

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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SEXUAL ASSAULT IN THE MILITARY

+ + + + +

FRIDAY, JANUARY 11, 2013

+ + + + +

The Commission convened in Suite 1150 at
1331 Pennsylvania Avenue, Northwest, Washington, D.C.
at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner*

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner*

VANESSA EISEMANN, Parliamentarian

* *Present via telephone*

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STAFF PRESENT:

LILLIAN DUNLAP

PAMELA DUNSTON, Chief, ASCD

YASMIN ELHADY

ALFREDA GREENE

JENNIFER CRON HEPLER

LENORE OSTROWSKY, Acting Chief, PAU

ELOISE PLATER

EILEEN RUDERT

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

JOHN MARTIN

CARISSA MULDER

MARLENE SALLO

ALISON SOMIN

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	4. Bridget Wilson, Major, California Guard, U.S. Army Reserve, Enlisted (Ret.), Rosenstein, Wilson & Dean, P.L.C. (Defense Counsel)	
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	4. Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Department Navy of the Navy	
	5. Lieutenant General Dana K. Chipman, Judge Advocate General, U.S. Department of the Army	
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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:31 a.m.)

3 **I. INTRODUCTORY REMARKS BY CHAIRMAN**

4 CHAIRMAN CASTRO: This meeting will come
5 to order. My name is Marty Castro. I am Chair of
6 the United States Commission on Civil Rights. I want
7 to welcome everyone here this morning to our
8 statutory enforcement report briefing on Sexual
9 Assault in the U.S. Military.

10 It is currently 9:32 a.m. on January 11,
11 2013. The purpose of this briefing is to investigate
12 current efforts to both reduce and address the
13 incidence of sexual assault in the armed forces of
14 the United States of America by examining the
15 Department of Defense's policies and practices
16 concerning sexual assault.

17 Those of you who are not familiar with
18 the Commission, our agency was born in 1954, sorry,
19 1957, as part of the Civil Rights Act of 1957.
20 Congress and President Eisenhower created us at the
21 fledgling moments of the U.S. civil rights movement
22 to examine the issues that were being faced in the
23 United States and to make recommendations to the

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1 President and Congress on how to address those civil
2 rights issues.

3 I am pleased that through the history of
4 this Commission, which is an independent, bipartisan
5 Commission, made up both of presidential as well as
6 congressional appointees, that we have recommended to
7 the President and Congress over the years, actions
8 that have resulted in the Civil Rights Act of 1964,
9 the Voting Rights Act of 1965 and other protections
10 which cover all of us today.

11 The Commission's role is an independent,
12 oversight Commission, so our statutory enforcement
13 report allows us to look at those federal agencies
14 who have enforcement of civil rights as part of their
15 agenda, to ensure that they are meeting their
16 obligation.

17 I want to thank Commissioner Kladney for
18 bringing this topic to our attention. I want to
19 thank my fellow Commissioners for supporting us,
20 examining this issue in a bipartisan fashion.

21 I remember when I was a boy, my father
22 was a Navy veteran, we would often watch the movie In
23 Harm's Way. However, today, the topic that we are
24 looking at is that yes, our men and women in uniform
25 are in harm's way, but unfortunately it's not only

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1 exclusively from foreign opponents.

2 We see from the information that we
3 received in preparation for this hearing that they
4 are in harm's way unfortunately from folks in their
5 own ranks, from their colleagues and from a command
6 that in some instances has not addressed issues of
7 sexual assault in the military.

8 Yet, if you look at the statistics of
9 the Department of Defense, by their own estimate, in
10 2011 there were approximately 3,192 sexual assaults.
11 They also, in another report, estimate that about
12 only 14 percent of those assaults are actually
13 reported, so the numbers could be as high as over
14 22,000.

15 That's a travesty. When we can't
16 protect those in uniform who are there to protect us,
17 there is something that we need to do about it. If
18 we cannot ensure the rights of those who fight and
19 give their lives so that we might enjoy our rights,
20 then the system is broken.

21 Justice has got to be done, and this is
22 not just a partisan issue or a political ideology
23 issue. This is an issue that affects all Americans.
24 So I hope that today, as a result of the information
25 that we gather from our witnesses, and from the

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1 materials that we received today and in advance of
2 this briefing, as well as from public comments 30
3 days after this, that we will prepare a report on a
4 bipartisan basis to the President and Congress with
5 findings and recommendations that will hopefully
6 thoughtfully contribute to addressing this issue.

7 Today we have a number of very
8 distinguished speakers. We have 14 speakers who are
9 going to provide us with a diverse array of
10 viewpoints.

11 The speakers have been divided into
12 three panels. Panel I speakers will represent the
13 perspectives of the victim and the accused. Panel II
14 will consist of academic scholars. And Panel III
15 will consist of presenters from our armed forces.

16 During the morning session, our
17 panelists will have eight minutes to speak. During
18 the afternoon session they will have five minutes to
19 speak.

20 After each panel presentations,
21 Commissioners will then have the opportunity to
22 question the panelists, and at that point panelists
23 can continue to elaborate on their earlier remarks.

24 We have, however, time periods that we
25 have to allot and abide by, so as Commissioners speak

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1 and as panelists speak, we ask you to remember that
2 we have to accomplish this in a certain period of
3 time.

4 Now, you are going to notice, panelists,
5 that there's a series of warning lights here. They
6 are like your typical traffic lights. When the light
7 goes from green to yellow, that means -- that usually
8 means slow down but here it means speed up so that
9 you can finish.

10 And when it goes from yellow to red,
11 that means stop. You know, we ask you to try to
12 conclude at that point. I don't want to have to cut
13 off anyone in mid-sentence, and then we'll have the
14 opportunity to speak further.

15 My fellow Commissioners know the process
16 well. I will identify them when they want to speak
17 and I will try to do so in a fair and balanced way.
18 Sometimes they may want to ask multiple questions.
19 We will ask them to try to keep it to one. But
20 sometimes questions do require follow-ups and we will
21 abide by that if possible.

22 So with those bits of housekeeping
23 aside, I want to now present the panelists in our
24 first panel. Rachel Natelson is the director of
25 legal services for the Service Women's Action

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1 Network, also known as SWAN. Our second panelist is
2 Retired U.S. Navy Commander Philip D. Cave, who is
3 also defense counsel in the Law Office of Philip D.
4 Cave. Our third panelist is Nancy Parrish, president
5 of Protect Our Defenders. Our fourth panelist is
6 Retired U.S. Army Major Bridget Wilson, who is also
7 defense counsel with Rosenstein, Wilson & Dean.

8 Now I will ask each of the panelists to
9 swear or affirm that the information that they are
10 about to provide to us is both true and accurate to
11 the best of your knowledge and to your belief.

12 (Whereupon, the panelists were sworn
13 in.)

14 CHAIRMAN CASTRO: Okay, Ms. Natelson,
15 please proceed.

16 **II. PANEL I: PERSPECTIVE OF VICTIM AND ACCUSED**

17 MS. NATELSON: My name is Rachel
18 Natelson and I am the legal director of the Service
19 Women's Action Network. SWAN's mission is to
20 transform military culture by securing equal
21 opportunity and freedom to serve without
22 discrimination, harassment or assault, and to reform
23 veterans' services to ensure high quality healthcare
24 and benefits for women veterans and their families.

25 We run a national help line. We engage

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1 directly with stakeholders whose individual
2 experiences all too often point to larger patterns of
3 injustice.

4 As widely as the needs of our clients
5 vary with personal circumstances, they stem primarily
6 from the shared challenge of military sexual trauma.
7 Their narratives, moreover, reveal a common arc of
8 betrayal, first by their brothers in arms, then by
9 their command, and finally by the very institutions
10 they fight to protect.

11 While much of the national conversation
12 around military sexual violence has focused on
13 criminal justice, the rights of crime victims exist
14 largely outside of actual criminal proceedings.

15 Under the law, police and prosecutors
16 represent and owe a professional duty to the state,
17 not to individual crime victims whose interests may
18 or may not align with their priorities.

19 How best to advance these priorities,
20 moreover, is a matter of discretion rather than
21 obligation. There are no legislative or conditional
22 guidelines about charging and decisions not to
23 investigate or file charges are ordinarily immune
24 from review.

25 While victims may play only a limited

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1 role in criminal proceedings, civil courts offer a
2 considerably more active forum in which to vindicate
3 rights. In cases of workplace crime, victims can
4 pursue a variety of claims for relief, both from
5 perpetrators and from employers, not only to
6 individual assailants, they can also bring negligence
7 claims against employers who knew or should have
8 known of the potential for crime to occur.

9 In addition, Title VII of the Civil
10 Rights Act obligates employers to act when employees
11 report threats, harassment or other potentially
12 violent conduct in the workplace.

13 Unless an employer can prove that it
14 exercised reasonable care to prevent and correct
15 harassment or assault, the employer can be held
16 liable for the misconduct of its employees, as well
17 as for any retaliation following.

18 By holding powerful institutions
19 financially accountable for inaction, successful
20 civil suits exercise an important deterrent effect
21 against workplace crime.

22 While these remedies are available to
23 defense contractors and civilian employees of the
24 Department of Defense, not to mention most other
25 civilian employees, they may not be accessed by

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1 uniformed personnel, an injustice stemming from a
2 degree of judicial deference prescribed neither by
3 statute, nor by the Constitution.

4 The foundation of this doctrine of
5 immunity from civil liability is *Feres v. the United*
6 *States*, in which the Supreme Court relieved the U.S.
7 government of liability under the Federal Tort Claims
8 Act for injuries to service members that arise out of
9 or in the course of activity incident to service.

10 Although the plain language of the Act
11 contains no such limitation, barring only liability
12 on claims arising out of the combatant activities of
13 the military during times of war, the ruling has
14 since been applied to virtually all claims for
15 damages by a military member, including sexual
16 assault.

17 While the *Feres* decision itself only
18 addresses negligence claims, it ultimately laid the
19 foundation for a far broader doctrine of immunity,
20 barring discrimination claims under both Title VII of
21 the Civil Rights Act and the U.S. Constitution.

22 In the wake of *Feres*, a series of
23 federal appeals courts interpreted Title VII to
24 suggest a distinction between the rights of civilian
25 employees of military departments and uniformed

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1 personnel.

2 In extending the reach of the *Feres*
3 doctrine to cases of intentional discrimination,
4 however, they notably cited the availability of
5 constitutional claims to aggrieved service members.

6 While Congress may have implicitly
7 excluded military personnel from the purview of the
8 Civil Rights Act, they argued, it never intended to
9 deprive them altogether of a remedy for
10 discrimination.

11 Two years later, in *Chappell v. Wallace*,
12 the Supreme Court did just that, in barring uniformed
13 personnel from bringing constitutional claims. In
14 denying such relief, the court pointed to the Boards
15 for the Correction of Military Records, an internal
16 office authorized to correct military records in
17 instances of error or injustice, as a parallel
18 enforcement mechanism for discrimination complaints.

19 The doctrine of separate but equal,
20 however, rarely delivers true equality, and the
21 military civil rights enforcement scheme falls
22 woefully short of its civilian counterpart.

23 While every base maintains an equal
24 opportunity office to review complaints of
25 discrimination or harassment, the office is not

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1 intended to serve as an advocate for victims, and
2 generally has a greater responsibility to the
3 military than to the complainant.

4 Confidentiality isn't guaranteed and
5 many members who report incidents of sexual violence
6 experience retaliation. Appealing such reprisals,
7 which can range from demotion to termination of
8 service, is daunting, and access to counsel is
9 erratic at best.

10 While EO for sexual assault response
11 coordinators -- complainants who suffer retaliation
12 may indeed petition their branch or for the
13 correction of military records for redress, they must
14 first file a grievance through the Office of the
15 Inspector General or IG, which often demonstrates
16 more allegiance to the command than to the
17 complainant.

18 Since IGs may determine at the outset
19 whether or not a complaint merits further attention,
20 remarkably few full investigations occur. According
21 to a recent GAO study, the IG fully investigated only
22 29 percent of all reprisal complaints over the past
23 five years, and substantiated only a fifth of those
24 investigated.

25 This means that only six percent of all

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1 complainants during this time period ultimately
2 obtain the findings necessary to petition the board
3 for a remedy.

4 The boards, moreover, are considerably
5 limited in their authority and capacity. Unlike
6 Article 3 or Article 1 judges, members are not
7 authorized to award damages or approve settlements.
8 They are not actually staffed by judges or
9 necessarily by attorneys or personnel specialists,
10 but simply by civilian DoD employees who convene on
11 an ad hoc basis in addition to their full-time
12 employment duties.

13 They may not undergo extensive or
14 specialized training in military law, are not bound
15 by the judicial doctrine of precedent, or even
16 required to review case files in advance of
17 convening.

18 In fact, recent FOIA data has found that
19 Army or Navy board members devote an average of 3.72
20 and 6.73 minutes respectively to deciding each case.
21 In short, the boards hardly constitute the guarantor
22 of due process envisioned under *Chapell*.

23 Reprisals meanwhile remain widespread
24 among victims who file reports of sexual harassment
25 and assault. Service members suffering the

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1 psychological wounds of military sexual trauma
2 routinely contact SWAN for assistance in challenging
3 improper administrative separations alleged in either
4 misconduct or behavioral disorders.

5 These accounts are consistent with Armed
6 Forces Health Surveillance Center statistics, which
7 have found adjustment disorder diagnoses to be 10
8 times more prevalent than PTSD diagnoses among women
9 in the military.

10 These experiences, however, are by no
11 means inevitable. While courts and legislators have
12 pointed to the potential for civil claims to
13 undermine the need for unhesitating and decisive
14 action by military officers, history suggests that
15 the enforcement of civil rights is not only
16 compatible with, but in fact necessary for, mission
17 readiness.

18 Even the most fundamental rights,
19 however, are all but illusory in the absence of the
20 means to enforce them. In establishing the doctrine
21 of judicial review, Chief Justice John Marshall
22 observed that our government cannot be called the
23 government of laws and not of men if the laws furnish
24 no remedy for the violation of a vested legal right.

25 If service members have a right to be

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1 free from sexual violence and discrimination, we can
2 no longer deny them the remedies that go along with
3 it.

4 CHAIRMAN CASTRO: Commander Cave, you
5 may proceed.

6 COMMISSIONER GAZIANO: Mr. Chairman,
7 just --

8 CHAIRMAN CASTRO: I'm sorry.

9 COMMISSIONER GAZIANO: if you don't mind
10 me helping the witnesses understand, the triangular
11 boxes are the microphone that help you project to the
12 back of the room. The microphone-looking things are
13 for C-SPAN and are equally important, but try to
14 place both in front of you. Thank you.

15 COMMANDER CAVE: Good morning and thank
16 you for the invitation to talk to you briefly from
17 the perspective of the person accused of military
18 sexual assault and the defense counsels who represent
19 them.

20 Sixteen years ago, two Marines went to
21 the base emergency room, showed the staff rope burns
22 around their wrists and said that they had been raped
23 by two Marines in the barracks.

24 The two Marines accused were arrested,
25 placed in the brig for pre-trial confinement, and

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1 were pending court-martial. They denied the rape.
2 Their defense was to be consent. Consent, by the
3 way, is the most frequent defense offered in court-
4 martial cases.

5 About a week later, an emergency room
6 corpsman came back to work from leave and heard about
7 the excitement. Realizing he had important
8 information, he went to the Naval Criminal
9 Investigative Service.

10 It turns out, as he was leaving work to
11 go on leave for a week, he had seen two women in the
12 hospital parking lot. Each of them were taking turns
13 rubbing their fingers around each other's wrists, and
14 let me demonstrate, in this fashion.

15 I don't know if you can -- excuse me.
16 Obviously he thought nothing of it at the time. But
17 then of course once he heard on his return what had
18 happened, the excitement in the unit emergency room,
19 he went to NCIS and told them what he had seen.

20 NCIS did in fact decide to go out and
21 challenge the complaining witnesses as to the
22 veracity of their complaint. They did in fact admit
23 that they had falsely accused the two Marines, and
24 they had deliberately faked these rope burn injuries.

25 When they were asked, "Why did you make

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1 this false complaint?" this is what they told the
2 investigators: "We were sitting outside the barracks,
3 smoking, when the two Marines," the two men walked
4 out past them.

5 One of them overheard the other say to
6 the other male Marine, "Now you know what it's like
7 to have sex with a fat chick." Now, let me be clear,
8 I'm not saying that that was appropriate by any
9 means. But that was the cause for these two Marines
10 to make a false allegation of sexual assault.

11 The two Marines were released from the
12 brig. They received administrative punishment and
13 administrative separations from the Marine Corps for
14 having sex in the barracks. It is an offense under
15 those circumstances, or was -- excuse me.

16 Nothing happened to the two Marines who
17 made the false allegations, and to my knowledge they
18 were allowed to stay in the Marine Corps and serve
19 out at least their enlistment.

20 These two Marines were lucky because
21 there was a witness. If that case happened today, in
22 2011, and there were no witness, it's quite likely
23 that they would still be in the brig, and they would
24 have a 50-50 chance of being convicted at court-
25 martial, and ultimately having to register as a sex

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1 offender for the crime of rape.

2 That is what concerns the individual
3 accused, and obviously us as defense counsel who
4 represent them. In other words, when that person
5 walks in my door or talks to me, is he one of those?

6 I don't know how many false rape
7 accusations there are. There is research, there is
8 talk that it varies anywhere from -- excuse me -- two
9 percent up to 60 percent, depending on who you talk
10 to. But from an accused perspective that doesn't
11 matter. What matters is, will he get a fair trial?

12 Currently almost all of the
13 investigative and legal services and assistance are
14 focused on the prosecution. There are no
15 investigators assigned on a permanent basis to assist
16 military defense counsel.

17 They do the work themselves. These are
18 young lawyers often just out of law school. They
19 don't have assigned experts to consult them.

20 Now some of this is changing, obviously,
21 because of some of the highly qualified experts that
22 are being introduced to the system, those kinds of
23 things.

24 But keep in mind, the military justice
25 system already had the perception that when you are

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1 accused, you are guilty, and that you are facing the
2 full resources of the government against you, and in
3 military sexual assault trials, that concern is
4 heightened because of the politics.

5 Concerns. Current rape myths. I am
6 well aware of the research and discussions about rape
7 and rape myths and that kind of thing. But there are
8 also some rape myths from the defense perspective
9 that we have to be concerned about, and this comes up
10 in the area of training.

11 One drink means no consent. This myth
12 has been consistently taught and trained over the
13 years, but it's a fallacy. It's not scientifically,
14 medically, psychologically and legally correct. But
15 we have to deal with that and in my written remarks,
16 I explained to you and referenced a false accusation
17 case of my own where that issue became significant in
18 choosing the panel members.

19 Another issue that I have referenced in
20 more detail in my written remarks is this: I
21 understand the point from a therapeutic perspective,
22 that if you have a victim you have to treat that
23 person as a victim. That's necessary for their
24 physical and emotional health.

25 The problem is that when the belief of

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1 the victim gets into the investigative process and
2 the prosecution process, we end up, as I have again
3 discussed at more length in my written remarks, this
4 whole issue of confirmation bias.

5 And what happens is, and you still see
6 this in the quality of investigations, confirmation
7 bias leads to inadequate investigations from both
8 sides, and if you notice, in my remarks, I mention a
9 particular case where, had they done their work in
10 investigation, it would have helped the prosecution
11 more than it helped me.

12 I had other remarks, but I'm going to
13 leave that and let's move on, Mr. Chairman. Thank
14 you.

15 CHAIRMAN CASTRO: You'll have an
16 opportunity to elaborate upon request.

17 COMMANDER CAVE: Exactly.

18 CHAIRMAN CASTRO: Thank you. Ms.
19 Parrish, you may proceed.

20 MS. PARRISH: Unpunished sexual assault
21 in our military has long been rampant. It seriously
22 undermines mission readiness and unit cohesion. This
23 epidemic of these violent crimes predated the recent
24 wars and the increase in women in the military.

25 Males are the majority of the one half

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1 million veteran victims. The Department of Defense
2 has failed to protect the rights of service members.
3 In fact, it frequently treats victims unjustly and
4 even overtly retaliates against them.

5 Protect our Defenders is a place for
6 survivors to build community, amplify their voices,
7 and take collective action. I am here to represent
8 survivors. It is important for you to hear their
9 voices, and since I am not one, I will now play a
10 brief video clip.

11 Is it working, folks?

12 (Whereupon, a video was played.)

13 MALE VOICE: When I reported my assault,
14 I was laughed at, I was ridiculed.

15 FEMALE VOICE: I was told how could I
16 possibly want to tarnish a good serviceman's military
17 career, and that I was a liar, a whore and a slut,
18 and if I wanted to keep my military career, I should
19 drop any kind of verbiage of rape, take an aspirin,
20 and go to bed.

21 SECOND FEMALE VOICE: I was sent back to
22 the station for a recommendation to get med boarded
23 out for adjustment disorder.

24 THIRD FEMALE VOICE: They had my
25 clothing where my zipper was broken and his

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1 fingerprints on my articles of clothing. They had
2 his DNA on my comforter. They found his DNA inside
3 my rape kit. He was still found not guilty of
4 anything.

5 SECOND MALE VOICE: There was a group of
6 assailants that decided they were going to sexually
7 assault me. Two of them got caught in the act doing
8 it to somebody else, and because they got caught they
9 were given bad conduct discharges, and that was it -
10 no sex offender status, no jail, no nothing.

11 THIRD FEMALE VOICE: He retired with
12 full
13 benefits and I don't know how many more rapes he
14 committed after me, but like he told me, I wasn't the
15 first and I wouldn't be the last.

16 FOURTH FEMALE VOICE: Despite the fact
17 that he has got multiple charges, he got away.

18 (Whereupon, the video clip ended.)

19 MS. PARRISH: Three months ago, Air Force
20 Sergeant Jennifer Smith, who is now honorably serving
21 our country, filed an official complaint alleging
22 harassment and sexual assault.

23 Sergeant Smith earned stellar
24 performance reviews on several tours of duty,
25 including Iraq. For 17 years under a number of

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1 commanders and on several bases, she endured what
2 thousands of others endure every day: an environment
3 of hate speech; military traditions of violent,
4 gender-based, degrading behavior; and sexual assault.

5 Eventually she sought help from her
6 chain of command. None was forthcoming. Twenty
7 years ago, during the Tailhook Scandal, Secretary
8 Sean O'Keefe said all the right things.

9 Quote: "We get it. We know that the
10 larger issue is a cultural problem, which had allowed
11 demeaning behavior towards women to exist. Our
12 senior leadership is totally committed to confronting
13 the problem. Those who don't get the message will be
14 driven from our ranks."

15 Now, faced with another scandal, Air
16 Force Chief of Staff General Welsh's words are eerily
17 similar. Words matter, but only if they are followed
18 with fundamental legislative reform and culture-
19 changing action.

20 For over 25 years, repeated scandals of
21 sexual violence, cover up, and abuse of authority in
22 the military have come to light. Military leadership
23 has repeatedly investigated itself, committed to
24 change the culture, released reports and touted
25 supposedly new reforms, all to no avail.

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1 As important as fixing the culture is
2 fundamentally reforming the broken military justice
3 system. Every aspect is dysfunctional, from
4 prevention and victim care to reporting,
5 investigation, prosecution and adjudication.

6 One survivor recently discharged put it
7 this way, "I still cannot grasp what happened to me.
8 When mentioned to commanders, nothing is done. Your
9 reports get lost. People turn their backs on you."

10 The system is encumbered with command
11 bias and conflicts of interest: inexperienced and
12 under-trained staff, arbitrary and inconsistent
13 application of the law, no sentencing minimums or
14 guidelines. Article 32 preliminary hearings are
15 often a defense free-for-all, where the rules of
16 evidence don't apply and the appeals process often
17 renders those few victim's rights which exist
18 ineffectual.

19 The system elevates an individual
20 commander's authority and discretion over the rule of
21 law. Commanders can and do arbitrarily decide to not
22 proceed with prosecutions or set convictions and
23 sentences aside.

24 Although a minority, commanders are also
25 capable of bad behavior. Forty percent of women

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1 victims report that the perpetrator was of a higher
2 rank, and 23 percent in their chain of command.

3 2011 brought unprecedented attention to
4 this issue. In response to each wave of publicity,
5 the Pentagon churned out mostly recycled or
6 ineffective reforms, some of which place the burden
7 on the victim.

8 Even limited reforms passed by Congress
9 to address this epidemic are sometimes not
10 implemented or promulgated or inconsistently applied
11 or encumbered with requirements that often render the
12 policies ineffective.

13 The Pentagon has repeatedly declared a
14 policy of zero tolerance, yet recent actions
15 challenge that notion. In December of 2011, faced
16 with a victims' class action lawsuit, the military
17 successfully argued that the alleged harm to victims
18 are incident to military service, an occupational
19 hazard.

20 In September of 2012, the Secretary
21 proposed the President sign an executive order which
22 would have effectively eviscerated the military's
23 rape shield rule.

24 Victims know they put their career at
25 risk if they come forward, so 86 percent of them do

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1 not. Perpetrators know the likelihood is they will
2 continue their career with little risk of being
3 caught, much less punished.

4 In 2011, only eight percent of reported
5 assaults resulted in court-martial convictions, and
6 of those, many of those convictions are for lesser
7 charges.

8 The Department of Defense is responsible
9 for failing to effectively govern its personnel. The
10 problems are so longstanding and actually require
11 countenancing of the violations of the rights of
12 women and victims of assault in the service.

13 We are a democracy. Congress, the
14 executive and the judiciary have roles to play in
15 righting this horrible situation. Retired Brigadier
16 General Loree Sutton recently said: "The only
17 credible solution is an independent, special victims
18 unit completely outside the unit chain of command,
19 under professional, civilian oversight."

20 We agree.

21 CHAIRMAN CASTRO: Thank you. Major
22 Wilson.

23 MAJOR WILSON: Thank you. If we do not
24 have military solutions to military problems, we will
25 fail. For example, the mission of the United States

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1 Army is to fight and win America's wars, and
2 everything that happens in that institution is within
3 that framework.

4 My boots on the ground, my ear to the
5 ground, tells me that the current efforts against
6 sexual assault in the military are now meeting with
7 cynicism and skepticism and a complete lack of
8 credibility in the ranks.

9 CHAIRMAN CASTRO: Can you speak up a
10 little bit, Major?

11 MAJOR WILSON: Yes. Not only with
12 regard to the soldiers in the enlisted ranks, but
13 even the lawyers and the officers who are involved in
14 enforcing it.

15 In part, what we are starting to see is
16 complete abdication of responsibility by commanders
17 who fear that their careers will come to an end if
18 they are seen as interfering with any prosecution,
19 and they will often be forwarding charges simply with
20 the idea, 'I am not putting my neck on the block, I
21 am not ending my career to be accused of tolerating
22 sexual assault,' and therefore end up forwarding
23 cases that are not the strongest cases.

24 And then the inevitable happens: you are
25 not getting the results in trial that you would like

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1 to have if what you are looking for is convictions,
2 because the cases you are sending there lack merit.

3 There are cases going to court-martial
4 that would not cross the threshold of any civilian
5 court. I have seen, where I live in San Diego, cases
6 turned away by the district attorney's office,
7 subsequently prosecuted by the military because
8 commands feel pressured into making that happen.

9 I am having a little trouble. When the
10 process is driven by fear, when the process is driven
11 by the goal being set, as opposed to the truth of the
12 situation, the possibility and the adequacy of the
13 case, you have what we have right now -- a system
14 that has begun to lack credibility and belief.

15 A week ago the United States Military
16 Academy, for example, issued a report in which they
17 proudly announced that they had more reports of
18 sexual assault at the military academy, and some of
19 my more civilian friends, "They are proud of having
20 more reports of sexual assault?"

21 And I said, "No, you don't understand.
22 They were told that their goal for this year was to
23 have reports, and by God, they had more reports."

