to deal with
14 that. And I think that's one area that would be
15 very important for us to look at jointly, as all
16 branches of Service. How is each branch of
17 Service actually trained, and some are doing
18 better than others, and we can pick and grab, but
19 we should all be thinking about we should be
20 trained the same because we have the same UCMJ.
21 So I think that's an area that we could do a lot
22 of work in, a lot of good.

1 CHAIR BASHFORD: Would that --
2 everything seems to be in a manual. Would there
3 be training manuals for these different
4 positions?

5 CMSAF MCKINLEY: No.

6 CHAIR BASHFORD: No?

7 CMSAF MCKINLEY: No.

8 CHAIR BASHFORD: Then I guess we can't
9 get that. It's just sort of ad hoc?

10 CMSAF MCKINLEY: Well, you have
11 commanders courses, you know, at different
12 levels. You have like a squadron commander
13 course, you have a group commander course, or
14 brigade, you know, whatever. Then you go all the
15 way up, and they're different level courses. For
16 the enlisted, you have the First Sergeant
17 Academy, you have one course. But, you know --
18 and then for each member of the unit, you know,
19 you get sexual assault training every year, but
20 the sexual assault training is a CBT, computer-
21 based training.

22 CHAIR BASHFORD: Yes.

1 CMSAF MCKINLEY: But there's really no
2 learning that takes place there. It's a race to
3 get it done. So, you know, back in the old days
4 we actually used to have commanders calls where
5 we had face-to-face with a commander, who would
6 get up there and he'd talk to people face-to-face
7 and have them do things. Now it's a race to get
8 the CBT done so you can go check, I'm good for
9 another year.

10 BG SCHWENK: That's because when you
11 were a junior enlisted guy all they had were the
12 stones and those little things -- it was too hard
13 to do it.

14 CMSAF MCKINLEY: You are --

15 (Laughter)

16 BG SCHWENK: Rode the horse.

17 CMSAF MCKINLEY: And we rode a horse,
18 and we -- yes, sir.

19 BG SCHWENK: Can I say some things
20 about -- oh, good ahead.

21 CMSAF MCKINLEY: Go ahead.

22 BG SCHWENK: Oh. Can I say some things

1 about strategic planning? Okay. Last time I said
2 I really thought we needed subcommittees, and the
3 reason I thought we needed subcommittees, it can
4 triple our output in the time that we have.

5 In order to get subcommittees we found
6 out, you know, from today from the FACA briefing,
7 you know, you have to identify what the
8 subcommittee is for, and then they'll approve it.
9 And it takes whatever amount of time it takes
10 except for the fact we're really lucky that the
11 guy who's the legal advisor to the people that
12 make the -- that run the committee management is
13 the guy who's performing the duties as the
14 General Counsel and has a vested interest in this
15 because he's the sponsor of it, so he can
16 manipulate both sides.

17 I still think we need them. The
18 question is what are they? You know, how do we
19 divide them up? And so our charter -- so there's
20 a lot of ways to do it. I mean, I think our first
21 meeting some people thought well, maybe we could
22 divide up into three subcommittees and have all

1 three subcommittees do some aspect of data
2 analysis, and then see what questions flowed out
3 from their data analysis. Let those subcommittees
4 look at the issues, the whys that they don't have
5 answers for, and prioritize in their minds what
6 they think the priority ought to be, brief us
7 back, and then we could look at all three groups,
8 and the priorities, and the issues and say all
9 right, we want to start with this one, and then
10 that one, and then the big group we'd have a way
11 to go forward. That's one way to do it.

12 But we also have a lot of other issues
13 that people have brought up that are not directly
14 related to data, and we've all decided, I think,
15 we haven't had a vote but I think we've all
16 decided our charter is broader than just
17 reviewing records of trial.

18 So another way to do it is have one
19 subcommittee be the data people. They're the ones
20 that are going to and look at Cassia's
21 information, the information from the SAPRO
22 report, at the information that Meghan and the

1 rest of the people on the Staff have all pulled
2 together from the past and start identifying
3 issues from that. Why? Why is this happening this
4 way? Why is that? And then in their own minds
5 come in and brief us when we have a meeting, and
6 tell us we think we should address -- these are
7 issues that we've discovered. We don't know the
8 answers, but they strike us something could be
9 wrong, and we need to look into it. And here's
10 what we think the priority of that would be.

11 Then we could have another one that is
12 sort of like the iPad part, you know, the actual
13 military justice, the investigation, the
14 prosecution, the defense, the special victims
15 counsel, the judiciary, that narrow lane and look
16 at the issues starting maybe by having -- asking
17 the Staff to go through and identify all the
18 recommendations made by the other two panels that
19 never got approved. I mean, they're just like us,
20 you know. They looked at the issue, they thought
21 this was something that ought to get done, and it
22 didn't get done, you know. So then we know those,

1 maybe you might want to look at one of those, or
2 two of those.

3 And that panel can also then, like
4 talking to these people today from the Army JAG
5 School, talk to some other panels at their
6 subcommittee meeting and get ideas. And then,
7 again, like the first panel, filter the ideas
8 together, prioritize them and come back and say
9 here's some ideas we thought of that we think we
10 ought to look at, just like we're brainstorming
11 today with ideas.

12 And then the third one could be the
13 broader brush, so we have the data, we have the
14 military justice, you know, sort of the court-
15 martial thing, and now we have the other stuff,
16 command training, the things that affect the
17 military justice process, that affect whether
18 we're getting reports that are restricted or
19 unrestricted, whether the process has the right
20 kind of training so when the members show up they
21 don't say as people have heard in the past oh,
22 one drink and you can't consent, you know, which

1 may be a good thing in training, but it's not a
2 good thing at a court-martial.

