UNITED STATES DEPARTMENT OF DEFENSE

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

PUBLIC MEETING

FRIDAY
APRIL 28, 2017

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
CONTENTS

Welcome and Introductions. ........................ 4

Presentation on the Mechanics of a Sexual Assault Case from Reporting to Referral. ............. 7

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

Break. .............................................. 106

Presentation on the Mechanics of a Sexual Assault Case from Reporting to Referral, Continued. .................. 106

The Judicial Proceedings Panel's FY 2015 Sexual Assault Case Adjudication Data Analysis .................... 227

Briefing on Department of Defense Annual Sexual Assault Reporting Data. ............................... 315

Adjourn. ............................................ 407
P-R-O-C-E-E-D-I-N-G-S

10:00 a.m.

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

The second meeting of the Committee is now open.

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

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

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

The Secretary of Defense appointed 16 Members to the Committee, 12 Members are present here today.
The DAC-IPAD was created by provisions in the National Defense Authorization Act for Fiscal Years 2015 and 2016.

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

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

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

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

Followed by a presentation by the Deputy Director of the Department of Defense's
Sexual Assault Prevention and Response Office, or SAPRO, on its sexual assault data collection and policy role within the Department.

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

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

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

He is accompanied by three professors from the Criminal Law Department, Ms. Patricia Sudendorf, a Special Victims' litigation expert, Army Major Kristen Fricchione, a Special Victims' Counsel Course Manager and Marine Corps Major Iain Pedden, Instructor in the Criminal Law Department.
Thank you all for joining us today and we look forward to hearing from you.

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

CHAIR BASHFORD: Good morning.

COLONEL KENNEBECK: Thank you.

CHAIR BASHFORD: You have the com.

(Laughter)

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

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

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

And then, we have a fact pattern that
we can talk about, to talk about the different ways a court-martial is handled from the top to the bottom.

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

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

So, go ahead.

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

My name is Patty Sudendorf, Patty. I come from the Cook County Prosecutor's Office in terms of my background as a prosecutor and have been with the JAG School now for two years.
I've interacted with all of the professors here and part of my learning curve was learning all the acronyms and learning the policies and procedures that were different from the civilian practice.

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

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

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

For all those who are promoted to Major, we continue on in the JAG Corps.
Before that, I was a prosecutor at Fort Drum in New York for about three years. And then, I was also a prosecutor in Germany and a defense counsel in Germany as well, most recently.

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

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

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

My portfolio is evidence. I also teach Sixth Amendment Confrontation, particularly relevant to your discussions here today, I teach the rules with respect to the rape shield
statute, Military Rule of Evidence 412 and also the law of privileges.

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

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

And, thank you very much for hosting us today.

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

CHAIR BASHFORD: We're still trying.

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

CHAIR BASHFORD: Colonel, can you see if your mic is on? I'm not sure if it's actually --
COLONEL KENNEBECK: Yes.

CHAIR BASHFORD: -- turned on.

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

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

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

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

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

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

And, our graduate course, which is
really our flagship enterprise there. We are an ABA accredited school that provides LLM to our very senior Captains or baby Majors, right about the seven year mark for your average JAG will come back to JAG School for one year to get their LLM.

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

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

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

So, I just wanted to give you some idea of how many people go through that building,
who we talk to.

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

Sir?

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

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

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

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

It is a Colonel that's been in the
Army about 20 or 25 years and, you know, commands a unit that's 3,000 to 5,000 soldiers.

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

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

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

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

Did that prompt any comments from -- oh, and, Iain is in charge of our Trial Advocacy
course. This fact pattern that you have today is our Advocate Fact Pattern that we just developed about a year and a half --

MAJOR PEDDEN: Almost two years now.

COLONEL KENNEBECK: Almost two years now.

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

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

Okay --

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

COLONEL KENNEBECK: Oh, oh, good.

Okay, then let's just -- we can go through the slide paper first.

So, as I explained earlier a little bit, we're going to talk about the overview of
the process, the prevention and response strategy
and the multidisciplinary approach to giving care
to victims.

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

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

Okay? That's usually the second time
someone's been in command. So, if you're a
Battalion Commander, you've been a Company
Commander before, you've been a Platoon Leader
before, so it's a decent amount of command
experience. And, it's someone who's been in the
Army about 20 years.
The Brigade level commander in the Army commands 3,000 to 5,000 soldiers. That person has 20 to 25 years of service and has now commanded for the third time.

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

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

And then, the GO, the General Officer who commands that unit is the General Court-Martial Convening Authority. And, it's the GCMCA who has the authority to refer cases to court-martial, general court-martial which your sex
offense must go through, the penetrative sex offenses.

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

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

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

Each Brigade will have a prosecutor.

Some Brigade's will have a Brigade Judge Advocate
as well, a Major who works on the Brigade staff,
but it's usually going to be a Captain
prosecuting the cases out of that Brigade.

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

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

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

So, that Senior Legal Advisor is
responsible ethically for all of those lawyers on
that installation to ensure that they're trained,
to ensure that, you know, they have the right to
fill, the right person in the right job and
replace them if they don't.

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

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

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

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

They give advice to the senior
leadership at the Pentagon.

Article 6 of the UCMJ basically was
built to ensure that commanders talk to their
legal advisors about legal decisions. And then, commanders have the freedom to discuss where a case should or shouldn't go.

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

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

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

And, that discussion, that conversation, is okay. It's protected by Article 6, we want that conversation so that the Senior Legal Advisor and the prosecutor in the case are
on the same page.

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

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

   Did that spawn any questions on that
slide?

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

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

   COLONEL KENNEBECK: It's the Brigade
level.

   CHAIR BASHFORD: The Brigade?

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

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

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

COLONEL KENNEBECK: That's correct.

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

COLONEL KENNEBECK: They do.

Stovepipes are the --

BG SCHWENK: Chain of command?

COLONEL KENNEBECK: -- chain of command. They have Regional Defense Counsel who's a Lieutenant Colonel. He's kind of like the SJA for the Region. And then, it's headquartered in D.C. at the Senior Trial Defense reside in D.C.
BG SCHWENK: How about the SVCs?

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

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

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

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

BG SCHWENK: For SVCs --

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

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

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

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

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

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

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

BG SCHWENK: Okay, thank you.

CAPTAIN TIDESWELL: Sir, in the Navy, it's also stovepipe and we have a different name.
The name is called Victims' Legal Counsel, VLCs.

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

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

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

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

I don't think that they feel fear to say, no Government, I don't want to help you out. No, I don't want to go to trial. Or, your -- my victim, my client, is having problems with the unit that looks like or smells like retaliation. That usually, you know, they're a canary in the mine and it's a fantastic asset to have.

I think that having that connection to
the SJA is beneficial to the system.

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

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

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

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

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

Okay, if there are no questions on that slide, I'll move to the next one.
So, reporting and disposition process, this is the picture I'd like you to have in your mind.

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

Commanders have the authority to dispose of offenses.

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

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

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

That's not true for sex offenses. Okay? It's been withheld up to the Brigade level. And, that's to have someone who's got a
little more maturity, take a look at the facts of
that case and make a decision about that.

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

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

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

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

Restricted means, you don't tell the
command. The investigators don't know, but all
of the caregivers do know. So, your sexual
assault nurse, your Sexual Assault Response Coordinator, your SARC, or your Victim Advocate.

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

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

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

CMSAF MCKINLEY: Sir?

COLONEL KENNEBECK: Yes?

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

COLONEL KENNEBECK: No, no, there's not.
So, if it's five years later, they
want to come back or 20 years later, okay, this
happened to me when I was in and I didn't want to
talk about it, but now I do. We're going to have
that -- the 2910 that we're going to talk about
later will be on file, if they went and reported
quickly after and there's some forensic evidence
to be gathered, that will be on file.

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

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

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

I'm on the fifth slide, I think.

Eventually, backup one, right there,
that's the slide I'm on right now.

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

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

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

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

So, that's how business works in the Army. And, I think that's been a huge help to making sure that we take a look at every single
And then, as soon as CID does open an offense, you're going to have a tracking number. So, on your Abbott case, you're going to see a CID number. Every one of your sex offenses that you see is going to have a tracking number and that helps marry up our data on the annual report which Nate Galbreath will talk to you about later this afternoon.

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

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

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

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

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

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

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

So, that conversation is happening throughout the investigation.

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

Down at the bottom you have your SVC.
So, most of our clients take a Special Victims' Counsel and they start getting the legal advice right away.

So, that is happening while the investigation is happening.

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

This is going to court-martial, and that's what these words are on the right, it can go up to a court-martial or he can forward it to the General and let the General decide or he can dispose of it alternatively with nonjudicial punishment, that's NJP, with an administrative action, which I'll describe here later, it could be something administrative that we do to the Soldier, to no action, maybe no action is
warranted or that Brigade Commander can push it back down and say, hey, Company or Battalion Commander, you can handle this at your level.

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

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

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

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

Any questions on this slide?

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

MAJOR PEDDEN: Sir, I think the only distinction I might draw, and pardon me if you're
going to get to this in a moment, but the disposition determination is not necessarily the same as the form selection.

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

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

COLONEL KENNEBECK: Right.

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

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

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

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

CHAIR BASHFORD: Okay.

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

CMSAF MCKINLEY: So, once the case comes forward and CID gets involved or OSI, I assume there were some things that are automatic for the alleged perpetrator and those are things like probably pull the PRP, probably suspend security clearance, probably ineligible for promotion, probably ineligible for a PCS, probably ineligible for re-enlistment.
So, are there any other -- are those
true and is there anything else that goes with
that?

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

CMSAF MCKINLEY: Personal Reliability
Program procedure.

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

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

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

But, yes, all of those things happen.
Yes?

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

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

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

So, if there's an investigation on the installation that involves a civilian, let's say he's in trouble for other stuff off the installation, that CID will share that information with that law enforcement.
DEAN HARRISON: So, if the convening authority makes a decision not to prosecute, the civilian prosecutor will be notified so they can exercise their discretion as well?

COLONEL KENNEBECK: Yes and vice versa.

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

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

MAJOR FRICCHIONE: Sex-related offenses.

COLONEL KENNEBECK: Sex-related offenses, the broad categorization, can ask that the case be tried in the civilian jurisdiction which requires then communication between the
lawyers and the local prosecutor to decide whether the local prosecution wants to take the case or not.

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

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

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

So, one example where the civilians can't prosecute it is, if the crime happens on a Military installation that has exclusive federal jurisdiction. Then, the local state court can't try that case because they don't have jurisdiction.
HON. GRIMM: When you have concurrent jurisdiction if the state -- if the local prosecutor takes the charge first because there's some other interest, and the result is one that the Military believes is not the proper outcome since they're separate sovereigns, does the Military have the right, if they chose to do so, to bring charges notwithstanding the fact that there was a disposition at court in the civilian community?

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

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

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

If there's been an unsuccessful prosecution off the installation, we're going to take a really good look at it and decide if we
can try it at a court-martial.

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

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

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

COLONEL KENNEBECK: Sir?

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

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

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

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

And, the command will decide, usually early on, if it's a violent offense that we're talking about or there is a chance that the accused might flee, then the Military has the option to put that person in pre-trial confinement or try to restrict them lawfully.
Our problem is, the challenge there is that we don't have a bail. We don't have bond, we don't have other methods of controlling. You're in jail or you're at the unit.

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

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

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

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

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

COLONEL KENNEBECK: Yes.

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

COLONEL KENNEBECK: I would say that the amount of time we spend thinking about how we take care of the victims and accused is private. Because, you know, accused are under a great amount of pressure during the investigation. And, the more senior the person is, the closer they are to 20 years, you know, at least the historical part of this, that might not be as meaningful ten years from now because

But, somebody's close to 20 years, you
know, that person's under a great deal of stress and some of them do commit suicide.

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

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

COLONEL KENNEBECK: Yes.

MS. GARVIN: Is that accurate?

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

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

And so, at those three levels, each
level has a different level of provided services across what we have in our SHARP program which is the acronym for the SAPRO program in the Army. And, then the provision of SVC services.

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

Dependents also have access to SVC services.

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

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

And, dependents will also have access to make those restricted reports as well, which
is really the critical component of SHARP services.

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

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

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

That doesn't mean I don't want to do it, it just means that it will have an impact.

So, typically, I have three Special Victims' Counsel at JBLM, Fort Lewis, that's about, you know, 25,000 soldiers on that installation. And, those three were maxed out.

By the time you end up taking 20 or 25
clients, you don't have enough time. They're
calling a lot of times on the weekends and the
evenings, it's a very taxing job.

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

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

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

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

And then, we do our best to fill the
gaps.

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

BG SCHWENK: And that is?

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

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

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

So, they're not victim advocates,
they're not neutral, they work for the
Government, but they definitely provide a lot of
information and some care and feeding to victims
and witnesses.

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

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

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

MAJOR FRICCHIONE: No, no, sir, not in
the Army. I believe the Marine Corps does
provide their VLCs to special crimes just like
that on a case by case basis. They pick and
choose which cases may deserve a VLC in that instance. But, we do not, it's only sex related offenses in the Army.

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

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

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

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

You can do -- make a decision of no action, take no action, take administrative action, NJP or Article 15, you can forward the charges to a subordinate or a senior commander or you can forward for court-martial.
And, bottom line, you know, for sex offenses, that decision is made by the Brigade level at an O-6 Special Court-Martial Convening Authority, and when the prosecutor sits down with that Colonel or Captain, that O-6 and briefs the case, they're generally going to have all of the information that they need from the investigation and they will have done the math.

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

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

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

The prosecution memo wouldn't be
shared with the commander, it's a work product, but it would be discussed so that the commander has an understanding of why a case should or shouldn't be tried.

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

Next slide?

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

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

You know, commanders now are calling the CID immediately. As soon as the Squad Leader
comes in and says, hey, First Sergeant, somebody told me something happened last Saturday in the barracks. What happened?

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

That's the dialogue that happens at the command level now. They don't waste any time. Get the victim to the SARC, let's call CID, let's start talking about victim care.

Who's the alleged -- who's the bad guy? Is he mine or is he someone else's? Let's find out, you know, and I use the word bad guy, I don't presume innocent.

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

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

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

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

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

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

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

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

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

How's the victim doing? Without
divulging PII, without talking about mental
health care, whether the victim is or isn't
receiving it, it's a description of are they
going to work? Are they -- do they need an
expedited transfer? How, you know, how is the
victim doing?

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

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

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

So, a 4833 is another way of managing
accountability.

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

COLONEL KENNEBECK: No, no, no.

MG ANDERSON: No?
COLONEL KENNEBECK: Oh, yes, yes. I'm sorry, the Battalion commander, the Lieutenant Colonel is supposed to meet monthly with the victim, yes.

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

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

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

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

COLONEL KENNEBECK: Yes, ma'am.

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

COLONEL KENNEBECK: Well, if it's been
carefully filled out, maybe, maybe. And, a lot of times, it will be a very generic description.

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

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

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

DEAN HARRISON: Excuse me, Colonel.

COLONEL KENNEBECK: Yes?

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

COLONEL KENNEBECK: Yes.

DEAN HARRISON: -- for administrative
purposes. Is there anything done for a Military victim to make sure that she or he is not penalized for reporting an allegation of assault?

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

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

MAJOR FRICCHIONE: Sir, yes.

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

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

And so, right now, we do have a number of ways to report retaliation. There is, across
the board, not even just professional reprisal
retaliation, but also social or ostracism from
the victim's peers. So, if they feel like
they're being excluded, that is also included in
retaliation as well.

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

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

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

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

Traditionally, reprisal is then
forwarded to the IG, so the Inspector General
will then look at that allegation and investigate it.

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

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

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

DEAN HARRISON: Thank you.

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

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

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

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

And so, you know, what is retaliation is the first question really. But, I don't think that's the big part of retaliation. I think retaliation is what happens as soon as the unit knows there's been a report and what happens to those friends. That's the thing that I think, as
much control as we can exert over that and we
talk to commanders a lot about that.

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

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

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

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

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

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

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

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

Additionally, the O-5 Battalion level commander who is the commander for the individual who's being retaliated against, will have to come
back with a plan to address it. And now, that's kind of where you get to the informal resolution that Colonel Kennebeck was talking about.

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

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

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

So, promotion to Tech Sergeant would have to take two tests and it's an intensive study period.
Well, they can't study, they can't concentrate. So, therefore, when they go to take the test, they may lose out on that promotion to Tech Sergeant because, you know, they could not focus.

So, that's an unintended consequence there.

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

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

So, therefore, your Board score toward the promotion is not going to be there. You know? And, there's nothing to the Board that says, you know, this happened during this period and this is why.
So, there are some unintended consequences toward promotion on the victim that I don't think there's anything out there right now to really help them out.

Does that make sense?

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

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

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

And, that is a dynamic that's
difficult to manage.

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

(Simultaneous speaking)

COLONEL KENNEBECK: Yes?

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

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

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

   Also, the SVCs collect data on retaliation as well.

   And so, SVCs will be pulled and there's tracking through that program as well as to what retaliation reports are coming in from the field.
COLONEL KENNEBECK: And, IG manages all formal investigations and they're going to track. I think tracking is going to be huge and there's probably going to be more policies forthcoming from the Big Army or Big DoD on what we count, what does count. But, I think those systems about what needs to be tracked and who tracks will be quite fixed and so they're forthcoming. Because the policy's growing quite a bit.

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

MR. SURIAN: DoD SAPRO has them, sir.

SGT MARKEY: SAPRO?

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

SFT. MARKEY: And then -- okay, thank you so much.
CHAIR BASHFORD: Sir, do you mind identifying yourself, sir?

CAPTAIN TIDESWELL: Guy Surian from CID.

SGT. MARKEY: Thank you.

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

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

SGT. MARKEY: Okay.

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

SGT. MARKEY: Okay, thank you.

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

So, last year, there was a DoD Retaliation Prevention Response Strategy that was signed at the DoD level. All the Services coordinated on it, all the Services have a process in play, it's different in each Service. I think that's very important to keep in mind.
So, I can certainly speak to the Air Force. There are different entities from whom retaliation data is collected.

So, there is a process by which retaliation data is collected in the SAPRO world working with the advocate and SARC's and Sexual Assault Response Coordinators.

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

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

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

And so, that data is collected
quarterly. It's then sent up to the Department of Defense and they collate it, collect it and then it will be reported yearly in the annual report.

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

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

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

MR. KRAMER: Sorry. So, what's the
difference between retaliation and reprisal?

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

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

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

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

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

    MAJOR FRICCHIONE: Yes, that would be,
you know, a chain of command, say, a First Sergeant taking action against one of the soldiers within his company.

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

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

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

And, that's where that conversation happens.

BG SCHWENK: So, reprisal sounds like it's a 10 USC 1034 whistleblower applied to sexual assault.
MAJOR FRICCHIONE: Yes, yes, well, yes. So, there's 10 USC 1034 that is the Federal Whistleblower Protection Act, but we also have the Military Whistleblower Protection Act and then we have now the codification of that same language within the new enumerated Article 132 as a punitive --

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

MAJOR FRICCHIONE: Yes.

BG SCHWENK: -- whatever now applied to --

MAJOR FRICCHIONE: Yes, exactly.

BG SCHWENK: Thank you.

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

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

So, on the left side, we see administrative actions, could be an on the spot
correction which is basically making someone do
something better than they're doing it,
corrective training, counseling, you can revoke
their pass, you can bar them from continuing
service.

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

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

All right? And, I wanted to stress
that because, other than honorable discharge is
damning to someone who has Military Service.
It's very difficult to get a job if you admit you
served. You're better off just not admitting you served.

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

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

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

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

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

BG SCHWENK: Is that true in all the Services?

COLONEL KENNEBECK: That's true in all
-- now, that's not required by the Manual for Courts-Martial, that's required by policy of the Services.

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

MAJOR PEDDEN: We do not, sir.

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

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

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

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

MAJOR PEDDEN: Wouldn't express a personal opinion, sir, but I've seen NJP be used afloat and it is remarkably effective.
COLONEL KENNEBECK: It would be nice if it wasn't -- if you weren't able to turn it down. It's a powerful tool, it's a wake up call, but I think it would be good.

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

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

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

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

COLONEL KENNEBECK: Yes?

MS. TOKASH: This is Meghan Tokash speaking.

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

COLONEL KENNEBECK: Yes.

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

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

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

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

(Laughter.)

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

(Laughter.)

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

But I know that the character of the accused is removed all together. The discussion is still in there, the factors are listed in there as well.
I don't know that the Services agree
what the state of proof should be in NJP. I'd be
a fan of something less than beyond a reasonable
doubt.

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

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

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

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

    MAJOR PEDDEN: I'm almost there.

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

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

    So, it's not a real conviction, it's
a paper conviction.
The real court-martial are Special and General. And, in practice, in the Army anyway, we have GCMCA's refer these. We don't generally have Special Court-Martial Convening Authority, those Brigade Commanders don't refer cases to court-martial.

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

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

But, it must be a General Court-Martial.

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

But, in reality, if it's worthy of
going to court-martial, almost always in the Army
now a days, they're going to General Court-
Martial.

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

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

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

Sometimes that's warranted.

Generally, for sex offenses, you know, I don't
think that's a common outcome and I don't think
it's warranted. But, it's an option. And it
gives you that bad paper that I was talking to
you about before, the other than honorable
discharge.
Then, you can see on the bottom right in yellow, those are the discharges that can be adjudged punitively.

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

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

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

B, when applicable, the views of the victim.

C, existence of jurisdiction, that would be important.

D, availability and admissibility of evidence.
E, the willingness of the victim or others to testify.

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

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

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

And, I, appropriateness of authorized punishments.

Those are the factors listed. But, I should point out that this is merely a discussion paragraph accompanying the rule for court-martial.

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

MAJOR PEDDEN: If I might add one thing on that point. As to your question, and particularly with regard to the consideration of
good Military character of the accused and the victim position, you'll note that it's been removed from the discussion in RCM 306.

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

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

MS. TOKASH: Thanks.

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

So, in the civilian world, law enforcement can unfound a case if it's determined to be false or baseless. Is there a similar process? I mean, is that your do nothing or no action, would that be an unfounded, false or baseless case?
COLONEL KENNEBECK: Well, no. So, do nothing is what the commander does after we know whether an offense is false or baseless or whether there's just probable cause or whether there's better evidence than that, what can I prove and to what degree.

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

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

It's not tied to founded or unfounded.

DR. SPOHN: Who makes that decision?

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

So, generally, what happens is, once
the Military Criminal Investigation Organization,
or the MCIO, is close to done with this case or
done with the case, it'll ask the prosecuting
attorney for an opine.

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

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

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

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

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

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

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

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

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

In practice, the difference is, in my
opinion, nonexistent, you know, the same players are having the discussion. The commander wants to know what's happening with the case in the Army just as well as it would in the Marines.

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

BG SCHWENK: The CID stops the founded, unfounded?

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

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

COLONEL KENNEBECK: Yes.

BG SCHWENK: If some of the MCIOs just do the investigation and deliver their report and make themselves available to answer questions and do follow on and don't make any conclusion about
whether there's probable cause or not or founded, they just -- their job is investigating and that's what they do.

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

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

BG SCHWENK: I should say found probable cause.

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

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

BG SCHWENK: So, it's kind of the --
COLONEL KENNEBECK: Yes, there is a difference.

Sir?

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

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

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

Because once they do that, we have a
possible person of sexual assault that's now in
the civilian community without any follow on
records. They are not registered as a sex
offender and basically, the command has just kind
of washed their hands of the subject.

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

COLONEL KENNEBECK: So, I do have
thoughts.

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

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

The possibility for upgrade is
extremely low when they have agreed to take a
Chapter 10 in lieu of court-martial or a Chapter
in lieu court-martial because, you know, that means the person who made the decision made with an attorney signed a form that says I understand all of these things that I'm giving up by signing and waiving myself and taking an OTH and I'm fully cognizant and I accept it.

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

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

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

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

If you look up sexual offenders in
this area right here, the whole area would be
covered with red dots. I don't know how useful
that is.

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

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

And, I think that there's probably a
happy medium in there about who needs to register
and who gets to decide who must register. I
think that's something that maybe this Panel can
take a look at because that ties hands.

So, I guess just my two cents there.

Okay, next slide?

This is meant to be just an overview of really the prevention and response effort. You see lots of slides on these with lines of effort in the middle.

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

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

But, in the end, you know, we want these three lines of effort to work together, first, to prevent and to educate. But, if that fails, we need to respond quickly and provide the victim care so that people feel that they can report and trust the system.
This is just a picture of that idea.

Next slide?

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

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

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

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

The environment in which they have to,
you know, show and talk about what happened is reduced.

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

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

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

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

Then you have your legal assistants. They can have -- be provided regular legal
assistants, medical care, behavioral health.

There's always the SAFE Helpline, social services, that are off the installation or on the community services on the installation or whatever the service is.

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

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

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

Next slide?

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

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

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

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

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

Throughout this process, you'll see these lines of effort, these different players
along the top are sort of the key players.

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

CAPTAIN TIDESWELL: Absolutely, yes, ma'am.

CHAIR BASHFORD: Great, thank you.

COLONEL KENNEBECK: I'll stop there.

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

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

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

And if there is a court-martial, these are the players who are supporting the victims, you know, the SARC who continues to interact with the victim, especially with the counsel,
throughout medical and mental counseling services.

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

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

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

I do think I misspoke. You know, the titling decision is separate from whether the investigation is complete or not. The titling is
earlier and the standard is lower. And you know, the founding and unfounding has gone away, but there still is a discussion about probable cause, and that is recorded, that’s not dispositive.

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

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

This case is meant to be very difficult to decide because it allows advocacy on both sides of the issue. So we built this for a school purpose of training advocacy, not really for this purpose, to talk about a case. But it's already built, and so therefore we used it.
And, I'm going to pass on. What else do you want to say about Abbott?

MS. SUDENDORF: So a couple things.

Major Pedden and I worked on it two summers ago, and what we wanted to do is try to fold in as many of the issues that the litigators would be facing when they're out there in the practice doing the court-martial, whether it's motions practice, or at the trial at court-martial.

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

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

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

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

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

MS. SUDENDORF: Sure. And takes all that all the way through to a final trial at the end. We've tried to create that fact pattern
that it's fair for a trial counsel or a defense
counsel.

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

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

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

And so they do provide that buffer, so
to speak, or really that translation piece to
allow the victim some time, and to reflect upon
whether they're going to forward and unrestrict,
as an example.

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

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

MS. SUDENDORF: Yeah, please.

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

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

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

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

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

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

And so, for example, the psychotherapy notes that are notional that we use during the
intermediate trial advocacy course were developed by a clinical psychiatrist at the University of Virginia. Those are actually composite patients of his, some 35 years of clinical experience.

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

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

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

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

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

And one reported immediately and one reported late with restricted -- so Wells had a
restricted report first. When she hears about
the next victim's attack, Patterson, she decides
to go unrestricted.

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

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

Right now, if you say the words sex
assault to your average person, they're going to
everything from touch to a penetrative offense,
and that's a problem. So when we talk about
sexual assault, as judge advocates, as
prosecutors, defense attorneys, we, or special victim counsel, we think about penetrative offenses.

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

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

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

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

Anything to add on that slide?
Everything in the blue is SVC-eligible, right?

Right. So for all sex offenses.