24 Now the pressure is to have more
25 convictions, and trust me, they will have more

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1 convictions because that's what the military does.
2 You give it a mission, it gets it done, regardless of
3 how that works.

4 Military justice is very different than
5 civilian justice. It is a two-pronged system --
6 justice and discipline. And that means when you walk
7 into that courtroom, much more so than even a
8 civilian court -- and I remind you that the vast
9 majority of civilians who go to trial in criminal
10 trials are convicted -- there is the belief that if
11 we have this guy in a courtroom, the old man must
12 think he is really -- must have thought he's really
13 done something.

14 We had the Secretary of Defense, the
15 Commandant Marine Corps, any number of public
16 officials making it clear that they believe, quote,
17 "These guys ought to be convicted."

18 When your superiors express that wish,
19 guess what happens? You get that result. We have
20 all the rules we need -- in fact, before any of this
21 reform ever started.

22 In fact at the time of Tailhook, we had
23 all the tools that we needed in the all-encompassing
24 military justice system, that has incredibly broad
25 power to prosecute crimes in a system that has the

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1 incredible ability to carry out investigations, all
2 the tools we need to deal with sexual assault.

3 The question is, the will to do it. You
4 can make another set of rules that will only be
5 window dressing unless the will to enforce that is
6 there. A great deal of that has to do with the
7 status of women in our armed forces and an
8 understanding that women are equal as peers. Right
9 now women remain 15 percent of the total force.

10 It means that the military might have to
11 come into the 21st century. You know, in any
12 civilian office the men in the office don't have nude
13 girly pictures hanging in their offices. Why would
14 they be allowed to do it in the military in their
15 workplace as well?

16 Those sorts of culture changes are
17 pretty obvious and pretty simple. But we need to
18 properly interpret how this thing works. For
19 example, the Military Rule of Evidence 412 -- the
20 rape shield rule -- that rape shield rule is not
21 being modified because we hate victims. It's being
22 modified so that it conforms to the Federal Rules of
23 Evidence, the civilian, similar rape shield rule, and
24 of course that pesky thing, the U.S. Constitution.

25 At the end of the day, these accused are

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1 entitled to due process and the solution to military
2 sexual assault is not simply to remove due process,
3 it is also to take a look at those solutions that are
4 not simply floating through the criminal courts,
5 because if that's the only solution, if that's what
6 we are telling people is the solution, that is what
7 we will get without the concurrent changes in
8 culture, the changes in opportunity, the changes in
9 how the military handles this and having women in its
10 ranks.

11 How we deal with that. Have I seen
12 false reports of sexual assault? For years I worked
13 hard for the repeal of Don't Ask Don't Tell, trust
14 me. To escape being separated under Don't Ask Don't
15 Tell, I saw any number of individuals who had been
16 falsely accused of sexual assault. It does happen.

17 Right now, we are rejecting the
18 practical. If I suggest that we take a serious look
19 at binge drinking, I will be accused of trying to
20 blame the victim. I'm not trying to blame the
21 victim. I'm trying to recognize the fact that a
22 significant percentage of these assaults occur among
23 the lowest enlisted ranks, the likes of the college
24 campus syndrome, and that if we start to address
25 binge drinking among the victims, alleged victims,

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1 and also the alleged perpetrators of these crimes,
2 maybe we can keep someone from being raped and some
3 young man from ruining his life.

4 It's a prevention matter. We want to
5 take the course of action that actually addresses the
6 problem instead of throwing the window dressing out.
7 Criminal prosecution is one part of that.

8 Right now, there is a very broad
9 perception that this system has become increasingly
10 tilted against the accused, that that scale is not
11 balanced.

12 I myself personally have a significant
13 interest as a woman who has served in the idea that
14 we can reduce sexual assault among our troops. It is
15 a terrible violation of the integrity of this armed
16 force and is something that we must deal with.

17 But we have to do it right. We can't do
18 it in a way that makes this look like a feeding
19 frenzy and a witch hunt, as opposed to actually doing
20 the hard work that it takes to change that culture
21 and to address these issues and to end abuse of
22 authority for example. Thank you.

23 CHAIRMAN CASTRO: Now open it up for
24 questions from Commissioners. Actually Major, I'll
25 ask you a question. So I want to understand what you

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1 testified to us this morning. You indicated that
2 military problems need military solutions, and yet
3 you went on to tell us how the military justice
4 system is producing results that, in your estimation,
5 may not be just.

6 Is your opinion, then, that the military
7 system should still be in place versus perhaps a
8 civilian system for these sorts of assaults?

9 MAJOR WILSON: I think that the people
10 within this institution have to own it, I think, for
11 the process to have credibility. The people in this
12 institution have to be the people who make that
13 change.

14 I am sure that there are some things we
15 can do to poke and prod, but in reality, at the end
16 of the day, these are the people whose boots are on
17 the ground, and it has to be bottom up, it has to be
18 command driven.

19 And we have the capacity to do that. I
20 genuinely believe that. You know, the civilians are
21 lovely people, but when you look at what the
22 legislative process did with Article 120, the rape
23 statute that had to be revised last year because in
24 essence it had a patently unconstitutional provision
25 in it on shifting burdens for a consent, sometimes

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1 they just don't get it right because they are not
2 paying attention to the people in that institution.

3 I can have cynicism about a lot of what
4 happens in the military, but it's an absolute lie
5 that those people in that system all do not care
6 about rape.

7 I don't know very many women in the --
8 men and women in the armed forces who are that
9 uncaring. We have to make sure that that solution
10 belongs to the services as well.

11 CHAIRMAN CASTRO: How do you solve that?
12 I mean you yourself just told us: this is the mission
13 and it's accomplished and the result that they say --
14 more charges. You talked about a specific instance
15 where -- instance went out to a civilian prosecutor
16 who turned down the charge but it went into the
17 military and it was charged.

18 Would it not be better then -- and maybe
19 justice was done in that case -- would it not be
20 better then to have a civilian process in place where
21 cases which aren't being charged, that should be
22 charged in the military context, might have a fresh
23 and different view in the civilian process?

24 MAJOR WILSON: I think we have to have
25 good cases. These are courts of law. They are not

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1 therapy sessions. I mean, the reality is that the
2 desire for vengeance and vindication on the part of a
3 victim, and our ability to convict someone, are not
4 the same thing, not to mention the fact that perhaps
5 it got rejected by the D.A. because it wasn't
6 provable because it didn't happen that way.

7 You talk to civilian prosecutors, they
8 will talk to you about rarely pursuing the drunken
9 party, he-said-she-said cases, because they are so
10 tough to pursue.

11 Sometimes the criminal solution is not
12 all. In the military, we have the ability to do
13 other things and we do. We can get rid of these
14 people. We can take administrative actions against
15 them even in situations where we don't have a
16 criminal case that can be sustained.

17 So there are lots of ways to do this
18 military style, and I think it has to be done
19 military style, so that the people in that
20 institution understand that this belongs to them, and
21 that the change is happening in that culture.

22 CHAIRMAN CASTRO: I'll let some of the
23 other Commissioners ask questions. Commissioner
24 Gaziano? Commissioner Kladney after that,
25 Commissioner Achtenberg.

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1 COMMISSIONER GAZIANO: Thank you all.
2 This is a very complex problem and I am going to try
3 to just, in my limited time, focus on one aspect of
4 it. But let me just state at the outset that in my
5 sort of crash course to try to learn as much as I can
6 before this hearing, I am convinced that the military
7 justice system can be improved, and there have been
8 some efforts, to me, that make sense, to move in that
9 direction.

10 It will -- any of those efforts would
11 take a lot of time. To create a more professional
12 corps of lawyers, I think, is one of the factors I
13 may ask about at a later panel. And I think that
14 that would serve both victims and those accused,
15 whether falsely or not.

16 Btu there's one point that keeps coming
17 up, that three of the witnesses, or maybe four,
18 testified about, and that's the command influence.
19 First of all, I should also state, I think the
20 military justice system unquestionably moves to put
21 it -- move it into the civilian context, I know in
22 some cases, I'm going to ask a law professor perhaps
23 about opportunities for referrals, I don't think
24 that's a good idea. I certainly concur with Major
25 Wilson's comments that the military has to solve this

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1 and there are a lot of important reasons for that.

2 But on this command influence issue,
3 there are constitutional concerns with decoupling the
4 command influence that go back to a series of Supreme
5 Court cases from the '90s that began with *Weiss v.*
6 *the United States* that I was actually integrally
7 involved with.

8 But I think even putting aside the
9 constitutional concerns with decoupling, which
10 possibly could be taken care of but would have to be
11 very carefully legislated, there are -- I have other
12 concerns with decoupling.

13 But I would like at least the three of
14 you, who in your written testimony talked about this,
15 before I even form my own decision about whether it's
16 worth going down that line, are ways in which command
17 influence -- some more examples can be reflected both
18 against, you know, an unwarranted dismissal or in
19 favor of the confirmation bias that we heard today
20 that results in charges and conviction.

21 It seems to me, by the way, that -- I
22 don't know if it's a good thing that it cuts both
23 ways. But it clearly can cut both ways. I'm not --
24 again, I am -- my bias is I don't think that's an
25 argument against eliminating command influence, but

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1 it might be. So I'll throw that out to all the
2 panel. Feel free to jump in, any one of you.

3 MS. PARRISH: Well, may I just say that
4 we want justice, an unbiased, fair and competent
5 process. Command bias that convicts the innocent is
6 as bad as command bias that wreaks retribution on the
7 victim and ignores the crime.

8 Regarding the facts, I mean the
9 Department of Defense' own data reports that between
10 2010 and 2011, commander actions on the grounds of
11 sexual assault decreased 23 percent.

12 The number of initiated court-martials
13 fell eight percent. Numbers of perpetrators
14 convicted of committing assaults decreased 22
15 percent. This concern validates the standing up of
16 an independent, impartial, expert office.

17 In terms of command influence, although
18 a legal term, victims will tell you there had been
19 command influence, undue influence, against the
20 victim, punishing the victim when they come forward,
21 when they attempt to report.

22 The fear and the destruction of the
23 victim's character. They become investigated. They
24 are put in psych wards, given psychotropic drugs,
25 released for purposes other than the fact that they

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1 were raped or assaulted.

2 The numbers, the Department of
3 Defense's own statistics, show that the only
4 influence by the Command to date has been to punish
5 the victim, and the perpetrator often remains in the
6 service and continues unimpeded with their career.

7 COMMISSIONER GAZIANO: With respect, I
8 don't think that's the only testimony we have today,
9 that the command influence only cuts one way. For
10 example, Major Wilson, you talked about, if more
11 reports and more convictions are required, then we
12 will get -- and how is that -- can you give me a few
13 examples of the -- I'm sure it doesn't need to be --
14 sometimes it's probably overt, but it can also be
15 very subtle.

16 And you spoke of the, Commander Cave, of
17 the confirmation bias, and could you give us, can you
18 -- I don't know, elaborate a little bit and give us
19 some examples?

20 MAJOR WILSON: I think it's the same
21 coin, in the sense that what we don't want to do is
22 to have something that says here's the result, now
23 get it, in that sense.

24 I don't -- no one is here being pro-
25 rape, let's put it that way. Command influence.

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1 Command influence is a proper thing. It's unlawful
2 command influence we all dislike.

3 And we want commanders to run this show
4 and we want commanders to make it sure, make it clear
5 that sexual assault will not be tolerated in their
6 ranks, and my experience, at least in the
7 contemporary -- with the contemporary military is
8 that for the most part, they do that.

9 There is -- you know, it's a large topic
10 without a single, simple solution from the beer pong
11 party-driven junior enlisted problem, to the general
12 officer abusing his authority with a subordinate.
13 Slightly different problems, different approach.

14 I want to see some things that work. I
15 want to see us do things that really work as opposed
16 to putting out lots of rhetoric and lots of window
17 dressing, to take the rules that exist and have the
18 people within that structure use them to that
19 benefit.

20 I have no heartburn with exposing the
21 fact that indeed, there is abuse of authority with
22 regard to rape victims. And might I add that my
23 clients with PTSD from combat who got pushed out with
24 personality disorder discharges, had the same
25 problem.

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1 It's the power of that institution. And
2 we do need to keep an eye on it, and we do need to
3 keep linked up to it, and we are a society in which
4 we have civilian oversight. That's not the argument.

5 What we want to do is not assume results
6 before we see what's really there.

7 COMMANDER CAVE: Let me approach it from
8 this perspective if I can. As a naval officer, I
9 think command influence is a proper thing and
10 appropriate in disciplinary areas, if it is used in
11 the -- if you approach it from the perspective of
12 command influence as a leader, in other words,
13 leadership.

14 What I get concerned about and my
15 colleagues get concerned about and ultimately our
16 clients get concerned about when it enters the
17 military justice system, in other words the complaint
18 is made, the 32 is ongoing, those kind of things, our
19 concern becomes the commander who is putting his or
20 her thumb on the scale to get a particular result in
21 that particular case.

22 That's the issue with command influence.

23 UNNAMED PARTICIPANT: How does he put the
24 thumb?

25 COMMANDER CAVE: Sure, it's done in many

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1 ways, some of them direct and some of them subtle.
2 For example, we have cases, reported cases in the
3 appellate cases, where commanders have told witnesses
4 they will not cooperate with the defense. They will
5 not talk to the defense. They cannot assist the
6 defense as a character witness, and if they do, they
7 will be punished for something.

8 That is, you can read the cases, those
9 are issues of command influence. You can -- a subtle
10 command influence is the training. I talk about this
11 somewhat in my written remarks about how the sexual
12 assault training can be a roadmap on how to make a
13 false complaint.

14 That is a subtle form -- so you screw
15 your -- people screw their eyes up about that. But
16 look at the individual cases and you will see how
17 that has happened.

18 It's subtle, and this is the issue of
19 the -- in a sense, the one drink issue which comes
20 up, as Major Wilson has talked about, is we all know
21 that -- we all know that that's false, but yet that
22 is consistently put out there.

23 So, and then you have the more general
24 but less subtle, the General Amos issue. And from a
25 commander's perspective, you would think you would

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1 not want to do that.

2 In fact, if I recollect correctly, in
3 some of his statements he said he knew he was doing
4 the wrong thing but he was going to do it anyway, and
5 what he ended up doing was affecting, I think it was,
6 20 or 21 cases.

7 I was involved in one of those cases and
8 there's a gag order on it because of some things that
9 were said. So you know, it's not just the accused
10 who needs to worry about command influence. It's the
11 other side, if you want to look at it as sides, that
12 needs to worry about command influence too, because
13 they end up prejudicing their cases.

14 And you lead to this lack of trust in
15 the system. And if you don't have trust in the
16 fairness of the system, the research will tell you,
17 the fact that you are going to get prosecuted and
18 convicted is meaningless unless the people have trust
19 in the system and then as a result of that they are
20 willing to obey the law.

21 That's the way I would approach that.

22 MS. NATELSON: May I add one thing? I
23 definitely agree this is a problem that goes both
24 ways. These are bad charging decisions so it's a
25 problem for the defendant and it's also a problem for

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1 the victim, and I think it's interesting that you
2 brought up Weiss, because in, you know, among our
3 closest allies, Great Britain, Canada, Australia, all
4 of their high courts have actually moved away from a
5 command-driven system of case disposition towards a
6 more independent model, out of concern for the rights
7 of the accused.

8 So you know, from my perspective, I see
9 it on the ground as it affects the victim, where if
10 you are coupling personnel decisions with criminal
11 justice case disposition decisions, you know, you are
12 -- those two things are going to affect one another
13 and things, sort of extralegal concerns like the
14 value of the accused to the, you know, to the unit,
15 and you know, the relative lack of value of the
16 victim to the unit are going to kind of color and
17 inform the way that the criminal case is being
18 disposed of, and other countries have recognized this
19 and moved away toward what they perceive to be a
20 model that is as destructive to the prospects of the
21 defendant as to the victim.

22 CHAIRMAN CASTRO: Thank you all very
23 much. The Chair is going to recognize, in the
24 following order, Commissioner Kladney, Commissioner
25 Achtenberg, and I understand Commissioner Yaki is on

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1 the phone and he has asked to ask a question. So
2 Commissioner Kladney, please proceed and let me know
3 if anyone else wants to ask a question.

4 COMMISSIONER KLADNEY: When you talk
5 about command authority, command authority can work
6 the other way too in terms of disposition of
7 sentences, can it not, Commander Cave?

8 COMMANDER CAVE: Yes sir.

9 COMMISSIONER KLADNEY: Have you seen
10 that happen?

11 COMMANDER CAVE: I'm not sure exactly of
12 your question, but certainly the commander has the
13 authority not to make -- not to move a case forward,
14 if that's what you mean.

15 COMMISSIONER KLADNEY: No, I mean
16 subsequent to courts-martial.

17 COMMANDER CAVE: Oh yes, if a person
18 goes to court-martial and they are convicted of one
19 or more charges on the charge sheet, then the case is
20 returned back to the convening authority, the staff
21 judge advocate makes a review of that and makes a
22 recommendation to the CA, the convening authority.

23 At that point in time, the convening
24 authority may make a clemency decision. That
25 clemency decision could be to reduce the sentence, or

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1 in the right case, set aside some or all of the
2 findings of guilty.

3 And once that happens there's a double
4 track. There's a two-track -- one is the --
5 depending on the sentence, the mandatory appeal or a
6 less mandatory appeal, and then the clemency and
7 parole process.

8 The commander does not get involved in
9 those processes. The commander's influence on the
10 case is to reduce the sentence, for example, and we
11 have all had -- I think we can all claim cases where
12 we have got some clemency.

13 That ends once he or --

14 COMMISSIONER KLADNEY: the Judge?

15 COMMANDER CAVE: The Judge -- if the
16 Judge is the finder -- if it's a Judge alone trial in
17 other words he or she is the finder of fact and of
18 sentence, then yes, he or she makes the sentence.

19 If it's a member's case, the Judge has
20 no influence on it. However, there is a -- there is
21 a provision within the rules, sometimes followed,
22 where the Judge, in a member's case, or actually in
23 his own case, can make a recommendation to the
24 convening authority as to potential clemency.

25 Now the idea is he is not challenging

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1 the sentence he gave himself, or she gave, but he or
2 she, the Judge is saying look, go take a look at this
3 and --

4 COMMISSIONER KLADNEY: I think my point
5 is, is that it works the other way as well.

6 COMMANDER CAVE: It can work the other
7 way. Sure. Yes sir.

8 COMMISSIONER KLADNEY: Okay. So the
9 other thing that I found of interest in your paper
10 was you found these, quote, "false reports" going
11 from 2 percent to 60 percent. Have you ever really
12 looked at those studies?

13 COMMANDER CAVE: I have looked at many
14 of those studies, and I am frankly not sure which one
15 I want to believe and that is for any number of
16 reasons, which the studies themselves point out.

17 And what I did, is I have taken the
18 conservative approach of two percent. And that means
19 that --

20 COMMISSIONER KLADNEY: I want to make
21 that clear for the record because you were actually
22 underlining 60 percent during your presentation.

23 COMMANDER CAVE: I apologize if I did,
24 but I meant to establish that the research indicates
25 a range, quite frankly, all over the place, and it

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1 depends on who you talk to.

2 Dr. Lisak is on one of your later
3 panels. Certainly under the circumstances his 2 to 10
4 percent seems a reasonable approach to take, which
5 means if you have 3192 reports in 2011, you know,
6 arguably -- arguably, I'm not saying are -- but
7 arguably, 2 to 10 percent of those are false reports.
8 You know --

9 COMMISSIONER KLADNEY: I understand. I
10 just want to make clear that when you quoted Dr.
11 Lisak's study, he actually negated the study, I
12 believe, by McDowell and Kanin.

13 COMMANDER CAVE: That's correct. I
14 agree with you on this.

15 COMMISSIONER KLADNEY: And also, in your
16 report you also talked about how -- or you seem to
17 speak to the fact that we offered victims lie
18 detector tests and that's when they decided not to
19 prosecute, when in fact, in Dr. Lisak's study, he
20 cites Dr. Kelly's study that says that that is a
21 primary bad thing to do, because victims will then
22 back down, even if -- I mean, I am just trying to
23 clarify your report. You wrote 19 pages of this
24 stuff.

25 COMMANDER CAVE: You lost me at the

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1 record, sir.

2 COMMISSIONER KLADNEY: So am I
3 correcting the record here? Is that correct, what I
4 am saying?

5 COMMANDER CAVE: I don't think you are
6 correcting the record sir. I think you are -- I
7 think you are doing what I was trying to explain,
8 which is that there is a great deal of work still to
9 be done to understand the full nature of what is or
10 isn't, by definition, a false report, and to what
11 extent they comprise the number of these complaints.

12 And that comes up, I would argue, most
13 often in the cases involving alcohol. I mean, the
14 example I gave obviously is a significant way to
15 express it, and we certainly have other cases where
16 we can say definitely this is a false report.

17 But in the -- this may be changing, but
18 we used to say that most of our cases were alcohol-
19 related, and how do you really tell, under the facts
20 of the individual cases, whether that case really is
21 a false complaint or not, and that's the issue from
22 my perspective.

23 So I think we are in agreement, the
24 numbers --

25 COMMISSIONER KLADNEY: I think that's

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1 why you have a trier of fact.

2 COMMANDER CAVE: Say that again sir?

3 COMMISSIONER KLADNEY: That's why you
4 have a trier of fact?

5 COMMANDER CAVE: That's true. Yes.

6 COMMISSIONER KLADNEY: And I'd like to
7 ask Ms. Parrish a question. You quoted in your
8 written statement as well as sitting here today the
9 diminishment, 23 percent less prosecutions or
10 whatever.

11 But quite often, in a vacuum, those
12 statistics don't really mean much to me. Have you
13 ever had an opportunity or has there ever been an
14 opportunity -- I mean there's only 2,000 cases a year
15 that are prosecuted, whether they are administrative
16 or whether they are 500 and something, 500 courts-
17 martial, something like that.

18 Have you ever thought of approaching the
19 military and asking them if you all could get
20 together and appoint say a non-partisan panel to
21 audit those cases, to see exactly why they went to
22 Article 15 or why they went to a field Article 15 or
23 just other administrative duties, or how those
24 sentences were -- came about?

25 Because I mean, because I didn't get

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1 that anywhere in any of the information I was given.

2 MS. PARRISH: Right, well I think that's
3 a great idea. I think it's much needed. The data,
4 as presented, at times is very confusing and even
5 sometimes contradictory.

6 The bottom line, though, in terms of the
7 numbers between 2010 and 2011, 1,025 actions were
8 taken by commanders on the ground of sexual assault,
9 and in 2011 there were 791, a decrease of 23 percent.

10 COMMISSIONER KLADNEY: Well I understand
11 that, but we don't really, we don't really know what
12 was brought, what was rejected, what wasn't.

13 MS. PARRISH: You're right, we --

14 COMMISSIONER KLADNEY: I mean that is --

15 MS. PARRISH: We don't, but I wish --

16 COMMISSIONER KLADNEY: On its face, it's
17 an unfair --

18 MS. PARRISH: Right.

19 COMMISSIONER KLADNEY: It's unfair.
20 It's maybe indicative of something. But --

21 MS. PARRISH: Well, I would say though
22 that you know, only eight percent of cases were
23 'quote unquote' "convictions," but of those
24 convictions, so many are often for lesser charges.
25 You know, rape --

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1 COMMISSIONER KLADNEY: Eight percent of
2 the 500 courts-martial?

3 MS. PARRISH: Between 2010 and 2011, the
4 number of initiated courts-martial decreased -- to a
5 total of eight percent, and the numbers, compared to
6 civilian [justice system]s, are so low. And of those
7 eight percent, many of them are often lesser charges.

8 I mean, you know, if you take Marine
9 Lieutenant Klay for example, who was allegedly raped
10 by two -- by a Marine and his friend, you know, one
11 of the perpetrators was of the 191, the eight percent
12 listed in the 2011 report that was convicted, and a
13 three-star general reduced the perpetrator's 45-day
14 sentence, which ended up being for only adultery and
15 indecent language, to seven days.

16 So there are all kinds of signals that
17 happen here. You've got rape charges that -- they
18 get reduced to adultery and indecent language. They
19 get a sentence of 45 days and the three-star general
20 reduces that to seven.

21 Now, that's the message and that's why
22 we are here today, because unpunished sexual assault
23 in the military is an epidemic, and Secretary Panetta
24 accepts that notion.

25 And so you know, victims don't come

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1 forward and report because it's futile.

2 COMMISSIONER KLADNEY: And so do you
3 believe an audit would go a long way?

4 MS. PARRISH: I believe an audit would
5 be a wonderful thing.

6 COMMISSIONER KLADNEY: And now one more
7 thing I'd like to ask, can you all explain to me this
8 thing about personality disorders and adjustment
9 disorders which -- when a victim gets discharged,
10 they do not receive services for that, or a
11 disability claim because it's a preexisting
12 condition? How does all that get set up? Yes.

13 MAJOR WILSON: Let's talk a little about
14 personality disorder separations -- I have done a
15 fair amount of personality disorder work. It's begun
16 to go away a bit because there was a public outcry
17 about the use of personality disorder separations on
18 soldiers suffering from combat stress-related
19 disorders, and we would see people being diagnosed
20 with personality disorders after a 40-minute
21 interview with a psychologist, almost an
22 impossibility.

23 And access to a disorder like that, it
24 is presumed to be a preexisting condition and
25 therefore not compensable under the military

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1 disabilities system.

2 And it was often used as the fastest
3 and easiest way to get rid of someone because you --
4 you know, you had far less due process because you
5 weren't being separated for misconduct, you simply
6 had this problem.

7 And I certainly saw it, I mean one of my
8 most -- one of my, shall we say, favorite cases was
9 stopping the Navy from discharging a woman with a
10 personality disorder discharge after she complained
11 about her chief petty officer having pornography on
12 his computer all day, okay?

13 I know this stuff happens, but I also
14 know that they do go after it, we do see those. The
15 services, and in fact with the assistance of civilian
16 oversight, have indeed stopped doing personality
17 disorder diagnoses in the ways they were.

18 Now, one of the difficulties we have is
19 that the adjustment disorder has become the
20 substitute for personality disorder in these
21 evaluations. But it's not just a problem with sexual
22 assault.

23 COMMISSIONER KLADNEY: Well, does the --

24 CHAIRMAN CASTRO: Commissioner Kladney,
25 I want to move on to Commissioner Achtenberg, but

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1 we'll come back. Commissioner Achtenberg?

2 COMMISSIONER ACHTENBERG: Thank you Mr.
3 Chairman. I just want to begin by saying that my own
4 view is that, given that enlistment in the military
5 has become a critical piece for young people in
6 general and young women in particular, a critical
7 place for people to gain skills and to better their
8 lives and to make themselves highly employable, not
9 only during their stint in the military but
10 particularly afterward, it's become a very important
11 institution for positive, life-altering uplift and
12 social mobility.

13 And to the extent that, as acknowledged
14 by the Secretary of Defense, there has developed in
15 the United States military an epidemic of sexual
16 harassment and exploitation, that alters profoundly
17 the ability of particularly women, although not
18 exclusively, to take advantage of the enormous
19 benefits that the military confers on a striving
20 population, an aspiring population, that's a big
21 problem.

22 And I am less concerned about the legal
23 particulars than I am concerned about the aggregate
24 impact of this phenomenon. So, given that that's my
25 area of concern, I'd like to ask Ms. Natelson and Ms.

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1 Parrish to express their own views about how this
2 problem, which everyone acknowledges is a problem,
3 even Mr. Cave, even Major Wilson --

4 COMMANDER CAVE: You didn't ask my
5 personal opinion.

6 COMMISSIONER ACHTENBERG: Everyone
7 acknowledges that this is a problem to some extent,
8 how would you have the military address this, given
9 what you know, because of who you work with, and who
10 you represent, Ms. Natelson and Ms. Parrish, if you
11 could opine?