3 So, you know, that could be the
4 broader that looks at related issues, reprisal,
5 you know, or retaliation. And again, they would
6 sit down, think of those issues, talk to whoever
7 they wanted to talk to, and come back and brief
8 us. And if we did that, then we'd have three
9 different focuses. I mean, this is just an idea.
10 You have three different focuses that are going
11 forward that are trying to cover the waterfront.
12 They're trying to identify issues, think about
13 them a little bit, prioritize them, and then help
14 lead us in the discussion so that -- and I agree
15 with whoever said, you know, next meeting we
16 probably ought to spend a lot of time just
17 ourselves figuring out what we're doing. But it
18 would give us a way to focus. That's it.

19 DEAN HARRISON: I agree with everything
20 I've heard. I would like to second Judge
21 Brisbois' idea about looking more closely at
22 whatever data we could get. I've just got some

1 questions, lingering questions, and I'm not sure
2 what subcommittee they would go to. For example,
3 I believe that it's not a one-size fits all.
4 We've got five different Services, you know,
5 different ways of doing things, tiny commands to
6 huge commands. And I'd like to know, for example,
7 some of the characteristics, if there are any
8 things in common. For example, is a victim
9 someone who's most likely to be on her first tour
10 in the military? Is an accused somebody who's
11 most likely to be on her first tour or more
12 senior? Is somebody at a training command most
13 likely to be victimized? Those are things that
14 would be helpful to me. I'd like to know if the
15 race of the victim or the perpetrator has any
16 impact on the outcome, either charging decisions
17 or the sentences?

18 That would -- I don't know why that
19 would be helpful, but I think that's something
20 that I would like to know about. I like the idea
21 of subcommittees because I do think that's going
22 to multiply our ability to get to --- down the

1 line, somewhat.

2 CHAIR BASHFORD: I also think that they
3 would be interested in how much happens when
4 somebody is deployed versus at home.

5 DEAN HARRISON: Or isolated commands,
6 even. You know, maybe Minot, North Dakota is not
7 the most conducive place in the world to mental
8 health, I don't know.

9 MR. KRAMER: Related to what you said,
10 I'd like to know if there's installations where
11 there's much higher prevalence, and maybe places
12 where there's a higher number of sexual assault
13 cases than other locations.

14 CMSAF MCKINLEY: I think you'll find
15 that's true.

16 MR. KRAMER: Yes, but I would like to
17 know where, and that would be something I think
18 we would want to know why.

19 CHAIR BASHFORD: Didn't Japan, bases in
20 Japan kind of kick this whole thing off a few
21 years ago, or something?

22 CMSAF MCKINLEY: Well, that had to do

1 with our Marine -- some Marine rape cases with
2 the Okinawans there and so you have very, very
3 bad stuff.

4 MR. KRAMER: That was citizens,
5 Japanese citizens.

6 CMSAF MCKINLEY: Yes, Japanese --
7 Okinawan citizens, yes. And they're basically to
8 the point where they're telling the Marines to
9 get off the island, you know. So yes, we have
10 some different locations. A lot of times it's
11 based upon the leadership, the local community,
12 and things to do on and off duty, you know.
13 Locale has a lot to do with a lot of things.

14 CHAIR BASHFORD: I do like Schwenk's
15 idea of divvying it up that way because I think
16 the data gives you some many opportunities to
17 look into the where, the who, the how because if
18 we just have the data presented to us at these
19 meetings, we're not going to have a chance to
20 really understand it and see where it needs to be
21 fleshed out more. And I thought the broad one
22 about sort of the procedures themselves was also

1 very good and then the, the sort of the catchall
2 which is like what are the impediments? And I
3 think like the retaliation, is that an impediment
4 to report -- it may be an impediment to going
5 forward, but it also very well might be an
6 impediment to deciding to go forward in the first
7 place when you see what's happened with your
8 colleagues.

9 And one other thing I saw that
10 somebody mentioned, but I don't think it's been
11 really tracked is what happens to the people
12 afterwards, the people that report? What's their
13 length of service? Do they continue to get
14 promoted? Do they decide to sever their ties?
15 Like how long term effect does this have?

16 CMSAF MCKINLEY: Yes, you know, and
17 that's a great point because there are
18 consequences, you know. And so you don't -- I
19 don't think that's really been studied, a victim
20 of what the long term promotion effect on that
21 person is, you know. You know, how long does that
22 linger? I mean, I don't think they ever get over

1 it, you know, so I don't think it's been studied.

2 Another thing I would like to, of
3 course, to look at, I think Staff is doing a
4 wonderful job but I would like the read-aheads
5 earlier so that we have time to do the read-
6 aheads. Me, personally, I think coming here for
7 one day is too short. To come in here and then
8 basically the moment you arrive you're getting
9 ready to leave, because we could have had some
10 more Q&A going on and got some good stuff out
11 here. So I think one day is kind of too short,
12 maybe a day and a half, and then give us time to
13 get out of town on the second day, something that
14 we should -- that's my recommendation.

15 CHAIR BASHFORD: I agree. I felt that
16 we had some very productive questioning going on
17 without enough time to do it, which we're
18 supposed to be in the public part now, aren't we?

19 CAPTAIN TIDESWELL: Not until 5:00.

20 CHAIR BASHFORD: Oh, sorry.

21 CAPTAIN TIDESWELL: And there's been no
22 request for public comment.

1 CHAIR BASHFORD: Oh, okay.

2 SGT. MARKEY: So I just wanted to make
3 a couple of comments. I'll try to be done by 5.

4 (Laughter)

5 SGT. MARKEY: I'm still-- and maybe we
6 can get clarification on the edict of the
7 committee, and the wording of review cases and
8 give advice. And maybe we can go back to whoever
9 wrote those comments and say this is what we
10 think it means, but you wrote it. What was your
11 intent for this committee?