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

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

And one of the first things that the victim is going to be asked, whether they've told anyone else or not, is do you want this to go restricted or unrestricted. And that is a form that they're going to look at called the 2910, which we provided in your materials, we'll look at it later, that allows the victim to make that choice, restricted or unrestricted.
While DoD, and I think Congress, wants to give the right to a victim to decide whether they're going to go restricted or unrestricted, a lot of times, victims tell their friends first. Or a third party will see something or hear something, and then report.

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

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

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

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

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

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

For those cases that are unrestricted, then all the rest of the machinery kicks into place. The investigation with the MCIO, the, you know, victim is offered a special victim counsel.
Many, most times, they'll take that special victim counsel. They'll talk to a SARC and/or a victim advocate.

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

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

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

So as this all blows up in the victim's life, they might say, I just don't feel safe here, I want out of here. Expedited transfer is, they're strongly encouraged. Well,
I shouldn't say strongly encouraged. They are, to say no to it is a difficult decision.

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

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

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

So if you have a really good case, you have, you know, an allegedly really bad perpetrator that the command thinks something really needs to happen in this case, but you have a victim who wants an expedited transfer, the command's in a tough spot.
They definitely don't want to say no to that victim, but they also don't want to, you know, let somebody off the hook that maybe shouldn't be off the hook. So those are very difficult decisions.

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

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

Because if you're restricted, you can't get it. Because by the nature of it being confidential, the commanding general is who signs off on the military protective order. So that's not available to you, right.
And also on the expedited transfer, that is also not available to the victim of sexual assault who files under a restricted reporting.

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

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

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

CHAIR BASHFORD: One of the JPP, I believe, subcommittee reports had indicated that there seemed to be some substantial delays
occurring before that first MCIO interview that
might be involved with getting the SVC assigned.
But that they weren't happening necessarily in
that first week. Do you have any experience to
share on that?

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

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

Generally, they're driven by
logistics. Whether the MCIOs are stretched thin
and investigating other cases, that's generally
not an issue. They can find the right people when they need them. This might be SVC-related. But once again, I'd say that's anecdotal. I don't have any data to back that up, but I don't see that as a pervasive problem. Want to add to that?

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

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

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

A conversation or maybe more with the victim. An interview with the accused and sometimes more. Usually there's two or three in my experience. This is not uncommon for the MCIO to go back more than once to talk to an accused. That is all happening now.
Throughout, the command has ensured the victim's safety. So this is your monthly battalion commander meetings. You know, the SARB is happening monthly. The victim is meeting with the SVC and getting mental and medical health care as required.

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

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

That makes the prosecutor in me want to stand up and say, no, don't do that. How are you going to feel about this five years from now?

But that is a right a victim has, and that does
happen in some cases. That could impact our ability to, you know, dispose of the case in the way that we might prefer.

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

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

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

Let's say you have three underage females drinking at a party. One of them is sexually assaulted, and you find out the next
week. Within the next few weeks, the other two females underage were given Article 15 by the battalion commander for drinking underage.

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

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

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

But like I said, that can have a cost when it comes to testifying and cross-
examination. So these are case by case and
difficult decisions. Anything to add to this
slide?

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

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

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

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

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

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

examination.

If there is any question about
credibility, and these cases are often always
about credibility because consent generally comes
up, it must be addressed in these cases, in many
of them. Not all of them, but many of them. And
when that happens, credibility is key.

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

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

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

That prosecution memo's going to
contain, you know, the strengths and weaknesses,
the challenges to our evidence. This is where
you have your special victim prosecutor, a seasoned litigator. Your trial counsel, a younger litigator, and then in some cases, your SJA.

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

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

There's not a formal policy on how this is managed. But if the decision is made that this case cannot be prosecuted, then that is, you know, recommended to the brigade commander, that O-6, who generally is going to say, Really? Why?
They want to know, they want you to explain it in great detail why a case can't be prosecuted. It's very frustrating to those commanders in most cases. And you have yourself a little mini-trial right there where you're talking about, you know, your evidentiary challenges to that command.

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

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

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

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

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

But as you probably see from the factors that Colonel Kennebeck read off earlier today, there are a lot of different details that
go into that very discretionary decision,
including but not limited to, personal and
professional care and concern for the victim at
issue and that Soldier under that officer's
command.

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

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

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

MS. SUDENDORF: Yeah, no, no,
absolutely. We talked about that on the way here
in the terms of the prosecution memo, you know.
Because like in Cook County, we had a felony
review memo.
And it was just that vetting process, where you went through and analyzed the case when it was coming from your investigating arm, whoever it would be, Chicago Police Department or one of the suburban police departments.

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

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

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

    COLONEL KENNEBECK: No, it's not a

limitation, let's put it that way. The

expectation would be if the government wants an

expert, then we're going to expect that defense

is going to need one, and factor that in. We

have plenty of budget to try the courts that

we're trying.

    But actually, budget is not enough of

a limitation, really, and it's never going to be

a limitation. I think civilian prosecutors are

probably more concerned about that than we are.

    MS. GARVIN: Very much so.

    COLONEL KENNEBECK: Yeah.

    MS. TOKASH: Just, this is Meghan

Tokash speaking again, just a comment. I would

say the one difference is as a federal civilian

prosecutor, once you meet those determinations

within your own office, you have a grand jury

either bill or no bill it, not a commander.

    So I think there is a little bit of

difference, or probably a great difference there.
But my question is, What is the current standard operating procedure when the staff judge advocate's written pretrial advice to the general court-martial convening authority differs from the GCMCA's decision? Is there discussion about that?

COLONEL KENNEBECK: Yes.

MS. TOKASH: What happens?

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

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

Now a court-martial has been created and would try the case. So preferral, charges. Referral, send the case to court-martial. And the standard is probable cause. So Article 34 of the UCMJ defines when you can refer a case, all right.
That is when the staff judge advocate, usually the colonel, gives advice to the general court-martial convening authority, usually a two-star. Sir, ma'am, here's the case. Do we have a -- can we look up Article 34 here? Read it to you.

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

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

COLONEL KENNEBECK: Okay, all right.

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

COLONEL KENNEBECK: Yes.

MS. TOKASH: Sorry, I thought you were
talking about --

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

MS. TOKASH: Yeah, grand jury is PC.

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

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

If the SJA recommend that a case go
forward and the GCMCA says no -- is that, what
you handed right here?
MS. TOKASH: Oh, that's 34.

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

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

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

COLONEL KENNEBECK: And I'm sorry, that's not policy. It's actually legislation.
MAJOR FRICCHIONE: But, yeah, legislation.

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

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

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

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

BG SCHWENK: Yeah, they did get that data.

COLONEL KENNEBECK: Yes, okay.

BG SCHWENK: I mean, I think it was zero cases where the SJA said, Go forward, and the convening authority said no. So no cases had
ever gotten a service secretary. 21 or 22 or
something where they checked, the SJA said, Don't
go, and the convening's already said, Okay, we're
not going.

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

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

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

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

It used to be a little bit more robust
with more discovery. But it's now limited,
really, to just what did the statement say, you
know, what's the paper say, do we have probable
cause. It is a review by another party. So the
32 officers call the preliminary hearing officer, a PHO, that is a judge advocate in the rank usually of captain or major, O-3 or O-4, who has a hearing. The victim can opt not to testify and just go with statements. And that hearing officer then produces a report. You'll also find this in your record of trial when you look at a court-martial.

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

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

But if a brigade commander is at all hesitant, the brigade commander says, no, let's just send this to a 32 and see what the 32
officer says. So on the on-the-fence cases, that's typically how they play out. Send it to a 32, let's see what that looks like, and then we'll make a decision.

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

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

COLONEL KENNEBECK: Right.

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

The idea that you're going to send it and get an independent outside observer's in-depth review seems to me like maybe you've lost
that part of that aspect of using the 32 for that purpose.

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

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

It's certainly not what it was. And I think there's pros and cons to that. That's a philosophical and a policy debate. I do think that the change to the 32 hurt the accused, because it was used as a discovery tool, and it was used to sort of test the strength of the
And that has gone away. So it has changed the system a little bit.

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

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

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

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

And then we would talk about alternative dispositions. If you have a case that's, let's say it's not a great case, it's a very decent case with a victim with decent
credibility but no good forensics. And maybe the victim and the accused were friendly beforehand, and you just don't really have a great case to prove.

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

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

MAJOR PEDDEN: Just on the alternative disposition piece?

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

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

but.

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

It's another option other than a criminal conviction when one can't be obtained. Generally, commanders are going to want to pursue a criminal conviction if it's pursuable.
CHAIR BASHFORD: Colonel, is a victim's decision to say, I'm out, is that dispositive? Does it matter at what stage that happens? Is it a matter of how egregious the actual offense was, or whether the accused was held in without liberty?

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

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

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

But that puts the commander in a very difficult position of, do I need the victim to testify? Usually you do. And if you do that, now you're going to compel somebody who said, I
don't want to participate in this prosecution to be a witness and probably be cross-examined, that's a very difficult decision to make.

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

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

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

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

The one thing I might add too is that the ITAC fact pattern that we provided to you, Abbott, sort of begs this question, right. Because on the one hand, we have Ms. Dawn Wells,
who after leaving the military service, goes to Canada and makes no bones about the fact that she does not wish to participate in the process and just leaves.

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

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

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

COLONEL KENNEBECK: So I thought maybe we could talk through -- well, it's a quarter
after 12. Is that the time you intended to stop
for lunch, or?

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

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

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

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

CHAIR BASHFORD: Apparently you have
an hour. I understand you were feeling a little
stressed for time. Use it as you see fit, but if
you could allow like five minutes at the end if
there's any follow-up questions, I would
appreciate it.
COL KENNEBECK: Perfect. I will do that.

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

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

MAJ PEDDEN: Yes sir. So we talked a
little bit about 412 and -- and the rules of
privilege before we adjourned for lunch, ma'am,
and at the risk of -- of kind of going on at too
great a length on this, because I am pretty
passionate about these rules, I think it is fair
to say that the Abbott case and this fact pattern
is somewhat typical, and it was really built
around some of these very significant legal
issues.

And so just by way of background, Rule
of Evidence 412 precludes the introduction of
evidence at trial of the prior sexual conduct of
a victim in a sexual assault case or evidence of
the victim's sexual predisposition, unless one of
three specific exceptions is met. And prior to
disclosing that evidence in open court, the
military judge has to hold a hearing. That
hearing has to be closed. There are notice
requirements and some other things. And also, in
2015, the National Defense Authorization Act
amended the language of the rule to specify that
the victim has a right to be heard, including a
right to be heard through counsel, including Special Victims' Counsel, at this hearing, which is not only vitally important for the victims, but also vitally important for the justice process so that the judge can make an appropriate determination on the admissibility of evidence during this closed hearing.

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

These issues are litigated in -- I couldn't give you a number, but I would say it is
fair to say most sexual assault cases, because
oftentimes, this information is not relevant, and
that needs to be preserved properly for the
record. So during the intermediate trial
advocacy course and in the fact pattern, what you
see are some pretty well-developed facts that try
to flesh these issues out at trial so that the
attorneys can argue about them and get a military
judge to issue a specific ruling that then
governs the admissibility of evidence after that,
and then there are arguments about that evidence
at the end of the trial.

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

(Laughter.)
MAJ PEDDEN: These notes are inadvertently spilled by the SVC, who accidentally leaves them behind in the trial counsel's office. The trial counsel does not know. The paralegal non-commissioned with the Services --

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

MAJ PEDDEN: We do, sir.

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

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

HON. GRIMM: Okay.

MAJ PEDDEN: -- privileged information --

HON. GRIMM: Okay.
MAJ PEDDEN: -- Military Rule of Evidence 510 and 511 that govern waiver and --

HON. GRIMM: Okay.

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

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

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

And so on the one hand, you could interpret that as an absolute denial by the victim that this thing ever happened. On the
other hand, in a clinical context, you would interpret this as a statement of a victim who is under an exceptional amount of pressure and is having doubts about whether or not she properly perceived these things, and a great many clinicians will tell you that that is a common occurrence for victims. And so that is why we built ITAC this way and the Abbott problem in this way, is to afford counsel an opportunity to litigate these issues as they come up at trial.

I couldn't -- I mentioned earlier I couldn't give you a number as to how often psychotherapist-patient privilege is litigated, but as kind of a general metric, I would offer that right now, we are hosting the military judges course at the Judge Advocate General School in Charlottesville, and there's about 60 students in the course, all senior judge advocates and litigators. All of them have tried cases involving these issues and litigated in many cases the new version of the Rule, and I mentioned earlier that this version of Military
Rule of Evidence 513, the psychotherapist-patient
privilege, was just modified by the Fiscal '15

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

HON. GRIMM: So Major, I had chatted
with you about this, but maybe for the benefit of
the Committee, I would like to -- if it's not the
time now, when you start talking about 412, I do
have a question about how that plays out, given
the fact that you probably have more sexual
assault cases go to trial in the military. You
certainly have more than the federal courts do
because unless we have a sex trafficking case,
you're almost never going to see a sexual assault
play out, so you're never going to see much
instances in which that rule in the federal
context is actually litigated in a criminal case.
It may come up in a civil case.

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

But the third is that very ambiguous
"or otherwise required by the Constitution," and
the fact that you built in have the defense
attorney for the defendant saying this is
constitutionally required that I have access to
this -- I had a sex trafficking case in federal
court a couple years ago where the issue came up.
I could find one reported case in the federal
reporting system about what is meant by
constitutionally required, about a half a dozen
in the military cases.

It could be a -- a clever defense
attorney could certainly say my confrontation
clause rights, because that is constitutional, my
Sixth Amendment confrontation clause rights trump
the protections under 412(a). I could go right
in there and get that otherwise protected
information. Have you not seen that happen in
real practice in cases, or is that given the fact
that you have this -- you more frequently deal
with this and it is litigated so often, are the
defense attorneys finding success in doing an end
run around the protection that the rape shield
rule affords under the 412(a)(1) and (2)
prohibited areas by arguing that this is constitutionally required by the confrontation clause?

MAJ PEDDEN: So Your Honor, a couple of things. The Military Rule of Evidence very closely parallels the Federal Rule of Evidence that you just described, and those three exceptions are roughly the same.

In short answer to your last question, I would say no, that --

HON. GRIMM: Good.

MAJ PEDDEN: -- generally, counsel are not making an end run around the first two requirements by pleading the third, the constitution-required section, and I think it is important in that connection to remember that at its basic level, this is a rule of exclusion.

HON. GRIMM: Right.

MAJ PEDDEN: The default position under this rule is not just that it isn't admissible, but it is not relevant --

HON. GRIMM: Right.
MAJ PEDDEN: -- at all, unless it is one of these three exceptions. And there is a -- we are very fortunate in the military context to have a robust executive and legislative history that shows the development and implementation of this rule, and I recommend to you reading an article by Colonel Fredric Lederer --

HON. GRIMM: Yes, yes.

MAJ PEDDEN: -- that talks about the judicial implementation and interpretation of the MRE, but the bottom line is it's not coming in. So if there's these three exceptions, then they -- the Sixth Amendment right of confrontation, or any fundamental constitutional right for that matter, will necessarily bend a Rule of Evidence. It must. That said, what we're also seeing in military justice litigation is very careful consideration of this issue by military judges who are well-trained on the matter.

I say that with confidence, not just because I am doing it, but --

(Laughter.)
MAJ PEDDEN: -- but because, as I mentioned to you, your Honor, I get special dispensation today to be absent from the military judges course in which I am both teaching and sitting as a student right now. The object of our motions exercise this week was 412 and 513. In that connection, military judges will issue a written ruling, and it will very clearly specify what counsel are permitted to ask and what evidence is admissible. To the extent that it's not specified in that ruling, it is not admissible.

HON. GRIMM: Excellent.

MAJ PEDDEN: These are robust protections. They are well-litigated. Military judges hear from the victim through SVC. In court during these closed hearings, the hearing is closed pursuant to a requirement in the Rule, and that requirement is there to safeguard the privacy and the dignity of the victim. In the context of that closed hearing, you will necessarily be exploring some likely embarrassing
details. Even if they are not embarrassing, they are still private, and so that hearing is closed. At the conclusion of those proceedings, the judge issues that ruling and narrowly tailors it to precisely what is required.

I -- the last thing I would offer you, Your honor, on that is simply that I think the most commonly litigated is the third exception because the first two are somewhat less likely.

HON. GRIMM: Right.

MAJ PEDDEN: You might consider 412(b)(1)(b), which is --

HON. GRIMM: Consent.

MAJ PEDDEN: Yes sir, evidence of consent between this accused and this victim.

HON. GRIMM: Right.

MAJ PEDDEN: Not that she has previously on other --

HON. GRIMM: Yes.

MAJ PEDDEN: -- occasions consented to sexual activity with other people --

HON. GRIMM: Right.
MAJ PEDDEN: -- which is plainly irrelevant under the rules, and that is --

HON. GRIMM: Right.

MAJ PEDDEN: -- widely agreed upon across the field of military justice --

HON. GRIMM: Right.

MAJ PEDDEN: -- litigation. There is one other exception for the prosecution in those cases where, for whatever reason or another, it is necessary for the government to prove a lack of consent. 412(b)(1)(b) also permits the government to use in a very limited way some contact to prove a lack of consent on a particular occasion so they can prove up the offense at trial.

HON. GRIMM: Thank you very much.

MAJ PEDDEN: Yes sir.

MS. SUDENDORF: Just to piggyback a little bit on that, just talking about the judges course that is going on right now, they just had some very vibrant conversation about who should be allowed present during a closed hearing.
MAJ PEDDEN: Right.

MS. SUDENDORF: And some went so far as to say, you know, the bailiffs shouldn't be there. There shouldn't be any supervisory attorney. It should really just be the litigants, and that's it. So they are very protective and cautious about who should be present in that closed hearing.

COL KENNEBECK: And the record is sealed after that as well so it can only be opened by certain personnel at certain times for certain purposes, and then I think what is interesting about 412 is it does allow the judge to tailor specifically, in an effort to protect, obviously, the victim.

So if you -- you have proven up by constitution required, I have satisfied it, that doesn't mean I get everything I want. The judge is still going to limit what I can and can't ask and can and can't say, which I think is a boon for the -- for the victim. So if there is a constitutional need, I can protect it, but still
protect the victim.

MR. KRAMER: Can I ask, on the same thing, how often does it come that there may be a pre-trial ruling or not on 412, and then the victim testifies, and then there is litigation because of what they said on direct, litigation about what could be asked on cross-examination? Does that happen in the middle, too?

MAJ PEDDEN: Well, in theory, it shouldn't, sir, for the simple fact that the military judge's pre-trial ruling is binding on everyone who testifies, including the victim, and so to the extent that counsel begin to ask questions that sound like they might encroach on the judge's ruling, the judge is going to stop them. And there are occasionally objections in that regard. I think it is fair to say that based on the written ruling issued by the judge prior to commencement of trial, everybody knows precisely what is and is not admissible, and as a general matter, they are pretty scrupulous about not pushing those boundaries.
MR. KRAMER: But I mean, if the -- if the victim says something on direct, does it ever happen that the defense lawyer says wait a minute, now this testimony on direct is --

MR. KRAMER: You have opened a door, you have opened a door.

MAJ PEDDEN: I am pressed to imagine a situation where that would be permitted, sir, simply because the judge has already considered those issues pre-trial. Now, if some other fact became known that gave cause for the judge to be required to revisit the issue of whether or not some response to a question were constitutionally required, then they might go back into closed session to address that, obviously outside the presence of the members of the court, and, you know, removing everyone from the gallery and closing the hearing again. They might have to reexamine that constitutionality question. As a general matter, that is not the case.

And the last thing that I would offer on that third exception, the constitutionally
required exception under Rule 412, is that if you
sort of step back and view the constellation of
cases in the military appellate courts, I think
what you see is that protection becoming more
robust over time, and so the -- the Rule is more
strictly construed in favor of victims now than
it was, say, 15 years ago, and to be fair, we
have had the Rule for 32, 33 years, so -- .

HON. GRIMM: Does the military version
of 412 require advance notice by the defendant 15
days before the trial?

MAJ PEDDEN: Not 15, sir, but it does
require advance notice.

HON. GRIMM: Are they required to
identify the specific purpose for which it's
offered so you don't get this sort of mushy kind
of a -- and that I imagine tailors what the
judge's ruling is, when they have to specifically
identify the purpose for which it is being
offered.

MAJ PEDDEN: Not only specifically
identify the purpose, but it is in fact the --
the moving party on the motion who bears the burdens of both proof and persuasion --

HON. GRIMM:  Right.

MAJ PEDDEN:  -- and so the defense in that case, if they brought the motion, would have to observe the notice requirements contained in the rule and then convince the military judge by a preponderance of the evidence that one of those three exceptions does apply, and not until then is any of that evidence admissible. And after having met that burden, it is only admissible to the extent that the military judge's order specifies.

HON. GRIMM:  And a judge who is required to give notice to the victim will consider the victim's views when making the ruling?

MAJ PEDDEN:  Yes, your Honor. The plain language of the rule expressly requires the judge to at least afford the presence and opportunity to hear from the victim through the SVC.
HON. GRIMM: Excellent. Thank you.

MAJ PEDDEN: Yes sir.

MS. SUDENDORF: One more component that I want to talk about for the 412 and 513 motion, both in the ITAC course and in the judge's course, is the SVC presence, right? So there is an SVC motion that is brought too that is not exactly aligned with the trial counsel position. She wants everything excluded, basically, you know, in terms of the victim's background.

And so we addressed that right away not only in written format in terms of argument, but also this past week we did a demonstration in front of the judges with all three of those parties arguing to show how that plays out in the court system.

COL KENNEBECK: There is of course, Article 6(b) gives the SVC the right to file a petition as well, so if the military judge isn't granting the rights that should be afforded to the victim or is doing something not following
and complying with 513 procedure, which is pretty prescriptive, then the writ goes up and can be granted and has been granted.

HON. GRIMM: Okay, and they've done it, right?

COL KENNEBECK: Yes.

HON. GRIMM: Oh, I'll be darned.

MAJ PEDDEN: Yes sir, and we might actually just pause to expound on that a little bit.

HON. GRIMM: Right.

MAJ PEDDEN: So let's sort of follow the trail through 412 on a hypothetical case, and I am imagining here from a Court of Appeals for the Armed Forces case called Ellerbrock, and in that case, the issue was whether or not the accused ought have been permitted to cross-examine the victim about details surrounding a prior extramarital affair that she had had.

And the theory of admissibility there was based on she would have a bias or motive to fabricate the allegation against the accused
because, as CAAF put it, it is, you know, substantially less likely that a marriage survives two affairs than one. And so in that case, the court found that very few, limited details about that extramarital affair and the husband's response to it could have given rise to a motive to fabricate, and so the defense should have been allowed to cross-examine a little bit. It doesn't permit cross-examination on all the intimate details of that prior affair --

HON. GRIMM: Right, right, right.

MAJ PEDDEN: -- or anything else, simply that there was a prior affair, and that they went through a period of marital discord. She promised to remain faithful, and they came back together.

Assume for the sake of argument that Article 6(b) had been in place when the trial judge originally decided the motion in the Ellerbrock case. That would have permitted the victim through counsel to petition the Service court of criminal appeals for a writ of mandamus
to the trial court enjoining the trial court from
permitting that cross-examination, and the
standard that is stated under Article 6(b) is a
very, very important one, and I spent a fair
amount of time on this at the schoolhouse.

Here is why: the standard in Article
6(b) is entirely subjective. What the statute
says is if a victim believes that what the trial
judge has done violates the victim's rights under
a list of rules, including 412 and 513, then the
victim may petition the court of criminal appeals
for a mandamus. That means that the entire
question of whether or not the victim has the
right to petition is resolved in the mind of the
victim.

That is a very, very powerful statute,
and I would submit also that it is being employed
rather judiciously. You don't see tons of writs.
You don't see writs in every case. You don't see
irresponsible writs being taken. Rather, what
you see are I think pretty well-considered writs
that are based on substantial questions where a
victim is committed to that privacy right and is willing to litigate.

HON. GRIMM: How quickly do they turn those around?

MAJ PEDDEN: They have priority at the court of criminal appeals, sir. Some in as -- in as quick as a few days. Others taken longer because they present more complex issues, and depending on the briefing schedule of the judges from the panel who get it for the relevant court of criminal appeals, it could take more or less time. Generally quickly, and as I mentioned, they do take precedence over the other matters before the court, and I think that is significant too.

HON. GRIMM: Right.

MAJ PEDDEN: So --

HON. GRIMM: They generally stay the court-martial submitted. They are trying to rush a stay in that case.

MS. SUEDENDORF: Without those speedy trial, civil ones.
MAJ PEDDEN: So that Article 6(b) right also applies to the privileges under Military Rule of Evidence 513 and 514, and also Military Rule of Evidence 615, which precludes the military judge from excluding the victim from the proceedings unless the military judge first finds that the testimony of the victim would be altered. Again, a very robust statutory right.

The way we generally talk about them at school is to describe these as the enforcement mechanisms for victims of these rules, and -- and they are robust enforcement mechanisms. A fair amount of litigation on this. I think there is always policy discussion across the field as to the prudence of the rules that we're litigating here and the scope of the privilege, and we should expect to see that.

The last thing I would offer, your Honor, is for the benefit of the other Members of the Committee based on our discussion during the last recess, was that unlike the federal district courts and the federal civilian courts under
Article 3, military courts construe privileges narrowly because we have them specifically enumerated. I would submit that that is a good thing, that we have very clearly articulated rules of an attorney-client privilege, a clergy privilege, a spousal privilege, right on down the list, so that -- and the theory there is that many years ago, we depended on a great many laypersons to administer military justice --

HON. GRIMM: Right.

MAJ PEDDEN: -- and those laypersons required the benefit of clearly articulated rules because they didn't have the knowledge of the commandant. Now we've got lots of lawyers in the room, and we are still grateful for having clearly articulated rules because they specify perhaps better than a collection of court decisions what -- the scope of these privileges.

All of those issues are present in the Abbott case to one degree or another. All the counsel that come through the JAG school at the intermediate trial advocacy course and our
graduate students get exposed to it, and military judge students certainly are exposed to it in depth. They all study these issues very closely.

COL KENNEBECK: What we're not doing really is applying the Abbott facts to what we're talking about right now. I think we're talking about things generically, which probably, given the time constraints, is about as good as we're going to get.

The one last comment I would make on this slide then is the offer to plead guilty: so in the military, a guilty plea is not the same as in civilian court. You make an offer. A deal is struck between the accused and the general court-martial convening authority. They generally sign an agreement that places all communications within that agreement, and then they will sign a separate document which agrees to the limit of confinement or punishment, and that is called the quantum.

And then there will be a stipulation of fact drawn up. The accused and the government
would agree these are the facts. At the guilty plea, the accused will have to go through those facts and be provident to pleading guilty, so there is no, you know, nolo contendere. There is no Alford plea. You have to admit what you did and walk through it, convince the judge beyond a reasonable doubt that you did those things, and then move into sentencing.

And after sentencing, the judge will look at the quantum page. He doesn't know what the quantum is. So the accused has the ability to beat the deal. So if the deal is for five years, they go through trial and sentence, pleads guilty, goes through the sentencing, and he gets four years from the panel or the judge, four years is the sentence. If he gets eight years from the panel or the judge, then the deal, five years, is the sentence, and that is kind of how things play out.