12 MS. NATELSON: How would, I guess I'll
13 need clarification, how would I want the military to
14 address some of the kind of repercussions of sexual
15 assault?

16 COMMISSIONER ACHTENBERG: How would you
17 have them address this phenomenon that we see here?
18 What would you have them do in order to make a
19 difference for the people that we are concerned
20 about?

21 MS. NATELSON: Well, I mean I think you
22 are right, that there are -- this goes beyond just
23 being a military issue. I mean these are -- the
24 consequences of sexual assault follow our clients
25 into the civilian world, and from my perspective, it

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1 becomes very much a poverty issue. It's very
2 destabilizing if you are not able to access
3 disability compensation from the V.A.

4 There are enormously elevated rates of
5 homelessness among women veterans, that far outstrip
6 comparable rates among non-veteran women and male
7 veterans, and a very high percentage of homeless
8 women veterans, you know, have histories of sexual
9 assault in the military.

10 So you know, again I think the real
11 problem is one of lack of remedy. If you are a
12 victim of a crime that -- and are injured and you
13 know, sustain economic and non-economic injuries
14 outside of the military, you have avenues for
15 compensation. You know, you can sue your employer,
16 hold your employer accountable, and you know, receive
17 damages.

18 These -- in addition to finding that the
19 criminal justice system fails them, our clients are,
20 you know, they are trapped, they can't leave their
21 job and they have no access to any kind of remedies
22 or compensation for the injuries that they have
23 suffered.

24 So that, you know, I think it's of
25 relatively limited value as an advocate for victims

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1 and as somebody who is interested in the civil rights
2 of victims, to focus on the criminal justice system,
3 because the focus of that system is perpetrators.

4 My concern is what can we do to ensure
5 that victims of crime in the military are being able
6 to access compensation for their injuries.

7 COMMISSIONER ACHTENBERG: Okay, so your
8 testimony is then that instead of this being an
9 opportunity for economic uplift, when you see women
10 veterans being disproportionately economically harmed
11 as a result of what happens to them in the military,
12 A, and B, your view is that the most significant
13 contribution that could be made is that legal
14 remedies would be made available that currently are
15 not available, to address this -- are you saying tort
16 and Title VII-like remedies?

17 MS. NATELSON: Right, and I do think
18 that those remedies, in addition to offering
19 compensation to individual victims, it's those
20 remedies that hold those institutions accountable, so
21 it's those remedies that have the greater potential
22 to make this problem go away by, you know, by putting
23 it in the military's financial interest to, you know,
24 to improve the setting for women, and assuming that
25 happens then, you know, there's less harm done to

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1 women and it's less likely that they will experience
2 you know, incidents that will destabilize them and
3 diminish their economic prospects when they get out
4 of the military.

5 COMMISSIONER ACHTENBERG: Ms. Parrish,
6 do you have a prescription for how this issue might
7 be more effectively addressed?

8 MS. PARRISH: No, well, I've spoken
9 somewhat about the, you know, broken system and the
10 bias in the system and the undue influence by the
11 command culturally that happened.

12 I think that the traditions that are --
13 that still objectify women, that are inculcated into
14 the service, is something that has to be faced. You
15 know, impressionable 17- and 18-year-old female
16 trainees forced to walk into mess halls and face
17 something called a cat walk, which consists of
18 demeaning and organized shout-outs that demean their
19 gender, or female Marines are called upon to repeat
20 cadences that humiliate and objectify them.

21 Sergeant Smith was forcibly carried into
22 a bar and thrown on top of the counter and forced to
23 endure a naming ceremony as it's called, which loudly
24 sings songs of the most graphic descriptions of being
25 mutilated and sexually violated, these are traditions

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1 embedded in the military and you know, the military
2 has shown itself effective to address this system in
3 the past.

4 I mean, during the -- when racism was an
5 extreme problem in the military in the '60s, you
6 know, there was a -- Congress had a role to play. It
7 passed sweeping, transformative legislation, the
8 Civil Rights Act, and then there was a subsequent
9 decision within the military that racism was a
10 fundamental problem and it had to be addressed.

11 And according to contemporaneous news
12 reports, Admiral Zumwalt for one created stiff new
13 rules against racial bias and ordered senior officers
14 to uphold them or be dismissed.

15 They were held accountable, and until
16 the military faces the traditions of gender bias and
17 discrimination in the military and holds seniors
18 accountable, then the problem of this culture of
19 punishing the victim, of blaming the victim, of
20 discrimination against women because she is one,
21 won't end.

22 And so you know, it's both -- and the
23 system, I would just say, quickly, that the broken
24 justice system, where inexperience is rampant, many
25 judges are -- in the Coast Guard, it's collateral

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1 duty, they are not trained properly on MRE 412 or
2 513, victims' privacy with the rape shield rule,
3 there are so many problems in the system and
4 dysfunction and inexperience and turnover, and
5 influence by the command, that the Congress must
6 address modernizing the military uniform code of
7 justice. They wrote it. They need to fix it.

8 CHAIRMAN CASTRO: The Chair will
9 recognize Commissioner Yaki, who is on the phone,
10 thereafter the Vice Chair, and then Commissioner
11 Heriot will likely have the last question.

12 COMMISSIONER YAKI: Thank you very much
13 Mr. Chair, can you hear me?

14 CHAIRMAN CASTRO: Loud and clear sir.

15 COMMISSIONER YAKI: Thank you. [i-n-a-
16 u-d-i-b-l e] I have been watching it on C-SPAN at
17 the same time with a slight delay.

18 When I worked, when I was the chief of
19 staff for Nancy Pelosi many years ago, one of the
20 things that I encountered were complaints made from
21 discharged women veterans on the unequal treatment
22 that they had received in discharges and benefits,
23 and then when we probed further, it became evident
24 that a lot of this was predicated on rather traumatic
25 sexual experiences that they had when they were in

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1 the service.

2 I mean, this is an issue that I have
3 been concerned about for many years and I will be
4 very honest with you, I now am very concerned about
5 it right now, because I have a niece who is in one of
6 the academies, and I was very concerned when she went
7 in, I am very concerned about, you know, what's going
8 on now.

9 I am concerned what happens when she
10 graduates and goes and does her service time, because
11 what we have here, I think can only be described as,
12 as living in the hell of -- if you were an African
13 American in 1947 living in the deep segregated south.
14 I mean, that's the comparable position that many if
15 not all women face in the military today, and I was
16 glad about Commissioner Achtenberg's question and the
17 last response, because I do believe that to break
18 this culture of sexism and discrimination and
19 violence, is something that requires the type of
20 commitment within the military that it took to end or
21 end its own segregation, but also in our own country,
22 to end segregation.

23 I mean, the problem when you are in the
24 military is that, is that unlike in civilian life
25 where you can move somewhere else, you can try and

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1 change jobs or what have you when you face harassment
2 or discrimination, the military will only give you --
3 you can get punished, you go AWOL, you get
4 dishonorable discharges, there are a whole set of
5 consequences to your mobility. You are essentially
6 trapped. It would be like if you were trapped in a
7 segregated town in 1947.

8 So my question goes along the lines of
9 Commissioner Achtenberg, but focuses on one aspect of
10 it, which is punishment. From reading various
11 panelists' statements, from reading what victims have
12 written to us in heartrending detail over the past
13 two weeks as word of this hearing came out, the issue
14 of discretion and either lack of, or a wide variety
15 of punishment available are at the discretion of the
16 military in these sorts of situations, seems to me
17 one of the common themes, and I just wanted the
18 panelists to expand on whether there needs to be
19 something along the lines of what has happened in
20 civilian courts, which is much more -- heavier
21 emphasis on the kinds of punishments available and
22 mandated by statute or by code, including the
23 addition -- the recent additions in the last 10, 20
24 years or so, of sexual offender databases of people
25 who commit these crimes being forced to report as

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1 registered sex offenders, and whether these kinds of
2 civilian-type punishments would have a salutary
3 impact on these sorts of offenses when they occur in
4 the context of the defense department.

5 CHAIRMAN CASTRO: Whoever would like to
6 answer that?

7 MS. NATELSON: I would just caution
8 again, against looking to the criminal justice system
9 as, you know, a potential point of salvation,
10 particularly the criminal civil -- the civilian
11 criminal justice system where sex crimes are
12 enormously under-prosecuted.

13 Also, I mean, over 90 percent of
14 criminal offenses in general plead out. I mean, the
15 hallmark of the criminal justice system is
16 discretion. So it's dangerous to attach too many
17 expectations to the criminal justice system, when at
18 the end of the day you can never make, you know, the
19 police investigate a crime. You can never compel a
20 prosecutor to prosecute a crime.

21 That's why I keep returning to the civil
22 justice system, because that's where victims have
23 more agency. You actually, you know, if a victim
24 decides to bring a civil claim, they own that claim.
25 Nobody can tell you we are not going to do this, you

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1 are not allowed to bring this claim.

2 And these are the rights that are
3 available to every other employee or crime victim in
4 the country, other than uniformed personnel. You
5 know, a service member can be performing the same job
6 as a DoD contractor or a civilian DoD employee, and
7 they have remedies that they can access if the
8 criminal justice system doesn't work for them, but
9 the woman in uniform doesn't.

10 MS. PARRISH: Well, Rachel makes a very
11 good point, but I would say, in terms of the
12 question, I do think minimum guidelines in sentencing
13 is something that needs to be considered, within --
14 it's, you know, juries are notorious for light
15 sentences on these crimes within the military, and
16 as, you know, defense counsel knows, even if they
17 lose at verdict, they could still win at sentencing.

18 And as I have said before, judges, you
19 know, it's collateral duty as in the Coast Guard. And
20 in the Navy, you know, sometimes they only have had
21 one or two tours and they have previously served in
22 non-military justice roles prior to taking the bench.

23 So the inexperience there, and the lack
24 of training on victims' rights, is a big issue. And
25 I would also say in the appeals courts, the Air Force

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1 appeals court is extremely defense protective, and
2 they should be defense protective, but it's the
3 extremis that the position, recently in the Marines
4 appeals court, reversed a rape conviction by a jury,
5 broadly endorsing the rape myth, you know, they
6 ignored frozen fear, claimed the victim wasn't --
7 didn't seem depressed enough, so they reversed a
8 jury's decision.

9 So there are -- throughout the entire
10 system incidents where victims' rights to legal
11 counsel, which the Congress passed and is now subject
12 to interpretation within the military. The Air Force,
13 in fact, is trying to do something about that
14 recently. We are pleased to hear them making those
15 efforts.

16 But there's pushback in the other
17 branches, in fact we have been told that the
18 interpretation of the new law passed by Congress was
19 that really it was nothing the same and the only
20 right a victim had to counsel was to remove a rapist
21 out of their will, or to break a lease and get them
22 out of the lease.

23 So you know, it's a confused and
24 unprofessional system, with undertrained personnel,
25 young prosecutors where their bosses are even less

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1 experienced than they are.

2 I mean, so it's a lot of problems within
3 that system that need to be addressed.

4 CHAIRMAN CASTRO: The Chair recognizes
5 Vice Chair Thernstrom.

6 VICE CHAIR THERNSTROM: Thank you very
7 much Mr. Chair. Well, I would ask quite a different
8 question than the sort of questions that have been
9 posed so far. A basic thought I would say, maybe I
10 would use the word -- adjective-loaded question, one
11 of the themes running through everyone's testimony
12 this morning, it seems to me, is the need to change
13 military culture such that women are fully
14 integrated.

15 But my reaction to that theme is, is
16 that really possible? I mean, sex and violence go
17 hand in hand in our popular culture. If you look at
18 video games, if you look at the movies, if you listen
19 to popular music.

20 When you join the military, you sign up
21 for training to kill. How is it possible to
22 encourage that aggression, needed aggression, on the
23 part of military members, and to simultaneously
24 suppress sexual aggression?

25 I mean these seem to me at odds. And

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1 you know, it leads to another obvious question,
2 perhaps, the military should be sexually segregated,
3 female-only units, which is of course a wild idea in
4 today's culture.

5 MAJOR WILSON: I really don't know. You
6 know, sexual assault in the military didn't appear
7 last year or in this decade. I raised my hand in
8 1977. It was there in 1977. It was there in 1987.

9 VICE CHAIR THERNSTROM: But you aren't
10 at war forever.

11 MAJOR WILSON: Well, it raises the idea
12 that all men are rapists, which is not true. It
13 raises the idea that all soldiers are potential
14 rapists, which is not true.

15 I find myself, as someone who has spent
16 a lifetime opposing abuse of military authority as
17 counsel for service members, sounding like I am
18 defending the institution.

19 But I think it's important that we
20 understand that this is the one institution in our
21 society that has the 24/7, 365-day-a-year control
22 over their people in a way that will allow them to
23 make those functional changes.

24 That's the difference from the civilian
25 world, and the idea that the longstanding violation

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1 of law of war, as we would call it now, that is
2 sexual assault, is something that is actually a part
3 of being a soldier, I really have to take exception
4 to that.

5 I think it's a terribly bad idea. I
6 think it misinterprets our soldiers.

7 VICE CHAIR THERNSTROM: I don't think
8 that's what I said. But --

9 MAJOR WILSON: Well, and I think that
10 you are right. We are teaching -- on one level we
11 are teaching people to kill. But we also channel it,
12 and that's why we have military law. It is our leash
13 on the dogs of war.

14 But never forget that actually the vast
15 majority of people in the military are not in combat.
16 They are sitting behind desks. They are pushing
17 paper. They are doing all sorts of things.

18 And I don't think that's a solution. I
19 don't even -- even jokingly, sarcastically or as a
20 suggestion, Ma'am, I think it diminishes the value of
21 the people in that institution and the women in that
22 institution.

23 Yes, sexual assault is a problem in the
24 military for women, and it has been for a very long
25 time.

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1 VICE CHAIR THERNSTROM: My point, and
2 I'd like to hear from other people, there is a kind
3 of a cultural problem here, that it seems to me is
4 part and parcel and always has been historically. We
5 have had wars as long as we have had men and women on
6 this planet.

7 There is a cultural problem, a clash of
8 cultures here, where you want to train people who are
9 preparing to fight wars, whether they end up with
10 desk jobs or not, that's the initial training, and
11 you also want them to be -- not to be kind of
12 aggressive in a way that is deeply embedded in our
13 culture.

14 COMMANDER CAVE: I thought I had brought
15 it with me. I don't have it. But there is a very
16 useful discussion of almost this very topic from, I
17 want to say 2000.

18 Commissioner Achtenberg, women and men
19 do join the military for a lot of different reasons.
20 She is absolutely right. People leave poor
21 backgrounds. I have met many, many military personnel
22 who have gotten out of bad circumstances through --
23 she is absolutely correct.

24 But to get back to this, and I'll make
25 it available to you through Ms. Eisemann, I'll send

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1 it to her once I get on the web.

2 And it discusses this sort of point of
3 yours, and one of the takeaways is, at least from my
4 perspective, is that this discussion and focus on
5 what is a problem -- I agree with you, my personal
6 opinion -- this topic has, is and has required us to
7 focus on a problem but in the process, we ignore the
8 good things.

9 I have had the privilege to serve with
10 many wonderful people. You are going to hear from
11 one of them later on. She is now Vice Admiral Nan
12 DeRenzi.

13 The point is, there are -- she is the
14 first woman to be a flag officer, a Judge Advocate
15 General of an armed forces. My point is, and the
16 takeaway from this article, and there's more to it,
17 much more to it, is that focusing on this problem,
18 obviously it needs a focus, but in the process we
19 ignore what have been some very profound and
20 substantial gains by military women who have served
21 and continue to serve and hopefully will serve in the
22 military.

23 And so -- and part of this article's
24 point is that unfortunately, if we continue to talk
25 about this, then we go back to some old, conservative

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1 -- apologies here -- some old, conservative thinking
2 that we need to have segregated barracks and
3 segregated galleys, mess halls, chow halls, whatever,
4 and that women shouldn't serve in the military, and
5 personally I think they are wrong.

6 MS. NATELSON: I also think that it's
7 not at all inevitable that military training and
8 sexual violence go hand in hand. I'd say just look
9 to our allies. Look at Israel.

10 I think the problem is in fact reversed,
11 that there aren't enough women serving in the
12 military. There are so few women that they are
13 marginalized and until their presence in the military
14 is greater, greater in number, greater in meaning,
15 greater in impact, you are going to find that they
16 continue to be marginalized.

17 So I think, you know, there are other
18 countries where men and women are able to serve
19 together without this being a problem, and that -- as
20 Mr. Cave says, I think it would be an enormous shame
21 to cut off those economic opportunities, those very
22 real economic opportunities, to women who want to
23 serve in the military for various reasons.

24 CHAIRMAN CASTRO: Vice Chair, I am going
25 to recognize Commissioner Heriot. We are a little

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1 over time already.

2 VICE CHAIR THERNSTROM: I just wanted
3 one sentence.

4 CHAIRMAN CASTRO: Okay, go ahead.

5 VICE CHAIR THERNSTROM: My basic point
6 here is -- and I'll just focus on men -- you can't
7 train men for war by stripping them of their
8 aggressive drive. I mean, the two go hand in hand.
9 And that's it.

10 CHAIRMAN CASTRO: The Chair recognizes
11 Commissioner Heriot for her -- for the final
12 questions.

13 COMMISSIONER HERIOT: Mr. Chairman, I
14 think my final question is going to be pretty brief.
15 Ms. Natelson, you brought up the Feres Doctrine
16 earlier in your testimony. I just want a
17 clarification.

18 You may have already answered this, but
19 I want to make sure that I understand you. Is it
20 your position that sexual assault should be a special
21 exception to the Feres Doctrine, or are your problems
22 broader than the Feres Doctrine?

23 And also, Commander Cave and Major
24 Wilson, if you could comment briefly on the
25 importance of the Feres Doctrine for the military.

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1 MS. NATELSON: I'm not suggesting a
2 particular course of action. I think, you know,
3 taking into account political realities and taking
4 into account the narrow focus of this particular
5 hearing, you know, my concern is how the Feres
6 Doctrine impedes access for remedies for victims of
7 sexual assault.

8 But I do think that the injustice of the
9 Feres Doctrine and sort of what it's, you know, sort
10 of what it's created, which is not just barring
11 negligence claims but barring intentional
12 discrimination claims also, that that is an injustice
13 to all service members.

14 COMMANDER CAVE: Thank you, I am going
15 to wave off on that question. I don't do -- I just
16 do court-martial work.

17 MAJOR WILSON: I do do civil tort
18 litigation, and as a private practitioner, sure, line
19 them up. If you want to give FTCA, Federal Tort
20 Claims Act authority for service members to sue, I'll
21 happily take on those cases.

22 However, the tradeoff is not that there
23 is no remedy, and I think that's false. It may be a
24 poor remedy, or, well, not a well-administered
25 remedy, but the tradeoff for *Feres* is that we offer

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1 service members the 365-day-a-year, 24/7 ability to
2 have military disability and veterans' disability
3 related to their injuries.

4 How well that is managed is a whole
5 other discussion, as we all know. But that's the
6 tradeoff. Do I think it's a fair tradeoff? Do I
7 think it's a proper tradeoff? Do I think there may
8 be some overriding policy issues that would merit
9 change, for example in medical malpractice cases in
10 stateside hospitals?

11 Yes. But that -- I don't think that the
12 -- again, oh, I wish these things were as simple as
13 eight-minute discussions.

14 CHAIRMAN CASTRO: Well, thank you all.
15 It was a very informative panel. We appreciate the
16 input that you have given us. And we look forward to
17 continuing conversation throughout the day.

18 We are going to now begin with panel 2,
19 so in the interests of time, we will ask folks to --
20 panelists for panel 2, to begin to take your places.
21 Commissioners, don't stray too far away. We are
22 going to start immediately once the panelists are
23 seated.

24 (Whereupon, the proceedings in the foregoing matter
25 went off the record at 11:06 a.m. and

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1 went back on the record at 11:10 a.m.)

2 CHAIRMAN CASTRO: All right, I am
3 calling the second panel into session.

4 **III. PANEL II: ACADEMIC SCHOLAR PANEL**

5 CHAIRMAN CASTRO: All right, I'm calling
6 the second panel into session. Let me briefly
7 introduce the panelists in the order that they are
8 going to be speaking. I will ask Commissioners to
9 sit down and take your seats please. Our first
10 panelist --

11 COMMISSIONER YAKI: Mr. Chair can you
12 hear us?

13 CHAIRMAN CASTRO: Yes we can hear you,
14 Commissioner Yaki. Is Commissioner Kirsanow on the
15 phone?

16 COMMISSIONER YAKI: We momentarily just
17 dropped there.

18 CHAIRMAN CASTRO: Okay, you're there.
19 We got you. Our first panelist is Dwight H. Sullivan
20 with the George Washington University School of Law.
21 Our second panelist is Elizabeth Hillman with the
22 University of California, Hastings School of Law.

23 Our third panelist is Victor Hansen with
24 the New England School of Law and our fourth panelist
25 is Dr. David Lisak with the University of

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1 Massachusetts, Boston, Department of Psychology.

2 I will now ask each of you to swear or
3 affirm that the information that you are about to
4 provide to us is true and accurate to the best of
5 your knowledge and belief. Is that so?

6 (Whereupon, the panelists were sworn
7 in.)

8 CHAIRMAN CASTRO: Thank you. Mr.
9 Sullivan, please proceed.

10 MR. SULLIVAN: Thank you Mr. Chairman,
11 members of the Commission. It's a pleasure to be
12 with you today. Because my name tent had indicated a
13 DOD connection, I will throw in the obligatory
14 disclaimer that I am speaking only on behalf of
15 myself and I'm not purporting to give the views of
16 any governmental agency.

17 Oliver Wendell Holmes of course famously
18 said that the life of the law has not been logic,
19 it's been experience. And experience teaches us that
20 there are certain dangers when attempting to reform
21 the laws governing sex offenses in the United States
22 military, and I'd like this morning to concentrate on
23 some of those dangers.

24 One lesson that experience has taught us
25 is that reforms can do more harm than good, and the

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1 best example of this is the 2006 National Defense
2 Authorization Act, which fundamentally changed the
3 criminal statutes governing sex offenses in the
4 military.

5 It resulted in a holding that the way
6 that it criminalized substantial incapacity offenses
7 was unconstitutional. As a result of that several
8 convictions were lost, and it threw other cases into
9 disarray, kept cases on hold for literally months
10 while these issues were hashed out in the appellate
11 system, and obviously holding military cases in
12 abeyance for months not only harms the accused with
13 his statutory and constitutional right to a speedy
14 trial, but also harms military efficiency, good order
15 and discipline and morale, to have these people often
16 not able to perform their primary duties because
17 their security clearance has been pulled, or because
18 there's a military protective order that compelled
19 them to be separated from the alleged victim. It
20 makes it difficult for the command to hold these
21 cases in abeyance. So that was one example of how
22 the 2006 legislation had an unintended effect.

23 Another way is that the legislation
24 eliminated a theory of liability for rape of a child.
25 So one way to prove force of rape of a child before

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1 2006, was parental compulsion, which was recognized
2 as a form of constructive force.

3 The 2006 legislation did away with that,
4 and as a result there was a naval case, *Valentin*, in
5 which a rape conviction was set aside because the
6 2006 statute did not incorporate that parental
7 compulsion theory.

8 Now obviously no one in Congress
9 intentionally did away with the constructive force
10 notion of parental compulsion. But the previous
11 statute was a very broad statute that had been
12 supplemented with case law and regulations.

13 And so when Congress then defined force,
14 they didn't bring in all of the case law that had
15 interpreted that under pre-2006 case law. They
16 missed that, and as a result, we once again had the
17 unintended consequence of a service member going free
18 who would have easily had his conviction affirmed
19 under the pre-2006 legislation.

20 So if the objective of the 2006
21 legislation was to hold more military sex offenders
22 liable for their actions, a very noble and worthwhile
23 goal, the legislation was actually counterproductive.

24 And so that's one important lesson that,
25 when trying to reform the military justice system,

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1 it's important to do so in a very deliberate fashion
2 that takes account of all the ramifications, all the
3 third order effects of how a change in one area may
4 affect the law in another area.

5 Another lesson I think we draw in
6 looking at experience, is that it's too soon to judge
7 the newly reformed military justice system's handling
8 of sex offenses.

9 Over the last year we have seen
10 substantial changes to the way that the military
11 deals with sex offenses. Of course one primary
12 change was the April 2012 change that Secretary of
13 Defense Panetta announced, in reserving discretion to
14 dispose of these charges to a special court-martial
15 convening authority of the rank of Colonel or Navy
16 Captain or higher.

17 That change took effect on June 28th.
18 Also, I mentioned the problems with the 2006
19 legislation, well, Congress went back in 2011 and
20 amended the statute. Those amendments took effect on
21 June 28th, 2012, and the implementing regulations for
22 those changes still haven't even been executed yet.

23 So the system has changed in fundamental
24 ways. No one knows exactly how those changes are
25 going to play out and those changes aren't even fully

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1 implemented.

2 And there's more change on the horizon.
3 For example, on January 28th of this year, the Air
4 Force is going to have 60 special victim counsel go
5 online who will provide counseling services to
6 victims of sexual assault offenses, another
7 substantial change in the military justice system.

8 Also, President Obama signed the
9 National Defense Authorization Act for fiscal year
10 2013 on the 2nd of January this year. Once again,
11 substantial changes to the way the military handles
12 these cases, including setting up special victim
13 units to investigate, prosecute and provide victim
14 assistance in these types of cases.

15 That, however, that change won't go into
16 effect until the 2nd of January, 2014. So you've
17 already seen substantial revisions and the system is
18 going to be changing even more in the future.

19 We shouldn't pre-judge the results of
20 those changes. It calls for substantial study, and
21 interestingly, the same legislation, the 2013 bill,
22 also set up two different commissions to study the
23 problem of sexual assault in the military, and the
24 effect of the changes that went into effect on June
25 28th of 2012.

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1 A third thing that experience teaches us
2 is that the military does not have exclusive
3 jurisdiction over sex offenses committed by military
4 members in the United States.

5 Now, sometimes when there are proposals
6 to reform the system, the idea is offered that we
7 should allow civilians to exercise prosecutorial
8 discretion. In reality, we already have that system
9 for any sex offense committed in the United States,
10 because any sex offense committed by a military
11 member in the United States can be prosecuted either
12 by the criminal justice -- military criminal justice
13 system, or by a state court or in federal district
14 court, and in the case of state courts, the same case
15 can actually be prosecuted in both the military
16 justice system and the state court because you don't
17 have the double jeopardy bar there with different
18 sovereigns.

19 And we have seen this actually play out.
20 In fact, there was a Stars and Stripes article on
21 January 9th, earlier this week, that said that last
22 year there were 15 cases where civilian authorities
23 declined to prosecute sex offenses against U.S.
24 military members where the military then prosecuted
25 them.

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1 The civilians refused to prosecute
2 because they were viewed as unwinnable. The military
3 stepped in and prosecuted them.

4 And it sometimes goes the other way.
5 For example in 2005, the Marine Corps declined to
6 prosecute Captain Douglas Dowson for an alleged sex
7 offense against a Marine Lieutenant.

8 The City of San Diego, or San Diego
9 state officials stepped in and prosecuted him and won
10 a conviction in that case.

11 So right now, we have a system where the
12 military serves as a backstop for civilian
13 prosecutions where civilians don't prosecute, and the
14 civilians serve as a backstop for the military where
15 the military doesn't prosecute, and it is almost
16 certainly the case that if we allow military
17 commanders to exercise their prosecutorial discretion
18 while also allowing civilian authorities to exercise
19 their prosecutorial discretion, we end up with a
20 combination of more convictions than we would have if
21 either one of those was the sole prosecutorial
22 discretion authority.