12 I know by the diversity of the
13 committee that -- and this is, again, my opinion,
14 that I believe that part of it is to provide a
15 different set of lenses to look at what is
16 occurring within the military. And you made the
17 comment about an organization looking at itself
18 as an organization, or IBM would investigate
19 themselves for fraud or something. And I'm not
20 saying right or wrong, but that does have some
21 inherent biases and issues that might be present.

22 I heard some things, I want to hear

1 some more things. I heard some things today that
2 I thought were really critical, very important,
3 raised my thought process as to the why question.
4 And so I don't know if we -- you know, when I
5 think of case review, I'm thinking from my lens
6 as investigator, as investigative case review.
7 And are there things that we are being successful
8 in our investigations that are working, and are
9 there some things that we maybe should consider
10 from the outside civilian world that would help
11 support what we're trying to do in our mission.
12 You know, and specifically it's, you know, like
13 victims that are dropping out. Is it something
14 we're doing in this investigative process that's
15 pushing the victims to drop out? Should we look
16 at that?

17 Unavailability, is it something we're
18 doing within the investigative process? And I
19 meant to say, I love the colors on those first
20 slides, but I look at the big red box, and in the
21 big red box was investigations. That was the
22 first step from the victim reporting, and

1 everything else was downstream from that. And I
2 know that DoD has done several reports through
3 their IG office looking at the investigative
4 process, and so I don't want there to be audit or
5 inspection fatigue, like we're going to do
6 another audit, do another inspection. But I think
7 we have an opportunity, and I'm not military. My
8 grandfather and my father were, but I think we
9 have an opportunity from the civilian side, are
10 there practices within the civilian world that we
11 could look at and possibly apply within the
12 military world, and it might not work.

13 One of the things that they talked
14 about relationships between the JAGs, and I
15 apologize, I don't know all those acronyms, but
16 between the attorneys and the investigators. And
17 when they say that attorneys are rotated every 18
18 to 24 months, how can you build a relationship
19 between investigators and prosecutors when you
20 know your case might not even -- you may have
21 started with one and you're going to finish with
22 two other prosecutors. And I think -- and I know

1 it's inherent in the military that that's what
2 happens. Right? So is that something we need to
3 look at? Is that something that could be changed
4 in the military where you would -- I can tell you
5 my thoughts. If I had a new prosecutor every 18
6 to 24 months, I wouldn't even be in that unit. I
7 would say this is not worthwhile. This is
8 frustrating. And it was frustrating at times.

9 I can tell you it takes two years, and
10 we talked about how many hours it takes to become
11 an expert. It takes you a solid two years just to
12 know where the door to the sexual assault unit
13 office was, and I know I simplified that, but
14 that's what was occurring in my unit. And so if I
15 saw a turnover every 18 to 24 months, we would
16 have definitely had gaps and we'd definitely have
17 issues that were created just by that factor. So
18 I see a lot of things that -- my thought is what
19 can we bring -- and I still -- your paper or
20 whatever you want to call it that you wrote, that
21 was brilliant. I loved it. It was very detailed,
22 a lot of good information, and I really believe

1 that those numbers are there. So do we really
2 need to capture more numbers, or do we need to
3 look behind the numbers and say like somebody had
4 mentioned, you know, why are these numbers there?
5 Why are victims dropping out? Why is there a low
6 prosecution and conviction rate? Is it because of
7 the process, is it because the practices -- maybe
8 we can improve the practice, maybe we can improve
9 the training, those types of things that I'm
10 thinking about. But I really want to know what is
11 a case -- what are we supposed to do with case
12 review and advice? And I don't know can we get --
13 can we ask a question, push it back upstream and
14 ask those questions or not about clarification?

15 MS. TOKASH: Can we get the people in
16 who tried these -- who investigated these cases
17 that the data is from, from 2015 and ask them? I
18 mean, we could ask the prosecutor, do you feel
19 like you didn't have enough experience? We could
20 ask a defense counsel, do you -- what happened?
21 How are the motions filed? You could ask the
22 investigator what -- why did you unfound this

1 case? Help us understand --

2 CHAIR BASHFORD: That would best be
3 done, I think, at a subcommittee --

4 HON. BRISBOIS: I think what Mr. Markey
5 is saying is can we get the legislation authors
6 and ---

7 (Simultaneous speaking.)

8 SGT. MARKEY: Yes, those are the ones -
9 - and the other thing I would add is, I would
10 love to hear from the MCIO in all three branches,
11 because we heard testimony that it's not --
12 doesn't appear to be being done in a
13 standardized and consistent way across the
14 military, or across the different branches. And I
15 think it reflects in some of the data, but I am
16 just curious about the investigative process. And
17 for me to talk to -- want to be able to provide
18 any sort of support and advice, I'd like to hear
19 about the investigative process. And I know I
20 talked about site, they talked about site visits.
21 And I think that's really important, too, to try
22 to get unfiltered information and data from

1 people who are in the trenches that are actually
2 doing the work, as well.

3 CHAIR BASHFORD: One thing we really
4 didn't hear about except one brief reference to
5 the Special Victims Counsel is case load. They
6 said they had 20 to 25. I don't have any sense of
7 how many cases the prosecutors have, how many
8 cases the defense has, how many cases the
9 investigators have. I mean, it could be
10 completely appropriate, or it could be --

11 SGT. MARKEY: Yes, that's a great
12 question.

13 CHAIR BASHFORD: -- wildly inadequate -
14 --

15 (Simultaneous speaking.)

16 CMSAF MCKINLEY: --- sometimes it's
17 very difficult to get a defense lawyer. You've
18 got to get a defense lawyer who's out of state,
19 you know, and that's a problem sometimes.