So I want to explain that generally so you understand how things work in the military. Ask questions about that if you would like.
Otherwise, let's move on to the next slide.

MS. SUDENDORF: And briefly too, there was a request for some of the different forms that are -- encompass what we're talking about, and so we didn't want to necessarily spend a lot of time talking about the forms. If there is time, we will. But the materials that you did receive from us, there is a table of contents, and it reflects a lot: the offer to plead guilty, the stip to facts, process memo, all these pieces that you're requesting, they are here for your resources as well.

COL KENNEBECK: Okay. So in the trial and sentencing phase, obviously, we've made it this far. We have a victim who is going to testify. We have no guilty plea. We -- or maybe we -- we're going to get to trial here, either contested or not contested.

This is when we pick our panel. So you will see also in your documents a court-martial convening order. That is the document that, you know, basically creates the court-
martial, and it will identify names of the panel members who are selected by the general court-martial convening authority from that installation or from the units that that general court-martial -- that general owns.

So Article 25 requires that the general choose those who are most qualified by age, experience, and the criteria are spelled out in Article 25. They typically are more senior folks because you want someone with age and experience. That is a factor. It tends to be captains, majors, lieutenant colonels, and colonels, and first sergeants, master sergeants, so E-7s, E-8s, E-9s. And their names are listed on the court-martial convening order.

And then the military judge will take over, and the case will be docketed. Motions will be argued. A trial date will be set, just like any other trial you are familiar with. Go ahead.

MS. SUDENDORF: Yes. For the Abbott case, what we do with our ITAC course is we
provide a panel, and we go through a mock demonstration with the students, going through panel selection. Once that court-martial convening order has been signed, determine who is out there, we kind of go through a mock panel selection with the students, both defense counsel, SVC, and trial counsel. Anything else?

Okay.

COL KENNEBECK: So, and then the last bullet there is victim can make an unsworn statement, as can the accused. That is in sentencing, all right?

MAJ FRICCHIONE: Yes.

COL KENNEBECK: So --

MAJ FRICCHIONE: Yes, that is right.

Under -- under RCM 1001(a), which is a new provision, it provides for the victim to be able to make an unsworn statement, which is usually in addition to the government's case and presentation of victim impact evidence.

It -- it provides an interesting new area for us to practice in because, much like the
accused, the victim's unsworn statement can be rebutted by the defense with additional evidence afterwards, and usually, it's in written form and provided to the defense or parties, so the judge and defense, beforehand. So the -- that unsworn statement, because of the notice requirement under 1001(a), is usually in written form, but it can either be written or an oral statement.

COL KENNEBECK: While defense cannot cross, they can rebut --

MAJ FRICCHIONE: That is correct, yes.

COL KENNEBECK: -- other evidence, right?

(Pause.)

MAJ PEDDEN: So in the -- sort of the life cycle of the Abbott case, what happens, and I think I mentioned previously that one of the victims ends her military service and moves to Canada. They did that purposely to make her unavailable at the subsequent proceeding.

Prior to doing that, she testifies during the Article 32 proceeding. There was a
verbatim transcript produced of that. In theory, you could admit that verbatim transcript at the trial later. But the Private Wells persona, as placed in the Abbott fact pattern, based on our experience and the many discussions that we've had in the schoolhouse about it, is somewhat typical, and I hesitate to use that word, but somewhat typical in that there was a lot going on, because she's a person.

And -- and so she leaves the country, and Ms. Patterson remains in the military, and we proceed to trial with charges, and then we have some discussion about whether you would charge a case as to both of these victims, whether or not you might get a propensity instruction or other things like that. And we proceed to trial on the facts that way, with charges for both of these victims, and then some other charges as well.

Both of the victims, I think I mentioned, have a clinical history, and that is pretty well developed in the record because we want them to litigate the 513 issue. I don't
think we have ever drafted a resolution to the
Abbott case in terms of sentence or anything like
that. It is only a two-week course, and we don't
get that far.

COL KENNEBECK: But we take it to a
mock trial, and, you know, they go all different
directions in the mock trial.

MS. SUDENDORF: But, you know, as
Major Pedden brought in before, the other thing
that it affords us to do, the Abbott fact
pattern, is to allow experts, so we have a lot of
experts that we pull in from UVA, from Fort
Bragg, and they are actual experts in their
field, and so it affords not only the trial
counsel and defense counsel and SVC opportunity
to conduct direct and cross-examination, but it
actually works to the -- the betterment of the
experts too because they bring their students,
and their students get an opportunity to be
crossed and -- cross-examined and direct examined
by folks, so it actually works on both ends.
They are both getting the exposure in that court-
martial procedure, so -- .

COL KENNEBECK: So what is consistent with Abbott and typical cases you would see, you might have witness availability problems, especially after an expedited transfer. That can by itself indicate -- you typically are going to have a 412 issue, whether it's a prior relationship or a prior sexual activity with the accused or with someone else. Those are consistent for a lot of our tried cases --

HON. GRIMM: Colonel, the implication of the unavailable witness is that prior testimony under 804(b)(1) comes in because it has been cross-examined at the Article 32?

COL KENNEBECK: Yes. That is one aspect that we want to drive home, you know, get some sworn testimony. But I am trying to draw parallels between our hypothetical case and the kinds of cases that we see.

HON. GRIMM: Right.

COL KENNEBECK: A lot of times, your unavailability will occur before we get any sworn
testimony, before --

HON. GRIMM: I see.

COL KENNEBECK: -- the 32. In this case, we made it at the 32 so that we could drive on and take this case, you know, to the end with the students.

MS. SUDENDORF: But we can still talk about those issues, right? So what happens if it were to happen before --

COL KENNEBECK: Right.

MS. SUDENDORF: -- if she was unavailable before? So we provide discussion workshops as well as presentation workshops to have exactly those type of discussions.

COL KENNEBECK: Let's go to the next slide.

So assuming there is a conviction, there will be a sentence, and that will -- the next one after this. Yes. There will be a sentencing hearing for the -- you know, unlike the federal practice, there is not a delay. There is not a gap between the end of trial on
the merits and the sentencing.

We get right into the sentencing, and, you know, there will be some witnesses who testify on behalf of the government about the impact of the crime, typically the victim, maybe some others. And then the accused will probably testify or do an unsworn statement, commonly unsworn. Family members might testify or unit members might testify on behalf of the accused, and then either the panel or the judge will render a sentence.

Once that is done, then we move into the post-trial phase, and this is sort of the paternalistic long tale that belongs to the Uniform Code of Military Justice. It has been there from the beginning, to really give a second look at what happened in that court-martial. It's another second bite of the apple for the accused because you generate a record of trial, it is typed up verbatim. This takes a few weeks. It is reviewed by trial and defense counsel for error. It is reviewed by the military judge for
error. And then it is served on the accused, who
may be in confinement, and that means it has to
be redacted, it has to go through the process,
so, you know, weeks go by.

It is also served on the victim, and
the accused has a certain window of time to
provide matters back to the convening authority,
because now the decision is back to the general.
The judge is done with it. Now the general gets
the case back. So we -- we try to get victim
input first because I want the accused to see
what the victim has to say. If I get input from
the victim after the accused has submitted their
input, now I have a new matter that the accused
does not know about, and I am injecting error
into my case, so I have to make sure the accused
sees everything.

So I try to get my victim input first,
which we are getting pretty good at now. Give
that to the accused, get the accused matter
submitted, and then we put together the record of
trial, which you're going to see. It is a blue,
generally blue covers, you know, with the form.

    MS. SUDENDORF: Report of result for

    trial --

    COL KENNEBECK: No --

    MS. SUDENDORF: -- 2707?

    COL KENNEBECK: No. It is the 490.

    MS. SUDENDORF: 490?

    COL KENNEBECK: So the record of trial

is covered with the 490. If you see record of

trial on there, you will flip it open. It will

have a chronology of when the case started and

when it ended. It will have dates, along with

post-trial too, and, you know, they will have

usually the MCIO investigation, all of the

submitted pieces of evidence that were admitted

or offered, and other documents related to the

case that may or may not have been used.

    Any sealed material will be in that

record of trial, the transcript of the Article 32

preliminary hearing will be in there, so all of

those documents. Usually a record of trial will

be four or five volumes of 200 pages.
So that record of trial is generated then, after we get input from the accused, and that is when the staff judge advocate drafts up the recommendation, right, will make a recommendation to the convening authority what the sentence should be, after reading, you know, the clemency matters from the accused and the input from the victim. And, you know, statutorily, Article 60 has been amended. That gave the convening authority previously power to disapprove findings of guilt or reduce sentences. That has been severely limited, but the convening authority still can grant some clemency.

Typical clemency that you would see in these cases is an accused who might be married and have a child, and asks, hey, can you forfeit my -- or waive my forfeitures for a period of six months so that the money I would have made can go to my family members for that long? That is the longest it can be waived, is up to six months after action. And sometimes, those are granted. That is case-by-case. They have to justify it,
and the convening authority has to agree with it.

    But as far as disapproving a finding
of guilty, that has been severely limited. There
are a few offenses for which a conviction could
be undone, but not really anymore.

    So the staff judge advocate will draft
a recommendation, usually do that before the
record of trial has been done, have a
recommendation, and then they get the 1105
matters, and the staff judge advocate will draft
up an addendum saying basically I have read the
clemency matters, I have read the victim input.
Based on all of this, and addressing the legal
error in the record if it needs to be addressed,
and then put a recommendation to the commanding
general.

    That whole packet goes to the
commanding general, and he signs a document
called the action, and that action really is an
approval of what the sentence and findings are.
It is a paragraph, but it's an important document
because it is the -- statutorily, it is the
document that approves the sentence as adjudged.
That starts the appellate process.

Okay. Comments on that?

MAJ PEDDEN: No sir.

MS. SUDENDORF: No sir. They are all under post-trial. If you go to the table of contents in the materials, it's all under post-trial, so you can see what that documentation looks like.

COL KENNEBECK: The Abbott fact pattern doesn't really get that far because we really just take this up to trial in our two-week course, but the Abbott fact pattern is really just a set of facts that is like other sex assault cases to open the door for these 412, 513, and other proof issues that we typically see in a sexual assault court-martial.

Okay. That went faster than I thought. Ma'am?

CHAIR BASHFORD: This is going back a bit, but you had a slide that was called Victim Care: A Multi-Disciplinary Approach, and one of
the -- that you listed was law enforcement MCIO. And while I think obviously anybody investigating a sexual assault should be sensitive, I am not sure I would agree that law enforcement is part of victim care. Shouldn't they be investigating the facts of a case? Is this -- is this really considered to be part of the victim care?

COL KENNEBECK: Yes. The lens through which I was looking was really oriented on accountability and adjudication, and, you know, that matters to the victim, that it is investigated and that a decision is made. And in that regard, I view law enforcement as a player in helping move the process along. But you're right, yes.

CHAIR BASHFORD: Okay. I just wanted to make sure that -- okay.

COL KENNEBECK: That is accurate.

BG SCHWENK: First off, I would like to thank all four of you for coming. I really enjoyed that presentation, and it gave me a lot to think about. And my wife last night, Major
Pedden, I told her that, hey, there is this Marine on this panel tomorrow, and he was the judge advocate for 2-8, 2nd Battalion, 8th Marines. And she said give him my best, because her dad was the commanding officer of Company G, 2nd Battalion, 8th Marines, Guadalcanal, so --

MAJ PEDDEN: I am honored to be even mentioned.

(Laughter.)

MAJ PEDDEN: And please give her my --

BG SCHWENK: I don't know about that.

He bombed out as a major general.

(Laughter.)

BG SCHWENK: What are you going to do, you know? So anyway, anyway, she said to say hi. Here is a question to help us as a panel think about issues for us to look at: so you guys have, you know, the basic course. They don't know anything, but you have what is now the graduate course. It used to be the advanced course. It is more formal now, the graduate course, the two-week course, the judges course,
you have all the one-week courses that come
through, and because none of those are federal
advisory committees, those people are allowed to
talk at lunch and in the evenings about what has
gone on.

And it would seem to me, people being
people, that you would hear things about --
probably less about what is going well in the
system, and more about what, in their perception,
is not going well. And so since our job is to
look at the system, I was wondering if you all
had any thoughts on things you have heard from
people out in the field that are actually
practicing about things that are not going so
well that we might want to look at in the next
couple of years.

And if you want, you can disguise your
own personal views by saying --

(Laughter.)

BG SCHWENK: That is why I phrased it
that way. Feel free to --

COL KENNEBECK: Well, I think it is
safe to say none of us are speaking for the
school or for our Services, but maybe some
observations. Go ahead.

    MAJ FRICCHIONE: Well, this -- I am
going to mention this only because it came up
over the last couple days, so it is recent. But
-- but it is -- it is an overarching issue with
Article 6(b) and the rights of victims at trial,
which is the -- it is kind of -- Article 6(b) has
very broad rights in there, and we put the
enforcement provision that allowed for petition
up to the ACCA right now.

    Actually, it is only ACCA because
there was a case that came out, Martinez, and the
CAAF said that they were not going to look at the
-- the rulings on those petitions from ACCA, that
6(b) was clear that -- that it only went to the
courts of criminal appeals and not to CAAF.

    So that case came out. Now, those
petitions only go up one level, but really, the
issue when you actually go into trying to apply
that enforcement mechanism at trial and try to
determine what rights victims actually have
during courts-martial, what ends up happening is
that you have many judges across all the
jurisdictions trying to determine what those --
those rights actually are, because we have got
the rights written, the right to be heard and to
counsel, 412, 513, and 514, not in 615.

And then you have got that enforcement
provision that allows victims to petition the
rulings of the judge, but no clear guidance on,
you know, what is and is not a right, and so just
like Major Pedden said, you know, it is what is
in the belief of the victim that made the appeal.
So there are procedural issues that mean that the
integration of victims and their counsel through
SVCs into courts-martial has meant that each
jurisdiction has to kind of take each case on its
own and try and figure out how to apply the rules
as they are.

So that -- that is what we have been
seeing, and I know that SVCs can be a little bit
-- they feel a bit like, as I put it, you know,
they feel a bit like an alien because they are
walking into a new ecosystem, and so when these
rules are brought, what ends up happening is that
they are -- the uncertainty can -- you know,
makes the efficiency of -- of the court-martial
maybe not as efficient as it could be at the end
of the day.

So that affects the SVC practice.
That affects the way judges practice, and trial
counsel, defense counsel with the -- the
introduction of the SVC also, we're all trying to
figure out exactly how to integrate the SVC. It
has only been a couple years. I think -- I think
overall, we're doing an excellent job on trying
to figure out how this -- this new advocate is --
is going to be operating within the actual court-
martial system.

BG SCHWENK: Now would that concern
extend to -- would that concern extend throughout
the trial, like during -- during the -- on trial
on the merits direct and cross, and the SVC
trying to figure out where do I sit and how do I
(Simultaneous speaking.)

MAJ FRICCHIONE: That is -- that is --

BG SCHWENK: -- question?

MAJ FRICCHIONE: Yes, that is --

BG SCHWENK: Am I allowed to object if I don't --

(Simultaneous speaking.)

MAJ FRICCHIONE: That is what I am talking about, yes, yes sir.

BG SCHWENK: Okay.

MAJ FRICCHIONE: So I -- in -- in some ways. So right now, if the -- you know, the victim is not a party at the court-martial. Like you said, there is no table in front of the bar, so they are standing -- or they are sitting behind the bar. And so to make an objection that would be efficiently answered before any, you know, either privileged or other information would come out from the witness, what they -- they have to do is stand silently and wait for -- to be recognized by the judge and walk in front
of the bar, or pass notes to the government counsel.

Each judge may have different rules about, you know, how that is going to be accomplished, but so that is -- that -- you know, that is something to think about when it comes to objections during motions which are accepted, and then we all understand when that is reasonable versus merits, which is --

BG SCHWENK: A more developed process.

MAJ FRICCHIONE: Yes. So anyway, we're all learning on the ground --

BG SCHWENK: Okay.

MAJ FRICCHIONE: -- but Article 6(b) is very broad, and it also includes the rights of all crime victims, and so that is something where, you know, we have to take a step back and figure out exactly what that means, and we're all learning, you know, taking it one step at a time, but anything that you would want to do to look into that --

BG SCHWENK: Okay, great.
MAJ FRICCHIONE: -- and then the appellate rights. I know that that has already been through the JPP, but -- but the appellate rights of victims as well.

(Pause.)

MAJ PEDDEN: Just one minor piece of what Major Fricchione just mentioned: so in response to your question, with regard to the Martinez case, the other difficulty we might see as a result of that is some dissonance between the Services, because if this petition stops in its appellate route at the Service court of criminal appeals, then that sort of disaffords the Court of Appeals of the Armed Forces the opportunity from granting a discretionary appeal in one or more of these cases in order to harmonize this practice across the Services. So just to extend on Major Fricchione's capable explanation there, that might be something to look at too.

BG SCHWENK: Thank you.

MAJ PEDDEN: Yes sir.
MG ANDERSON: I had a question about the Special Victims' Counsel and the VLC in other Services. In terms of your assignments, where does this fall in the spectrum? Because we all know that there's certain career — I won't say enhancing, or some that are, you know, okay assignments, but where does this fall in the developmental, you know, range for, you know —

COL KENNEBECK: That's a great question. Captains talk about this a lot.

So in the Army, and I will speak just for the Army, generally, the policy has been that we want you to have litigated before you are Special Victims' Counsel. It's hard to give good advice if you haven't been in a courtroom and you don't know the process. So that happens pretty consistently. There are a few where maybe people had civilian litigation experience, so that is good enough, and, you know, we need the bodies, so we have to fill these buildings.

So that is one prerequisite. And I think at first, it wasn't necessarily a popular
idea, but given the amount of time that these
folks are spending in court, that they are
spending working on cases where there is a victim
who really -- whose life has been altered and
they are helping these people, there is a benefit
derived from that. It is also very difficult to
manage that, but there are benefits that derive
from that, and it feels like a crim law job,
which, you know, a lot of young JAGs want to do a
crim-law-related job, so it has that feel.

So I think over time, what I am seeing
anecdotally are people who aren't opposed to the
job, and maybe even some who like it, and I think
that trend will continue, you know, especially if
you -- if -- if we all start looking at this job
as a litigation-like. If it is perceived as
litigation-like, it is going to become something
that everybody wants, and that is where I see it
going.

MG ANDERSON: Is it a three-year
assignment?

COL KENNEBECK: No. It really just
depends.

MG ANDERSON: Okay.

COL KENNEBECK: I mean, we have -- I think we're trying to -- we have given a lot of jobs to captains --

MG ANDERSON: Yes.

COL KENNEBECK: -- so --

MG ANDERSON: Yes.

COL KENNEBECK: -- you know, adding this new job in the mix has made the rotation increase, so the length of time they get to spend in a job has been smashed a little bit. I think we're normalizing that, probably. That is a difficult personnel management issue.

MG ANDERSON: Yes.

COL KENNEBECK: But I think, you know, two years is probably about right because --

MG ANDERSON: Okay.

COL KENNEBECK: -- three years of a job that emotionally taxing would really wear you down, so --

MG ANDERSON: And they still have to
get a professional military education squeezed in there somewhere --

       COL KENNEBECK: Right.

       MG ANDERSON: -- and maybe --

       COL KENNEBECK: Right.

       MG ANDERSON: -- another billet, so --

       (Simultaneous speaking.)

       CHAIR BASHFORD: Given that, what is the turnover? I mean, how often do you have to replace a trial counsel in a sexual assault case, an SVC in a sexual assault case, or the defense attorney?

       COL KENNEBECK: So Special Victim prosecutors, senior litigators, are typically three-year assignments, so they will be in a region for a period of three years and have oversight over all those cases, some of which they will try themselves, some of which they will manage.

       Trial counsel are typically in the job either 12, 18, 24 months. It really just depends on what is going on in that unit. Are they going
to deploy? Are they just coming back from deployment? You know, has the person already been on the installation for two years, and now in their third year, they are prosecuting for a year so they need to PCS after that? There are so many factors that there really is no normal answer.

The goal would be to keep prosecutors for 18 to 24 months. The goal would be to keep SVC for a couple years because there is a learning curve to that job, just like defense. We want defense, you know, in that job two or three years as well. So the goal is to aim for two-year gigs I think overall, but that -- I don't want to speak for the -- this is anecdotal.

MG ANDERSON: Sure.

MS. GARVIN: So I have two questions. One is because it relates to issues that both Majors have raised. So what is the -- well, the Article 6(b) rights are very broad, right? And there is no appellate case law -- not much appellate case law in the military right now.
What is the precedential value of civilian case
law on 18 U.S.C. 3771, since those rights have
been around since 2004 and are nearly identical?
Is there any precedential value? Is it just
persuasive authority?

MAJ PEDDEN: Yes. I think as a
general matter, it is persuasive authority,
ma'am, and given that, again, these are
specifically enumerated in the Uniform Code of
Military Justice, I would consider it a duty of
the court to first look to that body of law
because it is specifically enumerated there. I
don't mean that to suggest that it is -- it is
fully complete or shouldn't be amended or
anything else, but simply that it is probably
best to go first to the language of our law
before examining other authorities.

MS. GARVIN: And then cross-branch
appellate courts, what is the precedential value?

MAJ PEDDEN: They are generally cited
as persuasive authority but not binding from
other courts of criminal appeals, and decisions
from the Court of Appeals of the Armed Forces are
binding on all of the Services.

COL KENNEBECK: It is much like
circuit courts in the states.

MS. GARVIN: So the fact that it can't
be appealed one more level, we are stuck with
persuasive authority across branches?

MAJ PEDDEN: Yes ma'am, and I think
you generally see them cited as persuasive
authority. Ordinarily, for -- especially in this
context, right, so the 6(b) context, there are a
few cases out there that some are addressing
precisely what 6(b) means and how far it goes.
Other cases are addressing the substantive issues
that are presented as part of the 6(b) petition
for the writ, right? So Martinez is a case that
interprets Article 6(b), whereas Kitchen, which
is a Coast Guard Court of Criminal Appeals case,
interprets the scope of the privilege under MRE
513, standing on the fact that it was presented
in the 6(b) writ.

So all of them are fruitful, and I
think when -- when for example the Army Court of
Criminal Appeals looks to the Coast Guard, they
are doing that to say, okay, this is or is not
persuasive, and we're going to adopt it or we
won't.

MS. GARVIN: So my second question was
since 6(b) rights apply to all victims, not just
those who have access to SVCs, barring Marines,
of course, have you seen many civilian lawyers in
court -- in military court helping protect the
6(b) rights of non-sexual-violence crimes?

COL KENNEBECK: Not yet. I mean --

MAJ FRICCHIONE: No, we haven't.

COL KENNEBECK: Yes.

MAJ PEDDEN: It's unusual, but it does
happen. There's not a particular requirement.
So for example, if you're going to appeal -- or,
excuse me, appear as counsel in a trial at a
court-martial, you have to appear on the record
and state your qualifications and whether you're
certified and sworn, and if you're not certified
and sworn UCMJ, you know, are you a member of a
bar? If so, what bar? Are you a member in good standing? And things of that nature.

And those qualifications suffice for the present time. There is not an independent statutory certification specifically required for SVCs, and occasionally, there are civilian counsel who appear in that capacity.

MS. GARVIN: And just so folks know why I ask the question relevant to this proceeding is because, right, that if there were those counsel, there would be another whole body of precedent that might be developed somewhere else within the military structure, so they were tied together. It wasn't a random question.

(Laughter.)

COL KENNEBECK: Yes. No, I think it is great, and it exposes the other side of the argument, which, so we have graduate students who write theses or research papers. A lot of the topics lately have been, you know, has the pendulum swung too far? What is happening with the accused? What has, you know, the injection
of another attorney who is going to represent the interest of the victim done to the system? I don't know that anybody has any answers.

I also think it begs a deeper philosophical question: you know, whose rights are we protecting or injecting? Is it the state and prevention of crime and, you know, assuring that if you commit a crime, we're going to punish you for it? Or is it the victim, making the victim whole again at the other end?

And I think we're in the middle of this philosophical debate over who gets to decide. Should it be the commander or should it be the victim? And, you know, the victim doesn't want prosecution: shouldn't that trump everything? So we -- we have a lot of debates about this topic, and -- and we are obviously pretty -- leaning forward by giving victims attorneys in all of these offenses.

I don't know of any other jurisdiction that really does that, so it's kind of new, and there's a lot of concern about that. I wouldn't
say fear. I would say -- and actually, it has
worked out pretty well so far. But there is a
lot of discussion about where are we, and where
are we going?

And then two other things I will
inject: one, this is something that I have always
found interesting. This is Kennebeck and not
anybody else: data. We collect a lot of data,
and you're probably going to be looking at a lot
of it. We have our annual report to Congress,
and I don't remember when it was built or why it
was built. Nate could probably talk about that,
so I don't want to steal your thunder, Nate.

But I wonder if we're collecting data
that is useful. And then when we do have data,
what are we comparing it to? How useful are
prosecution rates? How useful are acquittal
rates? We don't really have another jurisdiction
that tries similar kinds of cases to compare it
to, and we don't, really. So we don't know if
we're doing well or not doing well. Every number
is either a good number or a bad number,
depending on who is talking.

So data has been something that I would be interested in, you know, having someone assess the value of it. And then the other one, we have -- we, broadly, have a great relationship with our law enforcement personnel, and we work closely together. We investigate these cases aggressively. But I wonder if there is room for growth there in how investigators work with government, and now you hear a lot about defense, and defense says, hey, I need an investigator. Somebody help me out.

I don't know that we have answered that. I know there is a lot of discussion about that, and that is an important question about how we get after that, whether it is with some government entity or with funding. But I do think that there is, you know, probably some room for growth there. We have probably learned some lessons over the last ten years. Sir?

DEAN HARRISON: Two questions, then.

This might be something that you can only answer
on behalf of the Army and the Marine Corps.

What are the resources available and
the training levels of defense counsel? You have
got --

COL KENNEBECK: It's a great question.

DEAN HARRISON: And can you describe
the --

COL KENNEBECK: Yes.

DEAN HARRISON: -- training required
for the senior counsel prosecuting in these
cases?

COL KENNEBECK: So defense attorneys -
- so at the school, we -- we stay in the middle.
We train everybody. They come through advocacy
courses, defense, SVC, prosecutors. We train the
basic course, grad course. We teach both sides
of the argument.

At Belvoir, the Army has Trial Counsel
Assistance Program and Defense Counsel Assistance
Program. They have HQEs. They have captains and
majors, and they have funding. They go out and
provide training at installations or in larger
groups. That training is oriented towards either
the prosecution or the defense of all crimes.
Sexual assault obviously is floating to the top
because it is tried quite often, so there is
typically sex-assault-focused training that
you're going to get from those entities, and they
train every single week of the year.

And, you know, the defense counsel,
defense bar is really tight. They network well,
they communicate well. I have been defense
counsel, and that is one of their biggest
strengths. As soon as someone has a motion in
California that works and is -- you know, was
successful, it is used throughout CONUS and Korea
and Germany. It is out there like that. They
communicate effectively.