23 And I only have a few moments left, so
24 I'll just mention the fourth concern is with the
25 politicization of the military sex assault issue that

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1 has led to another problem that might be called over-
2 prosecution, where we have cases that go to Article
3 32 investigations, the Article 32 IO says there is
4 not a basis for prosecution, and yet the convening
5 authority refers the case anyway.

6 And it's interesting, in that same Stars
7 and Stripes article, there was a quote from the chief
8 prosecutor of the Air Force, Colonel Don Christensen,
9 who said a commander who is believed to turn a blind
10 eye to sexual assault, his career will be derailed.

11 And so there is that concern with the
12 politicization leading to over-prosecution. Thank
13 you Mr. Chairman.

14 CHAIRMAN CASTRO: Ms. Hillman.

15 MS. HILLMAN: Thank you, Chair Castro,
16 Vice Chair Thernstrom and Commissioners for the
17 opportunity to speak to you today. I'd like to just
18 begin by commenting on how appropriate I think it is
19 that the Commission has taken up this particular
20 issue.

21 Sexual assault in the military is
22 critical for civil rights in the United States. The
23 United States Armed Forces have been essential in the
24 epic struggle for equality in our nation's history,
25 and the histories of many other nations.

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1 Sexual assault and rape, their
2 prosecution and investigation have often reflected
3 our society's assumptions, not only our military's
4 assumptions, but our society's assumptions about the
5 differences among us with respect to race, gender,
6 sexual orientation and disability.

7 From the civil rights perspective then,
8 the current system of prosecution within the military
9 fails to protect the rights of many vulnerable
10 minorities, including survivors of rape and sexual
11 assault who suffer disability as a result of those
12 experiences, women whose professional opportunities
13 are limited by the prevalence of sexual assault, men,
14 especially African American men, who have too often
15 been unfairly singled out for prosecution for these
16 crimes, and gay men and lesbians, historically
17 perceived as sexually deviant and therefore less
18 deserving of protection, whether they have been the
19 targets of or accused of the criminal misconduct
20 themselves.

21 Each of these groups, essential to the
22 effectiveness of the U.S. Armed Forces, would benefit
23 from improvement and reform in this area of law.

24 Now, like all of us who have been paying
25 attention to this issue in recent years, I am humbled

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1 by the challenges of trying to address it. I am also
2 humbled by the fact that you gave each of us eight
3 minutes and the TJAGs five minutes.

4 So let me just suggest I suffer from the
5 same confirmation bias as the rest of us in this, but
6 I would like to make two modest contributions that I
7 mentioned in my written remarks, to what our legal
8 response to military sexual assault ought to be.

9 First, the United States is an outlier
10 among the nations, among the world's militaries, in
11 placing the discretion to prosecute in the hands of
12 commanding officers rather than civilian authorities.

13 The clear trend in the militaries of our
14 allies is towards civilian control over a military
15 criminal prosecution, not only in sexual assault, but
16 in all criminal cases.

17 The United Kingdom, which was already
18 mentioned today, for example, has a director of
19 service prosecutions. His name is Bruce Holder. He
20 is a civil servant. He has been in that job since
21 2009. His deputy is a Brigadier General.

22 This is a direction that the United
23 Kingdom has been heading since 1996. It has -- it
24 took gradual steps in this direction. It did not
25 happen all at once.

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1 This has also happened in Canada, in
2 South Africa, Ireland, Australia and New Zealand.
3 They have military justice systems with civilian
4 authority to prosecute.

5 Now, Bruce Holder, in the UK, has four
6 decades of experience in criminal law. He also has
7 experience in war crimes tribunals. But he is not a
8 military officer.

9 This affords him independence, both
10 practically and structurally, and insulates the
11 British military to the extent possible from the
12 inescapable political consequences of prosecutorial
13 decisions.

14 The second point I'd like to make is
15 that both the recent and more distant past suggest to
16 us that our armed forces are unlikely to be able to
17 resolve this problem on their own.

18 Colonel Sullivan, an attorney and
19 scholar and officer for whom I have the deepest
20 respect, disagrees, and believes we need to let this
21 most recent slate of changes take effect before we
22 remake the system once again.

23 He is right about the potential
24 consequences, but I am less sanguine about the
25 likelihood of success under this latest regime. And

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1 I consider the imperative to protect commanders'
2 authority to prosecute a Pyrrhic victory at best,
3 because it leaves commanders liable to the scrutiny
4 of the public, to criticism no matter what they do,
5 and it leaves their troops vulnerable to a problem
6 that so far our military has gained little traction
7 over, despite two decades of what I think are serious
8 and comprehensive efforts to address it.

9 Now, I note how I offer these
10 observations and how I come to those. I think the
11 appropriate comparison for us here is not to civilian
12 prosecution systems, but to other militaries and
13 their decisions about how to prosecute these.

14 I also note that I am a legal historian
15 and a comparative scholar of military law. I am also
16 a veteran, and I remember as a young Lieutenant, when
17 I was in Colorado Springs during the aftermath of the
18 1991 Tailhook Scandal and the training that unfolded
19 as a result of that, the consequences, intended and
20 otherwise, that followed from those events.

21 I also was on the faculty of the Air
22 Force Academy when we decided on the course of action
23 to one of the many scandals of sexual assault that
24 have -- have disrupted and compromised the missions
25 of our national service academies.

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1 During my post-Air Force career, I have
2 observed and written about the growing importance of
3 legal counsel in military operations, about the heavy
4 burden carried by our Judge Advocates who face a
5 spectrum of professional demands and conflicts of
6 interest that rival the most complex that any
7 attorneys face.

8 Now, removing the authority to prosecute
9 from command is a rational way to reallocate
10 resources and protect the core, professional
11 expertise and function of the armed forces.

12 It would not disturb the innovative
13 practices that the Judge Advocate Generals of the
14 services have described in their submissions. These
15 include extensive training of military leaders on the
16 psychology, sociology and consequences of sexual
17 assault, the creation of a norm of intervention, of
18 bystander programs, the attempt to ensure a seamless
19 transition from on duty, active service, service
20 provision, to services provided to veterans, and the
21 establishment of expedited transfer processes for
22 those who report sexual assault within their units.

23 The changes already made in the intra-
24 military structure of criminal prosecution have
25 tinkered at the margins, by bringing in civilian

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1 advice, by shifting authority to prosecute to more
2 senior officers within the chain of command.

3 Those changes have yet to be proven
4 effective or ineffective, but the experience of other
5 militaries suggests a cleaner, more complete, less
6 duplicative solution is the best authority in a
7 civilian.

8 Each branch of service is now crafting a
9 separate set of regulations and structures to deal
10 with this same problem. Some of the tinkering
11 already in place sends counterproductive messages,
12 undermining the ability of military prosecutors to
13 bring charges and reifying the stigma and shame that
14 has been long associated with being a victim of
15 sexual assault.

16 The restricted reporting option for
17 instance, available to service members who are
18 victims of assault, deeply undercuts that very
19 command authority over military discipline that
20 command only prosecutorial authority is intended to
21 protect.

22 Now, let me just close by saying,
23 allowing a civilian to make a decision to prosecute
24 will permit commanding officers to focus on adapting
25 military culture, to the extent possible, to prevent

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1 the full spectrum of wrongful, sexual, sexualized
2 behavior. All of that behavior corrupts military
3 discipline. Sexual harassment that is not criminal
4 to sexual assault that is criminal -- it would remove
5 that legal precision and questions of prosecution
6 from command, allow commanders to speak more freely
7 on these topics and to address the problem more
8 holistically, conserve resources and perhaps fix this
9 tenacious and destructive problem. Thank you.

10 CHAIRMAN CASTRO: Mr. Hansen.

11 MR. HANSEN: Thank you for the
12 opportunity to speak on this very important issue.
13 This is a critical issue of importance for many
14 reasons, but above all, it is an important issue if
15 we are to ensure good order and discipline within the
16 military, and if we are to retain and continue to
17 recruit an effective fighting force.

18 Our military has a unique mission, and
19 we ask a great deal of our service members. We have
20 a special and critical obligation to protect them
21 from these crimes in exchange for the selfless
22 sacrifice that we ask of each of them.

23 In my opinion the military has moved
24 effectively on many fronts to better address this
25 problem. First, I believe the statutory reforms over

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1 the past few years and more specifically with respect
2 to the most recent amendments to Article 120 of the
3 Uniform Code, which Colonel Sullivan just recently
4 spoke about, dealing with sexual assault, I believe
5 these amendments are significant.

6 They not only have clarified the law in
7 this area but they have given commanders additional
8 tools to more effectively punish a broader range of
9 sexual assault crimes.

10 I also believe an increased emphasis on
11 tracking reporting of incidents over the past several
12 years is an important and positive development. The
13 attention of senior military and civilian leaders and
14 Congress have placed on how these crimes are
15 reported, investigated and punished, send a powerful
16 and important message that these are serious issues,
17 and that Commanders at all levels are expected to pay
18 attention and to take action when appropriate.

19 Finally, the military -- recognition by
20 the military that sexual assault cases can be
21 particularly difficult to effectively prosecute, and
22 to, as a result, add additional expertise, to hire
23 civilian expertise, experts to train and assist
24 military attorneys in the prosecution and defense of
25 these cases, is I believe an important and

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1 significant development in that it is a recognition
2 that any efforts to address this issue must not
3 undermine the basic rule of law protections that are
4 at the core of our military justice system.

5 Now in spite of these positive efforts,
6 I think there remains much to be done and
7 specifically in the area of what I have referred to
8 as under-detection, and specifically with reference
9 to the role of the military commander.

10 Now, this under-detection problem was
11 most recently seen in cases arising out of Lackland
12 Air Force Base, but this is not -- this is just the
13 latest in a line of cases that stretch back to
14 Aberdeen Proving Ground, to the service academies and
15 to other military bases.

16 In these under-detection cases, the
17 perpetrators were often able to assault multiple
18 victims over many months without being detected, and
19 without the victims reporting their assaults.

20 None of the reforms that we have
21 mentioned to date, in my opinion, are sufficiently
22 designed to address this problem of under-detection
23 as it relates to the chain of command.

24 There are many reasons for this under-
25 detection but I believe one of the most important,

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1 and as of yet unaddressed -- yet unaddressed reasons,
2 is that military commanders lack sufficient cultural
3 and legal incentive to aggressively prevent and
4 suppress this misconduct.

5 Invariably when these cases come to
6 light, the military and civilian leaderships state
7 that the solution to these problems rests with the
8 military leadership and the chain of command.

9 I agree. And in order to ensure that
10 the leadership addresses these issues, more must be
11 done to incentivize commanders to prevent and
12 suppress these crimes.

13 The changes that I believe, or that I
14 propose, involve both a cultural shift within the
15 military as well as clearer statutory guidelines.

16 Now there is often a cultural tendency
17 within the military, and I should state that this is
18 broader than just in sexual assault issues, my
19 experience in the Abu Ghraib Investigations, and my
20 experience over my time in the military, it is clear
21 that oftentimes when there are command failings and
22 leadership shortcomings that contribute to
23 atmospheres that lead to crimes, and in the case of
24 sexual assault crimes, when the military does address
25 these, they often send confused and mixed signals

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1 about the failings of the chain of command.

2 The situation at Lackland provides an
3 example. In that situation you had a Lieutenant
4 Colonel Mike Paquette, who is the commander of the
5 331st Training Squadron where 9 of the 17 accused
6 instructors were assigned, and Colonel Glenn Palmer,
7 who is the commander of the 737th Training Group,
8 were both relieved of command after the allegations
9 came to light.

10 The Air Force used characteristically
11 cryptic language in announcing these actions, stating
12 only that the leadership had lost confidence in these
13 two commanders.

14 Similarly, Colonel Eric Axelbank, who
15 was head of the Training Wing at Lackland, was not
16 relieved of command. However he stepped down from
17 his command much earlier than his initial --
18 initially-assigned change of command.

19 When referring to that, the Commanding
20 General of the Air Force training command simply
21 said, "We think we needed a different set of skills."

22 These comments and this response are not
23 unique to Lackland or unique to the Air Force. There
24 exists within the military a culture against fully
25 investigating and clearly identifying the command

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1 failings which may have contributed to under-
2 detection of these sexual assault crimes.

3 Now in addition to these cultural
4 changes, I believe there must be more specific
5 statutory changes to the Uniform Code of Military
6 Justice, to further incentivize commanders to
7 investigate, prevent and suppress these crimes.

8 There is a doctrine which exists under
9 the customary international law known as command
10 responsibility. This is a doctrine which exists and
11 which we, the United States, played a significant
12 role in developing after World War Two, and it was
13 used to hold military commanders of our enemies
14 accountable for the law of war violations committed
15 by the forces under their command.

16 Since that time this doctrine has been
17 codified in a number of international treaties and
18 military codes throughout the world. As of yet, this
19 doctrine has not been fully incorporated into U.S.
20 domestic law within the Uniform Code of Military
21 Justice.

22 Currently, Article 92 addresses
23 dereliction of duty and is the primary statutory
24 mechanism within the Code to hold commanders
25 criminally accountable for their command failings.

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1 As currently formulated, I believe
2 Article 92 is inadequate. Under Article 92, all that
3 is required of a commander is to avoid wilful
4 failures and to achieve a level of competency that is
5 somewhere above simple negligence, or culpable
6 inefficiency.

7 The commander cannot be held accountable
8 under this provision, even if he did not do
9 everything feasible or even reasonable to
10 investigate, prevent or suppress these crimes.

11 As long as the commander's failures were
12 not negligent or culpably inefficient or wilful, he
13 is not derelict of his duties. By contract, under
14 international law the commander is required to do
15 everything in his power that is reasonable to
16 prevent, suppress and punish law of war violations.

17 I believe that we ought to borrow this
18 doctrine that exists under customary international
19 law, and incorporate it into Article 92, and
20 specifically set forth a clear standard that requires
21 commanders to do all that is reasonable and within
22 their power and authority to investigate, prevent and
23 suppress these sexual assault crimes within the
24 ranks.

25 This change and clarification of the law

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1 will have several benefits. First, I believe it will
2 provide commanders with the needed incentive to make
3 detection and prevention of sexual assault within the
4 ranks a top priority. Commanders are tasked with any
5 number of important responsibilities and duties. At
6 the top of that list should be, must be, the
7 responsibility to establish and maintain a command
8 climate where every service member is valued and
9 protected.

10 I also believe that this will send a
11 powerful message to commanders that it is their
12 responsibility in this area, more than taking action
13 when they become aware of possible allegations, that
14 they have the affirmative duty to investigate,
15 suppress and punish, and I believe this change will
16 help the cultural shift.

17 Finally I don't believe that the
18 military can continue on one hand to claim the
19 solution to this problem rests with the chain of
20 command, while on the other hand failing to
21 investigate commanders and appropriately hold them
22 accountable, fully accountable, when their command
23 failings contribute to these crimes. Thank you.

24 CHAIRMAN CASTRO: Dr. Lisak. Please
25 proceed.

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1 DR. LISAK: Thank you. Members of the
2 Commission, I am honored to have this opportunity and
3 I thank the Commission and its staff for inviting me
4 to speak today.

5 I am a clinical psychologist and
6 researcher. I have studied sex offenders for 25
7 years. For the past 10 years I have been working
8 with all four services of the U.S. military.

9 I am intimately familiar with the
10 problems that our military services have in
11 confronting sexual violence within their ranks.
12 There should be no surprise that the military has a
13 serious problem of sexual violence.

14 Every society on this planet has a
15 serious problem with sexual violence, and every major
16 institution within our society has a serious problem.
17 In particular, any community or institution, like the
18 military or any university, that brings together
19 young people in the age range of 18-24, will have an
20 acute problem with sexual violence. That's the age
21 range among adults of maximum risk for sexual
22 assault.

23 Since the eruption of sexual assault,
24 the scandal at the Air Force Academy almost 10 years
25 ago, there has been a very harsh, bright light

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1 beaming down on the U.S. military, exposing its many
2 problems in dealing with sexual violence.

3 That bright light, and the pressure, as
4 harsh as it has sometimes been, is a necessary
5 ingredient in forcing the services to sustain their
6 commitment to doing everything possible to improve
7 their response to sexual assault.

8 But let's be very, very clear about one
9 thing: if that same harsh, bright light were to be
10 focused on our nation's colleges and universities, or
11 on our local district attorney's offices, it would
12 expose precisely the same problems, the same
13 failings, the same lack of adequate response and
14 adequate protection for the members of those
15 communities.

16 So by all means, let's pressure our
17 military to dramatically improve how it handles
18 sexual assault, but let's not fool ourselves that
19 other sectors of society are doing any better.

20 I would like to focus now on a few of
21 the most critical areas in which the military must
22 improve its response to sexual assault. We are still
23 fighting long-held misconceptions about who
24 perpetrates non-stranger rapes.

25 Few people are confused about rape where

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1 the rapist dons a ski mask, wields a knife, ambushes
2 a victim on a dark street corner. But when the
3 rapist has a charming smile and an earnest look on
4 his face, when he targets victims in bars and parties
5 and uses manipulation, alcohol, intimidation and
6 threats instead of a steel blade, suddenly many
7 people get confused.

8 These types of rapes are often referred
9 to as date rapes, a term that masks a far more brutal
10 reality. I have studied these rapists, as have
11 others. About two-thirds of these rapists are serial
12 offenders, who by their early 20s have raped an
13 average of six women.

14 Their rapes are premeditated. Like all
15 sex offenders they are adept at identifying
16 vulnerable individuals and then manipulating them and
17 exploiting their vulnerabilities.

18 If you have a basic understanding of how
19 Jerry Sandusky worked, you have a basic understanding
20 of these non-stranger rapists. Even though these
21 serial rapists represent a very small percentage of
22 the men in the military, they are responsible for a
23 wildly disproportionate level of harm.

24 The vast majority of rapes, upwards of
25 90 percent, are committed by these serial offenders.

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1 This has enormous implications for how we investigate
2 and prosecute these cases.

3 Virtually every assault that is reported
4 should trigger two related but separate
5 investigations: an investigation into the specific,
6 alleged sexual assault; and an investigation into the
7 behavior and background of the alleged rapist to
8 determine whether he is a serial offender.

9 This dual response is precisely what we
10 do in many other violent crimes. If a soldier
11 reports to OSI or CID or NCIS that a fellow soldier
12 tried to sell them a vial of crack, the investigation
13 would not be strictly limited to that specific
14 attempted drug sale.

15 It would immediately investigate whether
16 the alleged seller was in fact a drug dealer, a
17 threat to the entire command. We must apply this
18 basic approach with equal diligence to sexual assault
19 cases.

20 Further, the men and women in the
21 military's investigative agencies in the JAG Corps,
22 must receive the specialized training that is
23 required to competently handle non-stranger rape
24 cases.

25 These cases are marked by complexities

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1 and challenges unseen in any other type of violent
2 crime, and these challenges can and very often still
3 do derail these cases and prevent them from being
4 successfully prosecuted.

5 The specialized training should include
6 interviewing skills that increase trust and
7 disclosure in victims and that do not intimidate and
8 shut down victims, skills that incorporate
9 neuroscience research on the impact of trauma on
10 memory formation and memory retrieval, recognition of
11 the unique evidence needed to effectively prosecute
12 sexual assault cases in which the issue of consent
13 will be central, in-depth training on victim privacy
14 issues and ways to safeguard victims from undue
15 trampling of their privacy rights.

16 Some of this advanced training is
17 already under way, but it must become more widespread
18 and crucially, it must be sustained. Successful
19 prosecution of a much higher proportion of sexual
20 assault cases is also a crucial component of the
21 military's long-term prevention efforts.

22 The prosecution of these cases sends a
23 strong message that firmly supports the military's
24 prevention messages, and conversely, when rape cases
25 are not aggressively pursued and prosecuted, those

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1 prevention messages ring hollow.

2 Now I want to address quickly, this
3 morning you heard some testimony about false
4 allegations and I think you have more about that in
5 the written materials.

6 I have analyzed virtually the entire
7 published research on false allegations. I have
8 conducted my own study. The reference earlier made
9 to Eugene Kanin's study, Kanin's study is a very,
10 very flawed piece of research. He violated nearly
11 every rule of research methodology. In fact,
12 basically it's a collection of anecdotes.

13 There is real research on false
14 allegations and that research puts the proportion of
15 rape reports that are false allegations at somewhere
16 between 2 and 8 percent, if you want to be more
17 generous, 2 and 10 percent.

18 All four services have launched a
19 variety of rape prevention programs. These programs
20 can only be successful if they are continually
21 evaluated and modified to increase their
22 effectiveness, if they are sustained as a permanent
23 part of military culture and crucially, if they
24 address not only sexual assault but also the climate
25 in which sexual assault flourishes.

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1 For this is something else we know about
2 sexual assault: that it thrives in environments in
3 which sexual harassment is tolerated. One large-
4 scale study of sexual assault and harassment in the
5 U.S. military found that, of the female soldiers who
6 had suffered sexual assaults, 99.7 percent had also
7 been sexually harassed.

8 I have sat in a room and talked to sex
9 offenders for almost three decades and I can tell you
10 that they don't rape because they see other men
11 harassing women.

12 But when they see other men harassing,
13 degrading and denigrating women, they view their own
14 behaviors as normal, as simply another way in which
15 women can be targeted and used, and they assume that
16 their behavior will not be seen as anything that
17 deviates from the norm and that they will never be
18 held accountable.

19 The problem of sexual assault is big
20 enough in the military and beyond the military, that
21 it will take a long-term commitment to action on many
22 fronts, only some of which I have identified here.

23 I sincerely hope that this Commission
24 will help the services to achieve what no other
25 sector of our society has yet accomplished: to create

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1 prevention programs that reduce the number of sexual
2 assaults that occur in our services; and to respond
3 aggressively and effectively to those assaults that
4 we fail to prevent. Thank you very much.

5 CHAIRMAN CASTRO: You brought up and it
6 was brought up earlier the issue of these false
7 accusations. I would imagine in every area of law
8 there is always some false accusations and we have to
9 give the accused the opportunity to show that the
10 presumption of innocence is there, at least in the
11 civil system. So we also have to be fair, to provide
12 the accused a forum to ensure that any allegations
13 raised against them have veracity.

14 Now having said that, I have seen the
15 movie, and I think my colleagues as well have seen
16 The Invisible War, and heard the testimony of the
17 victims in that film, and also the complaint that was
18 filed by them, and the materials that we have
19 received, including public comments, indicate that
20 many of these individuals have been so victimized
21 after reporting, there's been such horrific
22 retaliation, that it boggles my mind to think that
23 someone would voluntarily make a false accusation,
24 knowing that they could be subject to this horrific
25 conduct in terms of retaliation.

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1 Again, not to say that there are not
2 some false accusations. But it seems to me
3 incongruous that those false accusations would be a
4 sizeable amount.

5 If you have got an opinion on that, I'd
6 like to hear it. And also in terms of what you said
7 about the profile of these accused, that they tend to
8 be serial rapists, predators, that leads to the
9 problem, I think, of under-detection which Dr.
10 Hillman talks about. You talked a little bit about
11 how to deal with that, but are there some models for
12 dealing with under-detection as well that we might be
13 able to recommend?

14 DR. LISAK: So, well, first on false
15 accusations. You know, I think we have to
16 acknowledge that is an emotional response to this
17 issue. Part of it stems from the fact that it is
18 truly a horrific thought, that you could be falsely
19 accused of something, especially something like a sex
20 crime. It's a devastating thing, and that's
21 absolutely true.

22 But simultaneously, we also know that
23 these happen very, very rarely, and one of the
24 reasons surely is what you just said, that to lodge
25 it, a formal complaint of a sex crime -- you know,

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1 you get investigated, you get asked a lot of
2 questions. This is an enormous sort of series of
3 events that you put in motion, and so the idea that
4 people would just kind of, for a lark or for minor
5 motivations, do this... it's really, what it is, is
6 there's a mythology about false allegations and it's
7 been around for decades, and I and other people, we
8 are trying very hard to get the discussion focused on
9 research, because this is not something we have to
10 guess about. We have some pretty good research on it,
11 and like I said, it's clear that this is a very small
12 percentage of cases, and I wish we could dispense
13 with that part of it, because it really doesn't get
14 us anywhere.

15 On the issue of under-detection, I think
16 that's crucial, and if I understand the sort of the
17 issue, and just -- it speaks to all these cases,
18 where we from time to time uncover these events where
19 individuals, perpetrators have, you know, enormous
20 numbers of victims, and the *Sandusky* case is a great
21 example of that.

22 And that's why, since we know that the
23 majority of these individuals are serial offenders,
24 that the moment where a report comes in, regardless
25 of how difficult the case might appear to be, and you

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1 know, the victim may have been intoxicated, she may
2 have only a partial recall of what happened; there
3 are all kinds of complexities and you may look at
4 this case and say I don't know if we are going to be
5 able to proceed. We are going to investigate. We
6 are going to try. But we don't know.

7 And that's legitimate. But the other
8 investigation that needs to be launched at that
9 moment, given what we know about the possibility that
10 this is a serial offender, that we go and investigate
11 this guy, and that's just an investigation. That
12 doesn't lead to anything, all right, unless you find
13 evidence.

14 And what I hear from investigators now,
15 who increasingly, they are -- the CID is getting you
16 know, state of the art training now in these kinds of
17 cases, and we are starting to see agents coming back,
18 finding other victims, and all of a sudden, instead
19 of a case that looked very, very difficult, now when
20 you have two victims or three victims that you are
21 prosecuting, this really changes the complexion of a
22 prosecution.

23 And so that's one of the things I think
24 that is crucial and it speaks to this issue of under-
25 detection of cases that are out there.

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1 MR. HANSEN: If I may, just on the issue
2 of under-detection, I'm not an expert on the social
3 sciences of under-detection, but with respect to the
4 role of the commander and the command, we spoke in an
5 earlier panel, you heard in the earlier panel about
6 this question of command influence and improper
7 command influence and improper command influence.

8 There is no question that the role of
9 the commander properly is to know what's going on in
10 his unit, on his watch, his or her watch. And if you
11 look at the reports that have come out from Lackland,
12 the Air Force court report that was released, and
13 this is very common, when we see widespread failings
14 where these crimes, and not just sexual assault
15 crimes but other types of offenses, when they occur,
16 what we often see is a commander who became lax, who
17 wasn't -- who wasn't aggressive or wasn't taking a --
18 paying attention to the very simple, basic things we
19 expect commanders to do.

20 And so part of the -- in my opinion part
21 of that role is to recognize that within the
22 military, that is the responsibility and a role that
23 we give commanders. We have to give them both, in my
24 opinion, the authority and also the incentive to do
25 the basic things we expect commanders to do.

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1 CHAIRMAN CASTRO: Thank you. The Chair
2 recognizes Commissioner Kladney.

3 COMMISSIONER KLADNEY: Thank you. First
4 of all, before I begin, I'd like to thank everybody
5 here in the service. I know we are talking about
6 something that is probably very sensitive. But I'd
7 like to thank you all for serving America and
8 hopefully, we can all gain something out of this.

9 Mr. Hansen, my question is, and no one
10 has really answered this I don't think, is there like
11 standard sentencing guidelines, normal procedures for
12 when you decide when to send something to courts-
13 martial or when you send something to Article 15 or
14 field grade Article 15, or anything like that, when a
15 commander makes that decision, or is that totally
16 within his discretion?

17 Because what we have heard this morning
18 was, you know, what sounded like some -- and albeit
19 in the past, some horrific kinds of offenses proven
20 and committed with some very different kinds of
21 sentencing punishments.

22 I mean you can convict, as Dr. Lisak
23 says, a lot of people. But if you are going to do
24 seven days in the brig, that's not a bad deal.

25 MR. SULLIVAN: Well, I'd like to clarify

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1 that seven day in the brig point. The -- that
2 involved a Marine Corps captain. That case involved
3 a Marine Corps captain who was charged with rape and
4 acquitted of rape.