20 CHAIR BASHFORD: That would be one
21 thing we should get our hands around. And I know
22 JPP has been doing the -- has issued -- either

1 the subcommittee has issued a report, or they're
2 about to issue a report on defense resources.

3 Right?

4 CAPTAIN TIDESWELL: Yes, ma'am. It was
5 just issued this week.

6 CHAIR BASHFORD: Yes, but I'm not sure
7 how much in depth it has gone, but we'll have to
8 take a look at it. And just following up on one
9 other thing. Some of the -- there were things
10 that they recommended, various panels have
11 recommended that have not been enacted. There's
12 also been things that have been enacted very
13 recently, so it might even be too soon to tell
14 what the effect is. That might be some of the
15 stuff where a longer, even if we lost a year, we
16 still have a pretty good chunk of time.

17 DR. SPOHN: I have a question. Are
18 there written protocols for investigation, and
19 prosecution, and defense of sexual assaults?

20 CMSAF MCKINLEY: Where? Within the
21 military?

22 DR. SPOHN: Within the military.

1 CMSAF MCKINLEY: I would not know.

2 CHAIR BASHFORD: We would have to ask,
3 but I'm sure there's some sort of protocols,
4 training materials, and --

5 DR. SPOHN: We can see, if there are
6 protocols, if we can see those.

7 CHAIR BASHFORD: For people who have
8 done cold case investigations, some cold case
9 teams have protocols, some don't. I suspect it
10 might be the same.

11 MG ANDERSON: I thought Colonel
12 Kennebeck said that it was within the Service
13 regulations, so that should be easy for us to
14 get.

15 CAPTAIN TIDESWELL: What we can do,
16 ma'am, is we can draft a Request for Information
17 for you that you would sign off and it would be
18 then reported to the Services.

19 CHAIR BASHFORD: Do we want to make --
20 what are people's thoughts? Are we going to stab
21 at trying to initiate the subcommittees? Do we
22 need to wait the three months? Do we want to

1 start thinking of people who might from outside
2 be good in a particular area and forward those
3 names on? Thoughts?

4 CAPTAIN TIDESWELL: It was my
5 impression from Ms. Crowley that it would
6 probably take less time if you all did not ask
7 for outside help but just --

8 CHAIR BASHFORD: Right.

9 BG SCHWENK: At least initially. You
10 know, just start internally, divide ourselves up
11 and then each subcommittee can say man, we could
12 really use a whatever, and then they can make the
13 request through us for Tammy to go to DoD.

14 CHAIR BASHFORD: I just want to make
15 sure, you can add members to a subcommittee
16 later.

17 CAPTAIN TIDESWELL: With permission, I
18 believe so.

19 CHAIR BASHFORD: Yes, with permission.

20 BG SCHWENK: Yes, they have a lot of
21 authority --

22 CAPTAIN TIDESWELL: Or you could also

1 just bring them on as a consultant --

2 CHAIR BASHFORD: We could --

3 CAPTAIN TIDESWELL: -- rather than a
4 member.

5 CHAIR BASHFORD: Well, we've got 25
6 minutes.

7 CMSAF MCKINLEY: I think it's pretty
8 important to kind of get an idea of what is our
9 objective when we meet in July.

10 CHAIR BASHFORD: Personally, I would
11 love if we could have had some smaller groups
12 that have had -- are able to if not personally
13 meet, talk, get a sense of what they need so that
14 we don't have the same discussion in July.

15 MS. GARVIN: Do we think a subcommittee
16 could be formed in a timely fashion before July,
17 or do we need to be thinking about preparatory
18 work?

19 CAPTAIN TIDESWELL: One option, ma'am,
20 would be is to get the cooperation of the General
21 Counsel, once the subcommittees are set, we could
22 then hold telephone conferences in a small group.

1 BG SCHWENK: You know, so if we have
2 subcommittees and whatever we decide they're
3 going to be, and we get them approved; in the
4 meantime, we certainly can have the Staff, ask
5 the Staff to go ahead and go through gathering
6 issues that have either been addressed and no
7 action was taken, or partially taken, the
8 questions that we've raised ourselves that are in
9 other things. I think the JPP is going to have a
10 number of things they're going to say -- and we
11 don't have time, but somebody ought to look at
12 this as being the somebody, you know.

13 (Simultaneous speaking.)

14 BG SCHWENK: And those -- list those
15 things so that even if between now and July we
16 have only one subcommittee meeting, you know, if
17 it takes forever for them to approve it, at least
18 when we come in July we can see this list We'll
19 have seen it ahead of time, each of us can have
20 our own views on what we ought to prioritize and
21 get on first, and what other -- there won't be
22 any issues probably we'll take off it. It's just

1 a matter of which ones are we going to try to get
2 done this year for the next March report, and
3 which ones wait, you know, follow on. And have a
4 robust discussion about that, and that'll
5 generate other issues.

6 It may well be that we decide we need
7 an MCIO panel. We have a whole list of issues on
8 the NCIS, and OSI, and CID, and we've love to
9 have them come in and talk to us, and they're
10 always great about coming in. And they send
11 pretty senior guys, people in here. And, you
12 know, we could do that, so that would -- at least
13 we'd have something to drive to that's
14 substantive, that gets us, you know, moving in
15 July, even if there's a delay in the
16 subcommittees.

17 And if we go to a day and half, I
18 don't know how everybody feels but I don't care,
19 but if we go to a day and a half, we could even
20 ask to have an MCIO panel, because if we divide
21 the work up similarly to what I suggested, then
22 that one panel, the middle panel is going to be

1 talking about investigations, and prosecution,
2 defense, and all that, and it would be a good
3 chance for them and everybody else to review on
4 how they do it, how similar their practices are,
5 how detailed their guidance is on here's what you
6 need to do in a sexual assault case, because we
7 know -- and they can tell us what schools they go
8 to. Maybe we can get copy of the syllabus or at
9 least a review of what the syllabus is that they
10 teach, and it would inform all of us a lot.