They train equally effectively, and
they like to manage their training, so we just
give them -- I think, once again I speak -- give
them the funds they need and the time they need,
and they manage it the way they want to manage
it. The same with the trial counsel side. So I
think the training is robust. We do the, you
know, the neutral institutional level at the
school to get in the functional level.

DEAN HARRISON: And is there any
effort -- because I understand that each court-
martial is unique and has a beginning and an end.
There is no standing court. Are there any
efforts to make sure there are not sentencing
disparities, either within a Service or across
the Services?

COL KENNEBECK: So the Military
Justice Act of 2016 was just passed, and it will
be implemented, you know, late next year
sometime. And originally, it had sentencing
parameters as part of the construct. That was
changed to allow sentencing by panel or judge
alone, but required a four-year study over types
of sentences, amounts of sentences, so that
question can be revisited at the end of the four-
year study. So it is injected in the plan so
that in 2023, you can take a good look at what
our sentencing looked like and then make a
decision then about whether parameters are appropriate, whether judge alone is appropriate, whether panel -- you know, answer some of those questions.

(Simultaneous speaking.)

BG SCHWENK: -- making investigation, or somebody else?

COL KENNEBECK: Sir?

BG SCHWENK: Who is doing the review?

(Simultaneous speaking.)

COL KENNEBECK: Well --

BG SCHWENK: -- Committee, or we don't know yet? Judge Sullivan?

COL KENNEBECK: It is --

(Simultaneous speaking.)

COL KENNEBECK: -- it is prescribed by I think Article 146 in the new Military Justice Act, so I think Article 146 gets after it, but I can't remember. Probably you guys.

BG SCHWENK: All right.

(Laughter.)

CHAIR BASHFORD: Well, Colonel
Kennebeck, Ms. Sudendorf, Major Fricchione, and Major Pedden, I think we have come to 2 o'clock. Thank you so much. You teed it up beautifully for Dr. Spohn about collecting a lot of data, but what are we going to do it for? And I don't want to cut into her time, but thank you so much. This was very informative.

COL KENNEBECK: Thank you.

MS. SUDENDORF: Thank you.

(Appause.)

Whereupon, the meeting went off the record at 2:00 p.m. and resumed at 2:06 p.m.)

CHAIR BASHFORD: So Dr. Spohn and Ms. Peters, in 15 minutes, please walk us through adjudication data analysis.

MS. PETERS: All right. Thank you, ma'am. Good afternoon, Committee Members. My name is Meghan Peters.

I would like to start with a brief overview of what the Staff collected in order to arrive at adjudication data for sex assault offenses relative to 2015. The JPP had three
statutory tasks to answer that it had to examine: information on case -- or, I am sorry, case dispositions, meaning whether or not it went to court-martial; the outcomes of those cases; and the punishments rendered at courts-martial. It also had to look at appellate decisions, the reviews of sex assault convictions, and to compare punishment data in military courts with punishment data in civilian, federal, and state courts.

Relative to today's presentation, what the Staff did was collect court-martial case documents, key documents that chart out the procedural history of each case from the military Services. So we went to the military Services last year and said we would like all of the sex assault cases that were tried or dismissed or resolved in Fiscal Year '15, and our body of cases reflect cases in which at some point, a charge of sexual assault was preferred. It wasn't necessarily preferred in '15. It could have been preferred in '14. But the case for us,
the end of the case was when findings were
adjudged, sentence was adjudged, or the case was
dismissed sometime in FY15.

So we are encapsulating the end result
of the case, and then going back to the
beginning, we have the charge sheet. We recorded
each charge and what happened to it. The Staff
collected hundreds of cases. Again, we used
court-martial documents to record each charge and
what happened to it in that case, and then we
recorded the outcome, the punishments into an
electronic database that we built, and we
uploaded the case documents there so that we have
a case document to mark the timing of the trial
and the result for each case that we entered.

This database produced an Excel
spreadsheet, and we provided that Excel
spreadsheet to Dr. Spohn so she could analyze raw
data without personal information that would be
contained in documents and whatnot and so she
could run an analysis that supported the JPP's
tasks.
In the end, we had 738 cases that were resolved in FY15. I think each of the Services might have identified more cases than what we received, but in the end, we found there were some duplicate counts in their -- in their case lists, or, in a few cases, we couldn't get a full set of case documents, so if a case didn't have a report of result of trial in the file, and we couldn't tell what the final outcome was, we didn't know whether the outcome reflected a pre-trial agreement or not, we neglected to enter that case into our database just because then we couldn't have a complete set of consistent information.

But we are a document-based database so that we can back up all of our case results with a document behind it from the trial, and we keep that as the Staff. That is given to us by the Services. It is not public. It wasn't redacted. But the -- the Services agreed to provide that to the Staff so that we could do this analysis for you.
DR. SPOHN: Good afternoon. So I have been working with the JPP for a number of years: initially analyzed the 2012-2014 data, and then most recently did the data analysis for the 2015 cases.

And as Meghan said, we looked at all cases involving a preferred charge of sexual assault that were completed in 2015, 738 cases total. 530 of these were penetrative offenses, and 208 were cases in which the most serious charge was a contact offense.

About two-thirds of the cases were from the Army or the Air Force, and you can see that the other Services had a smaller number of cases, and I really caution us from drawing too many conclusions about the Coast Guard given the small number of cases that the Coast Guard disposed of in 2015.

I will go through this really quickly. What I am going to do is provide some descriptive data on the accused, the victim, and then the disposition of the case, and depending on how
much time we have, we may be able to talk about
the correlates or the predictors of case
outcomes.

But in terms of the accused, the
typical accused was an enlisted Servicemember.
Almost all of them were male, and most of them
were assigned to units in the United States or
its territories when charges were preferred.
This is not necessarily where the case occurred
or where the incident occurred, but where the
accused was stationed at the time that charges
were preferred.

Victims: we had pretty limited
information on victims, but we did have some data
on victims. The number of victims ranged from 1-
15. Most of the cases involved either one or two
victims, but there were cases with more victims
than -- than two.

The typical victim was female. There
were some cases in which the victims were male,
and there were a handful of cases in which both
males and females were victims. The typical
victim was also a member of the Military Services. It was about two-thirds to one-third who were civilians. And this year, we had data on the relationship between the victim and the accused, and about 82 percent of the victims were not the spouse or intimate partner of the accused, so 82 percent were either some other relationship or no relationship at all.

So these are the case dispositions, or how the cases were disposed. Almost three-fourths of the cases were referred to a court-martial, and of those cases, 16 percent received an alternative disposition, and 12 percent were dismissed without further action -- excuse me, the 16 percent and the 12 percent are the cases that were not referred to court-martial.

So of the 526 cases that were referred to a court-martial, most went to a general court-martial, with the remainder going to either a special court-martial or a summary court-martial. There were 39 cases that went to a summary court-martial, and that is reflected also in the fact
that there were 39 cases that were decided by a summary court-martial officer. The other cases were almost evenly split between cases that were decided by a military judge and those that were decided by a panel of military members.

All right. So these are the -- the case outcomes for the cases in which the most serious charge was a penetrative offense. Again, there are 530 such cases, and of these cases, 25.8 percent were convicted of at least one count of a penetrative offense. Very few were convicted of a contact offense, 2.5 percent, but a fairly large number were convicted of a non-sex offense only. And you can see that 21 percent were acquitted at trial, and then 14.2 percent received an alternative disposition, and 14.7 percent were dismissed without further action.

So if you add up the first three columns on the graph, the conviction rate for preferred cases in which the most serious charge was a penetrative offense was 49.8 percent, so just about half of those cases resulted in a conviction for
So moving on to the contact offenses, the most common outcome for these cases was conviction for a non-sex offense. Almost 41 percent of the cases in which the most serious charge was a contact offense were in fact convicted of something other than a sexual offense, but 17.8 percent were convicted of a contact offense, and that leads to an overall conviction rate for contact offenses of 58.6 percent.

So the conviction rate for the contact offenses was somewhat higher than it was for the penetrative offenses, and you can see the other outcomes there. Acquittals were 13 percent. Alternative dispositions, 22 percent, and then 6 percent of those cases were dismissed without further action.

So another way to think about case outcomes is to look not at cases where charges were preferred, but -- next slide -- to look at cases that were referred to trial. So these
graphs do not include the alternative
dispositions or the cases that were dismissed
without further action, so these are the ones
that actually went to trial. And you can see the
numbers there. About a third of the penetrative
offenses resulted in conviction for at least one
count of a penetrative offense. 3.4 percent were
convicted of a contact offense only, and then
again about a third were convicted of a non-sex
offense, with 30 percent of the cases that were
referred to trial resulting in an acquittal at
trial.

So looking just at those cases that
went to trial, the conviction rate was 70 percent
for the penetrative offenses. And for the
contact offenses, again, we see a pattern whereby
those who are charged with contact offenses are
more likely to be convicted of a non-sex offense.
57 percent of the cases that were referred to
trial resulted in a conviction for a non-sex
offense. And so the overall conviction rate for
the contact offenses is just about 82 percent.
Moving on to sentences, these are not mutually exclusive categories because the third column there is confinement and separation, and so that 52.1 percent where they got both confinement and separation is subsumed in the first two columns. But the -- 71 percent of the cases resulted in some type -- or some length of confinement. Almost 60 percent resulted in a punitive separation, and then just over half resulted in both confinement and punitive separation.

Length of sentence -- yes?

HON. GRIMM: Are those years or months by the sentence there? You have the mean of 43.04. Are those months?

DR. SPOHN: Months.

HON. GRIMM: Months.

DR. SPOHN: Yes.

MG ANDERSON: And is that for contact and penetrative?

DR. SPOHN: These are --

MG ANDERSON: Okay. Thank you.
DR. SPOHN: -- and I will provide the data for each a little bit later.

So the adjudged sentences ranged from 0.57 months to life in prison. The approved sentence ranged -- this range was the same. The mean sentence for those who -- or the mean approved sentence was slightly less than the adjudged sentence, a difference of about seven months.

I feel like I am racing through this. So this presents a diagram of case outcomes by the military Service of the accused. The bottom bar, the green -- sort of the Army green bar, presents the conviction rate for each of the Services. The blue bar is the acquittal rate. The sort of mustard yellow is alternative dispositions, and then at the top are the dismissals.

And you can see that the Coast Guard had the highest conviction rate at I think it is 73.7 percent, but as you'll see in a moment, most of those were convictions for non-sex offenses as
opposed to sex offenses. The Army had a relatively high conviction rate, as did the Marine Corps. The Air Force had the lowest conviction rate of all of the Services.

So this, again, breaks it down by -- when we did the bivariate analysis of case outcome by the Military Service of the accused, we found that there was a statistically significant relationship between case outcomes and the Military Service, but only for the penetrative offenses.

And as you can see here, recall that the Coast Guard had a relatively high conviction rate, but as you can see in this chart, most of those were convictions for non-sex offenses, and again, there is a very small number of cases in that category, so -- . The Army and the Navy had relatively high conviction rates for -- I mean relative to the other Services -- for penetrative offenses, and the Marine Corps and the Coast Guard had relatively high rates of convictions for non-sex offenses.
So this is just presenting that -- the data for the cases that were referred to trial, showing the conviction versus the acquittal rates. Again, the Coast Guard had the lowest rate of acquittal, followed by the Army, and then the lowest rate -- or the highest rates of acquittal -- rate of acquittal was found for the Air Force.

So we did some analysis where we looked at the relationship between sentences and a variety of factors and found that there were significant relationships between the likelihood that the accused would receive a confinement sentence and then some of the characteristics of the case and the characteristics of the victim, and this shows that the likelihood of confinement was greater if the victim was a civilian or if there were both civilian and military victims than if the victim was a military -- a member of one of the Military Services. Now I think the fact that the confinement rate is the highest for those cases in which there is both military and
civilian victims reflects in part the fact that by definition, those cases involve more than one victim.

So the sentences also varied not surprisingly by the type of conviction charge, with confinement being much more likely if the accused was convicted of a penetrative offense than if the accused was convicted of either a contact offense or a non-sex offense. So 90 percent, just over 90 percent of those who were convicted of penetrative offenses received some term of confinement.

We also found that the likelihood of confinement varied by the type of court-martial, with cases involving summary court-martials being much less likely to result in confinement. And again, those are the less serious cases that are referred to -- to the summary court-martial, so that is not surprising either.

In terms of the trial forum, we found that cases that were adjudicated by a military judge had a higher rate of confinement than those
that were tried by a panel of military members, 
with the lowest confinement rate again reflecting 
the summary court-martial officer.

In terms of the length of the 
confinement sentence, we found that the -- many 
of the factors we looked at affected the length 
of the sentence that was imposed. The 
significant predictors were the status of the 
victim -- cases involving civilian victims 
resulted in longer sentences than cases involving 
military victims; the relationship between the 
accused and the victim -- cases in which the 
victim was the spouse or intimate partner 
received substantially longer sentences than 
cases in which there was either no relationship 
or some other type of relationship; type of 
conviction charge -- again, the penetrative 
offenses resulted in longer sentences than either 
contact or non-sex offenses; and then the type of 
court-martial and type of trial forum, with cases 
that went to a general court-martial and that 
were decided by a military judge resulting in
longer sentences.

Length of confinement sentence was not affected by I think that should say the Military Service of the accused, the rank of the accused, or the gender of the victim.

So this just displays graphically some of the relationships that I have just talked about. So the sentence in months is on the vertical axis, and again, you can see that cases involving military and civilian victims resulted in longer sentences than those that involved only civilian victims, and those who involved -- those cases that involved only military victims resulted in the shortest sentences.

This displays the relationship between the victim and the accused and the length of the sentence. Consistent with what I just talked about, if the victim was a spouse or intimate partner, the sentence was substantially longer than if the victim was not the accused's spouse or intimate partner. Not surprisingly, the penetrative offenses resulted in substantially
longer sentences than those who were convicted of non-sex offenses or contact offenses.

Shall I just conclude here? Because I know we are over time.

CHAIR BASHFORD: We will reserve our questions for another time.

DR. SPOHN: Okay.

CHAIR BASHFORD: Don't --

DR. SPOHN: Oh, do you want me to go through the rest of it?

CHAIR BASHFORD: Yes, conclude your --

DR. SPOHN: Okay.

CHAIR BASHFORD: Sorry.

DR. SPOHN: All right.

CHAIR BASHFORD: That sounded like "conclude."

DR. SPOHN: So the last stage of the analysis was to do a multivariate analysis that controlled simultaneously for several different factors, and so this analysis allows you to say for example whether the relationship between the victim and the accused affects the outcome,
whatever it might be, controlling for the type of conviction charge, the status of the accused, and so on. So this analysis simultaneously controls for factors.

So through all of these analyses, the strongest predictor of outcomes was whether the accused was charged with or convicted of a penetrative offense, but the results were not necessarily what you might expect. So compared to those who were charged with contact offenses, those charged with penetrative offenses were less likely to be convicted, more likely to be acquitted, and more likely to have all charges dismissed, suggesting I guess that these cases are more difficult to prove and that the evidentiary hurdles are higher when the charge is more serious.

Compared to those who were convicted of non-sex offenses, on the other hand, those convicted of penetrative offenses were more likely to be sentenced to confinement, more likely to receive a punitive separation, and
faced longer confinement sentences. So even though these penetrative offenses or more serious offenses were more likely to fall out of the system than the other kinds of offenses, if they did result in a conviction, they were treated more punitively.

Neither the rank of the accused, whether the accused was an enlisted member or an officer, nor the gender of the victim affected any of the outcomes we looked at, so there were no differences based on those two factors in any outcome examined.

The other variables had less consistent effects. There were some differences based on the Military Service of the accused, and most of these involved differences between the Army and some of the other Services, but there was not a real clear pattern there.

The number of charges affected some of the outcomes, so that cases that had more preferred charges, which ranged from I think I indicated 1-43 was the range for the number of
charges, and the mean was about seven. So they had a higher likelihood of conviction, a lower likelihood of acquittal or dismissal, and resulted in longer confinement sentences, that is, the more charges that were preferred or -- more charges that were preferred.

Cases that had more victims had a higher likelihood of conviction and a higher likelihood of a confinement sentence. The status of the victim, if the victim was military rather than civilian, the likelihood of conviction was lower, acquittal was higher, length of confinement sentence was lower, and the likelihood of punitive separation was lower.

We also found some effects based on the relationship between the accused and the victim. At least for some of these outcomes, if the victim was the spouse or intimate partner of the accused, the likelihood of conviction was lower, the likelihood of case dismissal was higher, but the confinement sentence was 31 months longer.
So the overall conclusions based on the 2015 data is cases involving penetrative offenses have higher rates of case attrition, but conviction for these offenses results in harsher punishment. There are some significant differences based on the Military Service of the accused, and I think that maybe one of the things that this Committee could look into is trying to tease out those differences and whether they reflect differences in policies and practices or, you know, what is it that results in the differences that -- that we see in the data? Status of the victim, military versus civilian, seems to be an important factor in the analysis, and then the relationship between the victim and the accused is a somewhat consistent predictor of how the case will be handled and the sentence that will be imposed. And that is it. 

CHAIR BASHFORD: Well, thank you so much. I don't think we have time for questions now. Luckily, we have access to you.

DR. SPOHN: I will put on my other
hat.

CHAIR BASHFORD: But while we're changing over to Dr. Galbreath, just one thing that -- two things that stuck out to me.

One is if military victims have higher rates of attrition, I think that is something we might want to look at --

DR. SPOHN: Yes.

CHAIR BASHFORD: -- to see if that is a result of retaliation. And I am also curious that we can look at another time if the more serious penetrative cases, because they tend to have more evidence than -- than a groping would, if there is somehow a reluctance to convict because the consequences are so serious.

CMSAF McKINLEY: Ma'am, could I ask for one other thing to look at?

CHAIR BASHFORD: Of course.

CMSAF McKINLEY: It is all branches of the Service follow the same UCMJ, but yet we have very different conviction rates. Can you give us 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
the conviction rate or conviction rate on the 
most serious charges and how high the acquittal 
rate was.

DEAN HARRISON: Did you collect data 
on the race of the victim or the defendant?

MS. PETERS: We did not have that 
available to us, and in looking at the procedural 
outcomes of cases, the information that the Staff 
collected tended not to include a lot of 
information about the facts of individual cases 
or the demographics in detail about the accused 
or the victim, so that is something you all may 
want to build upon, but we were focused on case 
outcomes for the most part. And --

PARTICIPANT: Did --

(Simultaneous speaking.)

DEAN HARRISON: Sorry.

MS. GARVIN: From the male victims, 
did you have the cross-gender aspect of this? So 
for the smaller number that are the male victims 
that you have captured here, was it male-on-male, 
was it female-on-male? Was that part of the
multivariate? Is that --

DR. SPOHN: I think there were only five cases involving female offenders.

MS. TOKASH: Did you -- did you all --

this is Meghan Tokash speaking -- did you all consider the Service courts overturning convictions for insufficient evidence?

MS. PETERS: We did. The Staff -- and that is something the JPP Staff -- and that is in the -- the JPP's April 2016 report, and coming out in the JPP's next report looking at '15 decisions, but what we did basically was look at every issuance from each Service criminal court of appeals that involved a conviction on an Article 120 or 125 offense or an attempt, and looked at was there relief granted in any of those cases?

We could at least look at a concrete group by year. These appellate decisions didn't tie to the cases we were analyzing, necessarily. They were just decisions issued on cases that might have been in the system for years. But we
found very few, and I mean largely single digits each year, maybe, where the -- number of cases where there was a conviction overturned. What was more likely was there was unitary sentencing in the military. Some other defects in the trial affected the entire sentence, and you ended up getting sentencing relief which would affect the sentence served for the sexual assault, but it may not have had anything to do with the sex assault offense or the sentencing phase related to the sex assault offense, and that is mostly what we saw.

But where we did see convictions overturned, there was in each Service probably at least one or two insufficient evidence, or factually insufficient cases, and I think there's probably more -- a few more of those in the 2015 time frame than in previous years. But I would -- we can supplement with the actual data for you, just calling to mind what a summary is, because we just kind of went through this as a staff. But that is how we looked at appellate
decisions.

CHAIR BASHFORD: Thank you so much.

MS. PETERS: Yes.

(Pause.)

DR. GALBREATH: Hi. Thank you. Thank you. I appreciate that.

CHAIR BASHFORD: Welcome.

DR. GALBREATH: Thank you. It is nice to be here. I even saw some familiar faces. All right. Perfect. Thank you.

CHAIR BASHFORD: I am going to suggest, since we're running a little behind, if any of the Members need to use the facility, you just excuse yourself rather than taking a break.

(Pause.)

DR. GALBREATH: Shall I begin?

CHAIR BASHFORD: Please.

DR. GALBREATH: Oh, okay, very good.

Thank you all for having me today. Appreciate it, and I look forward to working with you in the forthcoming years as you all take a look at this problem that is very, very important to both the
Secretary of Defense and a lot of the senior leadership that we work with. And -- hey, how's it going? Like I said, lot of familiar faces here.

The -- as we go forward today, what I thought I would do is give you a high-level view about how the Department views this problem. It is a -- and I know that the Committee here is very much focused on investigation, prosecution, and defense. Some of the materials that I think that I have -- that I bring today might not immediately come to your mind as -- as being focused on those areas, but they do, and I will try and show you what I mean as we go through some of this material. There is quite a bit, so I would be happy to stop as we go if you have questions and -- and answer those as -- as we progress.

A little bit about my background, just so that you know where I am coming from on this: I started out as an Air Force Office of Special Investigations special agent. I worked for OSI
for 12 years. I was a forensic science consultant and also a detachment commander at a couple of different bases in New Mexico, Utah, and Colorado.

After that, I won the education lottery and went to Uniformed Services University of the Health Sciences, and once I got there, they informed me that this was a -- going to be a health psychology program, and I said well how about health psychology with sex offense research? And they went, no thanks. But nonetheless, I was able to convince them that that was very important for the Department, and so I spent a lot of my clinical time working with Dr. Fred Berlin in Baltimore, Maryland at the National Institute for the Prevention, Treatment, and -- Prevention, Assessment, and Treatment of Sexual Abuse there in his clinic that is in downtown, and it is affiliated with the Johns Hopkins University.

And so worked there for about five different -- five years assessing and treating
sex offenders, kind of on the defense side of the house as well. I also testified in a number of court-martials and things as I got that experience.

I then went there, and the Air Force rewarded me by sending me to Minot, North Dakota. Oh, yeah, you betcha. So I was up there for three years. I was the mental health flight clinic chief, and so I oversaw both the mental health, family advocacy, and drug demand reduction, so worked on a lot of that, and then I got rescued by this small policy office that they were standing up at the Pentagon called the Sexual Assault Prevention Response Office, so I didn't have to do four winters in North Dakota.

And so I have been with SAPRO in some form ever since, for about 10 years now. So I have -- a little bit of my history goes into a little bit of the SAPRO history, and I will -- and I will try and touch base with that as we go through the slides. So I will -- I will go to slide number two.
The DoD SAPRO is -- is the representative of the Secretary of Defense on this issue. We are kind of the center -- the central point of authority with regard to advising him on what we do with regard to response and -- and prevention and oversight of this issue within the -- within the Department.

We -- our mission is to promote military readiness through sexual assault prevention advocacy and execution of the program, and we do see sexual assault prevention response as a readiness issue. We know that any number of folks that might be called upon to deploy may not be deployed because of their involvement in the investigation/prosecution process, and so we look at this very very closely. In addition to that, whether they are the accused or whether they have been a Servicemember who has experienced this crime, we want to make sure that our -- our role is to ensure that the Services are out there to support victims as they go through the process as well as work with the Services on their -- on
their prevention. So we certainly are prevention-focused, with a commitment to victim care.

Next slide. Where we are located is if you follow that, this was -- this was -- I had to do this real quick last night, so I apologize, but it's Secretary of Defense at the top. We fall under the Undersecretary of Defense for Personnel and Readiness, and then underneath the Assistant Secretary of Defense for Readiness. That is Dr. Elise Van Winkle, who has been working with us in a prior role as the head of the Defense Manpower Data Center survey operations, and so she knows these -- these issues exceptionally well. I am sure you might have her out at some point.

But we are there with some of the other offices that handle challenging behaviors, such as the Defense Suicide Prevention Office, Drug Demand Reduction and Alcohol Reduction, and Office of Diversity Management and Equal Opportunity that handles sexual harassment, so we
have -- we have just -- we were all put together there about a year ago, and we have been working together to kind of figure out how do we share a collaborative process going forward to get after some of these issues together? And I will tell you a little bit more about that as we go on.

In my office -- next slide -- office is run by a two-star general officer, flag officer. We have our brand new Director onboard, all of two weeks. Her name is Rear Admiral Ann Burkhardt. She used to run the 21st Century Sailor Office in OPNAV for the Navy. That is the Navy -- Navy office that handles a lot of these issues as well with family advocacy, sexual harassment, sexual assault, suicide prevention, and so that is certainly an approach that a lot of the Services have taken with regard to a lot of these issues, understanding that while the problems all might have different appearance, some of the solutions that we would put together to prevent these are common. There is no silver bullet, but they do share some common pathways
towards prevention.

We -- I am the Deputy Director. I am an SL, which is a flavor of senior executive, but the kind that is more of a technical advisor. In addition to that, I have got a chief of staff and a senior enlisted advisor. We have five branches in the office, and that is Prevention, Victim Assistance, Assessment, Policy, and Operations. Next slide, please.

So rather than read you some of these slides that you all can take a look at, but largely what we do are the policy and the planning pieces. We are the coordinating function of the Department of Defense that issues the policy. Our policy documents are on www.sapromil, and those are -- we have three main policy documents. One is a directive which essentially establishes the who and what everybody is -- and who is responsible for things, and then we also have an instruction, which is responsible for the what and how the program is supposed to run.
It is one of the most detailed instructions in the Department, and very very long, and because this -- this program only benefits if we have a concerted effort to get this right and work together. So what I would tell us is that we also run -- we're a little bit different policy office than what you would see in the Department because we run operations as well.

One of the operations that we run is Safe Helpline, and that is administered through us through our contract with the Rape Abuse Incest National Network. And they -- that is where you can call 24/7, or you can text or you can go online and chat with someone who can get you assistance and care, and that is anywhere in the world. And so we often -- what Servicemembers can do is call in, find out who in their area, how do they get a hold of their -- how do they get a hold of their victim advocate, and what kind of community services might be there available, and that is what Safe Helpline
does to us. It also has some chat rooms and some things that are monitored and assisted by specially trained personnel.

We also have a certification program for our sexual assault response coordinators and our victim advocates. That is D-SAACP that you see there. We all live in acronyms. I am sure you are used to that if you have been around the Department for a while.

D-SAACP is again a credentialed program so that we can ensure that the folks that are serving our victims are trained and ready and prepared to be able to do that, and once you receive your certification, that allows you to sit in front of a victim and provide support and assistance as well as capture data and enter things into the next operation that we run, which is the Defense Sexual Assault Incident Database, or DSAID. And that is a congressionally mandated database that we -- that we stood up starting in FY12, and it now captures all of the restricted and unrestricted reports in the Department, as
well as case disposition information, which
you're going to hear a little bit more about
today, and that is where we get a lot of our
data.