5 He was acquitted. He was tried, there
6 was a contested trial, the case had gone to an
7 Article 32 investigation. The Article 32
8 investigating officer had said there isn't enough
9 proof here to get a conviction. It was referred
10 anyway. It went to trial. It resulted in acquittal.

11 The officer was convicted of two
12 offenses: adultery; and using crude language. You
13 don't get prosecuted for either of those in the
14 civilian world. So if he hadn't been a Marine
15 officer, he would have gotten no confinement.

16 So the fact that he ended up with seven
17 days' confinement for adultery and use of crude
18 language doesn't seem like an injustice to me. It's
19 only if you draw the hypothesis that he was guilty of
20 rape.

21 COMMISSIONER KLADNEY: I'm not talking
22 about an injustice. I'm talking about standards. I'm
23 talking about, is there a book, like sentencing
24 guidelines, like something like -- I mean, I am
25 really --

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1 MR. SULLIVAN: There is not, and so
2 there are certain military offenses for which there
3 is a mandatory minimum. They are rare. For the vast
4 majority of military offenses, the President sets the
5 maximum punishment that a court-martial may adjudge
6 for that offense, and the court-martial is free to
7 impose any sentence from no punishment up to the
8 maximum.

9 COMMISSIONER KLADNEY: So let me ask
10 you, how is there continuity, when there are so many
11 commands around the world, where there's O6s making
12 these decisions regarding specifically these cases,
13 but also regarding, you know, an O3, a company
14 commander can make a decision regarding a lot of
15 other offenses as well.

16 Where is there the continuity? Where is
17 it when a soldier or sailor goes from command to
18 command, they know the penalties, they know what's
19 going to result in a charge, they know how it's going
20 to be?

21 I mean I know if I am speeding down the
22 street, I am going to pay two dollars a mile, three
23 dollars a mile, something like that. That's my
24 question.

25 MR. SULLIVAN: Right, and of course in

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1 terms of knowing what is expected of them, there is
2 mandatory training on the Uniform Code of Military
3 Justice. In terms of knowing, if I commit an
4 unauthorized absence of three months, what am I
5 likely to be sentenced to, you could ask -- you could
6 ask a military lawyer the answer to that question,
7 and they'd have a pretty good answer to that. But
8 it's not because that comes from a sentencing
9 guideline. We don't have them. It's because it
10 comes from customs and traditions and experience of
11 what this case is worth.

12 COMMISSIONER KLADNEY: And Dr. Lisak, if
13 I may, the Vice Chair asked a question earlier about
14 training people to kill and then asking them not to
15 be so aggressive otherwise.

16 So I am not going to ask you that
17 question. The question I am going to ask you, is, are
18 there some psychological instruments that can weed
19 some of these people out in a recruitment process,
20 and are they used?

21 DR. LISAK: I've gotten asked that
22 specific question by the leadership of all four
23 services, and unfortunately the answer now and
24 probably for some time to come is we have no
25 algorithm that will tell us, if you apply this to all

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1 -- everybody who is applying to the military, we'll
2 be able to weed out --

3 You know, there are some things that we
4 know about, about rapists, about sex offenders. They
5 are a little bit more of this and little bit more of
6 that and so forth, and I can put together something.

7 But I can't put together, nobody can put
8 together a profile. What we are going to do is we'll
9 have far more false positives doing that than we will
10 have actually true positives, and it would be unfair
11 and probably illegal, and it's just not useful.

12 COMMISSIONER KLADNEY: Just asking.

13 CHAIRMAN CASTRO: The Chair recognizes
14 Commissioner Gaziano, and thereafter Commissioner
15 Achtenberg, and Commissioner Yaki, if you are on the
16 phone there, just holler up when you want to ask a
17 question.

18 COMMISSIONER GAZIANO: Well Commissioner
19 --

20 CHAIRMAN CASTRO: Kirsanow, have you
21 joined the call?

22 COMMISSIONER GAZIANO: Commissioner
23 Kirsanow was ejected from the call. I hope he's
24 still on. At one point I received a --

25 COMMISSIONER KIRSANOW: I'm back on.

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1 CHAIRMAN CASTRO: Okay, well let us know
2 when you want to ask a question.

3 COMMISSIONER GAZIANO: We're trying to
4 reserve your place in line.

5 COMMISSIONER GAZIANO: Thank you Mr.
6 Chairman, and thanks, the panel, again, for
7 highlighting the complexity of this issue. I like
8 the way both Professors Sullivan and Hillman put it
9 and the humility with which they approached the
10 subject.

11 But I am going to focus on them again,
12 this sort of question that I, again, with the first
13 panel, about the command authority, decoupling it
14 rather than trying to prevent improper command
15 authority, although I really appreciate, Mr. Hansen,
16 your suggestion as well, I think part of the equation
17 is enforcing and investigating proper command
18 responsibility.

19 And Professor Hillman, you have done
20 more I think than anyone to convince me it might be
21 worth the try. I think you know my bias. But I want
22 to ask you to explore that. And maybe if we are not
23 done, I can -- if you are willing to talk to me about
24 this a little bit more.

25 But you said the United States is an

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1 outlier. Currently, since 1996, some of our common
2 allies are moving away from it. But we are now an
3 outlier in our Constitution too.

4 So that's one additional perhaps problem
5 that needs to be taken into account. And again,
6 because of my experience in the *Weiss* case, I believe
7 it can be done, by the way.

8 But I don't have an extreme amount of
9 confidence that Congress is comfortable and aware in
10 this area, that they would know what it would take to
11 have this pass constitutional muster.

12 And in *Weiss*, as you know, it was a
13 three, or it was a two-one-two decision where the
14 entire military justice system was just seemingly
15 close to being declared unconstitutional, and some of
16 what you suggest might render the entire justice
17 system unconstitutional.

18 So that's a big risk. But assuming we
19 can do that, let's, let's -- maybe you and Professor
20 Sullivan would like to comment on how likely you
21 think it is that Congress would get that right and
22 not render the entire justice system
23 unconstitutional, when they try to change this.

24 I am also interested in the unintended
25 consequences of this dramatic change. There seem to

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1 be a lot of changes that can be made that maybe have
2 unintended consequences but don't impose the risk.

3 And the risk, the non-constitutional,
4 unintended consequence, is to decouple a part of the
5 requirement to enforce good order and discipline, and
6 only part of it I can see, and what that tends to do,
7 that responsibility of course has evolved over
8 centuries -- we inherited it from the British -- and
9 it would potentially decrease the accountability that
10 commanders -- you made some wonderful arguments as to
11 why they would really like that, and love that,
12 people like to have less responsibility and less
13 accountability.

14 I think that's the flip side to what you
15 were saying, and given the unique justice system that
16 evolved over many, many centuries, can you all either
17 pro, con, or whatever, try -- I'm glad I'm not going
18 to make that decision; I'm just going to issue a
19 report that someone will ignore.

20 But --

21 (Laughter)

22 Anyway, help -- help explain to the
23 decision makers who might actually try to put this
24 into law, why you think, in your case, the risks are
25 on balance worth the effort that it won't disrupt the

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1 responsibility, and if you have a contrary view I'd
2 appreciate hearing that.

3 MS. HILLMAN: Thank you sir. Let me go
4 first, and then Colonel Sullivan can rebut my
5 arguments, since I got a chance to do that in our
6 initial order of proceedings here.

7 I think that the change that we are
8 talking about need not be perceived as disrupting the
9 fabric of a system that has evolved over time. But
10 let me say, I don't find that system so engraved as
11 what -- the idea that it has evolved over centuries
12 and has built up, sort of initially evokes in one's
13 mind, because the military justice system, as I think
14 Chair Castro pointed this out, and as did
15 Commissioner Kladney's questions, it is very
16 disparate and it is subject to a lot of change, a lot
17 of tinkering, things change all the time, as Colonel
18 Sullivan's comments made clear. The regulations are
19 different in each of the services. The way the
20 things are implemented is different in the services.
21 We have -- we have dozens, hundreds of authorities
22 who make decisions about prosecuting.

23 I don't think that that's a system that
24 was built on the British Articles of War that have
25 since been jettisoned by the UK. So I'm not sure

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1 that actually making a change that would shift simply
2 that decision to prosecute, and not all the rest of
3 the system necessarily, and I don't think that --

4 COMMISSIONER GAZIANO: Although that may
5 follow.

6 MS. HILLMAN: It might. If we handle
7 this the way Australia did, then we are in trouble.
8 But there is no reason to think that we would do it
9 that way. And in fact I would say that the repeal of
10 Don't Ask Don't Tell is a sign of how Congress and
11 the President and the military can work together, not
12 in a way that met my own personal timetable for how
13 things ought to go, and not in the way that I think
14 demonstrates the appropriate degree of civilian
15 oversight of the military with respect to civil
16 rights, but in a way that respected the needs of the
17 military for control over personnel decisions and
18 operational changes, and was deliberate, consultative
19 and sequenced in a way that worked.

20 So I don't know that I think that simply
21 removing that simple decision to prosecute really
22 from this would --

23 COMMISSIONER GAZIANO: Thanks for that
24 clarification.

25 MS. HILLMAN: undermine the

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1 accountability of commanders in the ways that
2 Professor Hansen wants to enhance, because I -- you
3 said that we all want less responsibility. You all
4 aren't sitting here because you want less
5 responsibility. You want more responsibility, you
6 want to make things right.

7 And that's what the officers, from top
8 to bottom, of the military legal corps want to do as
9 well, as well as commanding officers. I think they
10 will maintain responsibility for this issue, but turn
11 over what is a legal and political and politicized
12 decision to a civilian.

13 MR. SULLIVAN: And I'll mention that
14 Professor Hillman and I are actually co-authors.
15 This is about as respectful a disagreement as you are
16 ever going to get. But I do disagree.

17 The -- and Professor Hillman mentioned
18 Australia and I was going to go to Australia as well,
19 because in -- the Australian system was changed in a
20 way to increase civilianization, and in 2009, the
21 High Court of Australia threw out their military
22 disciplinary system in a case called *Lane v.*
23 *Morrison*, and that led to enormous disruption in the
24 Australian military.

25 And if there were a comparable

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1 disruption in the United States military, it would be
2 catastrophic. And one enormous difference between
3 the United States military and any other military in
4 the world, and the United States military is unique,
5 is that we routinely have far more service members
6 stationed abroad than I believe any other military in
7 the world.

8 And so one very important aspect of any
9 United States, American military justice system, is
10 portability. And so we have to be able to have the
11 same military justice system here in the United
12 States and be ready to take it with us to
13 Afghanistan, to Iraq, when we are sending the unit to
14 Colombia, wherever our units go, when we are sending
15 the ship over the horizon, that ship --

16 COMMISSIONER GAZIANO: Or a submarine
17 under sea.

18 MR. SULLIVAN: Exactly. They take the
19 military justice system with it. And we prosecute
20 courts-martial aboard vessels under way, we do, we
21 prosecute courts-martial in Afghanistan. We
22 prosecute them in Iraq.

23 And so the United States military system
24 is unique and what may work for the United Kingdom or
25 what may not work for Australia, as we saw the

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1 catastrophic failure of their system, once again, the
2 doctrine of unintended consequences, doesn't mean it
3 is well suited to the United States military.

4 And then I will mention just two other
5 concepts, and one is military commanders are focused
6 on mission accomplishment and unit readiness, and to
7 have those, you need to have the esprit de corps, you
8 need to have morale and you need to have good order
9 and discipline.

10 And we can't demand that of our
11 commanders while we take away their tools to promote
12 that. And the military justice system is a tool to
13 promote that. If you look at the preamble of the
14 Manual for Courts-Martial, it talks about the
15 purposes of the military justice system, and it is
16 not only to dispense justice, but that is a necessary
17 part of it, but it's not only to dispense justice,
18 but also to maintain an effective fighting force to,
19 as the Manual says, protect the national security of
20 the United States.

21 Those are the stakes we are involved in.
22 And the final thing I will mention, if I may, I hope
23 I am not straining your patience, but Professor
24 Hansen's writings in this area have actually been
25 very influential in my thinking about this, and

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1 Professor Hansen has looked at cases like *Yamashita*
2 and said look, we impose criminal liability on
3 commanders to control their forces. When we have
4 them, you know, in a foreign land, armed, with a
5 civilian population at their mercy, we demand that
6 the military commander control them, and the way that
7 the military commander does that is in part through
8 the use of the court-martial system.

9 So how can it be that we impose the
10 requirement, as a criminal law matter, on a commander
11 to control his or her subordinates, but not give them
12 the tools that they need to do it?

13 MR. HANSEN: So he articulated that
14 better than I ever did. Thank you.

15 CHAIRMAN CASTRO: The Chair recognizes
16 Commissioner Achtenberg and thereafter, Commissioner
17 Yaki.

18 COMMISSIONER ACHTENBERG: This is
19 addressed to Dr. Hillman. So Professor Sullivan
20 counsels against adoption of further reforms without
21 further study, and makes a pretty persuasive case to
22 that effect.

23 You, on the other hand, recommend some
24 significant and I would assert kind of paradigm-
25 shifting reforms, and that they be undertaken as soon

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1 as possible.

2 Given that the track record isn't so
3 good in terms of how much time it will take before
4 reforms actually take hold, and represent meaningful
5 change, I am wondering, Dr. Hillman, are you familiar
6 with H.R. 3435, the Sexual Assault Training Oversight
7 and Prevention Act, or the STOP Act, that's been
8 introduced into the Congress?

9 MS. HILLMAN: Yes.

10 COMMISSIONER ACHTENBERG: There are
11 recommendations in that Act and Mr. Chairman, I don't
12 know that this is already a part of our record, but I
13 would ask that it be made a part of the record.

14 CHAIRMAN CASTRO: I'll accept it into
15 the record. Thank you.

16 COMMISSIONER ACHTENBERG: The
17 recommendations that are made there for change in
18 command, essentially, civilianization of the
19 prosecution for sexual assault and the like, would
20 you talk a little bit about the extent to which you
21 agree with some of the recommendations contained in
22 H.R. 3435, and some of the extent to which you
23 disagree, and then I am going to ask a more narrowly
24 tailored explanation of the same from Mr. Sullivan.

25 MS. HILLMAN: Thank you for the

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1 opportunity to comment on the STOP Act, because that
2 has garnered tremendous attention and has been the
3 signal effort from the Congress to address this
4 issue, so it certainly belongs in the discussion that
5 we are having.

6 I think that the shared intent that we
7 all have is also the intent of the drafters of the
8 STOP Act, and I agree with some of what it's trying
9 to do. I don't think it's possible to decide to
10 remove the authority to prosecute only for sexual
11 assault from the military, from military commanders,
12 and not all the other offenses that occur.

13 I -- and it would be a more dramatic,
14 perhaps, paradigm-shifting change that has again,
15 I'll just reiterate, been adopted by our allies
16 already without significant consequences for the most
17 part. Australia is a bad situation and when you talk
18 to the Judge Advocates from Australia, they have been
19 thrown into a state of demoralization and
20 frustration.

21 It's partly a problem on the ground and
22 the practical consequences of how things have worked
23 out, but it's really also a sense of disruption and
24 whether or not they can do their job at all.

25 And I agree, we would not, we should

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1 not, and I would not recommend we do that to our
2 Judge Advocates and commanding officers who face all
3 the demands that we place upon them.

4 But I think that shifting the authority
5 to prosecute away from command, avoiding the problem
6 of command influence and freeing up resources would
7 make sense, and to that extent, I embrace the STOP
8 Act.

9 MR. SULLIVAN: Continuing our point,
10 counterpoint, I believe that the portion of the STOP
11 Act that would remove the authority to make
12 prosecutorial decisions from command is both unwise
13 and unnecessary, and unnecessary in the standpoint
14 from what I discussed before, which is we already
15 have civilian prosecutors making a prosecutorial
16 decision about every single military sex act that
17 occurs in the United States because any one of them
18 could be tried in U.S. District Court or in a state
19 court instead.

20 So it -- the STOP Act isn't well
21 tailored to solve the problem. In fact the problem
22 is adequately addressed under the status quo. It's
23 just not widely recognized that there is that dual
24 prosecution authority for offenses that occur in the
25 United States.

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1 And then for the same reasons that I
2 previously discussed about undermining the authority
3 of the commander and undermining the ability of the
4 commander to maintain good order and discipline in
5 her or his unit, to me counsels against that.

6 And I'll mention one other thing if I
7 may, I mentioned that under the National Defense
8 Authorization Act for Fiscal Year 2013, Congress set
9 up two study groups. One of them was to study the
10 overall issue about sex assaults in the military, and
11 then the other to specifically zero in on the effects
12 of the 28 June 2012 changes, the first study group
13 that is directed to study that issue of whether
14 prosecutorial discretion should be removed from
15 commanders. So that's something that Congress has
16 already established: a study to investigate and
17 again, I think it would be unwise to move before we
18 have the results of that study.

19 COMMISSIONER ACHTENBERG: But it's the
20 concurrent jurisdiction issue that you think
21 adequately addresses the issue, am I understanding
22 that correctly?

23 MR. SULLIVAN: That's correct. What we
24 see -- and I realize that Professor Hillman's --
25 Professor Hillman comes at this in a different way,

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1 and I think, you know, probably frankly in a more
2 persuasive way than what some other people argue
3 about command control and command authority to refer
4 these charges.

5 But what some people argue is that
6 essentially, in fact this is in Ms. Parrish's written
7 statement, that commanders sweep these problems under
8 the rug.

9 There is no doubt that that occurs on
10 occasion. I have no doubt that that is not a
11 widespread phenomenon. But it does happen on
12 occasion.

13 And again, we see on occasion, like in
14 the case from 2005 at San Diego that I mentioned,
15 military, or civilian prosecutors coming in and
16 prosecuting a service member for a sexual assault
17 against another service member, and again, they can
18 do this for any off-base offenses. Many military
19 bases have concurrent federal and state jurisdiction.
20 A state prosecutor could step in in that instance and
21 charge. If it's a military base that is an
22 exclusively federal enclave, then there could be a
23 prosecution in U.S. District Court if for nothing
24 else, that under the Assimilative Crimes Act, which
25 brings in state law and allows a prosecution for a

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1 state law offense that occurs in an area of exclusive
2 federal jurisdiction.

3 So if someone is dissatisfied with a
4 military commander's failure to prosecute, they can
5 go to a state prosecutorial authority, or they can go
6 to a federal prosecutorial authority, depending upon
7 the location of the alleged offense, and get a second
8 look at that now, under existing law.

9 And so perhaps if that -- if that were
10 more widely known, that would be recognized as a
11 backstop against the problem that some people are
12 trying to cure by taking away the prosecutorial
13 discretion from the convening authority.

14 CHAIRMAN CASTRO: The Chair recognizes
15 Commissioner Yaki, Kirsanow and then Commissioner
16 Kladney.

17 COMMISSIONER YAKI: Thank you very much
18 Mr. Chair. I am still so troubled by what I hear but
19 I am more troubled by what I have seen in the past
20 and what I have read, the emails and letters that we
21 have received from ordinary women service members.

22 And part of me just thinks that -- and I
23 want to get the comment of the panelists -- is that I
24 understand all the need for esprit de corps, unit
25 cohesion.

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1 But it seems to me those are the very
2 same things that would militate towards the military
3 having better access to get things done and to
4 address this problem.

5 But it's been a generation at least
6 since this became a very, very, very big issue and it
7 was probably a big issue before then. But nothing
8 really has changed. There have been reforms around
9 the margins, but you still have these -- it's not
10 simply just the prosecutions. It's the retaliation,
11 it's the disclosure on forms of whether or not you
12 received counseling for sexual assault, it's a whole
13 panoply of issues that continue to intimidate,
14 degrade and subordinate complainants in the military
15 on issues of sexual assault.

16 And I am just wondering, from your
17 slightly more elevated standpoint in academia,
18 although you, as I point out to all of you, have
19 served, and I thank you for that, isn't it time to do
20 something that doesn't go around the margins but
21 makes some wholesale, fundamental, top-to-bottom
22 change in the way these issues are addressed so that
23 we are not confronted with this in another 5 or 10
24 years or another congressional panel, or another,
25 another special commission or another task force,

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1 isn't going over this again and again and again,
2 because we seem to be asking the same questions every
3 5 to 10 years and we keep on hearing that oh, these
4 changes are being made, those changes are being made,
5 but they don't really seem to be addressing the core
6 question, which is violence against -- sexual
7 violence in the military and how we better protect
8 our own men and women in the service, who as one of
9 my other colleagues pointed out, go in there for any
10 number of good, good, true, noble and career-oriented
11 reasons, only to come out of it, if they are a victim
12 of this process, not in any way, shape or form that
13 dignifies their service to our country?

14 MS. HILLMAN: I applaud your sense of
15 urgency about the issue, and I largely agree, that a
16 change that strikes at this problem rather than
17 tinkering at the margins, which is a phrase that I
18 used, notwithstanding what I think are actually very
19 extensive resources, I mean truly perhaps too
20 extensive resources on some of the efforts that we
21 have undertaken, and I think duplicative in some
22 ways.

23 But the consequences of this problem are
24 profound and they deserve our attention and they
25 deserve our resources. I think that it would be, I

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1 think that making a change is important.

2 I would say I don't think whatever
3 change we make or don't make will mean we won't face
4 this again in 5 or 10 years. I don't think this is a
5 military problem. I think this is a human rights
6 problem that the world is facing, not just the
7 world's militaries but the world.

8 You can point to any one of recent
9 incidents to portray that. India is what comes to
10 mind right now for me. But there are many instances
11 and I think that we will continue to have to face
12 this and evolve better ways to reckon with it as it
13 works into a different problem in the future.

14 CHAIRMAN CASTRO: Commissioner Kirsanow,
15 please proceed.

16 COMMISSIONER KIRSANOW: Thank you Mr.
17 Chairman. I apologize because I was off the line for
18 a period of time because the line went dead, so this
19 may have been addressed or there may have been a
20 question related to it.

21 But I heard at the tail end someone make
22 some reference to deployments overseas and I'm
23 wondering if anyone on the panel can address whether
24 or not there is any comparative data related to the
25 incidence of sexual assault in deployments overseas

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1 versus domestically, that is state-side personnel,
2 whether or not the culture of a particular country to
3 which somebody may be -- in which somebody may be
4 stationed may have any effect, whether or not combat
5 deployments have different incidence rates versus
6 non-combat deployments to say Germany or something
7 like that, and to what extent the ability of the
8 military justice system is affected in its ability to
9 address these issues by virtue of the incidents
10 occurring overseas versus domestically.

11 MR. HANSEN: I can address just briefly
12 the military justice component of that in addressing
13 these issues that occur overseas. As Professor
14 Sullivan noted, the Uniform Code of Military Justice
15 is designed to be worldwide deployable and to affect,
16 to be effective regardless of where we find ourselves
17 in the world.

18 The practical reality is somewhat
19 different. There are oftentimes where -- very
20 complex cases, which these cases can sometimes end up
21 to be, they are perceived to be such a drain on the
22 command's resources and time and efforts while they
23 are otherwise engaged in military operations, that in
24 the Army in particular, there's a significant
25 practice of returning many of these cases back to the

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1 United States and dealing with them back in the
2 United States.

3 But I think that gets to a more
4 interesting issue that is outside of just the sexual
5 harassment context, which -- or a sexual assault
6 context, which is a broader question of do we really
7 have a uniform code that is worldwide deployable when
8 we see that virtually most complex cases that arise
9 overseas are not dealt with overseas?

10 And in fact there's a Department of
11 Defense-directed Commission that is looking into that
12 issue because it raises other concerns about our
13 ability to work with host nation support and the
14 like.

15 But I think that can be a particular
16 issue in these cases as well, in terms of developing
17 the evidence and having the resources necessary to do
18 the kind of effective job of investigating these
19 claims if they arise in a, particularly in a deployed
20 environment.

21 I think that environment places
22 significant stresses on the ability to investigate
23 these cases in a way that we heard and will hear
24 later today that the military believes are necessary
25 to fully develop the facts of these kinds of cases.

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1 CHAIRMAN CASTRO: The Chair recognizes
2 Commissioner Kladney.

3 COMMISSIONER KLADNEY: Thank you. I
4 would like to address a couple of questions. First
5 of all -- Colonel Hansen?

6 MR. HANSEN: Colonel Sullivan.

7 COMMISSIONER KLADNEY: Sullivan, I'm
8 sorry. When you were saying there's co-
9 jurisdictions, at the very end of your comment you
10 said, "And if someone doesn't feel they get
11 satisfaction, they can go to civil authorities." In
12 other words, the military, one, doesn't report these
13 matters on base to civil authorities as a matter of
14 regularity, is that correct?

15 MR. SULLIVAN: There is a Memorandum of
16 Understanding between the military, the Department of
17 Defense and the DOJ, which governs on-base offenses,
18 and in certain instances, there is a reporting
19 requirement and also earlier, when the issue of sex
20 offense registration arose, in fact these military
21 offenses are entered in the national databases, so
22 there -- and sex offense registration is a
23 requirement that arises from conviction by court-
24 martial of a sex assault offense, but even before
25 then, at the investigative stage, it is -- it is

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1 common to have reporting of the investigation in such
2 a way that that civilian sector has visibility over
3 it as well.

4 COMMISSIONER KLADNEY: Right, so in
5 other words the soldier or sailor would not have to
6 go to the criminal, or civil criminal authorities
7 themselves to instigate it? If they got no
8 satisfaction in the military, they would have to go -
9 - if their commander didn't do what they wanted it to
10 do, then what would that do to their career? How
11 would they perform under that commander after doing
12 something like that?

13 MR. SULLIVAN: Well, of course the -- as
14 part of the newer revisions, that individual has the
15 option to remove himself or herself from the command.
16 So the -- there have been a number of comments about
17 how the system has failed people that report events,
18 and in the past, our -- the military's dealing with
19 victims has been quite poor, and of course the
20 Yokohama incident from a couple of years comes to
21 mind.

22 It has been quite poor, but that is an
23 issue that the services themselves have been
24 emphasizing and again, as I mentioned, on the 20th of
25 January, the Air Force is setting up a new system

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1 where any victim of a sexual assault offense, if they
2 are a member of the U.S. military, or an adult family
3 member of a U.S. military member, they can get a --
4 they can get a lawyer assigned to them individually.

5 So one task that that person might have
6 would be to liaise with the state officials or the
7 U.S. attorney's office.

8 COMMISSIONER KLADNEY: Dr. Lisak, right?
9 I got that right? A couple of questions for you. One
10 was, we talked about sentencing -- you talked about
11 strong sentencing sending a message, but you didn't
12 really talk about the communication part of that, so
13 that the rest of the ranks would hear, and I was
14 wondering what your ideas were on that.

15 And then the second question I have is,
16 in your written materials, you wrote, "The more
17 sexual harassment occurs, the more sexual assault
18 occurs," and so my question is, is when you have
19 sexual cadences and all those types of things, does
20 the military still allow that? You work with them.
21 Do they still -- does that still go on?

22 DR. LISAK: Well, certainly and I'm not
23 an expert on --

24 COMMISSIONER KLADNEY: You said
25 certainly?

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1 DR. LISAK: Certainly it does. I mean,
2 I know that anecdotally. You can read any, you know,
3 any number cases and so forth, and it's clear that
4 that is, you know, one of those so-called climate
5 issues that has to be addressed and it has to be
6 addressed more effectively.

7 And it's going to take a long time. We
8 are talking about a massive culture change, and you
9 know, a number of people have rightfully brought up
10 the comparison to racial segregation, desegregation,
11 and how the military led the way there.

12 And I actually think that this is going
13 to be harder and bigger, that gender and sexuality
14 are actually going to be tougher to work on, you
15 know, discrimination and the biases.

16 And I just think, you know, we have to
17 do two things simultaneously: one is, treat this with
18 real urgency; and at the same time understand that
19 this is not going to happen overnight. It's not
20 going to happen in the next few years. It's just a
21 way bigger problem than that.

