

MILITARY JUSTICE REVIEW PANEL (MJRP)

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OPEN SESSION

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TUESDAY
JULY 18, 2023

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The Military Justice Review Panel met in the Auditorium at the National September 11 Memorial and Museum in New York, New York, at 10:51 a.m. EDT, Elizabeth Hillman, Panel Chair, presiding.

PRESENT

Dr. Elizabeth Hillman, Chair
Judge Benes Z. Aldana
Capt(R) Steven Barney
Col(R) Kirsten Brunson
MG(R) John Ewers
Col(R) William A. Gunn
MG(R) Robert Kenny
Col(R) Lawrence Morris
Col(R) Tara Osborn
Judge James Redford*

Capt(R) Bryan Schroder

Judge Jeri K. Somers

MJRP STAFF

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Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Ms. Amanda Hagy, Senior Paralegal

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Ms. Kate Tagert, Staff Attorney

Ms. Terri Saunders, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

***Participating virtually**

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Adjourn

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

2 10:51 a.m.

3 COL. BOVARNICK: I got you. If we have
4 everyone, we can get started a little early here.

5 Okay, so just for the members, tab 6
6 is the extensive biographies for our three
7 members that I'm going to introduce here briefly.

8 And then the panelists will talk a
9 little bit about their organizations, and then
10 open it up for questions.

11 So we have from your left to right,
12 Mr. Peter Perkowski, from Minority Veterans of
13 America.

14 Dr. Lorry Fenner from the Service
15 Women's Action Network; and Mr. Josh Connolly,
16 from Protect Our Defenders.

17 So, Mr. Perkowski, let's start with
18 you for some brief introductory comments, and
19 then we'll go down the row and then hand it off
20 to the members.

21 MR. PERKOWSKI: Good morning members.
22 I'm Peter Perkowski, Legal and Policy Director of

1 Minority Veterans of America.

2 Our mission is to create community
3 belonging, and advance equity for minority
4 veterans.

5 For us, that means veteran populations
6 that have felt marginalized or under served, and
7 under represented historically during their time
8 in military service, and afterwards.

9 That includes women, veterans of
10 color, LGBTQI veterans, non-religious/religious
11 minority veterans, immigrant veterans, and
12 veterans living with HIV.

13 So, a lot of people represented there.

14 And we advocate not just on behalf of
15 veterans, but also those who are in-service, who
16 want to rejoin the service, who are looking to,
17 or who have historically faced barriers in
18 service, or joining the service, and trying to
19 reduce those barriers.

20 I'm a lawyer. I've been involved in
21 military and veteran justice issues for about 10
22 years, including criminal justice.

1 I have acted as civilian defense
2 counsel in some courts-martial, courts martial,
3 excuse me, and administrative separation boards.

4 And because of this, my perspective
5 may skew a little bit more to the defense side of
6 things, than my co-panelists. Maybe only
7 slightly.

8 In addition, because of my work in
9 advocacy, well, most of my work in legal and
10 advocacy has centered on LGBTQI veterans. So, my
11 perspective may come from that lens.

12 Thank you.

13 DR. FENNER: So you'll hear, I guess I
14 should turn it on. So, you'll have a lot of the
15 same things from all of us because we work with
16 the same communities, and we actually work in
17 coalitions together, as well.

18 SWAN is a 501(c)(3). We're non-
19 partisan, not apolitical. Today, there are about
20 350,000 women on active duty, and over 2 million
21 women vets. The most in history.

22 We advocate with DoD, the VA, and help

1 educate Congress on our particular issue.

2 Our main issue is sexual assault and
3 harassment. But when I say that, you know, it's
4 very complex and many things go with that between
5 suicide, homelessness, and other issues.

6 We know that the issue that needs to
7 be resolved is culture, a culture change. And
8 so, we work on long-term structural change in
9 order to achieve that.

10 We also do file as amicus with court
11 cases, so we do some legal things. And I guess I
12 should do the disclaimer. I am not a lawyer. I
13 am a historian.

14 So we also again, work with our
15 coalitions and we work on minority issues, not
16 just women's issues. And that's where we come to
17 associate a lot.

18 Today I'll be talking a lot about
19 giving you examples from our case manager, who
20 gets a lot of the calls from active duty women,
21 and service women, and some others that we can
22 help.

1 We have about 10,000 members directly,
2 and 45 others that reach us, 45,000 others that
3 reach us through our social media.

4 And then again, we try to amplify both
5 our coalition partners, and our own voices
6 through those means.

7 We were actually founded in 2009 out
8 of veterans' organization, a women's veterans'
9 organization, that was focused on getting women's
10 claims through the VA.

11 What our forebearers noticed was that
12 a lot of those were MST claims, because MST was
13 not recognized within the PTSD realm with the VA.

14 So, SWAN broke off and decided to
15 focus on active duty women, and military sexual
16 assault and harassment, specifically.

17 We also then started noticing that
18 part of these culture changes, are about women
19 not having equal opportunities to serve in all
20 career fields.

21 And you may be familiar with, we just
22 resolved a case, SWAN v. Austin, that was 10-12

1 years in the resolution, that was about the Army
2 Leaders First Program.

3 We're also working on now bringing the
4 National Guard into that, and we watch carefully
5 the DACOWITS work on special operations, women on
6 submarines, and the integration of Marine basic
7 training, which Congress has demanded.

8 So our goals are, the big lofty one,
9 eliminate sexual assault and harassment in the
10 military, and support the victims. And in the
11 VA, by the way.

12 Hold the perpetrators accountable
13 through the military justice system; and, have
14 MST and women's and minority needs met by the VA.

15 Thank you.

16 MR. CONNOLLY: Good afternoon, I'm Josh
17 Connolly. I am Senior Vice President of Protect
18 Our Defenders.

19 I was on the Capitol Hill for 16
20 years. Was with Congresswoman Jackie Speier, who
21 was the ranking member, and then Chairwoman of
22 the Military Personnel Subcommittee, for a good 8

1 years.

2 And, I worked closely with her to
3 draft all sorts of amendments to address military
4 sexual assault, and harassment.

5 And that's what brought me to Protect
6 Our Defenders.

7 Like Dr. Fenner's organization, we aim
8 to address military sexual assault and harassment
9 by wholesale cultural change, within the
10 military.

11 We're dedicated to ending sexual
12 violence, victim retaliation, misogyny, sexual
13 prejudice, and racism in the military, and
14 combating culture, culture that's allowed it to
15 persist.

16 We also have a pro bono legal network,
17 pretty much the only of its kind in the country,
18 providing free legal services specifically for
19 survivors of military sexual assault, and
20 harassment.

21 And bystanders and whistleblowers who
22 are suffering from retaliation for intervening,

1 or reporting sexual assault or harassment.

2 Services often include victim legal
3 representation for the military justice process,
4 protection from retaliation, discharge record
5 corrections, and assistance with obtaining needed
6 health care.

7 So thanks for letting us participate
8 today.

9 DR. HILLMAN: So it's great to see old
10 friends, and meet new ones here. I'm grateful
11 for everyone who decided to join us for this
12 public session, of the Military Justice Review
13 Panel.

14 On behalf of the panel, I want to
15 thank you for your time and expertise.

16 I'm going to focus on a few questions
17 here that will be familiar to you, as you've been
18 thinking and working on these issues.

19 And then other panelists will jump in
20 too with questions, as we move through this.

21 The first set of questions are about
22 changes in the military justice system. The

1 Military Justice Act of 2016 introduced a lot of
2 changes.

3 And your constituents, the folks you
4 hear from and that you represent, have been
5 affected by those, by those changes.

6 So, how would you characterize what
7 kind of impact the Military Justice Act of 2016
8 has had on the people you're representing before
9 us today?

10 MR. PERKOWSKI: I guess I'll go first,
11 thanks.

12 I would say the modifications to sex-
13 based offenses, has been most impactful for both
14 women and sexual minorities.

15 So we saw Article 93a prohibited
16 activity with a recruit, or trainee. A new
17 Article 120c, with other sexual misconduct. I
18 don't think that was actually in 2016, it might
19 have been later.