Finally, we have an area that is kind
of a social media area behind a protected wall
called SAPR Connect, and this is where a lot of
our professionals that work in this area, our
sexual assault response coordinators, our victim
advocates go for resources and information about
what's some of the emerging things that are out
there in the field and share good ideas, and so
one way that we try to make common practices best
-- excuse me, best practices across the
Department.

Next slide, please. We also work very
closely with the offices that handle all of the
sexual assault programs in the Army, Navy, Air
Force, Marine Corps, and also the -- it's not up
there, but Coast Guard as well, and also the
National Guard Bureau.

We have a number of core elements
behind us, and of course I think you might know
that there is the -- one of the first things that
we did in the Department is have the ability for
people to make a restricted report, and I will
tell you a little bit more about that as we go.
But we -- there are some things that as we have
gone forward in time, that we begin to add, and
we think that this is part of a really good way
to demonstrate our commitment to folks who have
experienced this crime, what we're going to do
for them and get them on the pathway to
restorative care.

We -- you want to go to the next
slide, please? So this is a bit of an eye chart,
and I apologize for it, but we have been in
existence for about since the fall of 2005.
Essentially a brief history of the last 12 years,
just to kind of give you an idea of where we came
from, in 2004, Secretary Rumsfeld at the time
began to hear reports coming from down range from
Iraq and Afghanistan that folks were deployed
experiencing sexual assault and not having
anywhere centralized to go, and no one to help
them through that process.

As a result, he initiated a 90-day
task force that took a look at what the
Department did for sexual assault prevention and
response, and after the course of 90 days, he
joined a task force. That Care for Victims Task
Force offered up a report recommending a number
of things. Chief among those was a centralized
office that would oversee things going on in the
field, as well as people at every installation
that could receive a report and then advocate for
victims as they went through the justice process,
and those became our sexual assault response
 coordinators and our victim advocates.

In addition to that, one of the
options that they recommended was the restricted
reporting option because we understood that
victims would rather suffer in silence at times
than come forward and face the scrutiny that one
gets in the criminal justice system. Restricted
reporting is a pathway to care, and it allows
folks to obtain that care in a way that wasn't available before 2005 that ensures their confidentiality, that they can talk to a mental health provider, they can talk to a SARC, a victim advocate, and they can be -- and any medical provider or mental health provider, they can be assured that their confidentiality under that restricted report will be respected.

So over the next couple of years, we kind of thought -- at least what was told to me when I got here, we were ran at that time by a GS-15 and a small cadre of GS-14s, and the military deputy was the single military person in the office for a while, and we thought that what we would be doing is largely monitoring policy and doing what other policy offices do in the -- in the Department, but clearly, this problem was out there, and it deserved additional attention, and I think that a lot of -- a lot of concern came from folks that had experienced this crime and gone to members on the Hill.

In addition to that, there was a --
there was a documentary that you might have heard of called The Invisible War that came out in 2012. In addition to that, there were a number of -- we, as I will tell you about shortly, we surveyed regularly to establish the depth of the problem of sexual assault in the force. We got a good estimate that way, and that year, in 2012, we received -- our estimate was that there had been 26,000 folks experiencing some form of sexual assault, from a penetrative crime like rape to touching crimes like abusive sexual contact, groping and touching and things like that.

That got a lot of folks' attention, including the Secretary of Defense, Mr. Panetta, and at that time, in December 2011, for the first time in SAPRO's history, we were called up to the Secretary of Defense's office to explain what is going on and what are you all doing to get after this? And from that point on, we appreciated very much the fact that Mr. Panetta assisted us in getting this issue to the forefront, and from
that time on, we have made rapid, rapid change in how the Department approaches and responds to and prevents sexual assault, and some of those I am going to tell you a little bit more about today.

Some of the -- one of -- another meaningful thing that happened shortly thereafter was the White House got involved and was very interested in what we were doing, and so in December of 2013, the President told us that we had a year to show progress in how we prevented and responded to sexual assault, and that he wanted a report by December of 2014. So we got together, we developed a suite of metrics to understand and better report on this issue and understand how we might be able to show progress to the President, and when we did, we worked together, us and the Services, very very closely in that time. We delivered that report on time in 2014, and my boss at the time, General Jeff Snow, got to brief the President alongside of Secretary Hagel and -- and the Chairman of the Joint Chiefs.
Since that time, in addition to that, we have also added a number of key features to the program. Secretary Hagel directed in 2014 that we would -- that by 2014, that all Services would have a Special Victims' Counsel program. That was piloted by the Air Force in 2013, and the initial response was so favorable that we decided that that was a best practice that we would make a common practice as well.

And in addition to that, something that is very relevant to what you all are doing here, we also stood up at his direction a special victim investigation and prosecution capability, which took a look at not only sexual assault, but child abuse and domestic violence and training our agents, our prosecutors and -- and other folks involved in the legal system to better understand this crime and to be -- and to better investigate and -- and identify and understand the evidence and the implications therein.

So it has been a -- it has been a short ten years in some -- in some respects. In
other respects, it has been very long because we are a learning organization, and every single time that we stumble or that we don't get something right, we learn from it, and we try to do better the next time.

Next slide, please. So when we talk about sexual assault in the Department of Defense, one of the things that people often don't understand is that we are actually talking about a range of crimes that constitute sexual assault in the Department of Defense. Most are housed these days under Article 120. We have one other, forcible sodomy, that is housed under Article 25-125. But again, when we -- when I talk to you about sexual assault today, I am not talking about just the penetrative crime or a contact crime. I am talking about the full range unless I say otherwise. And that is something that is sometimes -- get lost -- gets lost in here.

Next slide, please. DoD offers a whole host of different kinds of resources for
folks that are trying to recover from sexual assault. Those resources have a lot of nexus on every installation between the sexual assault response coordinators, the victim advocates, the Special Victims' Counsel, the medical providers that might be conducting the sexual assault forensic exam, the criminal investigators that might be looking at the unrestricted reports and investigating those, as well as the trial counsel and the defense counsel. All of those folks we hope that we have done right by in ensuring that they get the latest, greatest, up-to-datest stuff about sexual assault and what -- what is -- and what are the thoughts there.

Certainly, some of the -- the most important things in this area are the emerging research in the neurobiology of trauma. As a clinical psychologist, this is something that I heard a little bit about, but it is so new that it -- in my school, but it is emerging so much, and the research has really been brought to the fore point by folks like Jim Hopper from Harvard
University and others in -- in this realm, and
talking about how certain behaviors are largely
influenced by one's traumatic experiences, and
being able to explain why victims of sexual
assault don't necessarily recall all the details
behind what happened during the -- their
incident, and why memory is -- is often
influenced not only by trauma, but also the
influence of alcohol or drugs that might have
been there at the time as well.

I would highly recommend that you all
invite Dr. Hopper and -- and -- or some of his
colleagues to talk to you about the neurobiology
of trauma because it forever has changed how
criminal investigators should approach this. As
a criminal investigator myself, I can tell you
that I fell -- I fell to some of the assumptions
that are commonly made in criminal
investigations, which is you can't trust a
victim, or somebody walks in, if their lips are
moving, they're lying to you, you've got to find
out for yourself. These are all shortcuts that a
lot of the -- that a lot of us criminal
investigators used to make.

But what is better, and what is more
interesting, and what is more helpful, is
understanding that trauma impacts everything with
regard to a victim's experience, and until you
understand that, and until you have that
perspective, then you will never understand why
victims don't want to come forward, why victim
testimony is often difficult to pull out in a
sequential order in a time sequence fashion, and
why it is -- and why they don't want to engage
the justice system. All of that is -- is
tremendously important, and I highly recommend
you all hear from those folks on that issue.

Next slide, please. Some of the other
things that we do is right now, we have a policy
for -- for looking over sexual assault forensic
examination policy. We work with the U.S. Army
Criminal Investigation Laboratory as well as
representatives from the Surgeon General's Office
that are training our -- our sexual assault
medical forensic examiners, our SAMFEs, and this
just is information that we have tracked ever
since I got to DoD in 2007 when we -- and it is
with regard to the sexual assault forensic exams
that we do each year.

Next slide, please. Another --

CHAIR BASHFORD: On the restricted --

DR. GALBREATH: Yes ma'am.

CHAIR BASHFORD: -- reports, do you
send the kits for analysis on a restricted
report?

DR. GALBREATH: We do not, unless the
victim requests and changes their report from
restricted to unrestricted. Those are held in --
by different organizations in the Services.

CHAIR BASHFORD: But isn't one of the
things that might help a victim make that
decision if the kit hit to say four other kits?

DR. GALBREATH: Agreed, and that is
one of the things that we have been looking at to
see what we might be able to do. There are a
number of -- we had conversations with the U.S.
Army Criminal Investigations Lab to kind of see what is within the realm of the possible there, and so that is still a -- that is still -- those talks are still underway to see what we might be able to do.

We want to make sure that we preserve the victim's confidentiality in sending that -- sending that -- that kit forward because, again, their materials and their information is in that kit, and so how we would have to do that would be with a lot of care, and so that is -- that is some of the sticky wickets that we're trying to get through. Yes ma'am.

DR. SPOHN: So one of the problems that has been identified in the civilian justice system recently is the untested kits.

DR. GALBREATH: Yes.

DR. SPOHN: Does DoD have a similar problem, or do they have a back load -- backlog of untested kits?

DR. GALBREATH: Not like what you see in the civilian world. Almost every kit that
they have -- as a matter of fact, USACIL has the capability now to test single-person kits, in other words, victims only, and then to pull out the -- what might -- what might have been contributed by the offender and then put that into CODIS and to have the national system check. So almost in every unidentified suspect case, at the close of that, each of the three military criminal investigative organizations has their own procedures for sending those kits to USACIL to have that done.

Another thing that we put in place in 2011 -- or, excuse me, in January of 2012, was expedited transfers. We found very early on that folks that were experiencing sexual assault often were feeling trapped, that they didn't have a good way to -- to begin their healing process, that sometimes they had to continue to work with the accused, that -- and that there was no way around that, that there was no mechanism to make -- make that change.

So we enacted the expedited transfer
process, where you can request a transfer across the base or permanent change of station in order to -- for whatever reason you want it. We have -- we set the bar exceptionally low by only asking that the Services determine if it's a credible report, and those credible reports, it's not a -- it's not a level of probable cause or anything like that, but if a victim comes in and requests an expedited transfer, that they grant them any time that they possibly can.

And so this has been something that, as you see the numbers here, it has been growing every year. What we find is that we did this so that folks could begin the healing process because I will tell you, if you are every day in the same climate, and the climate is unfriendly to you for one reason or another, whether you're perceiving it to be or other things are going on, you've got to get out of there, and this is one way that we help people do that, not only for their healing process, but in case that folks were also experiencing retaliation for making a
report of sexual assault.

    And I will talk a little bit more
about retaliation as we go forward because this
is something that we think has been helpful. We
are now collecting some data on is this truly
helping folks out? And that is something that
we're -- that we're looking at in the -- in our
most recent survey that is going to come out on
Monday. I will tell you a little bit more about
that.

    BG SCHWENK: Who decides on -- you
have two categories here --

    DR. GALBREATH: Yes.

    BG SCHWENK: -- I guess one is on the
same installation but a different unit, the other
--

    DR. GALBREATH: That is correct.

    BG SCHWENK: -- is a different
installation --

    DR. GALBREATH: Requesting --

    BG SCHWENK: Is that decision the

    victim's?
DR. GALBREATH: Yes, absolutely, and also, in addition to that, Congress has passed a law that says that the accused may be transferred if that is easier or more -- easier to facilitate than moving the victim as well, so Congress also -- not only codified expedited transfers at the request of the victim, but also gave the Department the ability to move offenders if that is easier and more effective in the eyes of the commander.

Next slide, please. So one of the things that was very difficult, when I got to -- when I got to the SAPRO 2007, as a clinical psychologist, I wanted to know what were we doing to report out on the progress that we were making? And what we really didn't have, and, as I began to look to other institutions and other places that took sexual assault on as an issue, there wasn't a real clear set of metrics or a pathway or any way to communicate about this.

Largely, at the time that I arrived, we were counting only reports. In 2004, we
received 1700 reports of sexual assault before
the -- before SAPRO stood up. I knew that that
was only part of the story because sexual assault
is an under-reported crime, something people
often talk about, but don't illustrate. And so a
number -- so since that time, we have put some
measures in place. In addition to that, we
experimented with metrics on this that we worked
with the White House to be able to develop.

Some of those metrics I think are
particularly effective. We are in our third year
now of tracking those. I think that it is time
for us to take a look and see if there is
something else that we might be able to do, but I
will show you some of our better metrics that can
show you what we do and how we measure progress
against this problem in the Department. Next
slide, please.

Like I said, if you're only counting
reports, well, that is what the picture looks
like. So you will notice that I have got us
started in 2007 on that, but like I said, 1700
reports in 2004. In 2005, we enacted restricted reporting. We got one quarter's worth of restricted reporting. In 2006, we had a full year. Our number of reports increased immediately.

Since that time, you can see that we were slowly but surely increasing, plateaued a little, and then in 2012, when Mr. Panetta and the other Service leadership got behind this problem, began to speak about it regularly, you can see that between '12 and '13, we had a 54 percent increase in the number of reports being received. In addition to that, another increase the next year, plateaued a little bit, but what I will tell you is that again, this is only part of the story.

What is the depth of the problem? We know it happens more often than -- than we ever -- than we ever see coming into law enforcement. So next slide, please. If I were to illustrate that for you, the depth of the problem and size of the problem, the whole iceberg. The tip of
the problem is what gets reported. So what I have done is I have shown you based on our survey data the point estimate that we have based on the rates of sexual assault in 2014. This survey was done for us by the RAND Corporation, who took a look to double check that we were doing all our math right and that we were doing our survey procedures correctly, and they agreed we were, but they said we might be able to improve our measures a little bit, and I will tell you about that in a second. The -- but again, our goal largely is to shrink the whole size of the iceberg, and hopefully until it's an ice cube and very small.

Our other piece is that we want the whole iceberg out of the water. We would love to have everyone make a report. We don't think that is going to happen, but we would like every victim to consider at least making a report, seeing what resources are out there and available to them.

So how do I do that? How do I go
after that? You take the -- if you go to the
next slide, we use surveys that go out to the
active force to assess what the rates of sexual
assault are in the past year. In 2007, when I
got here, when we were only counting our reports,
I reached out to a couple of different locations,
and some of my graduate training in public
health. Public health and epidemiology basically
tells us if you want to know and really manage a
problem, you have to survey your population, you
have to gather some kind of data to understand
the depth of the problem, and then you have to
understand how much of it that you might see in
your official reporting capabilities or in your
institutions.

So what we did is we established that
we would get a -- the size of the problem through
a survey, and then we would follow the number of
reports that we get from law enforcement and also
through our SARCs and our VAs through our
restricted reports. This is an approach that has
been used with HIV/AIDS. It has been used with
colds and flu every year to understand how big
the problem might be through surveying the
nation, and then seeing how much we might be able
to prevent it, but also how much of it shows up
in our clinics and things like that.

MG ANDERSON: Question.

DR. GALBREATH: Yes?

MG ANDERSON: Active duty, so does this
include members of the Guard, Reserves across the
Services who are also mobilized on active duty --

DR. GALBREATH: No, these are just
active duty folks, and we survey in off-years the
Reserve component, the Guard and Reserves.

MG ANDERSON: I'm talking about the
ones who are on active duty as opposed to those
who are on inactive status.

DR. GALBREATH: Right. This would only
go to active duty folks, so someone who's not in
active status. So if you're a member of the
Reserve, or you are a member of the National
Guard, you would not appear in this number, you
would appear in our Workplace and Gender
Relations Survey of the Reserve --

MG ANDERSON: Right.

DR. GALBREATH: So even if you are mobilized you wouldn't get --

MG ANDERSON: You wouldn't get --

DR. GALBREATH: -- in this --

MG ANDERSON: So if one of them reports an assault where does it go? Where does it --

DR. GALBREATH: I'm sorry?

MG ANDERSON: So if one of them is assaulted and ends up going through the process you just described for the last couple of hours.

DR. GALBREATH: Right.

MG ANDERSON: If it's going in a different place?

DR. GALBREATH: They -- well, their report is something different. This is survey.

MG ANDERSON: Okay, got it.

DR. GALBREATH: Okay. All right. So, interestingly enough, these surveys are done with the idea that we -- that they are generalizable to the total force, so if you look at those
numbers and if you were to do the math, you would be able to figure out the depth of the problem in the Department of Defense. So in 2006, when you see 6.8 percent of women and 1.8 percent of men indicated that in the past year they experienced some form of unwanted sexual contact which was our measure, our proxy measure for the crimes that constitute sexual assault under military law defined, what you would get is, you would get about 6.8 percent times about 220,000 or so and you'd -- at 1.8 percent times about a million or so when you figure that out, the next slide will show you what we found.

In 2006, 34,000 folks we estimated experienced a sexual assault. And this is why you do this math, because if we hadn't done this math we would have never discovered that more men experience sexual assault in the Department of Defense every year than do women. In our reports, men constituted at that time about 9 or 10 percent of what was reported, but that number, 34,000, that represents 20,000 men and 14,000
women. Why is that?

    Well, 85 percent of the military force
is male, and so a very small percentage of the
male force ends up in a fairly large number. And
so even though women are at higher risk and
remain at higher risk than men, that actual sheer
number of men outnumbers women. So it became very
clear to us when we did this math that we have to
be gender neutral in the military, that we have a
duty to men just as much as we do women to
prevent and respond to this exceptionally well.

    The other piece that's really very,
very important is that parentheses that 7 percent
above the 2,289 mark. That's my estimate, and
there's -- keep in mind there's fuzz in all the
data but that's my estimate for the number of
Servicemembers that chose to make a report that
year, so the math is very easy; 2,289 over
34,000, divide that, 7 percent. Only 7 percent or
1 in 14 decided to make a report that year.

    If you look over time as we go to the
right along the chart you'll see how that's
changed over time. I think we learned our lesson in 2010. I think people thought hey, we've got a good grip on this, rates are down, and we didn't see the focus that we did in the early years of the sexual assault program in the Department. And then 2012 showed us that if you take your eye off this focus, rates can rebound at any time, and so we began to look very carefully at what we can do. And, of course, a lot of the reforms and a lot of things that have happened since then continue to produce what occurred in 2014 where we experienced a decrease.

I can't tell you today, but on Monday I'll give you -- on Monday we roll out our annual report and we'll be able to tell you what the next dot is across the top. So what you see across the top are the survey estimates of sexual assault in the past year, or what we call past year prevalence or occurrence, so that's what we gain off of the survey. And like I said, this -- in FY14 the numbers were 10,600 men and about 10,000, excuse me, 9,600 women due to rounding it
doesn't necessarily add right to 20,300, but
that's the numbers.

So last year you'll notice that we got
about 23 percent of victims that decided to make
a report of sexual assault, and that's what we
see as progress. More people are coming in and
getting care and support than they ever did
before. That's a function of the decrease in
prevalence. In other words, there's less crime to
report, but more people are choosing to report
the crime, and that's why -- that's what we want
to see. We want to see that pie slice get bigger.
We would like to see how large -- how many people
we can get out of that.

Now, I will tell you, you saw in the
reporting data that we had about 6,100 folks
report over the last three years. Okay, if we
never get another report, though, what I would
tell you is, it's that percentage of victims that
I want to see come to the door and get clearance
for it. That's what I would like to see, so as
that -- we would like to see that proportion
grow, but we'd also like to see more people at
least desire, at least considering reporting.

Across the bottom again, those are
just the number of reports by Servicemembers.
Something that was interesting that I'll talk to
you a little bit about; every year -- the numbers
that you see on Slide 16 as far as the number of
reports go don't match with numbers that you see
on Slide 13; the reason being is that every year
the Department receives reports from civilians
that have been sexually assaulted by military
folks. And in my top line number, Congress has
told us that we count sexual assaults by and
against Servicemembers, and so that's why I have
that -- a different top line number. But what I'm
showing to you on this slide is Servicemember to
Servicemember, Servicemember across the top,
Servicemembers across the bottom.

The other modification I've done to
this is that every year about 9 percent of our
reports involve Servicemembers that are coming
forward to make a report of sexual assault for
something that occurred to them prior to their
service. We thought that was very important. We
think that's a good measure of trust, largely
because they don't have to tell us. They don't
have to tell us anything, but if they trust us
enough to come in and see what kind of services
and support that they can get, we think that's a
very good thing. So a lot of times those will
come in as a restricted report, but sometimes if
they do come in as an unrestricted report, all
three MCIOs connect that individual with the
jurisdiction where the sexual assault may have
occurred and try to make sure that they get the --
that they can go and make a report to the
appropriate authority in that location, something
that I often do as the detachment commander at my
different bases in OSI.

Any questions about that? This is the
reporting -- this is the public health piece, the
reported versus prevalence is kind of the
epidemiological work. This is how we measure
progress. Our goal is to reduce the prevalence
over time through prevention work. Our goal is to increase the proportion of Servicemembers that choose to report every year.

Interestingly enough, there's a different story in these numbers. There's one more story that I'd like to tell you a little bit about, and that's on the next page.

I told you about how men report -- that we have more male victims than female victims. They also report at different rates, so in 2014, the last year's worth of data that I can share with you at this point today, men reported at a rate of about 10 percent, and women report at a rate of about 38 percent. And that's, again, an estimate based on the reporting along those lines but we feel very strongly that we've got to hear from more men on this, so for the past two years we've been focusing -- we and the Services have been focusing on what we can do to help bring more men in, help folks understand that if you're a lawyer, you already know how to report this kind of thing and get help when you need to.
Yes, sir?

CMSAF McKINLEY: Sir, thanks for being here.

DR. GALBREATH: Thank you.

CMSAF McKINLEY: By the way, Minot is a great base.

DR. GALBREATH: You betcha it is.

CMSAF McKINLEY: You betcha.

DR. GALBREATH: Oh, yes.

CMSAF McKINLEY: This slide here, the man study 2014, I mean just to clear it up in context here. That study was also asking the question if they've ever had sexual assault in their lifetime, and so it's not necessarily military on military. It could be civilian on military, and it could be before they even came in the military.

DR. GALBREATH: So we made it very, very clear that when we were asking about our past year prevalence, RAND showed them a date at the top of the screen saying in the past year, and we mean this date here, did you experience
any one of these behaviors? And so we're very
focused with this number, and we have very good
confidence that this is kind of what happened
within that 12-month period in the year prior to
being surveyed.

Now, what you're asking about is
another question that RAND had on the survey
which said after they got through the measure of
past year prevalence, we also said have you
experienced anything like what you just told us
at any point in your life? And that gave us what
we would call a lifetime measure.

CMSAF McKinley: That's where you got
the 26,000 from.

Dr. Galbreath: No, no, the 26,000 --
The 20,000 for this year came from the past year
prevalence, only what happened in the past year.
I don't have a point estimate for the lifetime
prevalence number which had to be larger
percentages because we're talking about someone's
entire life. Right? Don't quote me but it's
around 6 or 7 percent for men -- excuse me, 4
percent for men, and about 23-25 percent for women. That's the lifetime measure, and that's very consistent with what we see in the civilian community, as well.

You might have heard when the White House stood up their task force, they were talking about one in four, and that's very -- one in four women will experience a sexual assault when they go to college or a university. That's lifetime measures. Got it?

CMSAF McKINLEY: Got it.

DR. GALBREATH: Great, very good.

Any other questions about that before we press on? Okay, next slide, please.

Again, another way just to look at that data, like I said is, our goal is to get a larger proportion of Servicemembers to report, and that's -- and if you take a look at that 11 percent versus 23 percent, that's what we're looking for. We really do want folks to understand what their options are and come in and have a conversation, come in and talk about what
might be their options and what's available.

Again, men and women experience sexual assault differently in the DoD. Next slide, please.

A little bit busy slide, but what I can tell you is, is that men oftentimes are more likely to experience sexual assault at the hands of multiple offenders. Men are more likely than women to experience it during their duty hours. They're also more likely to describe what they experienced as hazing, so what I would tell you is, is that men often don't even consider the sexual nature of what they experienced as a sexual assault, that they would probably say oh, yes, I got hazed the other day, and yes, it might have involved somebody touching their genitals or something along those lines but they would never even think that that was a sexual assault. They discount the sexual nature of it, just what -- kind of how men have been socialized to do. So this was something that we thought very closely that hey, this is something that requires
attention.

In addition to that, you'll notice there's a lot that men are more likely to not have been drinking, and that also aligns -- all these behaviors aligns with kind of a workplace experience that men have with either hazing or things along those lines.

With women, it's a little bit more along the lines of they experience it off the installation or at somebody's home or residence, less likely to happen at work or during duty hours, less likely to call it hazing, but more often to involve alcohol, and that might be due to an offender trying to use alcohol as an incapacitator. Next slide, please.

Again, a lot of times what's interesting is for 30 years this country had prevention programs that told women, women, you need to stop walking in dark alleys, you need to dress more appropriately, and you need to watch out for the guys behind the bushes that jump out and are going to attack you. And men you've got
to quit raping. Thirty years, that's what our
prevention stuff sounded like. We're changing
that. And thank goodness we have people that have
kind of looked at this, but in the military this
-- that approach makes no sense whatsoever
because 90 percent of sexual assaults in the
military occur between people that know each
other. They're inside the wire, they're an
insider threat, so it doesn't matter if you
locked your door, it doesn't matter if you locked
your windows, if you walk in lighted spaces and
what you dress like because at the end of the day
none of that has to do with whether or not that
offender is going to choose not to sexually
assault you and run because you know them and you
trust them. And this is why it causes such a huge
readiness issue for the Department because if I
had to go to war with you and you are my battle
buddy, and you are the person that was -- I am
depending on you for my -- check my six as we say
in the Air Force or get my back, how could I do
that once you've violated a huge trust area with
me, and you've crossed an uncrossable boundary?
Not acceptable.

And so at the end of the day, what we
do in the Department is substantively different
than what this country has done in the past 30
years. We didn't always, didn't always and it
wasn't until really the past recent couple of
years that we've really understood what
prevention is. I'll get to that in just a second.

Next slide, please.

SGT. MARKEY: Just one question.

DR. GALBREATH: Yes?

SGT. MARKEY: So the strange -- is that
based on the 4,700 that you know are reported or
is that the estimated number of total?

DR. GALBREATH: That's the estimated
number. I'm sorry, my -- excuse my acronym.
That's the RAND Military Workplace Survey. That's
the little asterisk underneath the pie chart
there.

SGT. MARKEY: Okay.

DR. GALBREATH: Sorry about that.
That's based -- but I will tell you that the data that I have for reports, very similar --

SGT. MARKEY: Okay.

DR. GALBREATH: So what gets reported to the Department? It's a little bit hard to show you stuff across time because since I've been doing this, try and help me out, how many times has the UCMJ changed, three times, 2007, yes. So -- and for all of the reasons that Dwight will explain to you and I can't, all the difference --

we still receive a number -- charging decisions are based on the UCMJ at the time of the offense, and so as a result we track a number of different offenses that no longer exist, but the vast majority of them fall into three categories, and you'll see them there; abusive sexual contact, rape and aggravated sexual assault or sexual assault.