22 In terms of the communication question,
23 I personally -- and I have been involved in a number
24 of court-martials, consult and so forth, and you
25 know, I talked to the commander afterwards and said

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1 you know, are people on base going to hear about
2 this, because these are enormous prevention
3 opportunities.

4 And it still seems to be a kind of a --
5 a completely idiosyncratic thing, and so some
6 commanders right away understand that this is a
7 message that I am going to get across to my troops,
8 and other commanders, you know, it doesn't even occur
9 to them.

10 So it's something that yes, it has to be
11 sort of more broadly sort of inculcated and sort of
12 part of the training for commanders, that you know, a
13 court-martial, an outcome, whatever the result is,
14 you know, even if it's acquittal, you communicate
15 this to your service members.

16 COMMISSIONER KLADNEY: So, if Mr.
17 Hansen's idea of, of disciplining, I think it was
18 commanders who don't perform, but to get rid of the
19 sexual cadences and to get rid of this -- to start
20 going down on this type of culture, then those
21 commanders should be disciplined if they don't do
22 that?

23 MR. HANSEN: That's exactly right. I
24 think that that's -- that's a significant component
25 to it. And to be clear, it's not to say that they

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1 are not now disciplined. The military does take
2 action.

3 But oftentimes the messaging is very
4 inconsistent and there is a cultural unwillingness to
5 broadcast those consequences in a clear way so that
6 the soldiers, the service members understand, and so
7 that other commanders understand specifically what it
8 is -- were the command failings, and there's a huge
9 cultural resistance within the military to do that,
10 and I think that needs to change.

11 CHAIRMAN CASTRO: I have a question for
12 Colonel Sullivan. You mentioned that if there is a
13 resulting conviction in a court-martial, that that
14 conviction will make it to the list of sex predators.

15 What if that court-martial conviction is
16 ultimately reduced by command to, as we have heard
17 today, adultery or inappropriate language? Will that
18 still make it to the sex registry?

19 MR. SULLIVAN: It would not, although
20 let me mention again, that instance in which the
21 result of the case was use of vulgar language and
22 adultery, it wasn't the commander that reduced it.
23 That Marine Corps Captain went to a court-martial and
24 was acquitted of rape. The only thing he was
25 convicted of at the court-martial was adultery and

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1 use of vulgar language.

2 He was sentenced to 45 days' confinement
3 and the convening authority knocked down the 45 days'
4 confinement to 7 days' confinement. So, so he --

5 CHAIRMAN CASTRO: Okay, well I probably
6 have got the facts confused. But in a case where
7 there would be a court-martial conviction on rape
8 that subsequently gets reduced to something less,
9 that something less would not then result in the sex
10 offender list being revised to add that person as a
11 sex offender?

12 MR. SULLIVAN: It depends upon what that
13 something less is, because there are many offenses
14 other than rape where reporting is required. There
15 is a Department of Defense Directive that says when
16 someone is released from confinement, if they are
17 convicted of one of these offenses, and there is an
18 enormous list of offenses, the confining official
19 shall notify the law enforcement authority that
20 maintains the registry in both the state and locality
21 to which the individual is going.

22 So it's a very formalized process. It
23 works. We see it work all the time. And so it's not
24 just rape. There's any -- basically any offense that
25 has the word indecent in it, results in automatic

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1 notification, you know, mandatory notification to
2 both state and local registration officials.

3 CHAIRMAN CASTRO: Adultery, though,
4 wouldn't count?

5 MR. SULLIVAN: Adultery would not.

6 CHAIRMAN CASTRO: And earlier, there was
7 some mention, and I forget which of our panelists
8 talked about the fact that each of the services is
9 working independently to come up with some processes
10 and some potential ways to deal with this.

11 It sounds like that's happening in a
12 silo. Is that a good thing or is there some way that
13 the branches can actually collaborate and coordinate
14 on dealing with this issue that affects all of them?
15 Anybody who wants to answer this question.

16 MR. SULLIVAN: I'll mention something
17 very briefly here as well, and that is, I have
18 mentioned the National Defense Authorization Act for
19 fiscal year 2013 several times. It also has certain
20 mandates to the Secretary of Defense, among which is
21 he has to come up with a plan to reduce sexual
22 harassment in the United States military, I believe
23 it's within 180 days.

24 So Congress is stepping in, and I think
25 recognizing what the Chairman is pointing to, that

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1 you know, we have, as Professor Hillman said, we have
2 a Uniform Code of Military Justice, you know, it
3 ought to be uniform.

4 And so we have Congress stepping in and
5 directing SECDEF to take certain steps, and I think
6 Congress is attempting to get --

7 CHAIRMAN CASTRO: What is SECDEF?

8 MR. SULLIVAN: I'm sorry. Secretary of
9 Defense. So I think Congress is stepping in to try to
10 get a more uniform response.

11 MS. HILLMAN: I think this afternoon's
12 witnesses can speak more directly to the coordination
13 that is happening. So, and as to whether it's good
14 to develop in a silo or not, that's the question of
15 the states as laboratories.

16 You know, are the service branches
17 laboratories where there evolve different approaches?
18 To some extent we have had that. I think that some
19 standardization in this realm would go a long way
20 towards promoting public confidence and restoring
21 faith that we are moving in the right direction.

22 MR. HANSEN: I think standardization as
23 well, and one of the things that has been discussed
24 from a number of panelists, is this question of
25 minimum sentencing or sentencing guidelines. To me

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1 that might be an avenue where some standardization
2 across the services might be appropriate and provide
3 more clear guidance and sufficient notice.

4 DR. LISAK: Just some things I have
5 observed personally. I think both are happening. I
6 think, you know the individual services initiate
7 certain things and sometimes you see exactly that.
8 They come up with creative ways of solving the
9 problem.

10 And then the problem is, who recognizes
11 that there is a good way, and now all the other
12 services have to sort of, you know, take note of
13 this, and that's where it kind of falls apart as far
14 as I can see, is there's no mechanism really to
15 ensure that the services are really pooling these
16 creative ideas and then enacting the ones that really
17 do seem to work well.

18 CHAIRMAN CASTRO: I don't know if any of
19 my colleagues have additional questions. I have one
20 more --

21 COMMISSIONER GAZIANO: I have a follow
22 up.

23 CHAIRMAN CASTRO: Okay, let me ask one
24 and then I'll have you. There was a reference
25 earlier and also in some of the materials as it

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1 relates to the imbalance between defense and
2 prosecution in terms of resources.

3 Could you speak to that and what's being
4 done to address that?

5 MR. SULLIVAN: That's an enormous
6 problem. The sexual assault prevention legislation
7 has earmarked funds for the prosecution of these
8 offenses, and so we are pumping more money into the
9 prosecution side.

10 As I mentioned, by statute there is a
11 requirement to set up special victim prosecution
12 units linking investigators, prosecutors and VWAP
13 victim witness assistance program specialists.

14 And you don't have a mirror image on the
15 defense side, and the whole idea of the military
16 justice system enshrined in Article 46 in the Uniform
17 Code of Military Justice, is that there is supposed
18 to be an equality of resources on both sides.

19 And again I think because of the
20 politicization of this issue, you see earmarks going
21 exclusively to the prosecution side. It's a very
22 real concern.

23 Mr. Cave mentioned the fact that the
24 defense counsel don't even have investigators. I
25 mean, literally something that would be taken for

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1 granted in most public defender's office, military --
2 military defense counsel don't have.

3 So I would very much encourage the
4 Commission, when it studies this issue, to look at
5 what can be done to ensure equality of resources on
6 both sides.

7 CHAIRMAN CASTRO: Commissioner Gaziano,
8 you have the last question.

9 COMMISSIONER GAZIANO: I wanted to thank
10 Commissioner Achtenberg for making a copy of the STOP
11 Act available, and I know there was one, I think,
12 series of questions on it.

13 I have just skimmed it so I haven't --
14 and as I am listening to all of this, without missing
15 a word, so I may have missed something in it. But it
16 provides the exact example I think of what I was most
17 worried about.

18 As someone who really knows the
19 appointments clause and separation of powers, I'd say
20 it's 70 percent likely unconstitutional, but I'd have
21 to read it carefully. It's gotten a two-level
22 appointment clause problem which Congress is
23 increasingly attracted to. The first level looks
24 kind of constitutional. The second level probably is
25 unconstitutional, and that's where it operates. But

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1 you have to determine -- but it's even worse than
2 being clearly unconstitutional, and that's what they
3 do, because it seems to me that this would create a
4 system that would flail around for five years and
5 then John Roberts tries to make something
6 constitutional that isn't. So maybe, maybe you know,
7 you would get this upheld. But you know, I think
8 even this, he would strain to do so, but there are
9 certain things that they just can't make
10 constitutional, so maybe if I am predicting what the
11 Supreme Court will do with this unconstitutional law,
12 maybe there's a 30 percent chance -- I don't know --
13 that it will be struck down, or 40 or 50.

14 Anyone on the panel, for example
15 Professor Hillman, do you -- you studied this Act and
16 are comfortable enough with the appointments clause
17 that you are going to give odds of how likely it
18 would be upheld constitutional, or is it just in
19 theory that you support it?

20 COMMISSIONER YAKI: Are they on the
21 panel, or just give the court a couple more years'
22 time. [i-n-a-u-d-i-b-l-e]

23 MS. HILLMAN: I embrace the idea in the
24 Act and I am an academic, and I said --

25 CHAIRMAN CASTRO: Commissioner Yaki, if

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1 you could use your --

2 MS. HILLMAN: Look, I'll just say that I
3 think that the idea of a civilian director of
4 military prosecutions is a potentially conceivable,
5 legitimate way, within the constitutional boundaries
6 that exist, and if the service branches got on board
7 with that idea the way they did eventually with for
8 instance the Don't Ask Don't Tell repeal, there's no
9 reason we couldn't alter the STOP Act in ways that it
10 would then at least possibly sustain, you know,
11 withstand constitutional --

12 COMMISSIONER GAZIANO: Oh, it's
13 possible. It's possible.

14 COMMISSIONER ACHTENBERG: It's never
15 even gotten out of committee yet.

16 CHAIRMAN CASTRO: Well thank you, but
17 I'll tell you what I can predict, that we have seen
18 an executive summary of Commissioner Gaziano's
19 dissenting opinion. So --

20 (Laughter)

21 CHAIRMAN CASTRO: Well thank you -

22 COMMISSIONER GAZIANO: That's assuming
23 you're in the majority.

24 CHAIRMAN CASTRO: That's true. So thank
25 you all. I appreciate the information you shared

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1 with us, very helpful. The panel, panel 2 is
2 concluded. We are now going to take a break for
3 lunch. We will be back at 1:15. We ask all
4 panelists and Commissioners to be ready to go at 1:15
5 sharp. Thank you.

6 **IV: LUNCH BREAK**

7 (Whereupon, the briefing was in lunch recess from
8 12:35 p.m. to 1:19 p.m.)

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15
16 **A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N**

17 (1:19 p.m.)

18 **CHAIRMAN CASTRO:** Commissioners Yaki and
19 Kirsanow, if you're there, let us know.

20 **COMMISSIONER YAKI:** We're here; go
21 ahead.

22 **CHAIRMAN CASTRO:** Great, thank you.
23 We'll reconvene our briefing on sexual assault in the
24 military. This is our third and final panel.

25 **V. PANEL III: PERSPECTIVE OF VICTIM AND ACCUSED**

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1 CHAIRMAN CASTRO: I trust all the
2 panelists were here earlier this morning, but if not
3 I will just remind folks or let you know in the first
4 instance that we have a series of warning lights here
5 that will give you the timing for your remarks.

6 You each have five minutes and you will
7 see at the -- a yellow light come on, that means
8 begin to wrap up. When the red light comes on, we
9 would ask that you conclude your remarks. There will
10 be opportunity to elaborate when we as the Commission
11 begin to ask you some questions, okay?

12 So let me introduce the panelists
13 briefly. Our first panelist is Major General Gary
14 Patton, director of the Department of Defense's
15 Sexual Assault Prevention and Response Office.

16 Our second panelist is Dr. Nate
17 Galbreath, who is a highly qualified expert with the
18 Department of Defense's Sexual Assault Prevention and
19 Response Office.

20 Our third panelist is Lieutenant General
21 Richard C. Harding, Judge Advocate General with the
22 U.S. Department of the Air Force.

23 Our fourth panelist is Vice Admiral
24 Nanette M. DeRenzi, Judge Advocate General with the
25 U.S. Department of the Navy.

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1 Our fifth panelist is Lieutenant General
2 Dana K. Chipman, Judge Advocate General with the U.S.
3 Department of the Army.

4 And our sixth panelist is Major General
5 Vaughn Ary, Staff Judge Advocate to the Commandant of
6 the Marine Corps.

7 Welcome. Thank you for being here.
8 General Patton, please proceed.

9 MAJOR GENERAL PATTON: Thank you.
10 Chairman Castro, members of the Commission, on behalf
11 of the Secretary of Defense, Leon Panetta, it is my
12 honor to share with you the Department's --

13 CHAIRMAN CASTRO: Actually General, if I
14 might interrupt, I have to swear you all in. I trust
15 the uniform but our proper procedure does require
16 that we ask you all to please swear or affirm that
17 the information that you are about to receive,
18 provide to us and we are about to receive from you,
19 is true and accurate to the best of your knowledge,
20 information and belief. Is that correct?

21 (Whereupon, the panelists were sworn
22 in.)

23 CHAIRMAN CASTRO: Put your time back on.
24 So go ahead. Thank you.

25 MAJOR GENERAL PATTON: Thank you sir,

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1 and Chairman Castro, members of the Commission, on
2 behalf of Secretary of Defense Leon Panetta, it is my
3 honor to share with you the Department's approach in
4 combating sexual assault in the armed forces.

5 Let me just first state that the
6 Secretary of Defense is committed to eradicating this
7 crime in the Department of Defense. Our Department-
8 wide mission is to prevent and to respond to this
9 crime in order to enable military readiness and to
10 reduce, with the goal to eliminate, sexual assault
11 from our military.

12 I'd like to begin by saying that it has
13 been my honor to serve our nation as an Army officer
14 for over 33 years. It has been a great privilege to
15 have served 9 of those years as a commanding officer
16 or deputy commanding general, and to have served a
17 total of 45 months in combat with the best Soldiers,
18 Sailors, Airmen and Marines in the world.

19 I am no stranger to leading culture
20 change, to include helping destigmatize mental health
21 care for our combat veterans, more fully integrating
22 women into the armed forces with the 2012
23 Department's Women in Se Report, and managing the
24 Department's repeal of Don't Ask Don't Tell over this
25 last year.

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1 The common denominator in all these
2 endeavors has been a clear understanding of the
3 challenges that we have confronted, an unequivocal
4 commitment to mission success, readiness of force and
5 the welfare of our men and women in uniform.

6 The Department of Defense recognizes
7 sexual assault is a terrible crime. It has no place
8 in the United States military, and it is an affront
9 to the values that we defend.

10 It is unacceptable that an estimated
11 19,000 service members experienced some form of
12 unwanted sexual contact in 2010. Of those we
13 estimate nearly 11,000 were men, and nearly 9,000
14 were women.

15 The same year, we received just over
16 2600 reports from victim service members,
17 demonstrating the significant under-reporting of this
18 crime. This under-reporting prevents victims from
19 receiving the care they need and limits our ability
20 to investigate these crimes, and hold offenders
21 appropriately accountable.

22 As experts have shared with you today,
23 sexual assault is a complex problem and there is no
24 single, silver bullet solution. Reducing and
25 eliminating sexual assault requires a multi-prong

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1 approach, one that leverages a wide range of
2 initiatives and engages every service member.

3 The Department's strategy is organized
4 along five lines of effort: prevention;
5 investigation; accountability; victim advocacy; and
6 assessment. The underpinning in all these efforts is
7 the focus on leaders and the responsibility to foster
8 an environment where sexist behavior, sexual
9 harassment and sexual assault are not tolerated,
10 condoned or ignored.

11 To gain victims' trust, we must create a
12 climate of dignity and respect, where a victim's
13 report is taken seriously, their privacy is protected
14 and they are provided the resources to manage their
15 care and treatment.

16 Commanders and leaders across the armed
17 forces play an essential role in establishing this
18 climate, where victims are supported and they do not
19 fear retaliation, where offenders know they will be
20 found and held appropriately accountable, and where
21 bystanders are motivated to intervene to prevent
22 unsafe behavior.

23 Our troops take care of each other on
24 the battlefield better than any other military in the
25 world. This same ethos of care must extend to

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1 combating sexual assault within our ranks.

2 Commanders are responsible and
3 accountable for the good order and discipline of the
4 forces assigned under them. This critical aspect of
5 command is essential to military readiness and
6 mission success.

7 Removing commanders from the
8 administration of military justice would undercut
9 their ability to establish good order and discipline
10 in their units, and undercut their authority
11 especially in combat, where the Uniform Code of
12 Military Justice is most tested by the stresses of
13 war.

14 The Department has undertaken and
15 implemented a variety of initiatives to fundamentally
16 change and strengthen -- strengthen our efforts along
17 all five lines of effort.

18 In prevention, our goal is to
19 standardize and deliver effective methods and
20 programs, where the cultural imperatives of mutual
21 respect and trust, professional values, and team
22 commitment, are reinforced in training and other
23 places and in other ways to create an environment
24 where sexual assault is not tolerated.

25 Widespread efforts are under way now to

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1 reinforce these elements of culture, from initial
2 military training, to multiple levels of professional
3 military education across our forces, to include
4 training for men and women who are about to assume
5 command and serve in key leader and non-commissioned
6 officer positions.

7 Victim care is central to our approach.
8 We implemented a new policy that provides victims the
9 option for an expedited transfer from their command
10 or base to a different location.

11 We have established a certification
12 program for sexual assault victim advocates and we
13 have expanded the DoD's SafeHelpline to help
14 transitioning service members who have experienced
15 sexual assault.

16 As I conclude, I want the Commission to
17 know that I have not come here today to minimize the
18 problem of sexual assault in the military. We
19 recognize we have a serious problem, and will
20 continue to confront the brutal realities of this
21 problem and remain persistent in all our efforts
22 until we eliminate sexual assault from our ranks.

23 I detailed the specifics of some of the
24 other programs and initiatives in my submitted
25 written statement. I thank you for your attention

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1 and look forward to your questions.

2 CHAIRMAN CASTRO: Thank you General.
3 Dr. Galbreath please proceed.

4 DR. GALBREATH: Members of the
5 Commission, thank you for this opportunity to talk
6 about the problem of sexual assault in the military.
7 We remain committed to our goal, and that is a
8 military free from sexual assault.

9 Given our policy initiatives and recent
10 legislation, I believe we have set the right actions
11 in motion that will move us toward that vision. My
12 experience on this issue comes as both a criminal
13 investigator and also as a clinical psychologist.

14 I have treated both victims and
15 perpetrators. I have published research, provided
16 training to military and civilian police, and I have
17 served as an expert witness in court.

18 We all want this crime stopped now, but
19 there is no single solution to this problem. The
20 societal, interpersonal and individual factors within
21 America that combine to produce and perpetuate sexual
22 assault operate far outside the influence of any
23 military or civilian courtroom.

24 Without a substantive change to American
25 culture, most sexual assaults will never be reported

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1 to police, and even fewer will go to trial. Because
2 of this, justice-focused solutions alone cannot bring
3 about the societal and cultural changes needed to
4 combat this crime in the long run.

5 Any effective strategy to combat sexual
6 assault must include prevention. This crime is
7 vastly under-reported in the United States, and in
8 the military, meaning that reports to law enforcement
9 fall short of the amount of crime estimated to occur
10 annually.

11 A 2010 DoD study found that 4.4 percent
12 of military women and 0.9 percent of military men
13 experienced unwanted sexual contact in the year
14 before the survey.

15 However, the study also found that a 35
16 percent decrease in sexual assaults against women and
17 a 50 percent decrease in sexual assaults against men
18 had occurred since 2006.

19 While there is no acceptable amount of
20 sexual assault in the military, we believe the
21 Department's policies and programs contributed at
22 least in part to this decrease. Additional
23 prevention work should hopefully drive the rate of
24 sexual assault down over time.

25 Contrary to longstanding societal myths,

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1 research suggests that most sexual assaults occur
2 between people that know each other. These non-
3 stranger sexual assaults account for the vast
4 majority of crimes that occur each year in both
5 civilian and military sectors.

6 However there are other factors that
7 complicate the experience of sexual assault in the
8 military. First, sexual assault typically occurs
9 where a victim lives and works. Some victims are
10 concerned that making a report will cause them to
11 lose their privacy, subject them to unwanted
12 scrutiny, and mistakenly mark them as weak.

13 Secondly, when a perpetrator resides in
14 the same unit as the victim, sexual assault can set
15 up a potentially damaging dynamic that can rip units
16 apart. If news of the sexual assault gets out, unit
17 members can take sides, causing all to lose focus of
18 the mission.

19 Third, military research finds that a
20 history of any kind of assault doubles the risk of
21 post-traumatic stress symptoms when the victim is
22 exposed to combat.

23 While we would all like this change to
24 occur quickly, there are challenges that we must
25 overcome and these are not unique to the military.

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1 First, no one expects to become the victim of a
2 sexual assault. This is particularly true for 18- to
3 25-year-olds who are most at risk.

4 Second, most sex offenders do not
5 believe that their behavior is criminal. Nearly all
6 sex offenders use cognitive distortions to justify
7 and rationalize their behavior. Consequently,
8 messages about accountability do not register with
9 them or motivate change.

10 Third, with so many competing messages
11 in the environment, important information on
12 preventing and reporting sexual assault fades into
13 the background, especially if you don't think that
14 you are going to become a victim.

15 The most promising methods of prevention
16 encourage people to intervene safely when they see
17 situations at risk for sexual assault. Active
18 bystander intervention empowers men and women to act
19 when they see risky situations.

20 This approach has been incorporated into
21 training by every service as well as other programs
22 on obtaining consent, having healthy relationships
23 and using alcohol responsibly.

24 Simply put, prevention works. There are
25 a number of interventions that demonstrate short- and

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1 long-term improvements in knowledge, skills,
2 behavioral intention, confidence about intervening,
3 and victim empathy, and we are using them throughout
4 the Department.

5 We are on track to creating a shift in
6 military culture where sexual assault prevention is
7 one more way of looking out for your comrades in
8 arms.

9 In conclusion, there is no single
10 solution to the problem of sexual assault. Rather,
11 the solutions come from working this problem at every
12 level of military and civilian society, from policies
13 that improve the functions of our institutions, all
14 the way down to the prevention skills that empower
15 our individual service members.

16 Justice-focused solutions alone cannot
17 bring about these changes needed to combat this
18 crime. Thank you.

19 CHAIRMAN CASTRO: General Harding.

20 LIEUTENANT GENERAL HARDING: Yes. Mr.
21 Chairman and members of the Commission, thank you for
22 this opportunity today to speak to you about sexual
23 assault prevention and response within the Air Force.

24 We are fully committed to supporting
25 victims of sexual assault, while we do everything

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1 humanly possible to eradicate this crime from our
2 ranks.

3 Our Secretary, The Honorable Michael
4 Donley, and our Chief of Staff, General Mark Welsh,
5 are fully committed to eliminating sexual assault.
6 They have made their position clear.

7 They and other senior leaders in the
8 United States Air Force have zero tolerance for this
9 offense. Our goal is to drive the rate of sexual
10 assault in the Air Force to zero.

11 One sexual assault is one too many. We
12 believe that our sexual assault challenge, like all
13 challenges we have faced in the past and those we
14 will face in the future, will be overcome by staying
15 rooted to our core values -- integrity first, service
16 before self, and excellence in all we do, and acting
17 on those values.

18 I would like to talk next about our
19 worldwide wing commander meeting and inspection that
20 we recently concluded. Our core values, as I
21 mentioned, demand that we maintain and sustain an
22 environment of mutual respect.

23 The Air Force succeeds because of the
24 professionalism and discipline of our airmen. Every
25 airman is critically important and everyone deserves

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1 to be treated with respect.

2 Anything less marginalizes great airmen,
3 degrades our mission effectiveness, and hurts unit
4 morale and discipline.

5 In November our chief of staff brought
6 together the Air Force wing commanders worldwide,
7 more than 160 senior colonels or one star generals,
8 for an unprecedented, day-long, face-to-face
9 conversation about leadership.

10 One of the primary topics he discussed
11 at length was sexual assault prevention and response.
12 As far as I am aware, this is the first time all wing
13 commanders have met in a single place at a single
14 time with the Chief of Staff of the Air Force on any
15 topic.

16 It was an extremely candid discussion.
17 The chief stressed to them that as wing commanders,
18 as leaders, they must directly and aggressively
19 address this issue.

20 His message was clear: we must redouble
21 our efforts to combat sexual assault, and we need to
22 start by ensuring that our work environments reflect
23 respect for all airmen.

24 As part of this meeting the chief
25 announced a health and welfare inspection across the

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1 United States Air Force, to reinforce expectations of
2 the workplace environment, to correct deficiencies,
3 to remove inappropriate materials, and to deter
4 conditions that may be detrimental to good order and
5 discipline.

6 Stated another way, it was a reset of
7 sorts, to ensure that the Air Force workplace was
8 free of offensive materials that might breed a lack
9 of respect for airmen.

10 Next I'd like to talk about our Special
11 Victims' Counsel Program. We recently initiated a
12 program that I believe will make a positive and
13 profound change in the way we approach sexual assault
14 cases.

15 Effective the 28th of this month, we
16 will begin a pilot program to provide airmen who
17 report that they are victims of sexual assault with a
18 personal attorney, at Air Force expense.

19 This new initiative we call the Special
20 Victims' Counsel Program. It is unique among federal
21 agencies in providing this level and kind of support
22 to combat sexual assault.

23 It will greatly improve the quality of
24 support we provide to victims of sexual assault. In
25 the last full year of sexual assault statistics, we

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1 noted that 96 victims who originally agreed to
2 participate in the prosecution of their alleged
3 offender, changed their mind before trial, and
4 declined to cooperate with law enforcement personnel
5 and with the prosecution.

6 These 96 victims represented 29 percent
7 of our victims of sexual assault who had filed an
8 unrestricted report of sexual assault. I believe,
9 had these victims been represented by their own
10 attorney, many of them would not have declined to
11 cooperate and hold the alleged offender accountable.

12 While our pilot program will likely
13 increase prosecutions for sexual assault, make no
14 mistake: its purpose is to give the best care to our
15 people.

16 Victim care is extremely important in
17 the United States Air Force. Our Special Victims'
18 Counsel will operate independently of the
19 prosecution's chain of command, establish attorney-
20 client relationships, provide zealous advocacy on
21 their clients' behalf, and thereby protect victims'
22 privacy and help preclude victims feeling re-
23 victimized by having to endure, alone, a complex,
24 exhausting and often confusing criminal justice
25 process.

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1 We are in the early stages of this
2 program, and we are very excited about what the
3 future holds. Last month, we trained our first cadre
4 of 60 military attorneys as Special Victims' Counsel.

5 Over the course of three days these
6 attorneys received in-depth training from experts in
7 military justice, professional responsibility, legal
8 ethics and victims' rights.

9 The training featured a recognized
10 civilian expert on counsel for victims, Professor Meg
11 Garvin, the Executive Director of the National Crime
12 Victim Law Institute and clinical professor of law,
13 and crime victim litigation at Louis & Clark Law
14 School.

15 Professor Garvin taught our JAGs lessons
16 that she has learned over a decade of representing
17 victims, providing valuable insights, recommendations
18 and practical tips to our counsel.

19 In closing, the men and women who raise
20 their right hand with pride and volunteer to serve
21 this great nation became more than just airmen. They
22 became part of an Air Force family.

23 Therefore we strongly believe we have a
24 sacred obligation to provide a work environment and
25 counsel for victims, to protect our fellow family

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1 members and represent them well.