20 So indecent viewing, visual recording,
21 broadcasting, and indecent exposure all came in,
22 which we view as a positive change that protects

1 as I said, women and sexual minorities.

2 And then I think there was
3 clarifications to the Article 130 for stalking,
4 as well.

5 All of those had a great impact on our
6 constituencies.

7 DR. FENNER: I'm going to be a wet
8 blanket. The changes that we see, you know,
9 government relations and working with Congress
10 and DoD and VA, are positive.

11 They are pushing in a positive
12 direction, and have shone a light on some of the
13 most serious problems.

14 But I have to say that young people
15 that call us, and some older ones by the way,
16 don't quite see those changes at the ground level
17 in an effective way yet.

18 And of course, that's not necessarily
19 your purview, but I do know you do some field
20 trips and talk to some of the lower ranking
21 people, as well.

22 So I would have to say our case

1 manager is not, would not report to me that she's
2 seen massive improvements, especially if you go
3 back to 2016.

4 If I gave our laypersons that, they
5 would say well, these are kind of esoteric, yes
6 that will help, but you know, where does the
7 rubber meet the road for me.

8 So we of course, have worked on this
9 quite a bit with Congress. And we see the
10 positivity, especially over the past two years in
11 the NDAA 22 and 23. But of course, some of those
12 won't even take effect until December.

13 So at my level, it's all positive and
14 we're going to get there sometime. But at the
15 ground level, we're still seeing the problems,
16 and having to work on those problems that haven't
17 quite affected yet.

18 Almost all of our callers said they
19 used outside counsel, because they didn't trust
20 the system. And that even their own attorneys
21 were not very helpful to them.

22 I have two quick examples. One is

1 public, and one I can't give you the details of.
2 And both of them really center around
3 retaliation.

4 One is the public notice of Sergeant
5 Sandy Marquis, that there was a problem in the
6 family and she was reported to Child Protective
7 Services in North Carolina, while at Fort Bragg.

8 That was resolved. She was completely
9 you know, resolved of any problems.

10 She transferred to Fort Hood, we'll
11 leave it at that. Once she got to Fort Hood, she
12 lobbied a sexual assault claim for herself and
13 another soldier, through SHARP.

14 Her commander called Texas Child
15 Protective Services, and they started a
16 reinvestigation of what had been resolved in
17 North Carolina.

18 And the commander brought her up on
19 charges for court-martial for child, child
20 neglect and for obstruction of justice.

21 The court martial was dismissed after
22 a year, so the commander took the next step to

1 try to put a GOMOR in her file. The official
2 letter of reprimand.

3 It took another year for that to be
4 taken away. But in the meantime, right when it
5 hit she was given 10 days to decide whether to
6 get out of the service. She had a 16 year
7 career.

8 By the time it was taken away, she
9 said, I knew they were trying to get me out of
10 the service whatever way possible.

11 And she was still deciding in 2022
12 whether to leave or not.

13 The other case, so that was a
14 retaliation case. This other case that has come
15 to us, and I won't mention service or anything
16 because it might give it away.

17 A young person who is in a very
18 respected career field, is in an abusive
19 relationship, and personal violence with a higher
20 ranking officer. Same service, also a very
21 distinguished profession.

22 She finally gains the courage to

1 decide to make a claim of abuse. The other
2 person finds out and levies an abuse charge in
3 retaliation. And it hits the base first, the
4 commander first.

5 So now the other young person if you
6 used accuse and accuser in this context, it will
7 be very confusing, she has to go through a court
8 martial.

9 She has obtained outside investigators
10 and attorneys. And she is asking for a general
11 discharge, because she was afraid of the court
12 martial.

13 If she gets a general discharge, she
14 probably won't be able to keep her career.
15 She'll be out of the service, but even her
16 professional career will probably be lost.

17 But she's willing to do that because
18 she's afraid of the consequences.

19 So, those are just two cases of what's
20 happening on the ground today with retaliation.
21 And that will come up over and over.

22 Thank you.

1 MR. CONNOLLY: So from an intake
2 perspective, I don't think there's anything that
3 I can point to that would indicate that there's
4 more faith in the system, or that the system's
5 working necessarily better.

6 From a data perspective, and the only
7 data that we have access to is the SAPRO office's
8 data. I don't think there's anything we can
9 point to either, that shows that the system's
10 working better.

11 When we look at the most recent
12 report, we see that although we don't have the
13 prevalence data point, which is super important,
14 and I would urge SAPRO and legislators to require
15 the prevalence data to be collected annually, we
16 see unrestricted reports going, kind of flat
17 lining, but we see restricted reports increasing
18 a lot.

19 Even after you take into account the
20 conversion of restrictive reports going to
21 unrestricted.

22 So, I'm deeply troubled by the

1 continued statistics that indicate that this
2 problem isn't getting any better.

3 I would also point to the Military
4 Academy Report, where we see a drastic increase
5 in the lack of confidence that individuals have,
6 that their commanders and leadership within the
7 academies are taking these issues seriously.

8 And the huge uptake in both
9 prevalence, and prevalence of harassment and
10 assault.

11 So I'm deeply troubled by the
12 statistics and yes, I don't, and to Dr. Fenner's
13 point, yes, we have been working with
14 policymakers in Congress, we've done a lot. And
15 the military's done a lot.

16 I just see no, I don't see that
17 translating into a, some sort of cultural shift
18 that's resulting in this being treated any
19 differently.

20 And I mean, I think from a rhetorical
21 standpoint, we've heard the leadership in the
22 military say the right things consistently. But

1 I, they've always kind of said that.

2 I just have not seen that translate
3 into actual data, to indicate that this problem
4 is getting better.

5 CAPT SCHRODER: When you say prevalence
6 data, what do you mean?

7 MR. CONNOLLY: So, there are the people
8 that come forward to report both unrestricted,
9 and restricted.

10 But the real important number is the
11 prevalence survey that is done, that asks people
12 if they've been harassed or assaulted. And many,
13 many other questions.

14 That is not done annually. And it
15 really does need to be. And the pushback we got
16 when Congresswoman Speier and I tried to get this
17 to be done annually was, we survey our service
18 members to death and they have, they have to
19 answer so many surveys.

20 My answer to that would be if this is
21 really a priority, and we're spending billions of
22 dollars on this, we have, and this is an issue of

1 retention, readiness, and resilience of our armed
2 forces, and it's having a really negative effect
3 on that, to take it seriously would be at the
4 very minimum, to have prevalence data annually.

5 It really is, you can't really, I
6 mean, ideally you want the delta between
7 reporting and prevalence to decrease.

8 That is really the way to discern
9 whether people are having faith in the system,
10 and whether the actual prevalence number is going
11 down and unrestricted reports are going up. And,
12 we don't always have that data.

13 DR. HILLMAN: Thank you.

14 In terms of you've talked a lot about
15 culture change. And just to pull you back to our
16 purview, culture sounds injustice, so they're not
17 entirely distinct.

18 But our purview is to review and
19 assess the military justice system over a long
20 period of time, and to make sure we're getting
21 the right data that we need in order to do that.

22 And you've talked a lot about data.

1 Where should we be looking to get the
2 information? You mentioned Mr. Connolly, that
3 the gap, for the gap to decrease between
4 reporting and prevalence, we would have a better,
5 we would have more accurate indicator.

6 But of course, what we want is for the
7 prevalence to decrease, or as Dr. Fenner said,
8 you know, to end you know, in this realm of
9 behavior that we want to discourage and avoid.

10 So what kind of data should we be
11 getting, that would help us actually answer the
12 question of the kind of impact this has had on
13 the people that you're representing?

14 MR. CONNOLLY: That's a great question.

15 I mean, I think I'm troubled that the
16 only data we currently have is SAPRO data. I
17 think the Fort Hood example is very instructive
18 of after the Vanessa Guillen tragedy, the
19 internal Inspector General basically did a deep
20 dive and came back and said everything looks
21 good.