11 MG ANDERSON: And also along the lines
12 of what Chief McKinley was talking -- I agree
13 with you that the training I think is an issue we
14 need to look at for all levels of command,
15 because you start with the Captain who's got a
16 couple platoons in the Army model but they're
17 going to -- they may have to deal with sexual
18 assault in their unit, and what kind of training
19 are they getting? Then with their First Sergeant
20 to be able to properly handle the victim and the
21 accused in the whole process. I submit to
22 everybody here, it's probably about an hour,

1 maybe two. And we spend, we spend a lot of time
2 in our units training up the SARCs. I mean, they
3 go to a pretty, a fairly long course, I think.
4 But then you give a very small sliver of time to
5 the command team, and I don't think that's fair
6 to the command team or to the accused or the
7 victim. So they've given an RFI to get that
8 information, as well, from each of the services,
9 as to what -- at each command level what kind of
10 training are you providing for your command
11 teams?

12 CMSAF MCKINLEY: I would venture to say
13 if our command teams across all branches were
14 better trained on how to deal with these
15 situations, you'd probably have a higher
16 conviction rate because the victims are willing
17 to stay in the game and go to court, and
18 everything else, and you've have less of them
19 saying I'm out of here.

20 MR. KRAMER: Which also might lead to a
21 lower incidence of sexual assault in the first
22 place.

1 CMSAF MCKINLEY: Right. But, you know,
2 having the leadership team in a unit no matter
3 what branch of service, that's committed and well
4 trained, and the people know it and they can see
5 it, is a great benefit.

6 CHAIR BASHFORD: Captain Tideswell,
7 following up on the idea that perhaps we could
8 meet for a day and a half --

9 CAPTAIN TIDESWELL: Yes, ma'am.

10 CHAIR BASHFORD: -- going forward,
11 since we're only meeting quarterly, would that be
12 an option?

13 CAPTAIN TIDESWELL: That's an option;
14 yes, ma'am.

15 CHAIR BASHFORD: And it would cost
16 extra hotel.

17 CAPTAIN TIDESWELL: Yes, ma'am, but
18 we're fine budget-wise.

19 CHAIR BASHFORD: Are there people who
20 would be -- with the option that everybody's
21 here, are people -- would people be interested in
22 that, available for that? I think it would be

1 very helpful. Anybody who thinks that's a
2 terrible idea?

3 BG SCHWENK: Well, it depends whether
4 Jan's catering her dinner or not.

5 (Laughter)

6 CAPTAIN TIDESWELL: So, ma'am, I would
7 just sort of put that in context for you all
8 because I know you're all very, very busy people.
9 So now as we potentially split up into
10 subcommittees that would now be a certain number
11 of hours in addition to what we're already asking
12 you to do, so you just -- just so you have those
13 variables.

14 DR. SPOHN: If we met for a day and a
15 half, the subcommittees could meet for at least a
16 part of that time.

17 MS. SMITH: Yes, they can.

18 DR. SPOHN: In addition to -- we have
19 conference calls, webinars.

20 BG SCHWENK: Right. Yes.

21 DR. SPOHN: So, I liked your idea about
22 a data committee, data on the existence and the

1 adequacy of data on the --

2 BG SCHWENK: Great.

3 DR. SPOHN: -- systems, the adequacy of
4 data.

5 BG SCHWENK: And the issues that that
6 committee spots that we ought to ask questions
7 about. I mean, to the Dean's issue about race,
8 why would we care about it? I think the military,
9 at least, always cares about race to makes sure
10 that the numbers don't show us we may have a
11 problem. I mean, no one -- we hope we don't see,
12 but if you see, you know, some imbalance of
13 male/female, you know, we haven't had an 0-7
14 selected in the Navy in six years that's female.
15 Well, is that because for seven years we had
16 incompetent females make 0-6, or what is going
17 on? It's an indicator, go ask questions. And so I
18 think having data like that gives you something
19 to look at to make sure there's not a consistent
20 trend that's potentially problematic.

21 DEAN HARRISON: I agree with that.

22 SGT. MARKEY: Well, I think very

1 strongly that we can also pull out information
2 about what the military is doing correctly in
3 this area, as well. And as part of the TAC, I
4 feel very strongly as a committee that we should
5 be able to provide help and support for --
6 whether it's resources, case load, or other
7 things that we feel or we see that, you know,
8 you're doing a good job. Here's some areas that
9 we believe if you just maybe move some resources
10 here or worked in this area a little bit more,
11 that the response would be dramatically improved.
12 So I feel very strongly that, you know, I think
13 we should highlight the good things, as well,
14 because I think we are some good practices that
15 honestly in the civilian world I wish we were
16 doing. And I think that would be important to
17 pull that out, as well. At the same time say hey,
18 I don't know if you would call them
19 recommendations or whatever you want to call it
20 but, you know, they're doing a good job. They
21 just need some help, and here are some things we
22 would like you to decide to look at to help

1 create a better response.

2 DEAN HARRISON: In terms of responses,
3 and this is probably something that is most
4 appropriate for subcommittees. We heard from some
5 excellent lawyers this morning, but we also heard
6 that a lot of the decision points -- that the
7 most important decision point is being made by a
8 Convening Authority, the Commanding Officer, and
9 various levels of Commanding Officers along the
10 way, and I'd just like to know -- I mean, I think
11 like a lawyer, but I'd like to know, if I was
12 thinking like a career officer, and I come into
13 the office in the morning and there is a report
14 of a sexual assault under my command. Do I have
15 any reaction other than, we need to investigate
16 this and mete out justice? Am I, for example,
17 asking, what is this going to do to my next
18 promotional opportunity? I mean, I may not be
19 saying that consciously, but what -- how does the
20 decision-making process of the Commanding Officer
21 along the way get influenced by things other than
22 protecting the victim and finding the truth of

1 the allegations?