2 I look forward to answering your
3 questions and I thank you for this opportunity.

4 CHAIRMAN CASTRO: Thank you General.
5 Admiral DeRenzi, please proceed.

6 VICE ADMIRAL DeRENZI: Thank you. Good
7 afternoon and thank you for the opportunity to talk
8 with you today about the Navy's commitment to
9 fighting sexual assault and, specifically, about the
10 Navy's accountability initiatives.

11 Let me state right up front: this is not
12 just a legal issue, it's primarily a leadership
13 issue. And in recognition of this, the Secretary of
14 the Navy and the Chief of Naval Operations
15 implemented a multifaceted approach to combat sexual
16 assault, including a comprehensive training and
17 awareness program that emphasizes active, involved
18 leadership and encourages bystander intervention.

19 But when an incident does occur, the
20 Navy is dedicated to ensuring that victims receive
21 the full scope and spectrum of timely support, to
22 include medical treatment, counseling and legal
23 assistance.

24 The Navy is hiring 66 additional
25 professional sexual assault response coordinators,

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1 and 66 full time professional and credentialed victim
2 advocates.

3 They will augment the more than 3,000
4 command victim advocates that we have already
5 trained, and we will work with specifically trained
6 NCIS investigators and JAG Corps prosecutors to form
7 the core of our special victim capability.

8 The JAG Corps is intensely focused on
9 upholding the special trust that is placed in us, to
10 provide a fair, effective and efficient military
11 justice system.

12 We have implemented several key
13 initiatives to ensure that our clients, both the
14 government and the accused, receive the highest level
15 of advocacy.

16 In 2007, to improve the overall quality
17 of court-martial litigation, we established the
18 Military Justice Litigation Career Track. JAG Corps
19 officers apply for designation as military justice
20 specialists or experts, based on their litigation
21 experience and aptitude.

22 Those selected for designation lead
23 trial and defense departments and provide experience
24 in the courtroom, personally conducting, overseeing
25 or adjudicating sexual assault and other complex

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1 cases.

2 This program leverages trial counsel,
3 defense counsel and judicial experience, to enhance
4 the effectiveness of our courts-martial practice for
5 complex cases.

6 Almost four years ago, the Navy hired
7 two civilian experts with extensive prosecution
8 experience in sexual assault and child sexual abuse.
9 In this past year, we hired two Highly Qualified
10 Experts, and we are in the process of hiring two
11 more.

12 They are channeling significant sexual
13 assault litigation experience into enhanced
14 litigation skills and practices for prosecution and
15 defense teams across the spectrum and in the field.

16 In 2010 we stood up our Trial Counsel
17 and Defense Counsel Assistance Programs, TCAP and
18 DCAP respectively, led by experts in military
19 justice. TCAP has delivered trial advocacy training
20 and prosecution process assessments worldwide.

21 They have conducted outreach training to
22 improve efforts between prosecutors, investigators
23 and other stakeholders in military justice, and they
24 have served as trial counsel or assistant trial
25 counsel in several complex cases, to include sexual

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1 assault cases.

2 DCAP was created to support and enhance
3 the defense bar, provide technical expertise for case
4 collaboration and standardize resources for defense
5 counsel.

6 The office leads training efforts and
7 consults with detailed counsel through every phase of
8 the court-martial process worldwide.

9 We have also established an externship
10 program, and in 2012 we assigned two mid-level career
11 officers to work in a sex crime unit in two civilian
12 prosecution offices.

13 What I hope is clear from these and
14 other initiatives described more fully in my written
15 statement, is that the Secretary of the Navy Ray
16 Mabus, the CNO Admiral Jonathan Greenert, and the
17 entire Navy leadership team remain steadfastly
18 committed to getting in front of this problem and
19 eliminating sexual assault from our ranks.

20 For our part, the JAG Corps is actively
21 engaged in sexual assault awareness training,
22 prevention efforts, victim response and
23 accountability initiatives. Again, thank you for
24 this opportunity and I look forward to your
25 questions.

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1 CHAIRMAN CASTRO: Thank you, Admiral.
2 General Chipman.

3 LIEUTENANT GENERAL CHIPMAN: Thank you.
4 Chairman Castro, members of the Commission, on behalf
5 of Army Secretary John McHugh and Chief of Staff
6 General Ray Odierno, thank you for the opportunity to
7 discuss our efforts to combat sexual assault in the
8 Army.

9 Sexual assault, as you know, is not just
10 a military problem. It's a nationwide problem, one
11 of the most under-reported crimes, and one of the
12 most difficult to prosecute anywhere, sexual assault
13 affects every sector of our society.

14 In the Army, sexual assault erodes
15 readiness, destroys unit cohesion and morale, and can
16 devastate the lives of victims. It undercuts the
17 trust that is so critical to mission accomplishment.

18 Leadership is the key to change, but
19 accountability in our ranks remains critical in
20 creating a command climate in which victims feel safe
21 and confident in reporting misconduct.

22 The military justice system constitutes
23 a modern, criminal justice system. All of the people
24 in the system are trained practitioners, who pursue
25 both justice and the maintenance of good order and

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1 discipline in the force.

2 Our system is well equipped to meet the
3 challenge of sexual assault. The unique role of the
4 commander, the wide range of disposition options and
5 our modern, comprehensive criminal statutes, provide
6 the tools necessary to hold offenders accountable,
7 protect due process rights of accused soldiers, and
8 provide support and justice for victims.

9 The Army has focused our accountability
10 efforts on the special victim capability now directed
11 in the National Defense Authorization Act of 2013.
12 Every unrestricted report of a sexual assault, from
13 an unwanted touch over the clothing, to forcible
14 rape, is referred to specially selected and trained
15 criminal assault investigators.

16 The sexual assault investigators from
17 our criminal investigation command and the special
18 victim prosecutors from the Judge Advocate General's
19 corps work hand in hand from the initial report
20 through the post-trial process.

21 The close coordination between these
22 two, the special victim prosecutors or SVPs and the
23 sexual assault investigators, has improved the
24 investigation, prosecution and victim care aspects of
25 sexual assault allegations.

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1 This expertise enables commanders to
2 make evidentiary-based disposition decisions in these
3 often complex cases. The SVPs are selected and
4 assigned based on demonstrated court-martial trial
5 experience, and the ability to work with victims.

6 Before assuming their responsibilities
7 we provide SVPs with additional training, including
8 on-the-job training with a civilian special victim
9 unit in a large metropolitan area.

10 In addition we employ civilian, highly
11 qualified experts or HQEs, who bring decades of
12 civilian practice experience in the investigation and
13 prosecution of these difficult offenses.

14 SVPs and HQEs have yielded great
15 results, and as we look to the future, we will expand
16 and formalize the concept, adding additional
17 resources and personnel to establish a premier
18 special victim capability.

19 In my view, prosecution and conviction
20 rates do not alone effectively measure the criminal
21 justice system's ability to address sexual assault.
22 If we pursue challenging cases because we believe
23 that serves both victim interests and community
24 interests, some defendants will be acquitted.

25 Nevertheless our system and outcomes are

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1 transparent and our focus on accountability has
2 produced measurable results and benefits. We stand
3 by our statistics on the rate of prosecution, knowing
4 that we prosecute difficult cases.

5 Not as easy to measure, but perhaps more
6 illustrative of our success, are the testimonials of
7 victims and their families attesting to the
8 dedicated, compassionate assistance provided by our
9 SVPs.

10 One trial counsel prosecutor was
11 described by a victim's mother as "a member of the
12 family" who "fought for her daughter, but most of all
13 showed her the Army does the right thing."

14 It would be naive to suggest that we can
15 prosecute our way out of this problem.
16 Accountability remains critical, but only one aspect
17 of the Army's comprehensive program to combat sexual
18 assault and its precursor behavior, sexual
19 harassment. The Army has invested unprecedented
20 resources, over \$50 million in each of the past two
21 years, into prevention and response programs designed
22 to achieve culture change. The I Am Strong training,
23 emphasizing Army values and teaching bystander
24 intervention techniques, saturates soldier training
25 at every level, beginning with our newest recruits.

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1 A senior leader priority, this is an
2 ongoing, monumental, institutional effort. You will
3 find details of the Army's SHARP prevention and
4 response program along with descriptions of policies
5 adopted to address the unique needs of military
6 victims in my written submission.

7 With that, I stand ready to answer any
8 questions you may have. Thank you.

9 CHAIRMAN CASTRO: Thank you General.
10 General Ary, please proceed.

11 MAJOR GENERAL ARY: Chairman Castro,
12 members of the Commission, thank you for the
13 opportunity to address you today. I must begin by
14 assuring you that Secretary Mabus and General Amos
15 continue to make elimination of sexual assault a top
16 priority in the Department.

17 Within the Marine Corps, our Commandant
18 is personally leading this fight; in June, 2012, the
19 Commandant issued his sexual assault prevention and
20 response campaign plan.

21 This plan is a blueprint for
22 institutional and cultural change within our Corps,
23 and sets us on a course to improve our ability to
24 prevent and respond to sexual assaults.

25 When we talk about preventing sexual

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1 assault, the Commandant uses the phrase, "Get to the
2 left of the problem." That means more than simply
3 emphasizing the importance of the issue: it means
4 taking action at all levels and focusing our
5 training, policy and other initiatives to help us
6 stop sexual assault before it takes place.

7 To reinforce the importance of top-down
8 leadership, the Commandant began the campaign plan by
9 directing every Marine general officer to attend a
10 two-day, staff or general officer symposium.

11 He also directed three focused training
12 initiatives: command team training for commanders and
13 their senior staff; Take a Stand training for all
14 non-commissioned officers; and All Hands training for
15 all Marines and attached Navy personnel.

16 The Commandant also traveled around the
17 world speaking to Marine leaders. In these heritage
18 briefs, he defined who we are and who we are not.
19 His goal with these speeches was to change behavior,
20 with a particular focus on preventing sexual assaults
21 from occurring.

22 Regarding our response to sexual assault
23 when it occurs, we respond to both the victim and the
24 alleged crime. In terms of victim response, the
25 Marine Corps is pursuing several victim care

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1 initiatives.

2 Our first major initiative involves
3 hiring trained and certified civilian professionals
4 to serve as sexual assault response coordinators and
5 victim advocates.

6 We are also implementing regional sexual
7 assault response teams to provide a comprehensive and
8 coordinated approach to victim care that extends
9 beyond the boundaries of any one response service,
10 such as medical, legal or counseling.

11 To improve our legal response
12 capability, we established a defense service
13 organization in the fall of 2011. In this past year,
14 the Commandant directed a complete reorganization of
15 our legal community.

16 This reorganization affected over 49
17 different commands and over 800 legal billets. This
18 new organization established four regional legal
19 service support sections designed to ensure that we
20 place the right counsel, both trial and defense, with
21 the appropriate expertise, supervision and staff
22 support on the right case, regardless of location.

23 Each region has a regional trial counsel
24 office that gives us a special victim capability.
25 The centerpiece of these offices is a complex trial

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1 team composed of experienced senior prosecutors.

2 These regional offices also contain
3 criminal investigators, a legal administrative
4 officer, paralegal support, and highly qualified
5 experts.

6 Our highly qualified experts are
7 civilian, experienced prosecutors who will provide
8 training, mentoring and advice on trial strategy and
9 tactics to all military prosecutors in the region.

10 All of these legal system improvements
11 continue to ensure that we protect the interests of
12 the victims, while ensuring the accused receives the
13 due process rights guaranteed by the Constitution.

14 Within the Marine Corps, the Commandant
15 has also expanded the scope of Secretary Panetta's
16 policy on the disposition authority for sexual
17 offenses, to cover not only penetration offenses, but
18 also all contact sex offenses, all child sex
19 offenses, and attempts to commit such offenses.

20 In essence, we now have a smaller group
21 of senior and experienced officers making disposition
22 decisions for all sexual offense allegations and any
23 related collateral misconduct.

24 Sexual assault remains a serious
25 challenge for our corps. But the Commandant's

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1 leadership and commitment is making a difference. By
2 using a top down, comprehensive approach, and by
3 attacking on all fronts, from prevention to
4 prosecution, I truly believe we are making a positive
5 change in the culture of our Corps.

6 Again I thank you for the opportunity to
7 address you today and I look forward to answering
8 your questions.

9 CHAIRMAN CASTRO: General, I would ask
10 the Commissioners who are on the phone, if you would
11 mute your line, unless you are going to ask a
12 question. We are getting a little feedback. Okay?

13 The Chair recognizes Commissioner
14 Kladney.

15 COMMISSIONER KLADNEY: Thank you Mr.
16 Chairman. Dr. Galbreath, gosh, I have got a ton of
17 questions. You were an investigator.

18 DR. GALBREATH: Yes sir.

19 COMMISSIONER KLADNEY: And so what do
20 you think the strengths and the weaknesses are of the
21 military investigative service when it comes to these
22 types of offenses?

23 DR. GALBREATH: I think turnover is a
24 prime challenge, is that we have a constant influx of
25 new investigators and keeping a highly-trained corps

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1 is a challenge.

2 And the reason I say that is that we get
3 very, very good training. As a matter of fact, next
4 week I am going out to Fort Leonard Wood to help the
5 Army with a task selection course to help them
6 improve their course that is out there.

7 The challenge that we have is that you
8 cannot build in experience and the -- you can train
9 them all day long, but how I usually explain it to
10 the folks when I teach investigations is, a good
11 investigator can identify the evidence that is
12 present in a crime scene or a case, but a really good
13 experienced investigator can also identify what is
14 not there.

15 COMMISSIONER KLADNEY: Well, I actually
16 had the opportunity to go through two of your
17 PowerPoint presentations that you made in '08. Do
18 you still think those statistics are relevant?

19 DR. GALBREATH: I don't think so because
20 at that time we didn't have access to the kind of
21 data that we have now.

22 COMMISSIONER KLADNEY: Okay, so I mean I
23 was kind of surprised, because in one of the slides,
24 you stated that victims of sexual assault were many
25 times more likely to develop PTSD and these types of

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1 problems if they reported the sexual assault. Is
2 that correct?

3 DR. GALBREATH: No, that's not correct.

4 COMMISSIONER KLADNEY: Okay. I must
5 have misunderstood that.

6 DR. GALBREATH: No.

7 COMMISSIONER KLADNEY: But victims do
8 develop PTSD, you did have a slide that said a
9 military sexual trauma at a higher rate than people
10 under intense combat, is that correct?

11 DR. GALBREATH: As a matter of fact,
12 that's data that is out there in the civilian
13 research and also that the VA has found as well.

14 COMMISSIONER KLADNEY: And does job
15 performance, what happens in the military when job
16 performance falls as a result of having PTSD or
17 depression or these types of maladies?

18 DR. GALBREATH: You said it exactly.
19 Job performance falls. It's very difficult for some
20 of our folks to maintain the high levels of
21 performance that they need to, when they are also
22 trying to overcome these problems in their daily life
23 and their relationships and at work.

24 COMMISSIONER KLADNEY: And how are the
25 service people treated if that occurs?

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1 DR. GALBREATH: I think that it's a -- I
2 don't know if I can paint with a broad brush. But I
3 think that any time, at least in my experience in
4 providing treatment and care, one of the things that
5 I do when a commander used to contact me as a
6 clinical psychologist and say I'm having problems
7 with one of my troops, I would try and educate them
8 on some of the information and how a person who is
9 suffering from PTSD might comport themselves, and the
10 challenges that they would have specifically.

11 And by providing that education to
12 commanders and also their first sergeants that were
13 the head enlisted person in the unit, they were able
14 to understand and maybe take a different vector
15 towards helping the person.

16 CHAIRMAN CASTRO: Commissioner Kladney,
17 I'm going to go on to Commissioner Gaziano. You have
18 the floor.

19 COMMISSIONER GAZIANO: Thank you and I
20 am -- you have heard me say I was humbled by the
21 complexity of the issues in the earlier panel, but
22 I'm more humbled by your all's presence, to have so
23 many senior flag officers testifying before us, and
24 also waiting throughout the morning's panels.

25 We used to have a practice at the

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1 Commission that the government witnesses would be on
2 the first panel and then they could leave, and I
3 objected to that, in appropriate cases.

4 But the reason I am pointing it out,
5 besides thanking you, is to -- well, I'll mention one
6 other thing. The past few times we have invited
7 someone from the Department of Justice, the federal
8 law mandates that all federal agencies shall
9 cooperate fully with the Commission. They won't send
10 a line attorney to, to testify at any time in the
11 past couple of years.

12 So it kind of belies at least one false
13 myth, and that false myth is that the military
14 doesn't take this issue very seriously. So after
15 trying to compliment you, I did want to -- I think to
16 Vice Admiral DeRenzi, I have a particular question,
17 but others may comment.

18 To the extent I have been able to get up
19 to speed on some of the issues, I think that the
20 biggest improvements to me is the kind of career
21 tracking that I think you all have the lead on in the
22 Navy, and as those of us who are -- I was a very
23 brief litigator -- but I know enough about the
24 prosecutors and other litigators, that you learn to
25 be a great lawyer by watching the great counsel,

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1 prosecutor or criminal defense, then working side by
2 side with them, then having them available to counsel
3 you, and just for the C-SPAN viewers who may not know
4 why you instituted this, and I'd appreciate it if you
5 could elaborate and explain, as I have been able to
6 understand it, there were incentives for those who
7 entered the JAG Corps to be you know, assigned
8 prosecutors, defense counsel, but there were higher
9 incentives maybe then to be stationed elsewhere, and
10 there wasn't quite the rewards of a career track that
11 end with, by the way, flag officer for the senior
12 judge, and now you have created that.

13 And it seems to me that both victims and
14 the accused, whether falsely or rightly accused, we
15 want a justice system that convicts someone even if
16 they did the crime, in a fair manner.

17 But that seems to me to be maybe the
18 most important reform of the past few years. But
19 it's young, and if my vision of what it takes to
20 learn at a great lawyer's side, you were a great
21 lawyer I understand. We may have even been on the
22 opposite side of an important case at one point.

23 But how is -- what's the early results?
24 And the other branches, how much do you think that
25 will help, has helped, can help and what kind of

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1 patience do we need before we see the effectiveness
2 of that solution?

3 VICE ADMIRAL DeRENZI: Well, thank you.
4 I appreciate your question and frankly you have done
5 as good or better a job of describing our military
6 litigation career path and track than many who I
7 expect to be more familiar with it.

8 We instituted it because we felt that we
9 wanted to: a) incentivize people to stay in military
10 justice; and in particular, incentivize people to
11 take judicial positions.

12 You described the phenomenon, and it
13 wasn't that military justice wasn't valued. Repeated
14 assignments in it just weren't viewed to be as
15 competitive as officers who went and served with the
16 operational line community, taking jobs that on their
17 face, and perhaps in practice, required a greater
18 degree of personal sacrifice with the operational
19 forces day in and day out.

20 And the uninitiated might look and say
21 if you've stayed in a courtroom you are not working
22 as hard. I disagree with that fundamentally as a
23 premise, and we determined that the best way to keep
24 good litigators in the courtroom was to bring them
25 into what line officers would call the equivalent of

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1 a restricted community.

2 They compete among each other for
3 promotion. So they are not competing against people
4 who work for three- and four-star officers, say in a
5 combatant command.

6 They are competing against other
7 litigators, trial, defense and judicial. We
8 instituted it in 2007. I will tell you that it takes
9 persistent leadership and attention to identify and
10 groom the right people. There's a numeric factor --
11 how many cases that we have.

12 But just like we have said with
13 everything else, numbers aren't everything. There
14 are the intangible factors and who has what it takes
15 to be a good litigator.

16 We look for those people. We groom them
17 and at the four-year point, they have an opportunity
18 to apply to specialize, and boards pick them, and the
19 boards are made up of military justice practitioners
20 and JAG Corps leaders.

21 At that point we tend to structure our
22 organization as we have grown a cadre of these people
23 so that they will be department heads for both trial
24 counsel and defense counsel, and they are trained not
25 only in litigating but in mentoring the young counsel

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1 and bringing them along, because as you said, it's
2 not just by doing. It's by watching, it's by
3 learning and it's done case by case, accused by
4 accused, victim by victim, argument by argument.

5 We are committed to continuing to do
6 that and it's starting to bear fruit, as we have seen
7 the promotion prospects improve. Our military
8 justice career practitioners are promoting at a rate
9 equivalent to the rest of us.

10 That's critically important because
11 there is no substitute for seniority, longevity and
12 experience when it comes to prosecuting complex cases
13 and leading litigators.

14 The chief judge position in particular,
15 as you said, not only incentivizes it, but
16 incentivizes people to be good -- to be judges, and
17 to take more than one tour as a judge.

18 That's critically important too.

19 You say how long will it take to bear
20 fruit. I think it's already borne fruit in the
21 leaders that it's produced for us, and in the fact
22 that our junior personnel are anxious to be a part of
23 that community.

24 One thing I would say though, you can't
25 just stay in the courtroom your entire career. You

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1 have to work among the fleet to appreciate how the
2 conduct resonates in the fleet, and to appreciate the
3 perspective of the sailor and the convening
4 authority.

5 Some of our best military justice
6 practitioners today are at sea as lawyers for our
7 nuclear aircraft carriers.

8 CHAIRMAN CASTRO: Commissioner
9 Achtenberg.

10 COMMISSIONER ACHTENBERG: Thank you Mr.
11 Chairman. General Patton, I have three questions of
12 you, but the others who have given such excellent
13 presentations, should feel free to chime in if you
14 have anything to add.

15 The -- General, the testimony that we
16 have just heard I think is very, very exciting, to
17 see the level of commitment being evinced by the
18 various leaders of the various services, the fact
19 that numerous experiments are about to take place
20 which we imagine will bear fruit.

21 Money is being spent, creativity is
22 being expended. Chances are being taken. People are
23 focusing enormous energy and attention on what you
24 admitted in your own testimony is a terrible problem.

25 I am wondering how these experiments

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1 will be evaluated, how the learnings will be shared,
2 how the public will be informed, whether or not all
3 these excellent inputs actually yield results and how
4 soon.

5 So I am wondering what the plan for
6 disseminating best practices, if any of these things
7 turn out to be, if not the magic bullet, then part of
8 the arsenal that becomes the way we combat sexual
9 violence in the military. Pardon the military
10 allusion.

11 MAJOR GENERAL PATTON: Well, thank you
12 for that question ma'am. One of our lines of effort
13 is really the one that you are really I think
14 commenting and focusing on and that is the line of
15 effort of assessment.

16 And so there are some things in place
17 here that allow us to -- we recognize we have to
18 continually look at ourselves and what I have
19 actually been sharing with my colleagues in the
20 services and so forth is that we have to assess our
21 programs with an eye towards taking the best
22 practices and making them common practices.

23 And so that's the approach that we are
24 taking in a number of different areas as we apply the
25 assessment line of effort to really everything else

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1 we do.

2 So you know, one example is in training.
3 We are -- we have launched a very comprehensive
4 assessment program in the area of training. This
5 will go on for several years.

6 The first element of training that we
7 assessed, and we have just completed the assessment,
8 I am going to get to the results. But we have just
9 completed the assessment on all the training that
10 commanders get before they take command, as well as
11 training that the senior non-commissioned officers
12 get before they take senior leadership positions.

13 The reason we focused on commanders and
14 senior non-commissioned officers first in the entire
15 training regimen is because of really the centerpiece
16 and the key role that they have in any sexual assault
17 prevention response program.

18 So this assessment went on over several
19 months. We have just collaboratively reviewed the
20 results of that assessment with all the services, and
21 I expect that Secretary of Defense Panetta will
22 publish the results of these -- results of this
23 assessment here in the, I think the days or the weeks
24 ahead.

25 And it's taken, what we saw in the area

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1 of training is that all the services were doing
2 something, but that we saw best practices in some
3 services that we want to be the common practice in
4 the others, like interactive training, adult learning
5 going on, the training tailored to the specific
6 audience.

7 For example, if there's a dramatic
8 representation of sexual relationships, it resonates
9 very strongly with young adults, called Sex Signals.
10 Well, this is perfect for initial military training -
11 and the people there, but it probably doesn't play
12 that well with the senior command staff person.

13 So that training is adapted to that
14 audience. So we have also seen where PowerPoint
15 training is -- we have thrown that away. Commanders
16 and senior non-commissioned officers, they thrive on
17 training where they are put in scenarios, scenario-
18 based training, ethical decision games is one model
19 that the Marine Corps uses.

20 The Navy calls it Take the Helm
21 training. I sat through three hours of Take the Helm
22 training with the Navy. It was given by a team of
23 experts and it's a mobile training team. They take
24 that training to every ship and element within the
25 Navy, export that training and it was really driven

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1 by a number of scenarios: what are you going to do
2 now, Captain of the ship, when this happens on your
3 shift, and then talking through the serious issues
4 and so forth associated with that.

5 So we have got some really aggressive
6 assessment programs in place for the training side.
7 Shifting gears a bit, well, to answer your question
8 how do then codify that?

9 Well, we standardize it in policy. And
10 so the core learning objectives that we have
11 identified that work best, and best practices for all
12 the services, will be codified in a policy that our
13 Secretary of Defense is going to promulgate across
14 the Department.

15 And that will be the standardized core
16 learning objectives and core competencies for all
17 pre-commander training.

18 COMMISSIONER ACHTENBERG: So you are
19 going to be measuring and evaluating each and every
20 one of the initiatives that these leaders have just
21 delineated and you are going to be making an
22 assessment of which are more successful than which
23 and then putting those forward as a uniform standard
24 of some kind? Right, I might --

25 MAJOR GENERAL PATTON: No, no, that's

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1 the idea. I really expanded on the training piece
2 but we are doing the same in other programs as well.
3 General Harding mentioned the Special
4 Victims' Counsel. That is a program, a pilot program
5 the Air Force has taken on that we want to take a
6 very close look at across the department, learn from
7 it, take the emerging lessons learned, and somewhere
8 down the road look to see how that can apply to the
9 rest of the department.

10 The Special Victims Capability is
11 another area. We have convened a study group. We
12 are looking at all the things that the services are
13 currently doing. You heard a lot of them.

14 But we want to standardize that in a
15 department-wide policy, again capturing the best
16 elements of that Special Victims Capability, and then
17 codify that in a policy that will then drive and
18 standardize over time the way in which we do Special
19 Victims Capability.

20 COMMISSIONER ACHTENBERG: When Professor
21 Sullivan urged us not to recommend more changes
22 because we haven't even figured out yet whether the
23 changes that are currently under way are going to
24 take hold and the Congress invariably will make a
25 mistake, if they, you know, if they try to do too

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1 much, too soon, and all of that admonition that we
2 take really seriously, it seems to me a very good way
3 of warding off future meddling in your business,
4 would be to make a very rigorous assessment of
5 everything that is being done, and you know, having
6 it see the light of day, so that the public has
7 confidence that you really are going to assess what
8 are the best practices and make those the common
9 practice as you have just identified. That's just a
10 piece of advice. I think it would go a long way.

11 My second question, before I lose the
12 patience of the Chair --

13 CHAIRMAN CASTRO: You will never lose
14 his patience.

15 COMMISSIONER ACHTENBERG: Thank you so
16 much, Mr. Chairman. My second question is: has the
17 Secretary given any thought to assessing cases that
18 perhaps were mishandled in the past, and if any of
19 you have seen any of the public comment that we have
20 received on this topic, my layperson's estimate is
21 that cases that might have been mishandled in the
22 past, might number in the many thousands if not tens
23 of thousands of cases.

24 Have you given any thought to some kind
25 of systematic address of past injustices, some

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1 opportunity for women and men who might have not been
2 treated as well by their services as we hope victims
3 and perpetrators for that matter will be treated
4 going forward on the basis of all these new programs,
5 how we might compensate them if at all for the past
6 failures to address this as a serious issue?