22 The base commander didn't believe

1 that, nor did the Secretary of the Army, so they
2 hired this impartial group of experts to come
3 and do a deep dive on Fort Hood, to look at the
4 culture and prevalence of harassment and assault.

5 And they came up with a radically
6 different conclusion. And 50 something
7 recommendations to implement.

8 So that's all to say that I think
9 fresh eyes and impartiality, and objectivity, and
10 a group that's outside of the military to go in
11 and look at both from a macro perspective what's
12 happening, but also a micro perspective of
13 looking at what bases and what leadership are
14 getting this right.

15 How to scale that, and who's getting
16 it really wrong. And what are the impacts of
17 that. And we don't have that data.

18 And from a cost perspective, I mean,
19 the Fort Hood independent commission cost
20 something like \$250,000.00. I mean, it's a drop
21 in the bucket.

22 So I really would urge, and Protect

1 Our Defenders worked with Senator Warren's
2 office, who is the chairwoman of the Personnel
3 Subcommittee on the Senate, to have a third party
4 look at the military academies.

5 We're hoping that RAND is the one
6 that's selected. But really, I think we need, we
7 need independence experts to really do a deep
8 dive, and to come up with their own independent
9 conclusions and data, that we can look at.

10 DR. FENNER: I agree completely. There
11 are I think a couple of other things. Climate
12 surveys, are climate surveys, are climate
13 surveys, are climate surveys.

14 And as Josh said, they're climate
15 surveyed to death. But obviously, we're not
16 asking the right things. We're not getting the
17 right data.

18 So, if an independent body that knows
19 better could do a climate survey that matters in
20 this area, and I'm not an expert, historians
21 sometimes don't like sociologists because of
22 quantitative stuff. But it's real in this issue.

1 The other thing that we notice and get
2 calls with all the time, and I talked to some
3 junior commanders, too, at the company level who
4 have to kind of execute and have some information
5 from them, too.

6 But the time limits it takes to do
7 investigations. Now we know some flexibility
8 needs to be included because of the collection of
9 evidence.

10 But the time limits should be looked
11 at. How long do these investigations take?
12 People PCS. People who are the accusers wait
13 forever.

14 And a lot of times they can't be
15 separated from the accused. They can leave
16 voluntarily, but there goes, you know, uprooting
17 a family. Maybe they're in a great job, they're
18 moving to somewhere else.

19 So time limits on investigations. The
20 other thing is the relationship of retaliation
21 and collateral charges, to those who are doing
22 the accusing.

1 Again, lot of examples of those who
2 are the accusers, then being retaliated against
3 with charges.

4 Sometimes they're exhibiting if
5 they've experienced military sexual trauma,
6 they're exhibiting some negative behaviors that
7 then gets them charged.

8 And the first thing that people do is
9 put them out of the service on other than
10 honorable discharges, which of course, hurts
11 their VA disability and monetary claims.

12 So the only other thing I would
13 encourage again, is that I know you interview
14 very smart people and people that aren't maybe as
15 smart, like us.

16 JAGs and judges, and everybody else.
17 University professors. Again, if at this table
18 we're sitting, some of the accusers separate from
19 the accused, some people who served on those
20 panels, the junior company grade commanders who
21 have to execute.

22 Those interviews might be really,

1 really informative.

2 Thank you.

3 MR. PERKOWSKI: I agree completely with
4 my colleagues. I will add though, that
5 quantitative data is not the only data.

6 And if the quantitative data isn't
7 showing you what you need to see, then it's not
8 as, as my colleague pointed out, it's not useful.

9 So, qualitative data may be the
10 answer. Listen to the people on the ground.
11 What is happening in these units, in these bases,
12 in these locations.

13 And you know, addressing kind of the
14 core issue, which isn't just culture, it's about
15 radicalization.

16 It's about misogyny. And it's about
17 how we, frankly we are training our young men, or
18 how we aren't training our young men.

19 DR. HILLMAN: Thank you.

20 I'm going to return to a topic that
21 you raised actually, that's trust. And that you
22 suggested you've seen an erosion of trust since

1 in notwithstanding, or because of the changes
2 that have happened in recent years.

3 Could you talk a little bit more about
4 that, how you think, how you think that trust is
5 lost, at what point?

6 And also specifically with the,
7 another major change pending for us, the stand up
8 of the Office of Special Trial Counsel, whether
9 you think folks who would be otherwise
10 distrustful, view that as an opportunity to
11 restore trust in a system.

12 DR. FENNER: Again, for those of us who
13 have worked on this for years with very important
14 people. Senator Gillibrand, Representative
15 Speier, the others, this is a very positive
16 change, and we can see change coming.

17 But for a young woman or man who is
18 assaulted today, it's too late. And they, they
19 don't know a special trial counsel from their
20 next you know, MRE.

21 So again, I don't want to be a total
22 wet blanket, but it takes some time and we know

1 that.

2 I can tell you some of the, I can also
3 submit stuff in writing if you guys want the
4 lists.

5 But from our callers, they have lost
6 trust and faith in their commanders, and faith in
7 the system.

8 They were branded as liars in the
9 courtroom, and their own lawyers were sometimes
10 worse than their commanders.

11 They also talk about retaliation. My
12 papers aren't in order anymore. And they just
13 time after time, cite instances of where the
14 trust in the system has failed.

15 Again, the longer an investigation
16 goes on, the more they and their families suffer.
17 They're isolated, they're ostracized.

18 One of them said they felt like they
19 would have to go and commit suicide, or try to
20 commit suicide, to be believed that this terrible
21 thing had happened to them, because they
22 basically weren't believed by law enforcement

1 investigators, or the justice system.

2 So, we have a longer list that we can
3 submit to you, but that's the kind of calls we
4 get about trust.

5 MR. CONNOLLY: Yes, I think once trust
6 is lost, it's nearly impossible to gain back. So
7 I think to Dr. Fenner's point, it may take a
8 whole new kind of cycle of folks that are subject
9 to the military justice system.

10 That are subject to the improvements
11 to see that trust gained, or retained. Yes,
12 which is going to take a long time.

13 So I think there's going to be a
14 substantial lag between the actual implementation
15 of these things, and hopefully the trust that can
16 be garnered, can be garnered by them.

17 MR. PERKOWSKI: Yes, I'm going to come
18 at this from the perspective of the LGBTQI
19 community, which has a long history of being
20 policed and criminalized in the military.

21 Which, you know, has resulted, and you
22 know, even now, the criminal, the military

1 justice system has been kind of weaponized
2 against them in the sense that, and I don't, I
3 believe you should believe the victims.

4 But because of our history of
5 experiences in this, the false accusations which
6 may be motivated by bias, which may be motivated
7 by identity-based bias.

8 So, there is a lack of distrust. And
9 like Dr. Fenner said, my community sees the
10 defense counsel as inadequate, as well.

11 It's part of the system. That person
12 is not going to represent me well. And so
13 they're constantly seeking civilian defense
14 counsel either as separate counsel, or as a co-
15 counsel to kind of check defense, JAG defense,
16 detailed JAG defense.

17 I think as far as the OSTC, we're
18 taking a wait and see approach whether this
19 procedure is going to work as intended.

20 And whether it's going to be resulting
21 in improvements for victims of sex-based
22 offenses, is kind of TBD right now.

1 But speaking for the accused, I guess
2 it depends on how OSTC view their roles, or how
3 they approach these cases.

4 Again, historically gay men in
5 particular, have been viewed as predators. And
6 particularly in the military, you know, as early
7 in recent history as the 90s, large majorities,
8 two-thirds percent of men in the military, did
9 not want to serve with gay men.

10 Because they didn't want to share a
11 shower with them; they didn't want to share. And
12 those attitudes kind of still persist.

13 So, if you have an accusation against
14 a gay man in the military about sexual assault,
15 or indecent touching, or indecent viewing, our
16 fear is that those are going to be believed when
17 in fact, we know that it's straight men who do
18 the assaulting of women, and of gay men.

19 And yet, women victims are not
20 believed, but male accusers are believed when
21 they're accusing other men.

22 So, will OSTC view these cases

1 dispassionately? Will they base decisions based
2 on evidence, or will they succumb to inherent
3 bias? Those are all the questions that we're
4 waiting to see.