2 CHAIR BASHFORD: Although, it did sound
3 in practice as though for the most part the
4 Commanding Officer was going along with the
5 recommendations.

6 DEAN HARRISON: Well, right now we have
7 a system where if you decide not to prosecute, it
8 goes up and your decision gets reviewed with a
9 great deal of scrutiny.

10 BG SCHWENK: Gee, you think that gives
11 somebody the impression that there's a right
12 answer?

13 (Laughter)

14 BG SCHWENK: No. It's an independent
15 professional judgment of the case.

16 CHAIR BASHFORD: Well, I'd like to get
17 the sense, do we think it would be appropriate
18 now to set up -- request for. We can't just set
19 it up ourselves, an initial subcommittee involved
20 with data analytics and data gathering, because
21 everything else stems from the data that yes, we
22 have. What more do we need? What can we do with

1 subcommittee of one.

2 CHAIR BASHFORD: No.

3 BG SCHWENK: Okay, so --

4 CHAIR BASHFORD: Judge Brisbois, would
5 you be interested in that?

6 HON. BRISBOIS: I don't have the skill
7 set for data analyst, so --

8 CHAIR BASHFORD: I think only Dr. Spohn
9 does.

10 HON. BRISBOIS: You know, I need to --
11 quite frankly, my docket is such that I need to
12 know what the subcommittees are, and what --
13 before I can tell you which one I might be able
14 to contribute the time to. You know, going to
15 days and a half might be problematic for me as
16 well, but that's just one person out of sixteen,
17 so. I think from a -- I'll go back to what I said
18 at the beginning, because subcommittees are
19 inevitable. That's the only way of --- in between
20 every three months that we're going to get
21 anything done. I understand that, and I agree
22 with that. I still think that 50 minutes for

1 strategic planning is woefully inadequate, and
2 that July should be dedicated almost entirely to
3 strategic planning. And by the end of that, the
4 other two subcommittees ought to be fairly well
5 fleshed out, as well. The data one is the one
6 that right now lends itself to starting the
7 process, because that's clearly defined. But I
8 would urge against starting the process within
9 the Oversight Committee, so at this point go
10 after a full day of strategic planning.

11 DR. SPOHN: Another person who is not
12 here and I wouldn't want to speak for her, but
13 Jennifer Long I think would be a good person on
14 that data committee, as well. She's working with
15 the Urban Institute on developing performance
16 measures for prosecutors, and they have like a
17 200-page document on how prosecutors can better
18 measure their performance that goes beyond
19 conventional grades. So she's somebody who has
20 thought a lot about these issues, and ---

21 CHAIR BASHFORD: We should volunteer
22 everybody who's not here.

1 (Laughter.)

2 BG SCHWENK: I'm happy to help, if you
3 don't mind having me.

4 DR. SPOHN: Of course.

5 CAPTAIN TIDESWELL: Ms. Bashford,
6 perhaps you might be better served since not
7 everybody is here, maybe if we come up with
8 perhaps the titles or what we think the three
9 subcommittees might want to do, and then
10 administratively the Staff could send out an
11 email to see who volunteers. Would that be
12 helpful?

13 CHAIR BASHFORD: I think the thought is
14 right now to set up just --

15 CAPTAIN TIDESWELL: Just data.

16 CHAIR BASHFORD: Just the data.

17 CAPTAIN TIDESWELL: Okay.

18 CHAIR BASHFORD: We'd like something
19 like data analytics, data gathering. But I think
20 seeing people who aren't here, if they're
21 interested it would be good, as well.

22 CAPTAIN TIDESWELL: Yes, ma'am.

1 CHAIR BASHFORD: And then you can
2 communicate with them about that.

3 CAPTAIN TIDESWELL: I'm allowed to.
4 Yes, ma'am.

5 CHAIR BASHFORD: Okay. But that would
6 give us three. That's a good start.

7 BG SCHWENK: Sure, if our third person
8 says okay.

9 CHAIR BASHFORD: That's progress.

10 CAPTAIN TIDESWELL: Yes, ma'am.

11 CHAIR BASHFORD: Along the way there
12 are many suggestions about perhaps the Staff
13 could do this or perhaps the Staff could do that.
14 Were there things that you took down as something
15 to do?

16 BG SCHWENK: Yes, identify the issues.

17 CAPTAIN TIDESWELL: Yes, absolutely, is
18 really identify the issues and if you all want to
19 strategize in July --

20 BG SCHWENK: It gives you a chance --

21 CAPTAIN TIDESWELL: -- we'll give you
22 an outline of just things to think about.

1 BG SCHWENK: Gives you a chance to
2 decide how to pot them, you know, what pot for
3 what.

4 CAPTAIN TIDESWELL: Yes, sir.

5 BG SCHWENK: What are the issues?

6 CAPTAIN TIDESWELL: Yes.

7 BG SCHWENK: And then that gives us
8 something to start with.

9 CHAIR BASHFORD: And doesn't the JPP
10 have some more reports coming out shortly?

11 CAPTAIN TIDESWELL: Yes, ma'am. I
12 anticipate at least four more. Yes, there was a
13 data report that's pending. They received
14 testimony and Dr. Spohn was kind enough to
15 present that. There's a report on military sexual
16 assault investigations that the subcommittee has
17 already briefed out. There's a report they're
18 working on that deals with victim's appellate
19 rights, so the Article 6(b), and I know there was
20 some discussion about right now, the response and
21 they'll have a recommendation probably on that. I
22 know there will at least be a final report.