Aggravated sexual assault went away in 2012 and now it's just sexual assault. We used to track forcible sodomy quite a bit because sexual -- Article 120 under rape was not gender neutral.
Only women could be raped under Article 120 for the longest time, and in the most recent rewrite in 2012, any penetration no matter how slight, orally and/or vaginally, now constitutes a rape or a sexual assault depending on the evidence. And so that's changed. All of those things even in that time have now changed and so -- and now in addition to that, wrongful sexual contact, indecent assault have all largely gone away, so we're down to very small numbers. I do believe that we'll see forcible sodomy drop off now because largely all of the Bench Books are out and all that kind of stuff, the instructions are out for those crimes so that they can -- so that folks are charged under the most recent version of UCMJ.

You'll notice that we get very small numbers reported of aggravated sexual contact.

Again, these are the allegations as described by the criminal investigators as they're investigating them. Oftentimes, the determination about what kind of crime they're investigating is
done in collaboration with the Staff Judge Advocate, Chief Military Justice. My common practice was when I received an allegation, and I got the basis of what I thought were the kind of elements behind what I would be looking at, me or my agents would go over and sit with our Chief of Military Justice and track through the crime. We'd develop an investigative plan to kind of figure out what are we going to do to prove these elements, and what kind of crime are we investigating? And that's where we got a lot of help and so that's what went into our system.

Anyway, those are the three major crimes that -- or at least the three categories of crimes that are reported. Again, sexual assault is a lesser degree penetrating crime than rape, and abusive sexual contact is a lesser degree contact crime than aggravated sexual contact. Next slide, please.

Restricted reporting conversions. I thought I'd show you the number, across the top, the TO line are the number of restricted reports
that we've gotten over time. The red line is the
number of restricted reports that remain
restricted at the end of the year. We snap the
chalk line every September 30 for accounting
purposes to report to Congress the number of
restricted reports that remain restricted at the
end of the year, but what you see in the blue
line across the bottom are conversions. So a
victim of sexual assault can convert their report
at any time, and they can -- and as you see
starting out in the early years of this program,
only about 13, 14, 15 percent of folks converted.
In the past couple of years that percentage is up
to about 20 to 21 percent, and we think that's a
good thing because that means that more people
are deciding to participate in the justice
system.

Why the increase? I wish I could tell
you. We don't make folks document the reason why,
just that they do. I'm hoping that that's because
-- well, and another thing that we also found is
that before FY14, I didn't have really good data
on this because I had to rely on what the Services reported. When the DSAID database came online, I actually got to see stuff in the computer and we were able to standardize how everybody counted all of these cases, the terms that they used. And so that allowed us a little bit better visibility into kind of what was going on.

Well, over the past three years, I can tell you that people are converting their sexual assaults much more quickly than they had before. Yes?

MR. KRAMER: You're right, obviously, but there's also been a very large increase in the number of initial restricted reports. Do you know why that is?

DR. GALBREATH: Well, I think that people have heard us invite them to come and find out what's there, what kind of options that we might have. And I think that that's one way for them to kind of test the waters. A lot of times when -- immediately after a sexual assault occurs
a victim does what I call an environmental scan, and they're immediately starting to look for the things that -- what do I do now? What happened to me? Who's going to help? Do I need help? Is this what everybody else is experiencing? And so they start to look for these things.

If folks are using our services, a lot of people are very wary because they see what happens sometimes in court. We've had some horrific cases where people, especially at Article 32 process where the rules have been a little bit looser in evidence gathering, be treated horrifically. That Naval Academy's, one of those hallmark cases where just horrific treatment of the victim by the defense attorneys that was there. That's a really tough sell for folks to say, come on in and let us scrutinize your behavior and make you look like a dirt bag to all of your friends.

MR. KRAMER: Can I just interrupt?

DR. GALBREATH: Yes, sir.

MR. KRAMER: And say that maybe the
defense lawyer was just doing their job.

    DR. GALBREATH: They might well, but at
the same time, though, is that if you're trying
to increase reporting of sexual assault it's very
difficult to make that a really selling feature.
Right? So what I would offer to you, though, is
that in this way, this restricted report gives
you a protected way to come in and find out
what's going on, and what kind of things you
might be able to do. No offense to the defense
attorneys in the room. Thank you.

    BG SCHWENK: I'm sure the Special
Victims Counsel will note that their program grew
up right at the time --

    DR. GALBREATH: Thank you, thank you,
    Jim. I was just going to also comment, I forgot
to do that. That in 2014, our Special Victims
Counsel program took over and have been inviting
--- has been providing confidential legal advice
to victims when they come in the door.

    Because of the change that I've seen
in the average amount of time that people are
converting reports, I don't have any evidence, but I believe that that probably has something to do with it, that people are able to come in and get better advice quicker than they were ever able to do before. Now they know if they have a case, or if they want to press forward and what the legal pitfalls might be if they do press forward, so I do see that. So if you're going to convert, you're going to convert within the first 30 to 60 days.

This last year you're going to convert a little bit quicker. The average is closer to about a month. And not only that, but what I also see in the data is that if you are going to convert, that's the only time you do. When I go back and I look at 2014, that number that you see down there, that 20 percent only grew to about 23 percent, so not too many people come in after that time, after that year goes by. And this -- SGT. MARKEY: Are you going to pull out any points as to why there's conversion and not, that process at all? Have you looked at that?
DR. GALBREATH: I don't because I don't have a data point on that.

SGT. MARKEY: Right.

DR. GALBREATH: Like I said, when you come in and you make a report of sexual assault to a sexual assault response coordinator or a victim advocate, you signed a DD Form 2910. And that basically walks you through all of the circumstances and all of the service that we have available to you. If you make a restricted report and you check that block at the end, there is also an opportunity that you can come back any time and re-sign your form and convert to a restricted, I mean, to an unrestricted report. I never ask anybody why are you doing this?

SGT. MARKEY: Right.

DR. GALBREATH: Just that they do.

SGT. MARKEY: And then the follow-up to that is the cases that are converted, do we know how many of those numbers are -- do move through the prosecution stage?

DR. GALBREATH: Yes. That's also a
research project that I have planned now that I have three years of data in the system. And I can count all the cases that converted and that are now unrestricted, and I just have to pull that thread through the system. And that's something that my team and I are planning to do. Next slide, please.

So, again, just to give you an idea ballpark about how many of our reports are for incidents that occurred prior to service, there's the numbers there. And what I've given you along the bottom is the number of Servicemember reports in the dark purple, and the light purple the number of reports for prior to service. Again, these people didn't have to tell us but they heard that we have services and support available, and so that's -- so they come in to see that. Next slide, please.

Now, this is something I think that is -- that sometimes we're looking for a little bit more, is the accountability piece. So let me explain to you how the system works in the DoD.
Every year, like I said, this last year there was -- in FY15 there were 6,083 reports of sexual assault to the Department. A portion of those, about 25 percent are restricted reports, remained restricted at the end of the year, and there is no investigation associated with those. The remainder are cases that are unrestricted reports that will receive a referral for investigation.

At the conclusion of that investigation, it goes to a commander who with the advice of their Staff Judge Advocate make a determination about what to do with the evidence that they identified during the course of that criminal investigation.

It presents an accounting challenge that I learned when I got to the office in 2007 that I've tried to make as clear as I can, but it's too many moving parts, and what I'll tell you is this. So, when I count my numbers and I show you this graph, and that is the number of reports that came in to the Department of
Defense, you all know that this is any time
during the fiscal year that we're counting. It
takes several months to investigate. It takes
several months to adjudicate an allegation, and
so not everything gets done in the fiscal year in
which it was initiated. And so what I'm about to
talk to you about are cases that were concluded
in the fiscal year, and that means that they
reached their conclusion in FY15, and they may
have started in FY15, but some of them or a good
chunk started in years before that.

So when we snap the chalk line instead
of cases that solely involved FY15 entry into the
system, I'm now showing you numbers about a cross
section of what came in in 2015. So as far as
trends go, there's not a lot of trend data here
because every year is a different pot of cases
just by how long they took to get through the
system.

In addition to that, every case as my
friend, Dwight, always reminds me, is decided
based on the evidence, and every single case is
looked at on the evidence, and those decisions
about what to do with it on the evidence, and so
those are all individual decisions that basically
stack up into the numbers that you're seeing
before you. So I've given you some percentages
over time, but we always caution that they don't
trend, but they are just the number that they
are. As a matter of fact, when we worked with the
White House to develop our metrics we created a
new word, which is "non-metric," and why did we
do that?

Metrics are things that you look at
and you want to change behavior or change
outcomes by changing the inputs. Right? That's
what we want to do, so I want to decrease the
number of sexual assaults occurring every year. I
could do that through prevention. I want to
increase the number of report. I can do that
through encouraging -- putting together a good
response system, encouraging people to come
forward. But in Military Justice, if we were to
change the inputs that might constitute illegal
or undue command influence, and putting our thumb
on the scale of justice, so we don't do that. So
these are non-metrics, we just look at them, and
we don't try to change the inputs other than
making sure that everyone's got the appropriate
training and experience to investigate, and
prosecute, and defend these cases.

So if you take a look at the top line
there, that dark green line, this is the number
of cases or the percentage of cases that we were
able to substantiate, the allegations that we
were able to substantiate. What does substantiate
mean to the Department of Defense?

It means that evidence existed for
commanders to take some kind of action based on
the allegation. Evidence existed for commanders
to take some kind of action based on the
allegation; meaning, there was a preferral of
court-martial and non-judicial punishment, an
administrative action, or discharge associated
with -- administrative discharge associated with
a resulting allegation, or at least disposing of
the allegation, as we say in the DoD.

So that could be for the sexual assault that was alleged, the crime that was alleged, or for any other misconduct that was committed by the individual. So sometimes a sexual assault is alleged, but the criminal investigators don't find evidence of that, but instead there's evidence of other misconduct, and we substantiate based on that. And I'll show you how those break out. But by and large, the vast majority of the numbers in there, cases in there are sexual assault allegations that have been substantiated.

SGT. MARKEY: Is that --

DR. GALBREATH: Sir?

SGT. MARKEY: Is that other misconduct criminal?

DR. GALBREATH: Yes.

SGT. MARKEY: Okay.

DR. GALBREATH: So Article 128, Simple Assault, false official statement, Article 112(a) Drug use, things along those lines.
So the next line down is -- that light blue one are subjects with command action precluded. This means that largely that there's evidence problems associated with these cases. And in that category are the following four buckets; victim declined to participate in the case or the prosecutive action, insufficient evidence of a crime to prosecute, statute of limitations expired, and also the victim died before the outcome could happen. We have only had one or two of those cases ever happen in that case, none in 2015.

So in that bucket also are a number of cases in this last year that's changing our numbers both last year and they're going to change our numbers for this year in that blue line those that were -- one of those is that -- and this gets very complicated very quickly, and so I'm happy to kind of put in more detail if need to, but cases that are unfounded, meaning that the accused -- that evidence existed that the accused did not commit the crime or that
evidence existed that the crime did not occur
were accounted for differently between Army CID
and Air Force Office of Special Investigations
and Naval Criminal Investigative Service, so Army
accounted for those cases differently than Navy,
and Air Force. And why is largely Service history
and preference behind how they used to do it.

Largely, Army would take the case and
they would get an opinion from an SJA as to
whether or not this case was unfounded, and then
they would go ahead and document it that way.
These cases always didn't make it in front of a
commander to review; whereas, in the Air Force,
Navy, and Marine Corps, those OSIs and NCIS hand
over the cases without an opinion on them. In
other words they don't say unfounded on them or
anything, they just hand them over and they leave
it to command to review and then for the SJA to
help them decide what to do with the allegation.

Since that time there's been changes
in law and policy that have brought Army in line
with that accounting, and so now -- so what you
have now is that Army is beginning to put --
account for their unfounded cases like everybody
else. Now, what we're finding is that in some of
those cases they were actually insufficient
evidence cases and not necessarily unfounded
cases. And that's why you see the uptick in the
blue line, and so that's how they follow it out
into our numbers. And then you see the number of
unfounded.

Now, my friend, Dwight, would also
like me to point out to you that some of those
unfounded cases may also be appearing in buckets
of insufficient evidence or the victim declined
to participate, as well. But on the whole, the
number of unfounded cases that we have in the
Department appear to be quite small compared to
the percentage that we're able to substantiate.

Next slide, please.

So, this is a version of what I love
to call the Waterfall Chart, which you will get
used to now. I also have a separate version
that's more detailed because it's a flow chart
and it is great for insomnia. So if you are --

but I will walk you a little bit through about

how we do it and why we do it this way.

Largely, what I can tell you is that,
again, very high level, every year I know I can
track now through the database how many subjects
I have waiting for some kind of a disposition
action in their case. This year in FY15 I had
about 2,200 cases that I didn't have any
disposition for. In addition to that, as I said,
we also have a number of civilians, foreign
nationals that might perpetrate crimes against
our Servicemembers that we can't prosecute. There
are a number of unknown subject cases that are
involved, as well. And we also have a number of
subjects that die or desert before we can take
action on them, or sometimes we'll have a
civilian or foreign jurisdiction decide to
prosecute the Servicemember and exercise their
jurisdiction over that person either through
their laws or through the SOFA agreement that we
have with the country. So in that -- last year I
I think we had 60 or 80 or so. I'll be on here when I show you this, 62 subjects in '15.

So what I show you in the dark bolded number there, that 2,783, those are the dispositions that I can tell you about that military commanders took in FY15. Those are the numbers. How does that break out? So, I have 1,437 commander actions in cases that could be substantiated. That's that 72 percent that you see there, that corresponds to the previous green line, 72 percent on that line that's on the chart that was before.

Again, if you go down a little bit more you'll see that 576 of those cases were substantiated for non-sexual assault offenses, so those are the simple assault or false swearing, things like that.

Underneath that 1,437 that we could take action on for a sexual assault offense, you can see that we had 926 court-marital preferrals, 303 non-judicial punishments, and 208 adverse administrative actions and discharges. Down below
you can also see the buckets, the cases that
didn't go forward with 250 subjects whose victims
decided to participate in the system, 420
subjects were rated sufficient evidence, 19
subjects statute of limitations expired before
conclusion of the action.

So what I'm counting here is also --
too, is keep in mind that this is very difficult
to get through, as well. Keep in mind that there
are multiple subjects and multiple victims. I am
at the mercy of the military criminal
investigative organizations and how they choose
to package their cases with regard to is it a
multiple victim case, is it a multiple subject
case? And so whatever they do, I have to count it
that way, but I have to be able to account for
everything. So what I will tell you is that there
are -- I am counting subject dispositions, not
necessarily unique subjects in here, but they
only differ by about 2 percent, so I've got --
for example in one of these cases, I've got an
individual, I've got 18 cases accounted for by
one court-martial in one Service, because there were 18 different victims in that case. So in that -- that being the case, that's why sometimes when you go in and you start looking at the data, you have to ask OSI, CID, and NCIS, are we -- when you're counting cases and you're counting numbers, how many unique subjects? I know you know those very well. How many unique subjects, and how many unique cases, and how many unique victims are we counting?

I'm trying to do the very best I can with you, so I'm showing you dispositions here, subject dispositions which is different from unique subjects. And why am I doing that? Because that's what the law tells me I've got to. I've got to account for every case of sexual assault that's been reported to the MCIOs because that's what in our laws. Next slide, please.

MS. GARVIN: Before you move on.

DR. GALBREATH: Yes?

MS. GARVIN: May I ask a question.

DR. GALBREATH: Yes.
MS. GARVIN: The last bullet on the prior slide, the 73 subjects allegation unfounded. Could you say again the definition of unfounded that you're using?

DR. GALBREATH: Yes. So, unfounded means that evidence existed that the crime did not occur, or that the accused did not commit the crime. And additionally to that, as well, there's a number of cases, too, that there might be some baseless cases in there, as well, which is the crime was improperly reported as a sexual assault, and so it turned out to be something else. Next slide, please.

So this slide answers the question, when commanders have evidence of a crime, evidence of a sexual assault and, again, anything from an abusive sexual contact or a penetrating crime like rape, when they have evidence of a sexual assault and jurisdiction over the individual, how do they dispose of the charges against the individual? And as you can see in the early days of the Sexual Assault Prevention
Response program, 2007, most sexual assaults were disposed of through administrative actions and discharges, and then non-judicial punishments and court-martials were not used as much. That has clearly changed over time, and this is -- I think if there's anything that going forward with our program we have always worked on a victim empowerment model, and that is we prepare victims for whatever it is that they would like to do to help put their lives back together, and to restore their lives. And if that's also something that they want to do, is to participate in the justice system, then that's what we want to help them do, as well. So our Victim Advocates, and certainly our Sexual Assault Response Coordinators provide a certain level of being able to do that, but the Special Victims Counsel, the victims legal counsel have now the best folks to be able to help victims make that kind of decision.

I would also just have you draw an imaginary line between FY13 and FY14, because
that's when my Defense Sexual Assault Incident Database began to take over, and I was able to be able to figure out apples to apples, and apples across all three military departments. And before that time, I had to just kind of sum all their numbers in very complicated spreadsheets that have gone the way of the dinosaur, luckily. But now in the database, a lot of this information comes directly from our legal officers, or SJAs that are entering the results of these trials.

So the next slide, and I'm not going to go through a whole bunch, but this is kind of how cases fall out in the system. If you were to ask me what happened at all 926 court-martials that I had on the docket for FY15, if you go across the top in the green boxes you can kind of see what happened. And just pacing through very quickly, I had -- I still had 113 subjects who were waiting on their court-martial outcome, or at least to have their case disposition reported to us. If you look at the very top box in the second column, you'll see that 813 subjects
there, if you go -- start to go to the right, I can show you what happened to them. About two-thirds of those guys went to -- excuse me, proceeded to trial, 20 percent were given what we call a discharge, a resignation in lieu of court-martial. What is that?

This is a situation where instead of going to court, the accused can offer a statement essentially saying -- acknowledging that there's evidence against them or a statement of guilt that says yes, there's evidence there that will probably make me guilty. And instead of going to court, I'd like to go -- I'd like to be allowed to retire or be discharged, resign or be discharged instead. And that's something that -- it's almost tantamount to a guilty plea more or less, and so we're able to discharge the person, and almost in every single case when you look at that, it results in an other than honorable conditions administrative discharge. And so about 115 of those, and then for 33 subjects we didn't have the nature of their discharge, but very
rarely have I ever seen a general discharge under
that as a result. So that happens for about 20
percent of folks. And then for 111 subjects, the
court charges were dismissed at some point in the
process, so that could have been before -- after
the preferral of charges, it could have been
after the -- before or after the Article 32,
could have been before they got to court, at any
point in that system.

Going across the top a little bit
more, as you see convicted of any charge at
trial. This is very important also to understand,
so this is a guilty conviction, I mean, a
conviction of any charged misconduct at trial,
the sexual assault or anything else. As you all
know that there's a number of charges that people
will be guilty of, or might be found guilty on.
So this is where our data is what I would call
give you the wave tops associated with what's
happening in the justice system.

The JPP, the Judicial Proceedings
Panel and the Response Systems Panel wanted to
look a little bit more closely at all of the
different changes in how things were charged,
what was charged, what fell of the charge sheet,
what kind of plea deals were entered into, all of
those inner-machinations of the Military Justice
System.

My system, DSAID, does not have that
fine detail. I report -- what I can tell you is
that -- I can tell you what happened to
penetrative crimes if they were convicted, that
was the most serious crime that they were
convicted of. I can tell you what -- and I can
tell you for non-penetrating crimes, and then
also for non-sexual assault types offenses.
That's in my data as well as the next slide I'll
show you in a couple of seconds. But that's --
so, again, this is for reporting to Congress in
a way that might help decision makers at that
level. Clearly folks that are in the legal system
want to see greater granularity and movement of
all of this stuff, and that is not in DSAID. So,
again, we report by wave tops information.
Acquitted of all charges, about 100 or 24 percent of folks. And then usually the top four punishments awarded at court-martial are a combination of confinement, reductions of rank, fines and forfeitures, punitive discharge, or dismissals. And then we also have sex offender registration required for folks that -- for rape and sexual assault, aggravated sexual contact, no; just rape and sexual assault is required for -- is registration for a sex offense.

SGT. MARKEY: I'm sorry, registration.

Yes, I'm sorry.

DR. GALBREATH: Registration, aggravated as well, or just rape and sexual assault.

MR. SULLIVAN: So, the DoD directive on that is a reporting to sex offender registration officials of the state, so it's not an actual registration regime, rather it's a reporting regime. That reporting regime will cover any 120 offense, as well as forcible sodomy under 125, and some 134 offenses, as well.
SGT. MARKEY: Thank you, sir.

DR. GALBREATH: Next slide, please.

Again, not trends but just what happened. These are non-metrics, again. On the lefthand side you can see kind of what happened to cases as they flow through the system at least pretrial. So you can see across the top, these are the subjects that eventually proceeded to court-martial. The blue line in the middle are the subjects whose cases were dismissed, and then the red line at the bottom are those subjects who were allowed to receive a discharge or a resignation in lieu of court-martial. Discharge, the difference between those two is that discharge is granted enlisted folks, and resignations are officers. By far, the vast majority are -- in that category are enlisted. Next slide, next graph over.

I was just -- the percentage of conviction of any charge at trial. Again, that could be for sexual assault or for any other charged misconduct. So next slide.

We want to take a look at -- this is -
think what I'll do is, because we're hitting 4:00 and I think that I'm going to get the hook at the top ---

(Laughter.)

DR. GALBREATH: But I'll just kind of explain to you what's on the rest of my slides and you can look at them at your leisure.

So this is an analysis of folks that were prosecuted for penetrating versus non-penetrating cases, and you can see the outcomes of those cases in the analysis that we have. The next side explains to you, on Slide 30, explains to you about the Defense Sexual Assault Incident Database, and what we capture in there, what it does. It's not just a bean counter. Our SARCs and our victim advocates -- our SARCs mostly use it for case management, but also our legal officers report case dispositions in there. And, of course, we also do a lot of business management in there with Sexual Assault Office as well. Next slide, please.

DSAID receives its information
directly from the Military Criminal Investigative organizations that are investigating the unrestricted reports, as well as from our SARCs that are loading in restricted information. There is no personally identifying information in the system for folks making a restricted report. That is to protect them because I don't want to be served with a subpoena that says show me everybody who started -- who made a restricted report. I can't tell you because I don't know, but I do have their demographics, and I do have their information. I have some stuff about what those cases involved.

SGT. MARKEY: Nathan, just -- I'm sorry. I know they're about ready to give you the hook.

DR. GALBREATH: Yes?

SGT. MARKEY: So DSAID, the information that's in there, all the CID, OSI, NCIS, they all enter data into that system.

DR. GALBREATH: They enter data into their own systems.
SGT. MARKEY: And then that --

DR. GALBREATH: Then interface with DSAID.

SGT. MARKEY: Is that used as an investigative tool at all to link cases through offenders and --

DR. GALBREATH: No, and the reason being is that the systems of record for sexual assault unrestricted reports are the MCIOs cases themselves, so they use their systems for intelligence purposes.

SGT. MARKEY: So they have a separate intelligence base that they can use --

DR. GALBREATH: Yes.

SGT. MARKEY: -- for intelligence analysis.

DR. GALBREATH: They do.

SGT. MARKEY: Okay.

DR. GALBREATH: Yes.

SGT. MARKEY: Okay.

DR. GALBREATH: Absolutely. Next slide, a little bit about reprisal, mistreatment,
ostracism, things like that. Retaliation is an issue that I will tell you is an unintended consequence of trying to improve or increase the number of folks that wanted to report sexual assault. It's something that we've been getting after. In 2014, we found that about two-thirds of women who experienced the sexual assault in the past year and made a report to the DoD authority received a negative outcome or a negative behavior associated with doing that. That could have been something that might have impacted -- they might have seen like their career or they were marked down on something, or they didn't get a training opportunity, or maybe that they might notice that people weren't talking to them as much, or excluding them socially, might be that they were mistreated or had their car keyed by somebody, along those lines.

What's interesting, though, is that we didn't ask our question very well in 2014 to really, truly understand the nature of what constitutes retaliation in the Department. So
what we did in that time, like I said, that's a negative behavior, but it doesn't necessarily meet the requirements for what constitutes retaliatory behavior under military law and policy. So we put together a strategy to deal with it. Happy to come back and talk to you a little bit more about that, but if you look at the next slide on Slide 33, I know it's very busy, the donut graphs here, but if you look at the very center one, this is data from the Reserve survey we did in 2014 or 2015. We tried to get at this idea that can we better get an approximation about not just the negative behavior that people experienced that they think might be retaliatory, but also under policy and law were we able to align that experience with the kinds of circumstances that it has to occur under. In other words, it's got to be because that person knew you reported the sexual assault, or suspected that you did. It's also got to be because they did this behavior to interfere with your participation in the justice system, or
interfere with reporting of other crimes in the — maybe from others in the area. So what we tried to do is apply that, and when we did, what we found is the following.

So if you look at that center donut, the lightest blue color there, we found that 41 percent of people that indicated experiencing a sexual assault in the past year on our survey didn't experience any negative outcome associated with their making a report. The lighter green side are the percentage of people, that 23 percent are the percentage of folks that experienced the negative behavior but not any of the other kind of qualifying circumstances in order for it to be considered or meet survey criteria for retaliation. And that 36 percent down there, the darkest number, that's the number of folks — that's the percentage of folks that experienced a sexual assault in the past year, reported that experienced the negative behavior under the circumstances that we talked about that might be considered retaliatory. So that kind of
essentially gives you an idea that about 36 percent of those folks had what I would say like a prima facie case for an allegation of retaliation. So, we don't want to walk away from that 60 percent, because if you notice, if you add the 23 and the 36 percent together you get 59 percent, basically almost the same number we got in 2014 for people perceiving the negative behavior associated with reporting, and that's a cultural piece. That's a cultural issue we've got to get out there. Then this bucket, about 36 percent of folks experienced something that we might say qualified for -- under policy or law for retaliation.

All right. That being said, other stuff talks a little bit about prevention and other things, and our way forward on that. The other document which you have is what we call our Waterfall Chart. I showed this all to you pretty much, but what this will do is this document will track you through all the reports that came in pretty much in 2015, show you how many were
restricted, unrestricted, and where they fell out
in all the different places along like we've
talked about, so some were civilian subjects,
things like that, how many got prosecuted by
military offenders, what were the outcomes of
those court cases, what were the outcomes of the
non-judicial punishments, things like that.

So thank you very much. I'm getting
the hook; there we go; done. Appreciate your time
and your attention, and certainly happy to come
back and talk less to you.

(Appplause)

CHAIR BASHFORD: So we have an hour and
-- less than an hour. We have 55 minutes to
discuss strategy. We've received letters from Ms.
Cannon who couldn't be here because she is
getting a fantastic award today from the criminal
--- I forget the exact --- Defender of the Year,
something like that from the Bar Association. I'd
like to congratulate her on that, as well.

We also have in our materials a letter
from Judge Brisbois about what he thinks might be
a good way to go forward. So would you like to just talk about that for a few minutes?

HON. BRISBOIS: Well, it was just a brainstorming session of one.

CHAIR BASHFORD: That's okay.