5 MR. CONNOLLY: Can I add something
6 really quickly?

7 So hopefully you've all seen it. I
8 mean, the legal outcomes on these cases is pretty
9 abysmal from a data perspective.

10 So if you're kind of rationally
11 looking at this, you've been assaulted, the
12 probability of the end result being a conviction
13 and confinement is so minute.

14 The likelihood that you're going to be
15 retaliated against, ostracized, is going to be
16 much, much higher.

17 So just like a cost-benefit analysis,
18 it's really tough to decide whether to come
19 forward, or not.

20 And then there's this false
21 accusations piece that we're hearing a lot about
22 now, of service members that say well I don't

1 even, I'm not even going to talk to women
2 anymore.

3 That I don't want to be alone with
4 them because that will equal me getting charged
5 with sexual assault, or sexual harassment.

6 So, I'm not going to characterize that
7 one way or the other. But I would say that
8 that's where leadership needs to come in and say,
9 this isn't about having healthy relationships
10 with your colleagues and your fellow service
11 members.

12 This is about committing crimes. And,
13 this false accusation narrative is simply not
14 accurate.

15 I mean, statistically, one, there's
16 very little to zero, there's zero incentive to
17 come forward and have a false, to accuse someone
18 falsely.

19 Because again, you're going to be
20 retaliated against. You're going to be
21 ostracized. That's not the issue here.

22 This is about predatory behavior, and

1 convicting those that have done illegal acts.

2 HON. GUNN: Dr. Fenner, I want to
3 follow up on something that you said, and that is
4 dealing with the lack of trust by, with respect
5 to victims, and they're not trusting their
6 lawyers.

7 So I'm thinking about say the, what is
8 it, the special, the victim's counsel model. Are
9 those the lawyers that they don't trust, or other
10 lawyers in the system?

11 Are we talking about a victim not
12 trusting the prosecutor who is supposed to be
13 handling the case, and, or what?

14 DR. FENNER: They -- sorry. They yes,
15 and yes, and yes. They don't trust the
16 prosecutors because they're part of the system.

17 Also, by the way, you all know that
18 this kind of gets down to, and something that you
19 can look at and collect data on is, what are the
20 composition of when you see, you walk in, and you
21 see the judge and the two counsels, and the
22 panels, and whether any of those people look like

1 you.

2 No matter whether you're the accused
3 or the accuser.

4 So we were working on Article 25, and
5 for the randomizing of panels. And I think
6 that's a good step, but it's hard.

7 So they also don't trust some of their
8 own defense lawyers. Or I shouldn't say their
9 defense lawyers. But the lawyer advocates for
10 them, because they're also part of the system.

11 The calls we get indicate that they
12 think they're given short shrift. Even they
13 don't believe them.

14 They're part of an alter --

15 (Simultaneous speaking.)

16 DR. FENNER: They're -- that's not me.
17 They are again, part of the system and they're
18 overworked.

19 They get a lot of ideas about
20 investigators, law enforcement, others that are
21 overworked and don't have time for them.

22 And sometimes, their cases are delayed

1 because they fall down on the importance level,
2 if you will.

3 So there's a complete lack of trust.
4 if somebody can get a pro bono lawyer, if
5 somebody can afford outside counsel, that is what
6 they're doing right now.

7 I hope that improves. I mean, I have
8 to be a little bit of an optimist but we've been
9 in the game for a long time now.

10 So, sorry I can't.

11 CAPT. ALDANA: Dr. Fenner, does that
12 include the victim counsel?

13 DR. FENNER: Yes.

14 CAPT. ALDANA: I just wanted to be.

15 DR. FENNER: Yes.

16 CAPT. ALDANA: Okay.

17 DR. FENNER: Yes. And now again, not
18 a lot of our callers yet have enough experience
19 with the system to differentiate.

20 But yes, if you're part of the system,
21 they think you're part of the problem. And, the
22 sensitivities just aren't there.

1 So if the people within the system
2 understand better that the people have been
3 traumatized, they have not only experienced it
4 but they hear stories from their cohort that
5 they're going to be re-victimized, re-
6 traumatized, then there's even an unconscious
7 bias towards them not appreciating the people who
8 are supposed to be on their team.

9 But there's constant comments about
10 even the people that were supposed to be on my
11 team, didn't believe me, didn't support me.

12 Weren't trained well enough. Look
13 like they're rushed. Wanted to get out of there
14 quickly.

15 That's what we hear.

16 MG EWERS: Is there any indication of
17 satisfaction or dissatisfaction when they
18 ultimately go for a civilian counsel, rather than
19 military counsel?

20 And, do you have any data on that?

21 DR. FENNER: I don't have numbers, but
22 it appears that they have confidence in that

1 outside counsel; and some of them, the pro bono
2 attorneys that will come are just fantastic.

3 We work a lot with the Yale law
4 student clinic, and with the Wake Forest law
5 student clinic, and others.

6 Yes, they have more confidence and
7 they tend to get better outcomes although not all
8 of them are perfect because again, they commit
9 some crimes from the traumatization along the
10 way.

11 Of course, minor ones not like we're
12 talking about against them, but I hope that
13 answers the question.

14 MR. CONNOLLY: Yes, I mean, just
15 empirically we've had great feedback on our pro
16 bono network. And they do amazing work.

17 And they're filling a gap and a need
18 that's clearly there.

19 From an SVC standpoint, yes, there's
20 some good ones, some bad ones. We've heard from
21 SVCs that their caseload is just, makes them
22 unable to keep up and provide the services and

1 the legal support that they would like to.

2 So I would urge, and I know the
3 military's been trying to staff up their SVC
4 cohort as much as possible. I think more needs
5 to be done there.

6 And then there's just the impediments
7 of access to evidence, lack of transparency.
8 Just kind of structural impediments to provide
9 the legal support that victims tell us they, they
10 needed, and want.

11 DR. FENNER: Can I jump in, just once
12 more. The other thing that we hear is about the
13 investigators.

14 So to the extent that your
15 investigation can be tied to the lack of staff
16 among the investigators and some of the bias
17 around conscious bias there, that some of the
18 junior commanders are saying as you create this
19 Office of Special Trial Counsel, and some
20 resources are moving in that direction, we see
21 the resources at this lower level where crimes
22 might still be charged, to get those cases over

1 with in a hurry if they can get the accuser to
2 agree or acquiesce, that it's also the staffing
3 and resources that the investigators are getting.

4 And of course, those two things are
5 tied.

6 MR. CONNOLLY: Sorry, yes, just to
7 reiterate that. That the SVCs we've talked to as
8 well.

9 I mean, as you all know, the
10 prosecution's only as good as the investigation
11 that's taken place.

12 And we've heard a lot from SVCs that
13 they're just, they're not fulsome, rigorous
14 investigations all the time.

15 And as you also know, these cases are
16 incredibly hard to prosecute. So you really need
17 highly skilled, highly trained investigators
18 doing this work.

19 HON. GUNN: Dr. Fenner, you talked
20 about the time limits on investigations as a
21 recommendation that you had.

22 I take it what you mean by that is

1 that right now, investigations are taking way too
2 long, and that's having an adverse impact on
3 victims.

4 Is that correct?

5 DR. FENNER: Yes, it has an adverse
6 effect on everybody.

7 HON. GUNN: Everybody, correct.

8 DR. HILLMAN: The accused, the victims,
9 their families, the unit. On everybody. And
10 what my comparison is, and it may seem trite, but
11 in the Air Force or in the Army, if you have an
12 aircraft go down, the commander has about 90 days
13 to finish an investigation.

14 Usually there's a safety stand down.
15 Ninety days to finish the investigation, make
16 sure you've got everything fixed before you put
17 people back in those, in those aircraft.

18 These investigations and again, we
19 understand why sometimes because of the
20 collection of evidence.

21 But when these things go on for years
22 or more, and again, people transfer and evidence

1 is kind of transitory and people forget things,
2 it makes it more, the longer it takes, the more
3 and more difficult it is for everyone involved,
4 so.