1 BG SCHWENK: Well, there's the
2 subcommittee report that's coming out --

3 (Simultaneous speaking.)

4 BG SCHWENK: They've got several issues
5 in it. Most of them say refer to the next
6 advisory committee.

7 SGT. MARKEY: And, Chairman Bashford, I
8 would just say that obviously my wheel house is
9 investigations, and if there's a subcommittee
10 that could look at that process and identify
11 performance indicators, and get a definition of
12 case review or reviewing cases, I'd be more than
13 happy to start to develop that, and coordinate
14 that.

15 CHAIR BASHFORD: Kathleen Cannon in her
16 letter also indicated that she was very
17 interested in looking at, you know, what staffing
18 resources and impediments to defense would be. I
19 do think it's important to cross pollinate so I
20 would not just want people who specialize in
21 defense to do defense, you know, because Meghan
22 and I, you know it's important to have a variety

1 of people looking at that.

2 SGT. MARKEY: Diversity.

3 BG SCHWENK: What if -- I mean, we're
4 going to have to look at investigation sooner or
5 later. What if we asked for two subcommittees and
6 have one be an investigation subcommittee that we
7 can change later on, and that allows the two --
8 or not investigations but case review. We've got
9 to do case review in some way. We have to do a
10 case review, whether we have the Staff do it and
11 brief us, or whether we -- but if we had a
12 subcommittee that was case review, it's easy to
13 sell because that's what the statute tells us to
14 do. So we could have data analytics, we could
15 have case review, and we'd have a chairman for
16 the case review, and Cannon can be on there, and
17 maybe somebody else, and that way at least that
18 would be stood up. And we know we have to do it
19 so that's sort of an inevitable one.

20 HON. BRISBOIS: But the definition of
21 case review is one of the strategic planning
22 things that --

1 BG SCHWENK: Well, but getting the
2 administrative part done so we have the
3 committee, then let the committee come back to us
4 if they're done in time to do it with ideas for
5 how they should work, we then pass judgment in
6 July.

7 HON. BRISBOIS: But to staff up or to
8 get promulgated a subcommittee you've got to be
9 able to define the purpose and goal, and until we
10 know what case review means, we can't say what
11 the purpose --

12 SGT. MARKEY: Are we going to be able
13 to define that more succinctly?

14 CAPTAIN TIDESWELL: No, sir, I don't
15 believe we are.

16 (Simultaneous speaking.)

17 SGT. MARKEY: So we're going to define
18 that.

19 CAPTAIN TIDESWELL: Yes.

20 SGT. MARKEY: All right. If you've got
21 a flip chart, let's go.

22 BG SCHWENK: So all we say is we're

1 tasked by statute to conduct the case reviews. We
2 need a subcommittee to do the initial case
3 review, so that they can brief the full Committee
4 on issues identified during the case review for
5 the full Committee to, you know, consider it and
6 reach a decision. And nobody -- I don't think
7 anybody in the General Counsel's office or the
8 Committee Management Office is going to looking
9 for and exactly how are they going to do it? And
10 what -- they're going to ask for the broad
11 parameter of what is this subcommittee for, and
12 is it related to the mission of the Committee?
13 And clearly this is, and I don't think there will
14 be any problem getting it approved.

15 CAPTAIN TIDESWELL: The more broadly
16 you define the subcommittee, the more flexibility
17 you'll have.

18 BG SCHWENK: Right.

19 MS. TOKASH: Can I offer another
20 perspective, that maybe we as a Committee should
21 do the case review, and that will identify issues
22 to develop the subcommittees? I mean, I get the

1 data part but maybe if we dig deep into the
2 review of the cases that will help us mete out
3 what the issues are to look into for
4 recommendations.

5 BG SCHWENK: Sure, and just because we
6 have a subcommittee that has that as an issue to
7 identify, you know, things they'd find out for us
8 to consider, doesn't mean any of us couldn't say
9 I'd like to come in a half day early and go
10 through, you know, case records that they already
11 have gathered or that Staff has gathered. I mean,
12 I think for those of us that want do that, that's
13 a great thing because it does help inform you as
14 we go forward. But my experience is when 16
15 people sit down and try to drive stuff you end up
16 with a long discussion and not a lot of end
17 result, but if some smaller group can come in
18 weigh it out, it's easier to grapple with the
19 issues.

20 CHAIR BASHFORD: We've agreed to set up
21 one subcommittee so far. Right?

22 BG SCHWENK: Yes.

1 CHAIR BASHFORD: Which is the data
2 gathering, data analytics to --- five minutes --
3 to support the work of the members as a whole,
4 and provide other venues for research or
5 something like that. Right? And now the proposal
6 is to at least get ahead of the curve and try to
7 set up one more for --

8 BG SCHWENK: Case review.

9 CHAIR BASHFORD: -- case review, that
10 would enable us to intelligently advise on how
11 well the investigation, prosecution, and defense
12 of cases is going. Right?

13 BG SCHWENK: On the issues identified
14 through the case review to improve the process,
15 you know, prosecution, investigation --
16 investigation, prosecution, and defense of sexual
17 assault cases. I mean, I think -- why else are we
18 supposed to look at case reviews, but to see if
19 there are ways we can't think of that might
20 improve the process? So that's all we write up,
21 that's what we want the subcommittee to do. So if
22 we don't want to do the subcommittee right now,

1 that's fine, but it seems to me sooner or later
2 we're going to have to do it.

3 CMSAF MCKINLEY: I think, of course, we
4 need to look at case reviews, but I agree with
5 him that, you know, we need to look at a
6 strategic plan to determine how many cases do we
7 plan on reviewing, what type of -- what case are
8 they, what branch of service, how many are we
9 going to review? And come up with a plan how
10 we're going to attack this.