HON. BRISBOIS: A very contentious conversation. But my -- I guess my under -- my assumption or maybe I misunderstood how much time we were going to devote to strategic planning at this meeting after our January meeting, but I thought that we were all going to kind of come back after doing our open reading and all that kind of stuff with some structure ideas, so that was my attempt to put my thoughts together. I noticed quite a bit of it, there's -- I kept seeing flashes of recognition today and what I have in mind in terms of the sources of available information, so maybe -- and there's some overlap in the last half that the Staff had put together too, and so to the extent that that's the starting or the working point to start from, I think it would be helpful for me, anyway, if the
Staff could go through the bullet points that I have. There are already sources of information that we can look to, to answer these questions. That would help me and maybe others for strategic planning discussions later. How much of it is yet to be created, how much of it is already in process, that kind of thing. But it really was meant strictly to be --- to start the discussion in terms of, you know, it's a five-year charter.

CHAIR BASHFORD: Actually, we were a five-year charter --

HON. BRISBOIS: Last year, yes. That's why I said four plus years.

CHAIR BASHFORD: No, three plus years.

HON. BRISBOIS: We're at three plus years? Okay, well time flies when you're having fun.

(Laughter.)

HON. BRISBOIS: But I think, you know, the enabling legislation as I pointed out in my opening paragraph, and as the opening paragraph of Tab 13 shows, there's no information other
than review cases and report back after March 30th, and so we have a pretty blank slate. But the one thing sort of that I -- looking at the first group that had a one-year to -- I forget the name of it.

CHAIR BASHFORD: The Response Systems Panel, sir?

HON. BRISBOIS: Response Systems.

CHAIR BASHFORD: Yes, sir. RSP.

HON. BRISBOIS: Yes, they looked at the articles, the UCMJ Articles and they made recommendations for changes there. The JPP has been looking more at the judicial practices, prosecution and things like that. Two years they're issuing reports now this spring, I think -- and then the fact that Congress said we have a five-year, three plus four years, that suggested to me that -- and I asked for the Congressional history on it, and Ms. Carson, there isn't a lot there to guide us. But the five-year mark and the general nature of the legislation, I think, suggested to me that this group wasn't so much
more of the -- these are the changes to make, but where to evaluate how well are those changes working and functioning. So that's sort of -- when you see my bullet points, that's the prism through which they were developed. We're measuring -- I think we have a longer time frame. We can take a longer view, and so we can develop systems and analysis to measure how well -- what are the outcomes? How well are those changes affecting maybe the prevalence rate and things like that, reporting rates?

The other part of my observations that came to my mind, is this isn't -- this is an issue that isn't going to be fixed by -- solely by changing the Articles of the UCMJ, you know, or resources for prosecutors and defense. There's a considerable social, cultural aspect to this whole issue, and especially when you consider you're recruiting 18, 19-year olds and brain science says, you know, they're not fully developed until they're 20-21 years old, so they have judgment skills that they haven't developed
yet. They're coming out of a social environment in high school and in middle school where you're already having misuse of social media in sexting, and pictures, and contents, and unconsensual publication of other material, so they're already desensitized or a little bit, if you will, and so there's -- you know, we train on everything from how to wear your uniform to how to fire your weapon. I'm wondering how much for those young people who are 18, 19, 20 is our training not socially oriented enough in terms of respect levels and things like that. And are we just assuming they're coming with those skills? And I think we can't make that assumption given what's happening in their high schools and their middle schools, and given their own cognitive and social development. So it's kind of a hodgepodge of things, but it's all from that perspective of measuring outcomes, checking the socialism and seeing what the social contact side of it.

But the way to try to pick a number of different things that I heard from our January
meeting, the materials that we already received, and connect them in some unified, you know, in my mind counter supportive way. And like I said, it's neither exhaustive, or exclusive, and was just meant to be a starting point for discussion. I've already heard quite a bit, some of the information is already available or it's going to be shortly begin to be collected, and it's just a priority from our point of view, from our -- you know, what are we going to focus on? We can't do everything even in three and a half years. We have to make some priority decisions, and that's the strategic planning part of this.

And I guess my suggestion would be that our July meeting be almost exclusively strategic planning for the whole day rather than one hour.

CHAIR BASHFORD: One thing that was apparent from the almost overwhelming amount of information we got today, there's a lot of data that's been collected already, and so I'm glad Dr. Spohn is on this because I think you could
help steer us to -- we've got a lot of data.

You've done some analysis, now what should we use that data for? Like how should we go into it.

Appreciate suggestions like that in that regard.

So we're drowning in data, everything is being tracked.

DR. SPOHN: Well, yes. And, you know, I think that there are some -- there are a lot -- there are more questions raised than answered by the data that we've analyzed thus far. But I think, certainly, the differences across the Services, trying to understand why those differences exist and whether they can be attributed to different policies and practices or to levels of resources or differential training. I mean, there are -- the question is how to get at that? How do we answer that question, and I think those are some of the questions that you raised in your bullet points, as well.

Civilian versus military issue, I think it's something that also deserves a little more analysis. And looking more closely at the
cases involving intimate partners and spouses, and the differential outcomes that those resulted in as well.

CHAIR BASHFORD: That was actually counterintuitive to me, that the punishment for the acquaintance, intimate partner ones is substantially higher than the strangers. In the civilian world, it tends to be the opposite.

HON. GRIMM: And the conviction rate is lower.

CHAIR BASHFORD: Conviction rate is lower.

HON. GRIMM: Which seems completely skewed.

DR. SPOHN: Again, I think that's something that the data that I have can't answer that question. There's very little information about the victim other than status and gender, and relationship to the accused. But we don't know whether victims in intimate partner and spousal cases are more likely to refuse to cooperate as the case moves forward, which I
suspect they would be --

HON. GRIMM: Right.

DR. SPOHN: -- for obvious reasons. But
documenting some of those things I think would be
important. And the data that he presented, that
Dr. Galbreath presented, does not include any of
the family cases.

CHAIR BASHFORD: And yours did have the
family members, right?

DR. SPOHN: Yes. Meghan could maybe
speak to that.

MS. PETERS: I'm sorry. I was getting
ready to follow-up on something else, so I'm not
sure if I can answer another question first. I
think it was --

DR. SPOHN: Well, I just mentioned that
Dr. Galbreath's data do not include the family
cases.

MS. PETERS: That's correct. So JPP
asking for all sexual assault cases, we were
asking for two universes. The DoD SAPRO office
has a big policy book and they cover just about
any relationship, friends, stranger, dating
relationship, but cases that are falling through
the military justice the exact same way are
counted differently within DoD if the
relationship is spousal or what they meet ---
what they say is an intimate partner. So, SAPRO
is not counting family cases or intimate partner
cases, but the SAPRO cases are everything else,
so they could be strangers, many of them are
acquaintances in the same unit and do know each
other at some level. So we kind of had a family
case pile, and then everything else pile, and we
had about 17 percent more cases than SAPRO
reports when we looked at the family cases. So
there's somewhat of a difference in the
relationship. We don't know how broad or really
how distinct those differences are when you look
at SAPRO cases and the family cases.

CHAIR BASHFORD: One thing I just
starred and I already don't remember, I think it
was the panel of four, they -- is it all Services
that write prosecution memos for their cases? So
could we do an RFI for prosecution memos for a period of time where they decided they didn't have enough information to go forward?

MS. PETERS: Yes, ma'am. Are those covered by work products?

CAPTAIN TIDESWELL: Well, we could maybe get at numbers. Are you trying to get at the numbers of --

CHAIR BASHFORD: Oh, then that's kind of --

CAPTAIN TIDESWELL: Are you looking for the actual numbers?

CHAIR BASHFORD: I'm just wondering why they weren't going forward, so --

MS. VAGHELA: I'm sorry. Can I just say, all Services do not write a prosecutory memo.

CHAIR BASHFORD: Okay.

MS. VAGHELA: I just wanted to say that for the record.

MS. TOKASH: I think what might be helpful -- this is Meghan Tokash speaking. Is,
you know, for an advisory committee on making recommendations on investigation, prosecution, and defense of sex assault, to me one of the most striking pieces of data today was the 49.8 percent conviction rate, and I know A.J. highlighted the disparity between that conviction rate and say the DOJ conviction rate. If we have these cases that the JPP and that Dr. Spohn's already analyzed from 2015, I wonder whether it would help us understand mechanically, you know, why, what happened? I think Robbie, you asked that. You know, why is that -- why do you have that statistic? Is it because there are not uniform standards of prosecution in the Armed Services? Is it because there is a push just to get sex assault cases referred -- preferred or referred? We just don't know, and I think that maybe that's where we could do a deeper dive by making a request for commanders or counsel who are involved in these cases to give us a better understanding of the why, because to me that's the biggest X factor at this point. And that
could maybe help us steer our recommendations for
how these cases should be investigated,
prosecuted, or defended. We're talking
substantially about rights of the accused, too.
If we're preferring charges and they're not
getting referred to cases, you have
Servicemembers who are flagged who are suffering,
you know, not getting promoted, things of that
nature while they're standing accused. And
likewise, conversely, you have a victim who is
believing that the system is going to deliver for
them. To me as a prosecutor, a 49.8 percent
conviction rate is not delivering results for
victims.

CHAIR BASHFORD: I wonder to what
extent prosecutorial discretion plays a role? You
had said that as policy, you want to see proof
beyond a reasonable doubt. And I know there's
civilian prosecutorial agencies that have the
same -- not that you won't take a hard case, but
you're not going to take a case that has
absolutely no chance of success. And I don't know
in the current climate if people -- again, it
might just be a pendulum swinging, that cases are
being brought that shouldn't, but it could be the
fact finders don't like the cases, but I think it
would be a good thing to look at, too. There's
got to be some structural reason there.

MS. TOKASH: And also just based on our
presenters today, Rule for Court-Martial 306,
it's -- there's some factors to consider in the
discussion section, but that's for the commander
to consider, not necessarily a set of
prosecutorial standards to actually lodge an
indictment against a Servicemember, and then
further refer to a trial -- tried by the highest
jurisdiction of court.

HON. GRIMM: You also have a completely
structurally different area, because what you
have is, is that one of these things that we
can't -- have not measured. There's no way of
measuring it, is what it means when you advise a
fact finder of proof beyond a reasonable doubt.
Probable cause is more likely than not, and that
is where there's a reasonable belief beyond mere suspicion that this occurred. When you have that and you go and you say you know have to find beyond a reasonable doubt as a standard, and you have situations where you have -- as the hypothetical fact pattern that they gave us, both of them drinking, conflicting comments about whether they had had, you know, some degree of intimacy before, and all those issues come in. Then that is a distinction in the Department of Justice, and in civilian prosecutors, you go to the prosecutor's control of a decision. You don't go to grand jury if you don't think it's a solid case. If the grand jury does not give a true bill you don't have a case, and if it does, even if you got an indictment as you develop it, if you believe that the case is shaky as you get closer to trial, you can dismiss.

You do not have the professional JAGs making the final decision. In fact, you've got a command structure in which the command has been told you're going to take these seriously. You're
going to investigate, you're going to provide
these services, and the decision makers, the
decision not to prosecute goes up to a full
Colonel or a General Officer who has to make that
decision. And what you get is you get -- and I'm
not saying this is right or wrong, or anything
else. I'm just saying that the decision as to
whether you go forward or not is not in the hands
of the lawyers the way it is in the civilian
system. And it is being done by individuals in a
command structure who have been told clearly and
properly, I think to a certain extent, you've got
to stop this stuff from happening, and you stop
this stuff from happening by moving forward. So
you have a lot of variables there going on. I
mean, if you had a 25 percent acquittal rate in
an office, in the U.S. Attorney's Office, I don't
think the U.S. Attorney would be in there very
long. That's a staggeringly large percentage of
cases that go to trial. So it's a completely
different system in terms of what goes from
investigation to the decision to prosecute, and
then you have to factor in that you've got a completely different standard of proof. And at least my experience with juries in the civilian community, because I've talked to every jury after a jury trial, is they take seriously that responsibility to measure the case. And when someone tells you if there is any reasonable doubt you must acquit, it is a different mind set than if it's like is there some evidence from which we can believe that something must have happened. And that's a factor, too. I don't know how you measure that, but there is just simply a fundamental difference in which the two systems operate.

MR. KRAMER: I also wonder, too, about the fact finders because we always talk about a jury of peers. That almost never happens in the civilian court. The defendant is usually much different than the jurors, but in this case we have fact finders who are in the same profession, in the same situation.

CMSAF McKinley: But significantly
different ranks. If you've got a private who is being prosecuted, you're going to have a sergeant major, first sergeant, or that jury is not necessarily a peer either.

MR. KRAMER: Well, you have people from the same world, let me put it that way.

CMSAF McKINLEY: That's true.

MR. KRAMER: Most of my clients, and most clients in state and federal courts all over the place are not the same -- from the same profession, situation, background as the jurors.

CMSAF McKINLEY: That's true.

MR. KRAMER: So you're absolutely right, of course, about the rank. But it seems to me -- and I don't -- I loved the presentation, all the presentations, and we have some incredible data, like you said. What we don't have is much explanation for any of the data except anecdotally in most cases. The data seems to be extremely important so, I mean, I think you're right. You're both right on all levels about this. This is very surprising to me. I was
surprised -- all the -- between Services as well as --

CMSAF McKinley: Right.

Mr. Kramer: -- within the entire Service.

CMSAF McKinley: I have some thoughts. And, number one, with what you said there, is I spent 10 years as a First Sergeant dealing with non-judicial punishment, you name it, everything with court-martials in between. And the thing we always heard is JAGs give recommendations, commanders make decisions.

Mr. Kramer: Right.

CMSAF McKinley: So it's up to the commanders to make the decision where you go. But, you know, one of the things that I see out there that I think we need to look at is, we are -- our military is more purple now than ever. We have joint basing, we've deployed jointly, and so we're out there stuck together. But through the judicial system, and especially training for the judicial system, it's totally different, because
we really have no clue what the other Services are trained to.

For instance, you know, for someone to take command, you know, of the Air Force, say a squadron of 300 people, that commander gets one week of training, and in that one week of training, maybe they get one hour of SARC training. And the First Sergeant of that unit gets two weeks of actual training at the First Sergeant Academy, and then two weeks of distance learning, you know. And then we put them out there and they're in charge of the health, morale, discipline mission of that squadron, but when they get a sexual assault in that unit, are they really trained to handle it? And I would say from one squadron to the next squadron, to the next squadron, they all do things differently because there's no training that -- they haven't been trained.

Now you go between one Service to the next Service. How is the Army trained? How is their commanders and First Sergeants trained? How
is the Navy done? And we deploy jointly, we live
together jointly. We should be looking at how we
train our commanders, and how we train our senior
leaders, enlisted leadership in dealing with
this. And I'm telling you, we're not trained.
When something happens, people pick it up and
they do the best they can. They got to the JAG
office, they get recommendations, but as far as
taking care of people, taking care of people in
the unit, for the victim who has to go through
all these different problems, for the accused for
all the things and all the flags that they get,
we're not really trained on how to deal with
that. And I think that's one area that would be
very important for us to look at jointly, as all
branches of Service. How is each branch of
Service actually trained, and some are doing
better than others, and we can pick and grab, but
we should all be thinking about we should be
trained the same because we have the same UCMJ.
So I think that's an area that we could do a lot
of work in, a lot of good.
CHAIR BASHFORD: Would that --
everything seems to be in a manual. Would there be training manuals for these different positions?

CMSAF McKINLEY: No.

CHAIR BASHFORD: No?

CMSAF McKINLEY: No.

CHAIR BASHFORD: Then I guess we can't get that. It's just sort of ad hoc?

CMSAF McKINLEY: Well, you have commanders courses, you know, at different levels. You have like a squadron commander course, you have a group commander course, or brigade, you know, whatever. Then you go all the way up, and they're different level courses. For the enlisted, you have the First Sergeant Academy, you have one course. But, you know -- and then for each member of the unit, you know, you get sexual assault training every year, but the sexual assault training is a CBT, computer-based training.

CHAIR BASHFORD: Yes.
CMSAF McKINLEY: But there's really no learning that takes place there. It's a race to get it done. So, you know, back in the old days we actually used to have commanders calls where we had face-to-face with a commander, who would get up there and he'd talk to people face-to-face and have them do things. Now it's a race to get the CBT done so you can go check, I'm good for another year.

BG SCHWENK: That's because when you were a junior enlisted guy all they had were the stones and those little things -- it was too hard to do it.

CMSAF McKINLEY: You are --

(Laughter)

BG SCHWENK: Rode the horse.

CMSAF McKINLEY: And we rode a horse, and we -- yes, sir.

BG SCHWENK: Can I say some things about -- oh, good ahead.

CMSAF McKINLEY: Go ahead.

BG SCHWENK: Oh. Can I say some things
about strategic planning? Okay. Last time I said I really thought we needed subcommittees, and the reason I thought we needed subcommittees, it can triple our output in the time that we have.

In order to get subcommittees we found out, you know, from today from the FACA briefing, you know, you have to identify what the subcommittee is for, and then they'll approve it. And it takes whatever amount of time it takes except for the fact we're really lucky that the guy who's the legal advisor to the people that make the -- that run the committee management is the guy who's performing the duties as the General Counsel and has a vested interest in this because he's the sponsor of it, so he can manipulate both sides.

I still think we need them. The question is what are they? You know, how do we divide them up? And so our charter -- so there's a lot of ways to do it. I mean, I think our first meeting some people thought well, maybe we could divide up into three subcommittees and have all
three subcommittees do some aspect of data analysis, and then see what questions flowed out from their data analysis. Let those subcommittees look at the issues, the whys that they don't have answers for, and prioritize in their minds what they think the priority ought to be, brief us back, and then we could look at all three groups, and the priorities, and the issues and say all right, we want to start with this one, and then that one, and then the big group we'd have a way to go forward. That's one way to do it.

But we also have a lot of other issues that people have brought up that are not directly related to data, and we've all decided, I think, we haven't had a vote but I think we've all decided our charter is broader than just reviewing records of trial.

So another way to do it is have one subcommittee be the data people. They're the ones that are going to and look at Cassia's information, the information from the SAPRO report, at the information that Meghan and the
rest of the people on the Staff have all pulled
together from the past and start identifying
issues from that. Why? Why is this happening this
way? Why is that? And then in their own minds
come in and brief us when we have a meeting, and
tell us we think we should address -- these are
issues that we've discovered. We don't know the
answers, but they strike us something could be
wrong, and we need to look into it. And here's
what we think the priority of that would be.

Then we could have another one that is
sort of like the iPAD part, you know, the actual
military justice, the investigation, the
prosecution, the defense, the special victims
counsel, the judiciary, that narrow lane and look
at the issues starting maybe by having -- asking
the Staff to go through and identify all the
recommendations made by the other two panels that
never got approved. I mean, they're just like us,
you know. They looked at the issue, they thought
this was something that ought to get done, and it
didn't get done, you know. So then we know those,
maybe you might want to look at one of those, or
two of those.

And that panel can also then, like
talking to these people today from the Army JAG
School, talk to some other panels at their
subcommittee meeting and get ideas. And then,
again, like the first panel, filter the ideas
together, prioritize them and come back and say
here's some ideas we thought of that we think we
ought to look at, just like we're brainstorming
today with ideas.

And then the third one could be the
broader brush, so we have the data, we have the
military justice, you know, sort of the court-
martial thing, and now we have the other stuff,
command training, the things that affect the
military justice process, that affect whether
we're getting reports that are restricted or
unrestricted, whether the process has the right
kind of training so when the members show up they
don't say as people have heard in the past oh,
one drink and you can't consent, you know, which
may be a good thing in training, but it's not a
good thing at a court-martial.

So, you know, that could be the
broader that looks at related issues, reprisal,
you know, or retaliation. And again, they would
sit down, think of those issues, talk to whoever
they wanted to talk to, and come back and brief
us. And if we did that, then we'd have three
different focuses. I mean, this is just an idea.
You have three different focuses that are going
forward that are trying to cover the waterfront.
They're trying to identify issues, think about
them a little bit, prioritize them, and then help
lead us in the discussion so that -- and I agree
with whoever said, you know, next meeting we
probably ought to spend a lot of time just
ourselves figuring out what we're doing. But it
would give us a way to focus. That's it.

DEAN HARRISON: I agree with everything
I've heard. I would like to second Judge
Brisbois' idea about looking more closely at
whatever data we could get. I've just got some
questions, lingering questions, and I'm not sure what subcommittee they would go to. For example, I believe that it's not a one-size fits all. We've got five different Services, you know, different ways of doing things, tiny commands to huge commands. And I'd like to know, for example, some of the characteristics, if there are any things in common. For example, is a victim someone who's most likely to be on her first tour in the military? Is an accused somebody who's most likely to be on her first tour or more senior? Is somebody at a training command most likely to be victimized? Those are things that would be helpful to me. I'd like to know if the race of the victim or the perpetrator has any impact on the outcome, either charging decisions or the sentences?

That would -- I don't know why that would be helpful, but I think that's something that I would like to know about. I like the idea of subcommittees because I do think that's going to multiply our ability to get to --- down the
line, somewhat.

CHAIR BASHFORD: I also think that they would be interested in how much happens when somebody is deployed versus at home.

DEAN HARRISON: Or isolated commands, even. You know, maybe Minot, North Dakota is not the most conducive place in the world to mental health, I don't know.

MR. KRAMER: Related to what you said, I'd like to know if there's installations where there's much higher prevalence, and maybe places where there's a higher number of sexual assault cases than other locations.

CMSAF McKINLEY: I think you'll find that's true.

MR. KRAMER: Yes, but I would like to know where, and that would be something I think we would want to know why.

CHAIR BASHFORD: Didn't Japan, bases in Japan kind of kick this whole thing off a few years ago, or something?

CMSAF McKINLEY: Well, that had to do
with our Marine -- some Marine rape cases with the Okinawans there and so you have very, very bad stuff.

MR. KRAMER: That was citizens, Japanese citizens.

CMSAF MCKINLEY: Yes, Japanese -- Okinawan citizens, yes. And they're basically to the point where they're telling the Marines to get off the island, you know. So yes, we have some different locations. A lot of times it's based upon the leadership, the local community, and things to do on and off duty, you know. Locale has a lot to do with a lot of things.

CHAIR BASHFORD: I do like Schwenk's idea of divvying it up that way because I think the data gives you some many opportunities to look into the where, the who, the how because if we just have the data presented to us at these meetings, we're not going to have a chance to really understand it and see where it needs to be fleshed out more. And I thought the broad one about sort of the procedures themselves was also
very good and then the, the sort of the catchall
which is like what are the impediments? And I
think like the retaliation, is that an impediment
to report -- it may be an impediment to going
forward, but it also very well might be an
impediment to deciding to go forward in the first
place when you see what's happened with your
colleagues.

And one other thing I saw that
somebody mentioned, but I don't think it's been
really tracked is what happens to the people
afterwards, the people that report? What's their
length of service? Do they continue to get
promoted? Do they decide to sever their ties?
Like how long term effect does this have?

CMSAF McKINLEY: Yes, you know, and
that's a great point because there are
consequences, you know. And so you don't -- I
don't think that's really been studied, a victim
of what the long term promotion effect on that
person is, you know. You know, how long does that
linger? I mean, I don't think they ever get over
it, you know, so I don't think it's been studied.

Another thing I would like to, of course, to look at, I think Staff is doing a wonderful job but I would like the read-aheads earlier so that we have time to do the read-aheads. Me, personally, I think coming here for one day is too short. To come in here and then basically the moment you arrive you're getting ready to leave, because we could have had some more Q&A going on and got some good stuff out here. So I think one day is kind of too short, maybe a day and a half, and then give us time to get out of town on the second day, something that we should -- that's my recommendation.

CHAIR BASHFORD: I agree. I felt that we had some very productive questioning going on without enough time to do it, which we're supposed to be in the public part now, aren't we?

CAPTAIN TIDESWELL: Not until 5:00.

CHAIR BASHFORD: Oh, sorry.

CAPTAIN TIDESWELL: And there's been no request for public comment.
CHAIR BASHFORD: Oh, okay.

SGT. MARKEY: So I just wanted to make a couple of comments. I'll try to be done by 5.

(Laughter)

SGT. MARKEY: I'm still-- and maybe we can get clarification on the edict of the committee, and the wording of review cases and give advice. And maybe we can go back to whoever wrote those comments and say this is what we think it means, but you wrote it. What was your intent for this committee?

I know by the diversity of the committee that -- and this is, again, my opinion, that I believe that part of it is to provide a different set of lenses to look at what is occurring within the military. And you made the comment about an organization looking at itself as an organization, or IBM would investigate themselves for fraud or something. And I'm not saying right or wrong, but that does have some inherent biases and issues that might be present.

I heard some things, I want to hear
some more things. I heard some things today that
I thought were really critical, very important,
raised my thought process as to the why question.
And so I don't know if we -- you know, when I
think of case review, I'm thinking from my lens
as investigator, as investigative case review.
And are there things that we are being successful
in our investigations that are working, and are
there some things that we maybe should consider
from the outside civilian world that would help
support what we're trying to do in our mission.
You know, and specifically it's, you know, like
victims that are dropping out. Is it something
we're doing in this investigative process that's
pushing the victims to drop out? Should we look
at that?

Unavailability, is it something we're
doing within the investigative process? And I
meant to say, I love the colors on those first
slides, but I look at the big red box, and in the
big red box was investigations. That was the
first step from the victim reporting, and
everything else was downstream from that. And I know that DoD has done several reports through their IG office looking at the investigative process, and so I don't want there to be audit or inspection fatigue, like we're going to do another audit, do another inspection. But I think we have an opportunity, and I'm not military. My grandfather and my father were, but I think we have an opportunity from the civilian side, are there practices within the civilian world that we could look at and possibly apply within the military world, and it might not work.

One of the things that they talked about relationships between the JAGs, and I apologize, I don't know all those acronyms, but between the attorneys and the investigators. And when they say that attorneys are rotated every 18 to 24 months, how can you build a relationship between investigators and prosecutors when you know your case might not even -- you may have started with one and you're going to finish with two other prosecutors. And I think -- and I know
it's inherent in the military that that's what happens. Right? So is that something we need to look at? Is that something that could be changed in the military where you would -- I can tell you my thoughts. If I had a new prosecutor every 18 to 24 months, I wouldn't even be in that unit. I would say this is not worthwhile. This is frustrating. And it was frustrating at times.

I can tell you it takes two years, and we talked about how many hours it takes to become an expert. It takes you a solid two years just to know where the door to the sexual assault unit office was, and I know I simplified that, but that's what was occurring in my unit. And so if I saw a turnover every 18 to 24 months, we would have definitely had gaps and we'd definitely have issues that were created just by that factor. So I see a lot of things that -- my thought is what can we bring -- and I still -- your paper or whatever you want to call it that you wrote, that was brilliant. I loved it. It was very detailed, a lot of good information, and I really believe
that those numbers are there. So do we really
need to capture more numbers, or do we need to
look behind the numbers and say like somebody had
mentioned, you know, why are these numbers there?
Why are victims dropping out? Why is there a low
prosecution and conviction rate? Is it because of
the process, is it because the practices -- maybe
we can improve the practice, maybe we can improve
the training, those types of things that I'm
thinking about. But I really want to know what is
a case -- what are we supposed to do with case
review and advice? And I don't know can we get --
can we ask a question, push it back upstream and
ask those questions or not about clarification?