5 HON. GUNN: And I take it the
6 interpretation is that this is a problem of
7 resources, primarily?

8 DR. FENNER: That's what we're hearing.
9 But some of it is about motivation. You're the
10 commander, you've got this thing that's
11 languishing and you know, is, I'm going to use
12 the vernacular, a pain in the ass.

13 And then something else comes up that
14 seems to be more related to your good order and
15 discipline, and your efficiency and
16 effectiveness.

17 Although I would argue that the
18 previous one is, too. Sometimes they get pushed
19 down on a scale.

20 So resources is one thing. Allocating
21 those resources is another thing.

22 HON. GUNN: Thank you.

1 DR. HILLMAN: Captain Barney?

2 CAPT BARNEY: Thank you.

3 And, I really appreciate the
4 perspectives that each of you bring to this
5 discussion.

6 As I think about the changes recently
7 in the military justice system and now with the
8 stand up of the Office of Special Trial Counsel.

9 I'm, I guess I'm troubled because on
10 the one hand, one of the common themes that I've
11 heard from your testimony so far, is the fact
12 that we are not seeing the kind of changes to our
13 culture within the services that would tend to
14 bring down the experiences that, that are both
15 you know, the fact that they are having
16 individuals are having crimes committed against
17 them. And how the commanders respond to it.

18 And I think about the pace of these
19 changes. The comments that each of you have
20 shared about the challenges of, of getting good
21 data that is meaningful and helps us to
22 understand things.

1 So, I wonder if you can help me and us
2 think about as we look at this upcoming stand up
3 of the Office of Special Trial Counsel, what are
4 the things that your constituents tell you are
5 most important to them?

6 And, how can we, in our attempt to try
7 and objectively assess how well those Office of
8 Special Trial Counsels are performing their
9 mission, how can we do that? What should we be
10 looking at?

11 Are there particular areas of measures
12 or metrics, that you think are being ignored that
13 will become more important to our mission?

14 And Mr. Perkowski, would you like to
15 perhaps kick off the discussion?

16 MR. PERKOWSKI: Sure, yes. I may be
17 the least of the panelists to have some
18 interesting answers here.

19 I truly believe that this panel, this
20 committee, should consider separating military
21 defense out separately from the departments in
22 the way that the Defense Health Agency has been

1 established independently.

2 And maybe that would give victims some
3 more comfort that because of that separation,
4 they will be better represented. Or their
5 interests will be better represented.

6 But as for what data, I mean, the data
7 that you should be looking at is the data that
8 was mentioned earlier.

9 If reports, and, I forget what you
10 mentioned, but if the gap is closing, then
11 something is working, right. And it could be
12 OSTC.

13 But other than that, I don't have a
14 good answer for you.

15 DR. FENNER: I think sure, if you were
16 to collect some data on pretrial confinement,
17 apparently most of the junior commanders who have
18 to, they call it brig chasing.

19 If their soldiers are accused and they
20 get sent to pretrial confinement, that commander
21 is, because it's alleged not convicted, that
22 commander is responsible for traveling sometimes

1 long distances to make sure that that soldier,
2 sailor, airman, airwoman, is being taken care of
3 well.

4 They have to go back and forth, and
5 back and forth. And then if the judges, they
6 constantly complain that for some serious
7 allegations, there's not long enough pretrial
8 confinement, that the bar is too high.

9 And what they end up with is a soldier
10 that they can't put back on the line. I was
11 talking to a young Army commander, a soldier that
12 they can't put back into duty, who continually
13 violates restraining orders, who then they have
14 to put 24 hour guards on a dorm room to keep that
15 person inside.

16 So the person is really undergoing
17 pretrial confinement. The burden is just on the
18 small unit commander where, rather than the
19 system.

20 So if there were some data about
21 pretrial confinement, how often is it given, for
22 how long, in what cases.

1 The other thing is sentencing. Some
2 of the commanders and the victims, if you will,
3 when someone is convicted of the crime, they
4 believe the sentences are much too light.

5 So that was a constant complaint both
6 from commanders, and from our victims. So if
7 some data could be collected on you know, where
8 that sentencing is happening.

9 The final thing I would say is that
10 data collection on how much you know, we argue
11 that the cases take too long.

12 But sometimes people report that the
13 commander is eager to get rid of this case. So,
14 charging crimes at the lower level keeps them out
15 of the system that we've so diligently set up.

16 And then somebody might be discharged,
17 but they won't get bad paper. They won't be put
18 on a child sex offender registry. They will
19 leave the service. There won't be bad marks on
20 their record.

21 So some of the sentencing, pretrial
22 confinement, charging at a lower level than what

1 would be called for.

2 And I would encourage you to look at
3 harassment again. We're very happy that some new
4 crimes are under, I mean, harassment elements are
5 going to be charged under criminal element.

6 But who's doing that and whether we've
7 gone far enough, is a big question for a lot of
8 people because they believe the bar is too high.

9 As a non-lawyer, when I read the
10 elements of legislation and it, I look for and's
11 and or's, and if I see too many and's, that means
12 the bar is being set so high that it has to be
13 this, and this, and this.

14 Again, has an impact on the people.

15 Thank you.

16 MR. CONNOLLY: So I look at a few
17 things. One, caseload, seeing how many, how many
18 cases per attorney the individual, or they have.

19 But the big thing is outcomes, right,
20 of looking at the number of cases that make it
21 through the 32 process to get to court-martial.
22 And what those legal outcomes are.

1 I know you've heard a lot about 06s or
2 convening authorities, that are just, will take
3 anything through a 32 to get it to a court-
4 martial, even if it doesn't, if the likelihood of
5 a prosecution is basically zero.

6 Which doesn't help anyone. These
7 should be, the decision of whether to prosecute
8 and to go to trial, should be done by a legal
9 impartial expert that doesn't worry about what
10 the optics are of prosecuting or not prosecuting.

11 So, I'd be very interested in looking
12 at the outcomes of the cases that do make it.

13 And although we as Protect Our
14 Defenders opposed making 32 decisions binding by
15 a legal expert, mainly because we, we're really
16 concerned that a magistrate or judge should be in
17 those Article 32 preliminary hearings.

18 Again, I'll just come back one more
19 time to the investigation piece of this that
20 again, this is not going to get fixed
21 quote/unquote, without, or there's not going to
22 be an optimal system in place to prosecute

1 individuals that have, that have committed crimes
2 unless you have really well-skilled, trained
3 investigators that don't get cycled out, and do
4 non-special victims crimes investigations.

5 You really need a cadre of SVC
6 investigators that stay in that position, and
7 develop real skills over, over potentially
8 decades.

9 CAPT BARNEY: This is very helpful but
10 at the same time, I don't come away from the
11 discussion we're having feeling really good
12 about, about what we're going to be seeing.

13 Because it appears to me that you
14 know, even with your insights that you're able to
15 share with us, that it's going to be very
16 difficult for us to assess the, you know, the
17 Office of Special Trial Counsel; it's impact.

18 I don't have any answers to this
19 thing. But if the Office of Trial Counsel,
20 Special Trial Counsel, does not begin to bring
21 some of the changes that you're finally attuned
22 to in terms of the impact to the constituents you

1 work with, what's next?

2 I mean, is it to double down on the
3 Office of Special Trial Counsel? Or, where would
4 the military justice system go to try to continue
5 to bring more improvement?

6 If you have views on it, I.

7 MR. CONNOLLY: Yes, I mean, I think the
8 north star should be how do we engender trust.
9 And how do we make people, how do we not incent,
10 but how do we encourage folks to come forward
11 when a crime's been committed against them?

12 And that, I think that is the salient
13 metric. So we need to really hone in on that and
14 again, look at a base by base level of who's
15 getting this right, and who's getting this wrong.

16 Because without people coming forward
17 with unrestricted reports, there is no
18 opportunity to even to activate a legal process.

19 So really looking at how to get that
20 unrestricted report number up. And yes, I think
21 that, I think that would be my, my singular
22 focus.