7 MAJOR GENERAL PATTON: I think the best
8 way I can answer that is by referencing an ongoing
9 review that the Department of Defense Inspector
10 General is conducting. This -- I don't have oversight
11 of that particular agency; however, they keep me
12 informed on their reviews and their efforts, and I
13 know they are finishing up a 2012 review of cases
14 that were handled by the military criminal
15 investigative offices across all the department.

16 They looked specifically at closed cases
17 and with those cases that were closed, how did they -
18 - did they comply with the standards for an
19 investigation, did they comply with the thoroughness,
20 the timeliness, and those sorts of things.

21 And I don't have the data on this
22 because I haven't seen the final report that they are
23 working on now, but they have returned some number of
24 cases back to the service military criminal
25 investigative offices, the CID, the OSI, the NCIS in

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1 the three services, for the purpose of continuing the
2 investigation.

3 They have also made some -- I know they
4 are doing some analysis as to whether those
5 particular investigations were conducted in the
6 standards of thoroughness, accuracy, timeliness and
7 so forth... by those investigative officers.

8 So that's one element and I would say
9 that the Secretary of Defense always has his
10 Inspector General to do things like that, to review,
11 in this case, criminal investigative matters.

12 That the IG has already announced that
13 their next year's -- this current year, 2013 --
14 oversight review topic will be compliance across the
15 department with the sex offender registry program,
16 and have detailed a number of things that they are
17 going to be looking at there.

18 So there's two years in a row where the
19 violent crimes division of the Department of Defense
20 IG is focused on these matters, for the purpose of
21 giving this I think a very critical look, at the
22 direction of the Secretary.

23 COMMISSIONER ACHTENBERG: But there's no
24 specific opportunity for example of women or men who
25 think that they were treated unjustly in the past to

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1 seek some kind of recompense or --

2 MAJOR GENERAL PATTON: I know one thing
3 that was addressed by a provision in the National
4 Defense Authorization Act that was just signed into
5 law in 2013, is the direction to reinforce the fact
6 that the Board for Correction of Military Records
7 that exists in each of the departments, is -- to
8 emphasize that and inform our, both our active and
9 our retired populations, that they are aware of that
10 as a forum of -- formal forum of redress for
11 wrongdoing or that sort of thing.

12 And that was reinforced in recent law
13 and my job will be to, with the services, to really
14 put that into place and do that broader information
15 campaign that ensures people are aware of that. So -
16 -

17 COMMISSIONER ACHTENBERG: And will that
18 extend to according people veterans' benefits if they
19 were otherwise qualified, or is it only correcting
20 the nature of their discharge?

21 MAJOR GENERAL PATTON: I believe it
22 generally deals with the correcting of the active
23 military component of their service.

24 COMMISSIONER ACHTENBERG: I will defer
25 my third question until later, if there is a later.

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1 CHAIRMAN CASTRO: Well actually, I am
2 going to ask a question and then we are going to go
3 to Commissioner Yaki, then to Commissioner Kladney,
4 then, who will have the last question.

5 There was a reference I think by you,
6 Admiral DeRenzi, and I heard it during one of the
7 earlier panels, to the issue of child sexual abuse.
8 To what extent are military families being victimized
9 by predators or by rapists who happen to be service
10 members, outside of the family? Is that an issue
11 that is going on here? Because we haven't talked
12 about it. We've really been focused on service member
13 to service member.

14 But since child abuse has come up twice
15 during this hearing, I wanted to find out a little
16 more about what that is.

17 VICE ADMIRAL DeRENZI: Part of the
18 reason you see them linked together is because we
19 have tried to get expertise available to us within
20 our own organization in the cases that are the most
21 difficult for us to adjudicate and to litigate, and
22 child sexual assault and adult sexual assault are
23 both like that.

24 They have some similarities, some
25 differences. We are working very hard to have our

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1 litigators understand the behavior that is exhibited
2 by victims of sexual trauma, adult or child. You see
3 some of those things happening intra-family, you
4 know, and the myth out there is you can't rape within
5 your own family. That, as you know, isn't true.

6 So we are working to ensure that we have
7 got the skills and that we develop the skills to deal
8 with both kinds of cases because there are
9 similarities, but there are critical differences too.

10 As a matter of fact, as you alluded to,
11 we have looked specifically to find folks with that
12 kind of experience. One of them is in the room
13 today, is in our headquarters, and one of the most
14 valuable things that she does for us is ensure that
15 we are looking for the cutting edge training so that
16 we don't just funnel it to one side of the aisle or
17 the other.

18 And we have benefitted tremendously from
19 her experience, as have the investigators, and in the
20 future, the victim advocates that we are bringing
21 online. I believe we will learn a lot from each
22 other and we need to continue to do that, and
23 leverage that experience in the special victim
24 capability, which would include victims of child
25 abuse as well.

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1 CHAIRMAN CASTRO: Thank you Admiral.
2 Commissioner Yaki, you have the floor.

3 COMMISSIONER YAKI: Thank you Mr. Chair.
4 Just briefly, I have one question but I just wanted
5 to do a quick followup statement on what Commissioner
6 Achtenberg was talking about.

7 And I think it's really important, the
8 point that she made. There are -- we receive any
9 number of different emails and letters from people
10 who basically were discharged from the service under
11 less than favorable circumstances because of how
12 their claims were handled or how they reacted to
13 their claims being mishandled within the services.

14 And I think it's really important, and
15 as someone who has worked with, with veterans on
16 correcting their military records and upgrading their
17 discharges in the past, I know how exceedingly
18 difficult it is to do it from their perspective, and
19 it's a very uphill fight.

20 So I would just urge that in whatever
21 the Inspector General is doing, that if there's a
22 way to work on reviewing records of people who
23 believe that they were wrongfully treated and
24 wrongfully discharged, I mean those have enormous
25 consequences to their future ability to receive

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1 healthcare, veterans' benefits, what they disclose on
2 a job form, and it may be for those people, where the
3 system failed them because people like yourselves
4 weren't in charge at the time and hadn't put in the
5 proper procedures in place, we can't forget about
6 those who paid a heavy price early on and are still
7 paying it now.

8 The question I have though is, listening
9 to all of your, all the different branches and seeing
10 how many of you, and again, as all of our panelists,
11 we thank you for your service to our country.

12 But I wonder if you can respond to one
13 of the proposals brought forth by an earlier --
14 someone in an earlier panel, which is it's great that
15 you are all doing these efforts to combat sexual
16 violence, sexual assault, sexual discrimination
17 within your branches, but the fact that each of you
18 is doing it in your own silo, how do you react to a
19 proposal that would create an independent, unified
20 branch of investigations or prosecutions for these
21 types of cases across branch divisions, would address
22 the issue of promotion and rank, because it would be
23 an independent civil service career path, rather than
24 an intra-military path, and create a service-wide
25 specialty in terms of investigating, prosecuting,

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1 defending and sentencing of sexual assault in the
2 military?

3 MAJOR GENERAL PATTON: Let me take a
4 first swing at that, and just take it from a
5 commander's perspective, and so if the notion is that
6 the sexual assault cases would be removed from the
7 chain of command and then provided to this
8 independent agency, I would just like to make a
9 comment on that aspect of that, and that is that we
10 put a lot of responsibility on our commanders.

11 They are responsible for the health and
12 welfare, accomplishing the mission, the readiness of
13 their unit. And we also owe them the tools to do the
14 job. One of those tools is training. Another one of
15 those tools is the military justice system, a
16 disciplinary system that allows them to not only put
17 standards in place but then to enforce the standards
18 by then applying disciplinary measures to people who
19 would choose to not comply with the standards, not
20 meet the standards, violate the standards of conduct
21 and behavior.

22 And so it's important, in my view, to
23 retain the commander as a central role in the justice
24 system, and the Secretary of Defense recognized this
25 earlier this year when he decided to elevate the

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1 disposition authority for the commander, and
2 previously that disposition decision as to what
3 direction a case would take in a sexual assault case,
4 be it court-martial, be it administrative separation
5 or so forth, that decision was moved from the O5 rank
6 to the O6 rank which in the Navy is a captain and in
7 the Army, Air Force, and Marines is a colonel.

8 And I served in command at both those
9 levels and I can tell you, as an O6 commander, I've
10 got 25 years in the Army versus 20 at that lower
11 level. I had handled a significant number more cases
12 including courts martial, and had much more
13 experience serving and working with trial counsel.

14 And at the O6 level of command, that's
15 really in the Army, the first level, when you have an
16 assigned trial counsel at your side, and so again,
17 mindful of all those elements, Secretary Panetta
18 decided to elevate that very critical disposition
19 decision and authority to the O6 level, but to retain
20 that command disposition decision within the chain of
21 command.

22 And I'll just close by saying, I mean,
23 the -- with my commander hat on here, the commanders
24 own this problem. Commanders are going to have to
25 fix this problem, and we need to keep commanders

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1 involved in the problem, not less involved.

2 By removing any kind of decision making
3 with regard to discipline away from the chain of
4 command, we are not keeping commanders involved in
5 the problem.

6 The energy in the program and all the
7 things we just talked about here in our opening
8 statements and some of our initial questions, that
9 dissipates when you remove, you know, some of those
10 key elements of the disciplinary system from the
11 chain of command.

12 I defer to any of my colleagues here for
13 other comments on that point.

14 LIEUTENANT GENERAL HARDING: I think --
15 and thank you Commissioner Yaki for that question --
16 I think any time you consider taking that valuable
17 function that commanders perform today and holding
18 members accountable in making those judgements, when
19 you take that away from a commander, the second,
20 third and fourth order of effects are ugly, and you
21 ought to consider those effects before making such a
22 recommendation.

23 First I'd like to address, though, the
24 idea of taking the investigative responsibilities.
25 It's awfully important as an investigator that you

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1 understand the nature of the unit that you are
2 investigating, the people involved, what they do,
3 where they came from, how they were trained.

4 Growing up inside those services,
5 wearing that uniform, walking the walk and talking
6 the talk is awfully important, to understand how
7 things might have occurred in a particular unit.

8 To find one size fits all for all
9 services would be awfully difficult. Easy to say,
10 difficult to create, in levels of expertise.

11 As far as pulling the authority from a
12 commander to hold members accountable and make those
13 disciplinary decisions, we fight and win the nation's
14 war and we've got a really good track record doing
15 that.

16 It's not by accident. It's because we
17 bring four things to every fight: the best equipment;
18 the best people; the best training, those are three
19 legs of a four-legged table; the fourth leg is
20 discipline.

21 And that ability to hold members
22 accountable is important for command and control.
23 This is the art of military science now. So if you
24 start to pull at that thread, the second, third and
25 fourth order of effects is awfully important, I think

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1 to all of us.

2 So I think it's important to the nation
3 to consider the ramifications of looking to someone
4 else to make those decisions. Thank you.

5 ADM. DeRENZI: If I might, sir, I'd like
6 to address one, one piece of Commissioner Yaki's
7 remarks, sir, that you referred to as independent
8 silos, and I can see how it might appear that way.

9 We are different services. We are
10 structured differently. Our service cultures are
11 somewhat different. But believe you me, my peers on
12 the panel here, we work well and cooperatively
13 together. Our trial counsel and defense counsel
14 assistance programs leverage each other's experience.
15 Our judges train together.

16 We take the best practices that we each
17 identify in our services, and try to figure out how
18 best to apply them within the challenges that we
19 face, and not necessarily uniquely, but perhaps
20 differently.

21 So it may not appear that we are acting
22 in a coordinated way, but I can assure you that we
23 are, particularly when it comes to the challenges of
24 complex litigation, and the prevention and response
25 efforts.

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1 They are all slightly different, but you
2 will see that they are all in essential very much the
3 same in their emphasis on prevention. Once they get
4 to us, we owe -- we owe the soldiers, sailors, airmen
5 and Marines a good, efficient, effective and fair
6 military justice system.

7 Even though that's one of my primary
8 statutory duties, I would like it if they didn't get
9 to us and that our prevention efforts succeeded.

10 CHAIRMAN CASTRO: Commissioner Kladney,
11 you have got the last question.

12 COMMISSIONER KLADNEY: Thank you Mr.
13 Chairman, I actually have three.

14 CHAIRMAN CASTRO: I suspected you might.

15 COMMISSIONER KLADNEY: I would just like
16 to tell General Ary that that I have a friend in the
17 military and apparently you have an extended sexual
18 assault training program, and they attended it and
19 they thought it was wonderful. Just to let you know.

20 MAJOR GENERAL ARY: That's great.

21 COMMISSIONER KLADNEY: Since you've been
22 sitting so quietly. I have asked this question
23 before, earlier today, so I am sure you have heard
24 it, especially the justice officers and the generals,
25 is there any way to have guidelines for commanders,

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1 especially since command and control is so important,
2 as to how to select a forum for discipline, you know,
3 there's Article 15 or courts-martial or summary
4 courts-martial or something like that, and some
5 sentencing guidelines for these types of offenses, or
6 is this just a near impossibility?

7 LIEUTENANT GENERAL CHIPMAN: If I could
8 take first crack at that. I think we have guidelines
9 already in the sense of this: each of our
10 commissioned officers, each of our commanders is
11 trained from their initial officer basic course their
12 role in military justice, and at each level, as they
13 assume increasing levels of command, they get
14 additional training on the execution of their
15 responsibilities.

16 As we have discussed already, at the
17 battalion commander and the brigade commander levels,
18 one in the Army at least has an assigned judge
19 advocate to help assist in making those disposition
20 decisions.

21 And so you are going to find, both by
22 policy and our regulations where we have withheld all
23 sexual assault-related contact to the battalion
24 commander level initially, then for the sexual
25 assault offense itself to brigade commander level,

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1 there is some disposition guidance already operative.

2 And as well, we are talking about judge
3 advocates at the prosecution level, at the staff
4 judge advocate level, colonels with 20 years'
5 experience who are guiding commanders in the
6 execution of their duties under the system.

7 So from that standpoint, there is
8 disposition guidance out there. In terms of
9 sentencing guidelines --

10 CHAIRMAN CASTRO: Speak up a little bit
11 General, the mic is not picking you up there.

12 LIEUTENANT GENERAL CHIPMAN: In terms of
13 sentencing guidelines, we think it's appropriate to
14 consider those factors that underlie any sentencing
15 system, any mature sentencing system, and we execute
16 that appropriately with panels for juries, and with
17 military judges who have served as prosecutors,
18 defense counsel, administering the system, and then
19 trained as judges at our common school.

20 COMMISSIONER KLADNEY: So basically you
21 are saying that this is being carried out already and
22 there's no need to write some of this now.

23 LIEUTENANT GENERAL CHIPMAN: If you are
24 engaged in a serious criminal offense, you will
25 receive the appropriate disposition decision and the

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1 appropriate sentence that is in fact unique to the
2 factors, aggravating and mitigating, of your
3 particular crime.

4 COMMISSIONER KLADNEY: And have now, do
5 you see more supervision over line commanders as to
6 what gets brought up on charges and discipline for
7 those commanders that don't bring things up on
8 charges? I mean, is that being developed, that type
9 of supervision from the field level?

10 LIEUTENANT GENERAL CHIPMAN: I think
11 it's fair to say that there is in fact a great deal
12 of interest in all levels of the command in how they
13 are handling these kinds of issues.

14 So for example, you've got the
15 disposition elevation initially to the captain or
16 colonel level supported by a judge advocate, guided
17 by a judge advocate in that decision.

18 But you've also got other oversight
19 mechanisms. You know, we have a civilian appellate
20 court, the Court of Appeals for the Armed Forces is
21 the ultimate supervisor.

22 We have got Article 37, which talks
23 about unlawful command influence in the direction and
24 control of our system. So there is in fact a level
25 of interest and a level of ability to influence those

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1 decisions.

2 And if a commander is unhappy about how
3 a subordinate would propose to handle a certain
4 issue, that commander can pull it up to his or her
5 level to dispose of that allegation.

6 COMMISSIONER KLADNEY: Thank you. My
7 last question, the last question. When the service
8 person files a restricted or unrestricted claim, do
9 these documents hit their personnel file? In other
10 words my concern is, is that -- well, I have lots of
11 concerns.

12 But one concern is, is that it follows
13 them from assignment to assignment. And the second
14 thing is if you file an unrestricted claim and you
15 decide to make a career in the service, you know, a
16 lot of other people go from unit to unit to unit and
17 there's, I guess it's a Navy term, scuttlebutt, that
18 follows them.

19 And how is all that handled, I mean, to
20 protect people, because if you don't do that, don't
21 you discourage those kinds of claims?

22 DR. GALBREATH: Unrestricted report,
23 first of all, the report itself is documented on a DD
24 Form 2910, a reporting preference form, and the only
25 person that gets a copy of that form is the sexual

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1 assault response coordinator that you spoke to and
2 the victim, and it does not go into a personnel file,
3 it does not follow someone throughout their career,
4 whether you report an unrestricted report or you give
5 a restricted report, either way.

6 We keep a copy of the DD Form 2910 for
7 unrestricted cases in our defense sexual assault
8 incident database.

9 COMMISSIONER KLADNEY: Is there any kind
10 of discipline for people who perpetuate that? I mean
11 it's very difficult, but if I am in a unit and I go
12 to another unit and there's somebody there from when
13 I filed an unrestricted claim and it gets around, and
14 I can, I guess, get ostracized or --

15 DR. GALBREATH: Well, harassment on any
16 account is taken very seriously and if the individual
17 reports that they are being harassed by someone
18 within the unit for something that occurred
19 previously, they need to bring it to the attention of
20 their commander, or to law enforcement, depending on
21 the level of the harassment.

22 COMMISSIONER KLADNEY: And that's well
23 communicated to the troops?

24 DR. GALBREATH: I believe so. We tell
25 everyone that you come in and you experience that

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1 kind of recompense and we want to know about it.

2 COMMISSIONER KLADNEY: Thank you.

3 MAJOR GENERAL PATTON: If I could answer
4 the question, recognizing the need for protections
5 and privacy and confidentiality and victim
6 preferences, one of the policies that we have put in
7 place just in the last six months is called the
8 expedited transfer policy. This is the policy across
9 the Department, Secretary of Defense-promulgated,
10 that allows the victim to make a request for a
11 transfer from the unit or from the installation and
12 again, it's at the request of the victim. There are
13 some victims that's very important to them, other
14 victims it may not be and they want to stay within
15 that team that they have grown up in.

16 And it only applies to unrestricted
17 reports and we track those very closely. And to
18 date, there have been about over 200 of those
19 requests made. I might add also that that request is
20 made to a commander in the chain of command, and if
21 the victim is not satisfied with the decision by the
22 commander, they have the right to appeal to the first
23 general officer in the chain of command.

24 And to date, in the over 200 requests
25 for transfer, the data I have seen shows that all but

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1 one of those transfers have been approved, and that
2 one case the victim was being separated from the
3 service and being transferred wasn't necessary.

4 So we are watching that very closely.
5 It's one of the data elements that we put into our
6 incident database because I think that we want to --
7 getting back to the question about assessment, we
8 want to -- we are continually looking at ourselves to
9 assess whether these programs are effective, are we
10 providing the support to the victims that is intended
11 by that policy.

12 So it's a six-month-old policy but we
13 are looking at it very closely.

14 CHAIRMAN CASTRO: Thank you very much.
15 In fairness and in the interests of bipartisanship I
16 am granting Commissioner Gaziano the opportunity to
17 ask a question.

18 [i-n-a-u-d-i-b-l-e]

19 COMMISSIONER GAZIANO: Thank you. I
20 just wanted to return to a question from the first
21 panel and maybe the other side of the ledger, which
22 is that I certainly concur with what one of the
23 witnesses said, that if it is your mission to get
24 more convictions, by golly, you will get more
25 convictions.

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1 But maybe that's appropriate. And so
2 let me ask you this sort of in some context, maybe
3 you should do better than not only what you have been
4 doing, but the civilian system -- in the civilian, as
5 I understand from civilian prosecutors, if there's a
6 -- two people have been drinking in a bar, a non-
7 stranger situation, they leave together, then there's
8 an allegation of rape, you know there's a lot of
9 civilian prosecutors who will obviously evaluate the
10 evidence, but need something a little bit more than
11 the he-said-she-said before they think that they are
12 willing to make a charging decision and seek proof
13 beyond reasonable doubt.

14 You know one of the witnesses -- it may
15 have been this panel but I'm not sure -- said you
16 know we are not afraid to bring cases that will
17 result in acquittals. That certainly makes sense.

18 But my -- but particularly to the --
19 those representing the Judge Advocates General of the
20 different services, do you think that there ought to
21 be a different standard, charging standard, than
22 maybe exists in the civilian system? Should the
23 services, you know, maybe charge at a -- for a lot of
24 unique reasons, try to bring a case and try to prove
25 guilt at a level that would be slightly less evident,

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1 slightly less strong than in the civilian context?

2 Or do you think that the ideal is to
3 make about the same charging decisions as a good,
4 civilian prosecutor would?

5 LIEUTENANT GENERAL HARDING: I'll offer
6 this up as I think an important part of considering
7 the predicate of your question. We try a lot of
8 cases that civilian prosecutors waive jurisdiction
9 on. And when an offense occurs off base for example,
10 the civilian prosecutor is often the first one to
11 make a decision whether or not to prefer charges.

12 As a matter of course, the Air Force
13 routinely requests waivers of jurisdiction, and we
14 receive waivers of jurisdiction in many cases that
15 they elect not to try.

16 We try many cases that are testimonial
17 cases, on- versus-one piece of testimony. I think we
18 have the right standard in making that determination.
19 We ask commanders to take an oath before they prefer
20 a charge, the charging instrument that we use, that
21 simply asks them that, based on their personal
22 knowledge or personal investigation of the case, did
23 they believe, honestly believe that the charges are
24 true to the best of their knowledge and belief.

25 That's the charging decision, and when

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1 those charges go forward to trial at a later date,
2 then we use proof beyond a reasonable doubt, the very
3 same standard that we use everywhere else in the
4 nation, and it is reasonable that we will see
5 acquittals and we do.

6 So I have a hard -- when you say the
7 best example or model of what those -- how those
8 decisions are made downtown, and put our model
9 against that, we are every bit as good and in many
10 cases better than that model.

11 COMMISSIONER GAZIANO: Better, we'll let
12 other people decide. But it sounds to me, and I'd
13 like the others to -- that what you are suggesting is
14 you'll charge more cases, even if the proof beyond a
15 reasonable doubt standard at the end is the same, you
16 might charge more cases than a really good civilian
17 prosecutor would.

18 Is that a fair assessment, and is that
19 the current goal, that you are -- not that you are --
20 maybe you will teach the civilian prosecutors
21 something? Can you all help me with your thoughts?

22 MAJOR GENERAL ARY: I guess I might toss
23 in a couple of comments sir. I think that from our
24 perspective, we care about cases being well tried
25 from both sides, all of us are responsible for both

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1 trial and defense.

2 We also don't have prosecutors running
3 for reelection on a win-loss record. They are
4 defined by their duties, and I think one of the
5 challenges, when you look at a unanimous verdict
6 downtown beyond a reasonable doubt, and a 12-member
7 jury panel, in our world, if you have eight votes,
8 two-thirds majority you can get a conviction beyond a
9 reasonable doubt.

10 Now a lot of people think that that,
11 when you have four voting to acquit, that's a hard
12 thing to get around when you have beyond-reasonable-
13 doubt standard.

14 It also helps to define why some people
15 may not understand the sentence that comes out of a
16 members' panel, because when four people have
17 reasonable doubt and vote to acquit, they are still
18 part of that group helping to define the sentence.

19 So there's a lot of factors in our
20 system. There are also -- the appellate courts in
21 our system have broad fact-finding review, because of
22 those issues.

23 So when you start looking at all of the
24 different control inputs, certainly that's the thing
25 that Professor Sullivan was talking about to your

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1 question, each one of these control inputs has
2 ripples across our system, and it truly is a justice
3 system, and I think that when we calculate these
4 things in, and we think about the rights of the
5 accused, the rights of the victim, the institutional
6 need for good order and discipline so that we can be
7 an effective fighting organization, we have to look
8 at it in its entirety and consider it carefully,
9 because the justice system is really something that -
10 - the sanctity of that system, as our Commandant
11 says, is a moral imperative for all of us.

12 LIEUTENANT GENERAL CHIPMAN: And if I
13 may add one perspective to that as well. Anecdotally
14 and by our data we do know we try more cases of a
15 given evidence level than our civilian jurisdictional
16 counterparts. We can show you that case.

17 COMMISSIONER GAZIANO: If you could
18 supply that to me or to the Commission, that would be
19 helpful.

20 LIEUTENANT GENERAL CHIPMAN: But the
21 reality is, that that's because in part, America's
22 moms and dads send us their sons and daughters and
23 hold us to a higher standard, and we believe strongly
24 that they have a right to a victim-free, an
25 environment free from sexual assault and all that it

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1 entails, and it's part of our unique fabric. It's
2 part of that special, specialized society apart from
3 America where we have that commitment to good order
4 and discipline that requires us to make certain
5 decisions that perhaps you would say in a resource-
6 constrained environment, you wouldn't make.

7 VICE ADMIRAL DeRENZI: Can I just, sir
8 if I may --

9 CHAIRMAN CASTRO: Yes. You have the
10 last word.

11 VICE ADMIRAL DeRENZI: Neither the
12 Secretary of the Navy nor the Chief of Naval
13 Operations has told me that my mission is to get more
14 convictions. My mission is to ensure a fair,
15 effective and efficient military justice system.

16 And as my peers said, commanding
17 officers are responsible for the safety, the welfare
18 and the good order and discipline within their
19 command. They have difficult leadership decisions to
20 make and we provide them experienced judge advocates
21 to advise them in making them, and they make those
22 decisions case by case, day in and day out, on the
23 specific facts and circumstances of each case, and
24 they try to do what's right in each case, not what's
25 easy, not what's expedient, and not what is a

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1 perception of what's expected of them.

2 CHAIRMAN CASTRO: I want to thank all
3 the panelists. This concludes our briefing. It has
4 been extremely informative to all of us, and we
5 appreciate not only your service, but your
6 participation today, and I know that there's veterans
7 out in the back of the audience so we also want to
8 acknowledge their service and their commitment and
9 their involvement in today's process as members of
10 the audience.

11 I also want to personally thank our
12 Commission staff who put this together. I
13 particularly want to highlight Vanessa Eisemann from
14 our Office of the General Counsel, who did a
15 spectacular job of putting together the panels in
16 this event today. Thank you.

17 I also want to acknowledge Pamela
18 Dunston and her staff, who are responsible for all
19 the logistics of bringing us all together here today.
20 Their efforts really have contributed to this
21 spectacular event.

22 Lastly, I want to remind everyone that
23 there is an opportunity to submit comments for the
24 record. You can submit materials or public comments
25 to us in one of two ways, either by mail at the U.S.

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1 Commission on Civil Rights, Office of the General
2 Counsel, here at 1331 Pennsylvania Avenue, N.W.,
3 Suite 1150, Washington, D.C. 20425, or you can send
4 them via email to publiccomments@usccr.gov.

5 We look forward to preparing the report
6 and sending it -- yes, that's right, you had a motion
7 you wanted to make.

8 COMMISSIONER ACHTENBERG: I'm wondering
9 if my colleagues would consider a request that we
10 keep the record open for an additional 15 days, given
11 the level of public interest in the topic.

12 CHAIRMAN CASTRO: So, rather than 30
13 days we would have 45?

14 COMMISSIONER ACHTENBERG: Forty five
15 days. Is that agreeable?

16 CHAIRMAN CASTRO: Do we agree to that by
17 unanimous consent? So you actually have, members of
18 the public, 45 days from today to submit your public
19 comments and then we do look forward to preparing and
20 sending our report with findings and recommendations
21 on what we have learned here today, to the President
22 and Congress.

23 Thank you. It is now 2:45 and we
24 adjourn this hearing.

25 (Whereupon, at 2:45 p.m., the hearing was adjourned

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