MS. TOKASH: Can we get the people in
who tried these -- who investigated these cases
that the data is from, from 2015 and ask them? I
mean, we could ask the prosecutor, do you feel
like you didn't have enough experience? We could
ask a defense counsel, do you -- what happened?
How are the motions filed? You could ask the
investigator what -- why did you unfound this
case? Help us understand --

CHAIR BASHFORD: That would best be
done, I think, at a subcommittee --

HON. BRISBOIS: I think what Mr. Markey
is saying is can we get the legislation authors
and ---

(Simultaneous speaking.)

SGT. MARKEY: Yes, those are the ones --
- and the other thing I would add is, I would
love to hear from the MCIO in all three branches,
because we heard testimony that it's not --
doesn't appear to be being done in a
standardized and consistent way across the
military, or across the different branches. And I
think it reflects in some of the data, but I am
just curious about the investigative process. And
for me to talk to -- want to be able to provide
any sort of support and advice, I'd like to hear
about the investigative process. And I know I
talked about site, they talked about site visits.
And I think that's really important, too, to try
to get unfiltered information and data from
people who are in the trenches that are actually
doing the work, as well.

CHAIR BASHFORD: One thing we really
didn't hear about except one brief reference to
the Special Victims Counsel is case load. They
said they had 20 to 25. I don't have any sense of
how many cases the prosecutors have, how many
cases the defense has, how many cases the
investigators have. I mean, it could be
completely appropriate, or it could be --

SGT. MARKEY: Yes, that's a great
question.

CHAIR BASHFORD: -- wildly inadequate --

(Simultaneous speaking.)

CMSAF McKINLEY: --- sometimes it's
very difficult to get a defense lawyer. You've
got to get a defense lawyer who's out of state,
you know, and that's a problem sometimes.

CHAIR BASHFORD: That would be one
thing we should get our hands around. And I know

JPP has been doing the -- has issued -- either
the subcommittee has issued a report, or they're about to issue a report on defense resources. Right?

CAPTAIN TIDESWELL: Yes, ma'am. It was just issued this week.

CHAIR BASHFORD: Yes, but I'm not sure how much in depth it has gone, but we'll have to take a look at it. And just following up on one other thing. Some of the -- there were things that they recommended, various panels have recommended that have not been enacted. There's also been things that have been enacted very recently, so it might even be too soon to tell what the effect is. That might be some of the stuff where a longer, even if we lost a year, we still have a pretty good chunk of time.

DR. SPOHN: I have a question. Are there written protocols for investigation, and prosecution, and defense of sexual assaults?

CMSAF MCKINLEY: Where? Within the military?

DR. SPOHN: Within the military.
CMSAF McKINLEY: I would not know.

CHAIR BASHFORD: We would have to ask, but I'm sure there's some sort of protocols, training materials, and --

DR. SPOHN: We can see, if there are protocols, if we can see those.

CHAIR BASHFORD: For people who have done cold case investigations, some cold case teams have protocols, some don't. I suspect it might be the same.

MG ANDERSON: I thought Colonel Kennebeck said that it was within the Service regulations, so that should be easy for us to get.

CAPTAIN TIDESWELL: What we can do, ma'am, is we can draft a Request for Information for you that you would sign off and it would be then reported to the Services.

CHAIR BASHFORD: Do we want to make -- what are people's thoughts? Are we going to stab at trying to initiate the subcommittees? Do we need to wait the three months? Do we want to
start thinking of people who might from outside
be good in a particular area and forward those
names on? Thoughts?

CAPTAIN TIDESWELL: It was my
impression from Ms. Crowley that it would
probably take less time if you all did not ask
for outside help but just --

CHAIR BASHFORD: Right.

BG SCHWENK: At least initially. You
know, just start internally, divide ourselves up
and then each subcommittee can say man, we could
really use a whatever, and then they can make the
request through us for Tammy to go to DoD.

CHAIR BASHFORD: I just want to make
sure, you can add members to a subcommittee
later.

CAPTAIN TIDESWELL: With permission, I
believe so.

CHAIR BASHFORD: Yes, with permission.

BG SCHWENK: Yes, they have a lot of
authority --

CAPTAIN TIDESWELL: Or you could also
just bring them on as a consultant --

CHAIR BASHFORD: We could --

CAPTAIN TIDESWELL: -- rather than a member.

CHAIR BASHFORD: Well, we've got 25 minutes.

CMSAF McKINLEY: I think it's pretty important to kind of get an idea of what is our objective when we meet in July.

CHAIR BASHFORD: Personally, I would love if we could have had some smaller groups that have had -- are able to if not personally meet, talk, get a sense of what they need so that we don't have the same discussion in July.

MS. GARVIN: Do we think a subcommittee could be formed in a timely fashion before July, or do we need to be thinking about preparatory work?

CAPTAIN TIDESWELL: One option, ma'am, would be is to get the cooperation of the General Counsel, once the subcommittees are set, we could then hold telephone conferences in a small group.
BG SCHWENK: You know, so if we have
subcommittees and whatever we decide they're
going to be, and we get them approved; in the
meantime, we certainly can have the Staff, ask
the Staff to go ahead and go through gathering
issues that have either been addressed and no
action was taken, or partially taken, the
questions that we've raised ourselves that are in
other things. I think the JPP is going to have a
number of things they're going to say -- and we
don't have time, but somebody ought to look at
this as being the somebody, you know.

(Simultaneous speaking.)

BG SCHWENK: And those -- list those
things so that even if between now and July we
have only one subcommittee meeting, you know, if
it takes forever for them to approve it, at least
when we come in July we can see this list We'll
have seen it ahead of time, each of us can have
our own views on what we ought to prioritize and
get on first, and what other -- there won't be
any issues probably we'll take off it. It's just
a matter of which ones are we going to try to get
done this year for the next March report, and
which ones wait, you know, follow on. And have a
robust discussion about that, and that'll
generate other issues.

It may well be that we decide we need
an MCIO panel. We have a whole list of issues on
the NCIS, and OSI, and CID, and we've love to
have them come in and talk to us, and they're
always great about coming in. And they send
pretty senior guys, people in here. And, you
know, we could do that, so that would -- at least
we'd have something to drive to that's
substantive, that gets us, you know, moving in
July, even if there's a delay in the
subcommittees.

And if we go to a day and half, I
don't know how everybody feels but I don't care,
but if we go to a day and a half, we could even
ask to have an MCIO panel, because if we divide
the work up similarly to what I suggested, then
that one panel, the middle panel is going to be
talking about investigations, and prosecution,
defense, and all that, and it would be a good
chance for them and everybody else to review on
how they do it, how similar their practices are,
how detailed their guidance is on here's what you
need to do in a sexual assault case, because we
know -- and they can tell us what schools they go
to. Maybe we can get copy of the syllabus or at
least a review of what the syllabus is that they
teach, and it would inform all of us a lot.

MG ANDERSON: And also along the lines
of what Chief McKinley was talking -- I agree
with you that the training I think is an issue we
need to look at for all levels of command,
because you start with the Captain who's got a
couple platoons in the Army model but they're
going to -- they may have to deal with sexual
assault in their unit, and what kind of training
are they getting? Then with their First Sergeant
to be able to properly handle the victim and the
accused in the whole process. I submit to
everybody here, it's probably about an hour,
maybe two. And we spend, we spend a lot of time in our units training up the SARC s. I mean, they go to a pretty, a fairly long course, I think. But then you give a very small sliver of time to the command team, and I don't think that's fair to the command team or to the accused or the victim. So they've given an RFI to get that information, as well, from each of the services, as to what -- at each command level what kind of training are you providing for your command teams?

CMSAF McKINLEY: I would venture to say if our command teams across all branches were better trained on how to deal with these situations, you'd probably have a higher conviction rate because the victims are willing to stay in the game and go to court, and everything else, and you've have less of them saying I'm out of here.

MR. KRAMER: Which also might lead to a lower incidence of sexual assault in the first place.
CMSAF McKINLEY: Right. But, you know, having the leadership team in a unit no matter what branch of service, that's committed and well trained, and the people know it and they can see it, is a great benefit.

CHAIR BASHFORD: Captain Tideswell, following up on the idea that perhaps we could meet for a day and a half --

CAPTAIN TIDESWELL: Yes, ma'am.

CHAIR BASHFORD: -- going forward, since we're only meeting quarterly, would that be an option?

CAPTAIN TIDESWELL: That's an option; yes, ma'am.

CHAIR BASHFORD: And it would cost extra hotel.

CAPTAIN TIDESWELL: Yes, ma'am, but we're fine budget-wise.

CHAIR BASHFORD: Are there people who would be -- with the option that everybody's here, are people -- would people be interested in that, available for that? I think it would be
very helpful. Anybody who thinks that's a
terrible idea?

BG SCHWENK: Well, it depends whether
Jan's catering her dinner or not.

(Laughter)
CAPTAIN TIDESWELL: So, ma'am, I would
just sort of put that in context for you all
because I know you're all very, very busy people.
So now as we potentially split up into
subcommittees that would now be a certain number
of hours in addition to what we're already asking
you to do, so you just -- just so you have those
variables.

DR. SPOHN: If we met for a day and a
half, the subcommittees could meet for at least a
part of that time.

MS. SMITH: Yes, they can.

DR. SPOHN: In addition to -- we have
conference calls, webinars.

BG SCHWENK: Right. Yes.

DR. SPOHN: So, I liked your idea about
a data committee, data on the existence and the
adequacy of data on the --

BG SCHWENK: Great.

DR. SPOHN: -- systems, the adequacy of data.

BG SCHWENK: And the issues that that committee spots that we ought to ask questions about. I mean, to the Dean's issue about race, why would we care about it? I think the military, at least, always cares about race to makes sure that the numbers don't show us we may have a problem. I mean, no one -- we hope we don't see, but if you see, you know, some imbalance of male/female, you know, we haven't had an 0-7 selected in the Navy in six years that's female. Well, is that because for seven years we had incompetent females make 0-6, or what is going on? It's an indicator, go ask questions. And so I think having data like that gives you something to look at to make sure there's not a consistent trend that's potentially problematic.

DEAN HARRISON: I agree with that.

SGT. MARKEY: Well, I think very
strongly that we can also pull out information
about what the military is doing correctly in
this area, as well. And as part of the TAC, I
feel very strongly as a committee that we should
be able to provide help and support for --
whether it's resources, case load, or other
things that we feel or we see that, you know,
you're doing a good job. Here's some areas that
we believe if you just maybe move some resources
here or worked in this area a little bit more,
that the response would be dramatically improved.
So I feel very strongly that, you know, I think
we should highlight the good things, as well,
because I think we are some good practices that
honestly in the civilian world I wish we were
doing. And I think that would be important to
pull that out, as well. At the same time say hey,
I don't know if you would call them
recommendations or whatever you want to call it
but, you know, they're doing a good job. They
just need some help, and here are some things we
would like you to decide to look at to help
create a better response.

DEAN HARRISON: In terms of responses, and this is probably something that is most appropriate for subcommittees. We heard from some excellent lawyers this morning, but we also heard that a lot of the decision points -- that the most important decision point is being made by a Convening Authority, the Commanding Officer, and various levels of Commanding Officers along the way, and I'd just like to know -- I mean, I think like a lawyer, but I'd like to know, if I was thinking like a career officer, and I come into the office in the morning and there is a report of a sexual assault under my command. Do I have any reaction other than, we need to investigate this and mete out justice? Am I, for example, asking, what is this going to do to my next promotional opportunity? I mean, I may not be saying that consciously, but what -- how does the decision-making process of the Commanding Officer along the way get influenced by things other than protecting the victim and finding the truth of
the allegations?

CHAIR BASHFORD: Although, it did sound

in practice as though for the most part the
Commanding Officer was going along with the
recommendations.

DEAN HARRISON: Well, right now we have
a system where if you decide not to prosecute, it
goes up and your decision gets reviewed with a
great deal of scrutiny.

BG SCHWENK: Gee, you think that gives
somebody the impression that there's a right
answer?

(Laughter)

BG SCHWENK: No. It's an independent
professional judgment of the case.

CHAIR BASHFORD: Well, I'd like to get
the sense, do we think it would be appropriate
now to set up -- request for. We can't just set
it up ourselves, an initial subcommittee involved
with data analytics and data gathering, because
everything else stems from the data that yes, we
have. What more do we need? What can we do with
what we have? We just have just some tremendous
work done on it already. People have a sense of
that? That could really -- we'd have to say what
the purpose is, and who would want to be on it.

CAPTAIN TIDESWELL: Yes, Madam Chair.

CHAIR BASHFORD: And then that would
have to go off for approval. Right?

CAPTAIN TIDESWELL: Yes, ma'am.

CHAIR BASHFORD: Which I presume would
happen before the next meeting.

BG SCHWENK: Yes.

CHAIR BASHFORD: People think that's a
good idea?

BG SCHWENK: Yes.

CHAIR BASHFORD: Dr. Spohn, would
everybody --

(Laughter)

BG SCHWENK: You mean the Chair of the
Subcommittee, she's not on board?

CHAIR BASHFORD: Would you be willing
to serve on that? Do you have time to do that?

DR. SPOHN: But I don't want to be a
subcommittee of one.

CHAIR BASHFORD: No.

BG SCHWENK: Okay, so --

CHAIR BASHFORD: Judge Brisbois, would you be interested in that?

HON. BRISBOIS: I don't have the skill set for data analyst, so --

CHAIR BASHFORD: I think only Dr. Spohn does.

HON. BRISBOIS: You know, I need to -- quite frankly, my docket is such that I need to know what the subcommittees are, and what -- before I can tell you which one I might be able to contribute the time to. You know, going to days and a half might be problematic for me as well, but that's just one person out of sixteen, so. I think from a -- I'll go back to what I said at the beginning, because subcommittees are inevitable. That's the only way of --- in between every three months that we're going to get anything done. I understand that, and I agree with that. I still think that 50 minutes for
strategic planning is woefully inadequate, and
that July should be dedicated almost entirely to
strategic planning. And by the end of that, the
other two subcommittees ought to be fairly well
fleshed out, as well. The data one is the one
that right now lends itself to starting the
process, because that's clearly defined. But I
would urge against starting the process within
the Oversight Committee, so at this point go
after a full day of strategic planning.

DR. SPOHN: Another person who is not
here and I wouldn't want to speak for her, but
Jennifer Long I think would be a good person on
that data committee, as well. She's working with
the Urban Institute on developing performance
measures for prosecutors, and they have like a
200-page document on how prosecutors can better
measure their performance that goes beyond
conventional grades. So she's somebody who has
thought a lot about these issues, and ---

CHAIR BASHFORD: We should volunteer
everybody who's not here.
(Laughter.)

BG SCHWENK: I'm happy to help, if you don't mind having me.

DR. SPOHN: Of course.

CAPTAIN TIDESWELL: Ms. Bashford, perhaps you might be better served since not everybody is here, maybe if we come up with perhaps the titles or what we think the three subcommittees might want to do, and then administratively the Staff could send out an email to see who volunteers. Would that be helpful?

CHAIR BASHFORD: I think the thought is right now to set up just --

CAPTAIN TIDESWELL: Just data.

CHAIR BASHFORD: Just the data.

CAPTAIN TIDESWELL: Okay.

CHAIR BASHFORD: We'd like something like data analytics, data gathering. But I think seeing people who aren't here, if they're interested it would be good, as well.

CAPTAIN TIDESWELL: Yes, ma'am.
CHAIR BASHFORD: And then you can communicate with them about that.

CAPTAIN TIDESWELL: I'm allowed to.

Yes, ma'am.

CHAIR BASHFORD: Okay. But that would give us three. That's a good start.

BG SCHWENK: Sure, if our third person says okay.

CHAIR BASHFORD: That's progress.

CAPTAIN TIDESWELL: Yes, ma'am.

CHAIR BASHFORD: Along the way there are many suggestions about perhaps the Staff could do this or perhaps the Staff could do that. Were there things that you took down as something to do?

BG SCHWENK: Yes, identify the issues.

CAPTAIN TIDESWELL: Yes, absolutely, is really identify the issues and if you all want to strategize in July --

BG SCHWENK: It gives you a chance --

CAPTAIN TIDESWELL: -- we'll give you an outline of just things to think about.
BG SCHWENK: Gives you a chance to decide how to pot them, you know, what pot for what.

CAPTAIN TIDESWELL: Yes, sir.

BG SCHWENK: What are the issues?

CAPTAIN TIDESWELL: Yes.

BG SCHWENK: And then that gives us something to start with.

CHAIR BASHFORD: And doesn't the JPP have some more reports coming out shortly?

CAPTAIN TIDESWELL: Yes, ma'am. I anticipate at least four more. Yes, there was a data report that's pending. They received testimony and Dr. Spohn was kind enough to present that. There's a report on military sexual assault investigations that the subcommittee has already briefed out. There's a report they're working on that deals with victim's appellate rights, so the Article 6(b), and I know there was some discussion about right now, the response and they'll have a recommendation probably on that. I know there will at least be a final report.
BG SCHWENK: Well, there's the subcommittee report that's coming out --

(Simultaneous speaking.)

BG SCHWENK: They've got several issues in it. Most of them say refer to the next advisory committee.

SGT. MARKEY: And, Chairman Bashford, I would just say that obviously my wheel house is investigations, and if there's a subcommittee that could look at that process and identify performance indicators, and get a definition of case review or reviewing cases, I'd be more than happy to start to develop that, and coordinate that.

CHAIR BASHFORD: Kathleen Cannon in her letter also indicated that she was very interested in looking at, you know, what staffing resources and impediments to defense would be. I do think it's important to cross pollinate so I would not just want people who specialize in defense to do defense, you know, because Meghan and I, you know it's important to have a variety
of people looking at that.

    SGT. MARKEY: Diversity.

    BG SCHWENK: What if -- I mean, we're going to have to look at investigation sooner or later. What if we asked for two subcommittees and have one be an investigation subcommittee that we can change later on, and that allows the two -- or not investigations but case review. We've got to do case review in some way. We have to do a case review, whether we have the Staff do it and brief us, or whether we -- but if we had a subcommittee that was case review, it's easy to sell because that's what the statute tells us to do. So we could have data analytics, we could have case review, and we'd have a chairman for the case review, and Cannon can be on there, and maybe somebody else, and that way at least that would be stood up. And we know we have to do it so that's sort of an inevitable one.

    HON. BRISBOIS: But the definition of case review is one of the strategic planning things that --
BG SCHWENK: Well, but getting the administrative part done so we have the committee, then let the committee come back to us if they're done in time to do it with ideas for how they should work, we then pass judgment in July.

HON. BRISBOIS: But to staff up or to get promulgated a subcommittee you've got to be able to define the purpose and goal, and until we know what case review means, we can't say what the purpose --

SGT. MARKEY: Are we going to be able to define that more succinctly?

CAPTAIN TIDESWELL: No, sir, I don't believe we are.

(Simultaneous speaking.)

SGT. MARKEY: So we're going to define that.

CAPTAIN TIDESWELL: Yes.

SGT. MARKEY: All right. If you've got a flip chart, let's go.

BG SCHWENK: So all we say is we're
tasked by statute to conduct the case reviews. We need a subcommittee to do the initial case review, so that they can brief the full Committee on issues identified during the case review for the full Committee to, you know, consider it and reach a decision. And nobody -- I don't think anybody in the General Counsel's office or the Committee Management Office is going to looking for and exactly how are they going to do it? And what -- they're going to ask for the broad parameter of what is this subcommittee for, and is it related to the mission of the Committee? And clearly this is, and I don't think there will be any problem getting it approved.

CAPTAIN TIDESWELL: The more broadly you define the subcommittee, the more flexibility you'll have.

BG SCHWENK: Right.

MS. TOKASH: Can I offer another perspective, that maybe we as a Committee should do the case review, and that will identify issues to develop the subcommittees? I mean, I get the
data part but maybe if we dig deep into the
review of the cases that will help us mete out
what the issues are to look into for
recommendations.

BG SCHWENK: Sure, and just because we
have a subcommittee that has that as an issue to
identify, you know, things they'd find out for us
to consider, doesn't mean any of us couldn't say
I'd like to come in a half day early and go
through, you know, case records that they already
have gathered or that Staff has gathered. I mean,
I think for those of us that want do that, that's
a great thing because it does help inform you as
we go forward. But my experience is when 16
people sit down and try to drive stuff you end up
with a long discussion and not a lot of end
result, but if some smaller group can come in
weigh it out, it's easier to grapple with the
issues.

CHAIR BASHFORD: We've agreed to set up
one subcommittee so far. Right?

BG SCHWENK: Yes.
CHAIR BASHFORD: Which is the data gathering, data analytics to --- five minutes --- to support the work of the members as a whole, and provide other venues for research or something like that. Right? And now the proposal is to at least get ahead of the curve and try to set up one more for --

BG SCHWENK: Case review.

CHAIR BASHFORD: -- case review, that would enable us to intelligently advise on how well the investigation, prosecution, and defense of cases is going. Right?

BG SCHWENK: On the issues identified through the case review to improve the process, you know, prosecution, investigation -- investigation, prosecution, and defense of sexual assault cases. I mean, I think -- why else are we supposed to look at case reviews, but to see if there are ways we can't think of that might improve the process? So that's all we write up, that's what we want the subcommittee to do. So if we don't want to do the subcommittee right now,
that's fine, but it seems to me sooner or later we're going to have to do it.

CMSAF McKINLEY: I think, of course, we need to look at case reviews, but I agree with him that, you know, we need to look at a strategic plan to determine how many cases do we plan on reviewing, what type of -- what case are they, what branch of service, how many are we going to review? And come up with a plan how we're going to attack this.

BG SCHWENK: And who's going to come up with those ideas for us? That's what the subcommittee --

HON. BRISBOIS: That's the subcommittee review.

BG SCHWENK: -- between now and July. So they come in in July and say we've actually thought about this, and here is what we think. And then we debate.

HON. BRISBOIS: This committee as a whole has to define what does case review mean.

BG SCHWENK: Exactly.
HON. BRISBOIS: Yes, we --

BG SCHWENK: I agree.

HON. BRISBOIS: But until we define it, you can't give it to the subcommittee to define for us.

BG SCHWENK: You can give it to the sub -- that's what subcommittees -- subcommittees can't make any decisions. Remember that. Subcommittees make no decisions. All they do is dig into an issue and give us a briefing on what they think we might want to do.

HON. BRISBOIS: That is the core fundamental strategic planning decision that this group has to make as a committee of the whole. That's what July needs to be dedicated to along with some additional strategic planning issues, and until that happens we're just kind of throwing stuff up in the air and seeing what sticks. And I don't --

BG SCHWENK: So who's going to brief that?

HON. BRISBOIS: We don't -- there's --
I asked for and received the legislative issue. There is none. Unless you bring the actual authors in to tell us what they think they meant at the time, the case review -- it depends on doing individual case reviews. Are you going to be second guessing the prosecutors and the Convening Authorities, or are you going to be looking at it in a broader system review in terms of, you know, how many are charged out, what are the outcomes? I mean, that's data analytics.

We have to decide what that means, and what is -- how is it going to be useful? What do we want to do with it? And then the subcommittee goes to perform the case review and report back. The subcommittee cannot define what case review needs -- the committee as a whole has to do that because that's the fundamental foundational strategic plan that drives everything for the next three and a half years.

BG SCHWENK: And we're both agreed. We completely agree. The only thing we disagree on is how we start the committee defining that
stuff. I'm suggesting we have a subcommittee come in having thought about it, and give us some ideas to start the discussion. You're suggesting the 16 of us sit down and individually try to come up with all this in the next meeting. I'm trying to make it, in my opinion, a little bit more efficient.

CHAIR BASHFORD: While I see the pluses and minuses of both, it's --- let me check this. This is actual time. It's 5:15, so while I think it would be advantageous, I really don't think we have enough time today to make that decision, so I think unless everybody disagrees with me, that we're better off starting one, and then we'll be moving to two. We're at 5:15.

CAPTAIN TIDESWELL: And they can -- the agenda for July could the first time block be definition of case review. It's us, it's not a briefing, and we as a committee resolve the issue.

CHAIR BASHFORD: Yes. So what I would suggest is everybody in the meantime be an Army
of one, and start thinking of what that -- what
you think that would look like, or would best
look like.

(Simultaneous speaking.)

CAPTAIN TIDESWELL: Ma'am, so the next
meeting I believe is scheduled for the 21st of
July. You all would like to be brought in the day
before perhaps, for a day and a half, or do we
just still want to stick with the one day?

HON. BRISBOIS: I'm envisioning no
briefings. I think it's an all work day.

CAPTAIN TIDESWELL: Yes, sir,
understood.

HON. BRISBOIS: And so that one day
should be sufficient.

CAPTAIN TIDESWELL: One day? Yes, sir.

CHAIR BASHFORD: But perhaps for the
next -- you can find out from the committee
members if that would be advantageous or feasible
for people to come in --

CAPTAIN TIDESWELL: Yes, ma'am.

CHAIR BASHFORD: -- a day earlier.
MS. TOKASH: And Captain Tideswell, can we submit our ideas to each other through you like ahead of time so we can --

CAPTAIN TIDESWELL: I'll defer to the DFO, but we have to avoid any appearance of pre-deliberating, and so perhaps maybe you could just individually send them to me, and I would put them all together. And I will have a read-ahead for the Chief ahead of time, the usual week we've been pacing out here. But if you send them all to me, I will -- we will rack and stack them as a staff ---

MR. SULLIVAN: If you send them to Captain Tideswell, you should also send them to Ms. Bashford at the same time. It should go to the Chair at the same time. And then -- and, obviously, just keep in mind that anything distributed in that manner will be made available to the public, so you wouldn't want to have anything that you do not anticipate and want to be in the public's view.

MS. TOKASH: Understood.
BG SCHWENK: CC to you?

MR. SULLIVAN: That's fine.

CHAIR BASHFORD: Watch your language.

(Laughter.)

CHAIR BASHFORD: I want to thank everybody, but it's 5:17, I believe, so we are adjourned.

MR. SULLIVAN: And for the record, the meeting is closed.

(Whereupon, the proceedings went off the record at 5:18 p.m.)
(202) 234-4433
polices 9:4 57:13 74:4
244:10 341:14
policy 6:3 15:6 18:6
24:2 33:8 60:2 68:4
80:9 83:2,4 99:18
116:12 119:15 122:4
133:17 142:3,20,22
143:4 147:19 157:16
180:14 207:12 253:12
257:8,12,15,15,17
258:7 263:15,16
270:17,19 313:21
331:5,15 333:13
343:22 347:17
policy's 59:7 74:9
pollinate 395:19
popular 86:9 105:19
139:10,18 310:18
323:6
premiere 41:13
preference 313:7
preferential 128:3
preferred 88:10 139:11
151:20
322:16
preference's 152:16 347:5
preliminary 94:14
144:16 145:1 146:10
147:11 194:20
preparation 106:17
preparatory 378:17
prepare 35:8 320:8
prepare 16:10
preparatory 378:17
preparation 259:13
prescribe 64:7 87:13
prescribe 16:10
prescriptive 35:8 320:8
preparer 259:13
preponderance 82:17
83:16 84:6 174:8
pre-requisite 207:21
prescribe 63:5
prescribed 64:7 87:13
preparatory 16:10
prescription 176:2
preposition 162:10
prepositional 176:2
preposition's 82:17
preposition's 83:16
prepositional 174:8
pre-requisite 207:21
prescription 63:5
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