1 DR. FENNER: I would completely agree.
2 The, I can't remember what the name of it is, the
3 new program where you start an investigation even
4 if it's a restricted report, so that there's a
5 data set that if somebody continues to show up in
6 restricted reports, that something can be done.

7 And I think that that's a great
8 program, but I don't think that that has filtered
9 down enough. And apparently, there's no data
10 that says its actually being done.

11 Again, the resources probably aren't
12 there. But to me, that focus on engendering
13 trust again, comes back to the accountability of
14 commanders.

15 So what you might be measuring in the
16 end game here to make sure of the effectiveness,
17 is what does the data suggest now in terms of
18 successive commanders, the numbers that even go
19 to trial.

20 What the trial outcomes are. Whether
21 they're fair, just, for everyone involved. What
22 the impact is on their lives.

1 But also again, to get back to
2 commanders. If they're failing, they're not
3 getting graded on that.

4 I'll go back to helicopter crashes.
5 If they have too many helicopter crashes, or DUIs
6 on base, their evaluations are not going to be
7 that good, and they won't get promoted into a
8 more senior position of authority.

9 What are we measuring here to be able
10 to hold commanders responsible, both for military
11 sexual assault and other crimes, but also the
12 outcomes of these trials?

13 At what level are they charged? How
14 quickly can we do them, but in an adequate way?
15 And so on.

16 And to say one more thing about that
17 and I notice sir, you're ready on the button, is
18 to say commanders calls are great, great.

19 They do colored glossy videos and they
20 tell the troops they're really serious about
21 this, and there will be zero tolerance.

22 But the actions don't match. That

1 commander isn't out there walking through the
2 barracks, going to the softball games, you know,
3 whatever.

4 What do you hear people saying?
5 Actually talking to people. If they're held
6 accountable for everything else, I hope the
7 system graduates to holding them accountable in
8 this way.

9 Now again, I know that you work on a
10 particular thing. Hold commanders, OSTC
11 personnel, and the rest of the people in the
12 system. Collect that data, and hold people
13 accountable.

14 Sir?

15 MG EWERS: I think you raise some
16 really interesting points. And I guess the
17 question I have for you is based on the
18 distinction between crashing airplanes and
19 creating a military justice system in which
20 outcomes, I mean, what's, how do you measure, do
21 you have any ideas about how it is that you
22 measure what's a fair and you know, well run

1 court-martial, or military justice matter?

2 I mean, that's the hard part is just
3 the two of you sitting side by side would
4 disagree on a particular outcome, depending on
5 whether you were you know, rooting for the
6 defense, or rooting for the prosecution.

7 So that's the hard part. Can you
8 think of any data that might help us there?

9 DR. FENNER: I'm going to turn it over
10 to Josh, but I would like to say that's why you
11 all are sitting up there because you're the smart
12 ones.

13 And I know the, my experience in the
14 military instance, has been the military does
15 hard things all the time.

16 And we sat in with DAC-IPAD, and some
17 people were saying if it's not broken, don't fix
18 it.

19 And it's like it's been broken for a
20 long time. And it's too hard to do, like
21 randomization of the jury.

22 So, I am fully confident that the

1 military and those of you that are charged like
2 this want to, changes will happen.

3 Now I'm trying to remember the first
4 part of your question, sir. It is really hard.
5 What's the comparison between a helicopter crash
6 and a military justice system?

7 I'm going to go back to, sir?

8 MG EWERS: I guess, I mean, you can't
9 measure outcomes. You can't just say okay,
10 convictions and acquittals, that's never going to
11 get you there.

12 Do you have anything that would help
13 us?

14 DR. FENNER: I'm going to go back to
15 Josh because it goes back to this data, and how
16 it aligns the prevalence data with the conviction
17 rate.

18 MR. CONNOLLY: Yes, I mean, it's two
19 things. It's the perception and reality. So if
20 they, if people perceive that a system is
21 working, and by working, which is your central
22 question, it's do people have a fair shot at

1 justice?

2 Are people not, do they have a
3 caseload that's reasonable. And are there
4 competent people that understand these crimes,
5 and understand the trauma that's associated with
6 them, representing these people?

7 To your point, yes, you can't just
8 look at convictions and acquittals. My hunch is
9 that some of these cases that are brought to
10 trial currently, that have no chance of being,
11 resulting in conviction, probably won't go to
12 trial.

13 And the conviction rates will rise, is
14 my prediction.

15 MG EWERS: So will that increase
16 confidence in the system, or because we're not
17 taking as many cases to court, will that reduce
18 confidence in the system?

19 And just quickly because I want to
20 follow on with this, is that, are there any
21 changes that you've seen over the last several
22 years, you can decide how many that is, that you

1 think have kind of backfired? Well intended, but
2 not really good for the system?

3 MR. CONNOLLY: I have a hard time with
4 restricted reports. I don't know the answer. I
5 understand that it can, that it provides victims
6 with the ability to seek health care, that they
7 otherwise wouldn't have.

8 But I also see it as kind of an escape
9 valve for, for folks to be able to do a thing,
10 but it doesn't at all result in any sort of
11 accountability for the perpetrator.

12 But yes, I still grapple with that.
13 But again, I think, I think to Dr. Fenner's
14 point, I mean really what we need to see is the
15 accountability.

16 And not just by accountability for the
17 predators, but creating an environment that's
18 conducive to allowing predators to thrive.

19 And so, we really need to elevate the
20 importance of maintaining a command climate on
21 base, that reduces the probability that these
22 incidences are going to happen.

1 And increases the probability that
2 someone's going to feel confident in coming
3 forward, and reporting.

4 That is measurable. I mean, you can
5 easily ask people, do they have trust that their
6 commander if they were made aware of an assault,
7 would do the right thing.

8 And I think that's, that's scalable,
9 but hard. But vitally important.

10 MR. PERKOWSKI: Yes, I just want to be
11 clear that despite my defense perspective, I
12 don't want to call it bias, I agree with my co-
13 panelists because my organization works in
14 coalition with them on these issues.

15 And I can't agree more with everything
16 they've said. I will add that how do you know
17 what's working? Again, I think you have to look
18 at the qualitative data, not the quantitative
19 data.

20 And like Josh said, if people are
21 reporting confidence in the system, and that they
22 can if they needed to come forward, be treated

1 fairly, and that the deck is not stacked against
2 them, then you'll know you have achieved that.

3 But other than that.

4 MR. CONNOLLY: Yes, and I guess I'll,
5 one last thing. I mean, it's pretty easy to have
6 kind of some sort of out take process after,
7 after someone's gone through this really
8 difficult process of going to trial.

9 Whether their assailant was convicted
10 or not, to have some sort of debrief. And to
11 aggregate that data and see if, if folks feel
12 like they're getting their fair day in court.
13 And whether they felt like they were fairly
14 represented.

15 That's pretty easy to do.

16 MR. PERKOWSKI: And it's not just
17 trials. I mean, for offenses like harassment
18 that may not, or maybe should be tried.

19 But there are levels of discipline
20 that might satisfy a victim, that is short of
21 trial. Maybe the victim doesn't want to go to
22 trial.

1 But they need to feel a) that they
2 were heard; and, also b) that there was some
3 measure of justice that was kind of meted out.

4 And, it doesn't have to be a
5 conviction and a confinement.

6 DR. FENNER: So I would add that
7 there's one point that we might disagree on, and
8 that's the restricted reporting.

9 Because the restricted reporting does
10 allow for the collection of evidence too, which
11 again, could be very transitory and difficult to
12 get afterwards if there's not a restricted
13 report.

14 So, there's a little bit of a
15 difference there. And you'll be happy to know
16 that we do get some people saying, it didn't turn
17 out like I wanted, the victims.

18 It didn't turn out like I wanted, but
19 I think the process was fair. So there are those
20 bright spots, and you can find that evidence.

21 At a recent --

22 MG EWERS: That's a very limited bright

1 spot. I mean, again, when it's a tragedy its not
2 going to have a happy ending.