11 BG SCHWENK: And who's going to come up
12 with those ideas for us? That's what the
13 subcommittee --

14 HON. BRISBOIS: That's the subcommittee
15 review.

16 BG SCHWENK: -- between now and July.
17 So they come in in July and say we've actually
18 thought about this, and here is what we think.
19 And then we debate.

20 HON. BRISBOIS: This committee as a
21 whole has to define what does case review mean.

22 BG SCHWENK: Exactly.

1 HON. BRISBOIS: Yes, we --

2 BG SCHWENK: I agree.

3 HON. BRISBOIS: But until we define it,
4 you can't give it to the subcommittee to define
5 for us.

6 BG SCHWENK: You can give it to the sub
7 -- that's what subcommittees -- subcommittees
8 can't make any decisions. Remember that.
9 Subcommittees make no decisions. All they do is
10 dig into an issue and give us a briefing on what
11 they think we might want to do.

12 HON. BRISBOIS: That is the core
13 fundamental strategic planning decision that this
14 group has to make as a committee of the whole.
15 That's what July needs to be dedicated to along
16 with some additional strategic planning issues,
17 and until that happens we're just kind of
18 throwing stuff up in the air and seeing what
19 sticks. And I don't --

20 BG SCHWENK: So who's going to brief
21 that?

22 HON. BRISBOIS: We don't -- there's --

1 I asked for and received the legislative issue.
2 There is none. Unless you bring the actual
3 authors in to tell us what they think they meant
4 at the time, the case review -- it depends on
5 doing individual case reviews. Are you going to
6 be second guessing the prosecutors and the
7 Convening Authorities, or are you going to be
8 looking at it in a broader system review in terms
9 of, you know, how many are charged out, what are
10 the outcomes? I mean, that's data analytics.

11 We have to decide what that means, and
12 what is -- how is it going to be useful? What do
13 we want to do with it? And then the subcommittee
14 goes to perform the case review and report back.
15 The subcommittee cannot define what case review
16 needs -- the committee as a whole has to do that
17 because that's the fundamental foundational
18 strategic plan that drives everything for the
19 next three and a half years.

20 BG SCHWENK: And we're both agreed. We
21 completely agree. The only thing we disagree on
22 is how we start the committee defining that

1 stuff. I'm suggesting we have a subcommittee come
2 in having thought about it, and give us some
3 ideas to start the discussion. You're suggesting
4 the 16 of us sit down and individually try to
5 come up with all this in the next meeting. I'm
6 trying to make it, in my opinion, a little bit
7 more efficient.

8 CHAIR BASHFORD: While I see the pluses
9 and minuses of both, it's --- let me check this.
10 This is actual time. It's 5:15, so while I think
11 it would be advantageous, I really don't think we
12 have enough time today to make that decision, so
13 I think unless everybody disagrees with me, that
14 we're better off starting one, and then we'll be
15 moving to two. We're at 5:15.

16 CAPTAIN TIDESWELL: And they can -- the
17 agenda for July could the first time block be
18 definition of case review. It's us, it's not a
19 briefing, and we as a committee resolve the
20 issue.

21 CHAIR BASHFORD: Yes. So what I would
22 suggest is everybody in the meantime be an Army

1 of one, and start thinking of what that -- what
2 you think that would look like, or would best
3 look like.

4 (Simultaneous speaking.)

5 CAPTAIN TIDESWELL: Ma'am, so the next
6 meeting I believe is scheduled for the 21st of
7 July. You all would like to be brought in the day
8 before perhaps, for a day and a half, or do we
9 just still want to stick with the one day?

10 HON. BRISBOIS: I'm envisioning no
11 briefings. I think it's an all work day.

12 CAPTAIN TIDESWELL: Yes, sir,
13 understood.

14 HON. BRISBOIS: And so that one day
15 should be sufficient.

16 CAPTAIN TIDESWELL: One day? Yes, sir.

17 CHAIR BASHFORD: But perhaps for the
18 next -- you can find out from the committee
19 members if that would be advantageous or feasible
20 for people to come in --

21 CAPTAIN TIDESWELL: Yes, ma'am.

22 CHAIR BASHFORD: -- a day earlier.

1 MS. TOKASH: And Captain Tideswell, can
2 we submit our ideas to each other through you
3 like ahead of time so we can --

4 CAPTAIN TIDESWELL: I'll defer to the
5 DFO, but we have to avoid any appearance of pre-
6 deliberating, and so perhaps maybe you could just
7 individually send them to me, and I would put
8 them all together. And I will have a read-ahead
9 for the Chief ahead of time, the usual week we've
10 been pacing out here. But if you send them all to
11 me, I will -- we will rack and stack them as a
12 staff ---

13 MR. SULLIVAN: If you send them to
14 Captain Tideswell, you should also send them to
15 Ms. Bashford at the same time. It should go to
16 the Chair at the same time. And then -- and,
17 obviously, just keep in mind that anything
18 distributed in that manner will be made available
19 to the public, so you wouldn't want to have
20 anything that you do not anticipate and want to
21 be in the public's view.

22 MS. TOKASH: Understood.

1 BG SCHWENK: CC to you?

2 MR. SULLIVAN: That's fine.

3 CHAIR BASHFORD: Watch your language.

4 (Laughter.)

5 CHAIR BASHFORD: I want to thank
6 everybody, but it's 5:17, I believe, so we are
7 adjourned.

8 MR. SULLIVAN: And for the record, the
9 meeting is closed.

10 (Whereupon, the proceedings went off
11 the record at 5:18 p.m.)

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In the matter of: Meeting of DAC-IPAD

Before: US DOD

Date: 04-28-17

Place: Arlington, VA

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