3 DR. FENNER: Absolutely. If you were
4 a different body, I would be talking to you about
5 the, on the front end -- left of boom we call it,
6 right -- that there's a lot of attention now,
7 thankfully, paid to victims and those outcomes.
8 But, we still haven't broken the code about
9 trying not to recruit people who have a
10 propensity, without violating somebody's rights
11 and profiling them.

12 About not just talking to young women
13 about, don't go out drinking with your all male
14 buddies because something bad could happen.
15 Telling young women to carry your keys in a
16 certain way, or carry mace with you or something.
17 We talk a lot to the people who might become
18 victims, we need to get left of that. And,
19 again, that's a very hard problem.

20 I did want to say something again
21 about command climate. We were just in an OSD
22 P&R meeting, and I think you might know Beth

1 Nolan, she's one of the SAPRO heads at the
2 Defense Department. And there was another VSO
3 person who was asking about, specifically, Rota,
4 Spain, said there were a lot of crimes happening
5 there, and was it due to staffing. That they're
6 so short of personnel that people go crazy and
7 rape each other.

8 Okay, I'm trying not to react to the
9 audience. But, Beth was very clear that it
10 wasn't happening in all units. All the units
11 were understaffed but people were saying, in some
12 units that were understaffed, that they had
13 complete confidence in their commanders to handle
14 situations properly. There were other units that
15 were understaffed that had no trust in their
16 commanders or systems. So, that's a way to
17 measure, too.

18 COL. OSBORN: So, I'm hearing that
19 you're hearing from your constituents that
20 there's a lack of confidence in the system as a
21 whole, or we've lost faith in the system as a
22 whole. I'm trying to kind of specify where it

1 most has broken. Do you perceive that, when you
2 say commanders, they've lost faith in their
3 commanders, who exactly do you think that -- who
4 exactly is that? And are they even commanders,
5 are we talking about the NCOs in the motor pool,
6 or are we talking about a two and three-star
7 convening authority? Do you have any specificity
8 on that?

9 DR. FENNER: I do, and it's yes, and
10 yes again. The folks that call us are usually
11 not going to talk to us about a three-star
12 convening authority, yet. They are generally
13 starting with, and I will say, leaders at every
14 level. So, is it the corporal in the motor pool?
15 Is it the NCOs who you make a complaint to, and
16 they say suck it up, you know, it's a guy's
17 world, whatever? When it starts on that
18 continuum from harassment or touching to them
19 later, a crime.

20 Is it the junior officers, the captain
21 commanders who may be overworked, or just haven't
22 fully bought into the idea that this is a program

1 that needs to be taken care of? And I will say
2 straight out that the activities in the House, by
3 the House majority, is not going to help you in
4 your program and it's not going to help our
5 constituents. Because, for every message that we
6 send that minorities and women need to be valued,
7 and that there's unconscious bias in addition to
8 conscious bias.

9 When these -- some of the military
10 people, whether they're NCOs or officers, have
11 been just putting up with the rules under DEI and
12 such, and now there's a backlash that is going to
13 tell them that they were vindicated, that they
14 don't have to do all that stuff, and do all that
15 extra work for the snowflakes and stuff, then
16 we've got a even bigger problem.

17 COL OSBORN: Likewise, on that
18 continuum, and I'm thinking chronologically, do
19 you -- what you're hearing is that there is less
20 faith and confidence in the system before a case
21 gets to trial, or -- I know you may say yes and
22 yes, but I mean --

1 (Laughter.)

2 COL OSBORN: I'm trying to separate
3 this out. Once a case gets to trial, do you
4 think that there's more confidence in that system
5 when they see a judge in a robe, a impartial
6 judiciary, or do you think it's all the same?

7 DR. FENNER: Well, it starts on the
8 one hand, but I won't say yes and yes. --

9 DR. HILLMAN: Can you hit your mic for
10 us? All right, thanks.

11 DR. FENNER: So, I won't say yes and
12 yes, but it is, because that's the precursor.
13 They might not even agree to go to trial and be
14 supportive witnesses, or anything. But, again,
15 if you walk into the courtroom and everybody
16 looks very official and everything, none of them
17 look like you, you've already been beat up by
18 counsel, your most private sexual assault reports
19 have been made public, you're being ostracized in
20 your unit.

21 But, you walk into that body and
22 already, in the pretrial questioning and stuff

1 like that, you've been made to feel like a false
2 accuser, the guilty party, it's not going to go
3 well.

4 MR. PERKOWSKI: I --

5 COL OSBORN: Do your constituents feel
6 the same way for cases that are ultimately tried
7 in the civilian sector downtown?

8 DR. FENNER: They usually believe
9 they'll get a better outcome in a civilian case
10 downtown.

11 COL OSBORN: Is that before and after
12 the case is tried downtown?

13 DR. FENNER: Yes.

14 COL OSBORN: Thank you.

15 MR. PERKOWSKI: I just wanted to add,
16 the confidence in the system actually begins long
17 before you get to a courtroom, right. And it has
18 a lot to do with how NCOs and the convening
19 authority level handle lower level offenses, like
20 harassment, right. If you are a woman in a unit
21 and that is full of demeaning, misogynist
22 comments that are not handled, you're not going

1 to report your rape because you know that it's
2 not going to even be treated seriously, given the
3 culture in the unit that you're dealing with.

4 CAPT. ALDANA: Just for clarification,
5 are we just solely focusing on sexual offenses
6 or, in terms of faith and confidence in the
7 system, how about other offenses and cases?

8 MR. PERKOWSKI: Well, I mean, I have
9 a lot to say about that. HIV, for example, is
10 criminalized in military despite, you know, the
11 successes we have seen with military treatment of
12 people with HIV, right. 99.8 percent achieve
13 viral suppression and yet everyone receives the
14 same safe sex order that was created in 1994.
15 So, there are instances of people with HIV being
16 convicted for Article 120 offenses for not saying
17 the words I have HIV, before engaging in non-
18 risky sex.

19 MR. CONNOLLY: That's a really
20 interesting question. I mean, so, for instance,
21 like, drunk driving was a really big problem in
22 the '80s all over the country, but, on bases and

1 within our military, and they got really serious
2 about it. And we're vigilant about it, and I
3 think the same goes for drug offenses.

4 I would say that if you polled or did
5 a survey on how vigilant the military is on
6 DUIs's and drugs, I think you'd get a very
7 different response than does the military, or
8 does my commander, take sexual assault and
9 harassment seriously. It'd be an interesting
10 question.

11 DR. FENNER: To-- but to that, too, is
12 that we focus mostly on sexual assault and
13 trauma. However, we also end up with disability
14 cases for the VA that, because people haven't
15 gone through the court system, they don't have
16 enough evidence to present to the VA. Or,
17 they're put out on collateral charges that look
18 like they have nothing to do with sexual assault,
19 but they do. And then, their other than
20 honorable discharge will affect what benefits
21 they get, and how their family is treated as
22 well.

1 So, although my organization
2 specifically focuses in an area, there's a lot
3 of, as you know, these problems are very complex
4 and they have a lot of issues that intersect
5 here. So, we don't have as much experience on
6 run-of-the-mill-- but, I grew up in the military
7 in the '80s and the de-glamorization of alcohol
8 and the attacks on the drug culture, this is
9 where I say the military can do hard things when
10 it wants to.

11 DR. HILLMAN: Last question to Colonel
12 Gunn.

13 (No audible response.)

14 DR. HILLMAN: General Kenny has one
15 after you, Colonel Gunn.

16 COL. GUNN: All right. My question is
17 geared, I guess, primarily to Mr. Connolly and
18 Dr. Fenner. Although, feel free to jump in here.
19 It builds on what General Ewers was asking about,
20 does perception, is it just influenced by where
21 you are, or the result?

22 What I think I hear you saying is, no,

1 that is not the case. And what I'm specifically
2 getting at is, the first time that I heard of
3 Protect Our Defenders it was about three or four
4 years ago when you all gathered information from
5 suing the military, dealing with racial disparity
6 results.

7 And then, of course, the Air Force, I
8 believe, followed up and did a racial disparity
9 study. And that racial disparity study, looking
10 at differences by race with respect to
11 non-judicial punishment, administrative actions,
12 and courts-martial, and investigations. And that
13 report had that objective data, but it also had
14 subjective data. And all of the data in that
15 report, I was not at all -- having grown up in
16 the Air Force in the 80s and '90s -- I was not at
17 all surprised by any of the objective data.

18 What surprised me, though, was to see
19 the disparity between the responses of senior
20 white officers and senior African-American
21 officers with respect to confidence in the
22 military justice system. Whereas, and this is

1 just, I'll throw it out roughly, I don't remember
2 the exact -- but, it was a flip-flop.

3 Basically, over 70 percent of white
4 senior officers had confidence in the military
5 justice system and their commanders to make just
6 decisions. But, only 30 percent, or thereabouts,
7 of African-American senior officers had
8 confidence in that same system.

9 And so, same system, different people,
10 and all of the people, the thing that they had in
11 common was the fact that they were the most
12 successful in that entire institution. And so, I
13 was shocked, personally, by that. But, it did
14 show me that it is so important to gather data,
15 objective data and subjective data. While people
16 may be tired of being surveyed, I don't think you
17 can get to that, that there is a problem, unless
18 you're getting that. I welcome your response.

19 MR. CONNOLLY: Yeah, I think it's such
20 an important point. And just, yeah -- so, I
21 think the lived experiences of individuals,
22 whether they be women or minorities in the

1 military, is just inherently different. And that
2 manifests in a lack of trust of leadership and
3 whether their cases or, if a crime is committed
4 or an allegation is made, whether that's going to
5 be treated seriously or not.

6 To your point on data. So, something
7 I fought for with Congresswoman Speier every
8 year, was to include in the prevalent survey,
9 one, to get them to do it every year. But, two,
10 to ask, if there was an independent prosecutor,
11 would you have trust in the system -- would you
12 have more or less trust in the system? Pretty
13 benign question that you'd think the military
14 would want to know.

15 The way the National Defense
16 Authorization Act works is, it gets vetted
17 through the military. So, every year I would get
18 it okayed by professional staff, and then they
19 would go to the military and the military would
20 say, no, we can't, we cannot support that
21 amendment. It didn't cost anything, it would
22 give more information, it seems really relevant

1 to this discussion. And the military, every
2 time, would pick that amendment out not to be
3 made.

4 So, again, I don't ascribe malicious
5 intent to the military and leadership on this
6 issue, or any issue, but you would think that
7 they would want to get as much information and
8 data, to wrap their hands around this issue, as
9 possible. And to fight on just gathering
10 information is deeply troubling to me.

11 DR. HILLMAN: Thank you --

12 (Simultaneous speaking.)

13 DR. FENNER: I would also add --

14 DR. HILLMAN: Just a quick response,
15 Colonel Fenner, and then we're going to go to
16 General Kenny.

17 DR. FENNER: Then I will keep it very
18 quick. Perceptions matter, and I've heard so
19 many people in the military at some of the
20 different forums say, well, that's just their
21 perception, your perception, their perception --
22 how are we supposed to work on perception?

1 Perception matters, that's where confidence and
2 trust comes from. And if the system is working
3 for you, you probably perceive that it's a good
4 system. And I think that's where your numbers
5 matter and the subjectiveness matters. Thank
6 you.

7 MG KENNY: So, thank you very much for
8 all of this, very enjoyable to listen to your
9 perspective and what you want. My question is,
10 can you help us? And what I'm looking for is, is
11 there some place where we can make the staff do
12 data research, from another justice system that
13 has a better perception of how they treat crimes?

14 In this specific instance, we're
15 mostly talking about sexual assault and that kind
16 of thing. But, all crimes, where another justice
17 system -- obviously, are going to be different
18 from ours -- but, does it better and has a better
19 perception. Where there's actual empirical data
20 that we can look to, to try to see what they do
21 and maybe make our system better?

22 MR. PERKOWSKI: Yeah. So, I think the

1 UK is instructive --

2 MG KENNY: I just want to -- keeping
3 in mind that the UK does not have the same
4 constitutional protection for defendants that we
5 do. What I'm looking for is, within our world,
6 federal systems, state systems, whatever they
7 might be, where we can look to a system that has
8 the same constitutional protections.

9 MR. PERKOWSKI: Sorry. So, like, with
10 the Service Prosecuting Authority that's
11 completely outside the chain of command, and
12 completely, essentially, kind of outside the
13 military. I mean, I don't think that's an apples
14 and oranges comparison. I mean, I think, looking
15 at what the perception is of that system I think
16 would be useful.

17 MG KENNY: Of the UK?

18 (Simultaneous speaking.)

19 MR. PERKOWSKI: Of the UK -- yeah.

20 MG KENNY: Okay. Well, that's why I'm
21 -- I'm familiar with Canadian system, I'm
22 familiar with the UK system, and I'm familiar

1 with a lot of the differences that they have with
2 the manner in which the constitutional
3 protections of defendants is protected. What I'm
4 looking for is a system in the United States.
5 You know, the federal system, or any state
6 system, that has empirical data that says people
7 think that system works. Even the people who
8 lose say, yeah, it was a, you know, I understand
9 I lost, but it was a fair result. That's what
10 we're -- is there anything out there that you can
11 direct us to?

12 MR. PERKOWSKI: So, I guess I'm
13 grappling with why you would narrow it just to
14 the U.S. and nowhere else?

15 MG KENNY: Because, the defendants in
16 the United States system have constitutional
17 protections, and much of our rules of evidence
18 are based upon constitutional protections through
19 long histories of --

20 MR. PERKOWSKI: Which is based on the
21 English system, but okay.

22 MG KENNY: But, it's not the English

1 system, and--

2 (Simultaneous speaking.)

3 MR. PERKOWSKI: I'm aware.

4 MG KENNY: So am I. And so, what I'm
5 looking for is a system, within our protective
6 sphere for constitutionally protected rights of
7 defendants, that is fairer, or seems fairer
8 empirically, to victims or witnesses in crimes,
9 no matter the outcome. And what do they do that
10 we don't do? Is there one that you can direct me
11 to, or direct us to?

12 MR. PERKOWSKI: I'm sure you know
13 this, but criminal defendants in the military
14 system have fewer constitutional protections than
15 in the civil system. But, as someone who doesn't
16 want -- again, from the defense perspective, I
17 couldn't confidently recommend any civilian
18 justice system in the United States.
19 Particularly when you're talking about how it
20 handles sexual assault and rape.

21 DR. FENNER: Yes, I would love to come
22 back to you and let us do a little bit more

1 research, particularly on other countries that
2 may have some constitutional protections that
3 you're talking about. But, I do agree with my
4 colleague here.

5 On a little bit different note, you
6 may be familiar with, but I would recommend a
7 Connecticut Law Review article on December 22 --
8 I can provide your staff with this information.
9 Eleanor Morales who is a Reserve Army JAG and is
10 at Wake Forest now, and John Brooker.

11 What they are advising is to look at
12 LOAC, Laws of Armed Conflict, and talk about
13 incorporating the notion not just of a gut feel
14 for good order and discipline, but to make
15 commanders and judges explain what good order and
16 discipline means to them. And to use a modified
17 system of evaluating proportionality. And this
18 would be for the accused, the accuser, the
19 families, and the units that that proportionality
20 and outcome matters. So, I'd recommend that
21 article and I'll give it to your staff.

22 MG KENNY: Thank you.

1 DR. HILLMAN: I want to thank you for
2 taking time to talk to us. I want to thank you
3 for choosing to operate in a space where there's
4 a lot of headwinds. The level of trust in
5 institutions out there right now, and the
6 particular set of issues that you're focused on
7 here, have not engendered a lot of faith in what
8 would happen next. And I appreciate that you're
9 trying to get us there, and you're going to help
10 us get smarter on this too.

11 We would like any submissions that you
12 have for us, any written submissions that you
13 have, we'd love for you to send those to us, to
14 the staff who contacted you. Also, any
15 recommendations on what we should read next.

16 We're going to thank you and adjourn.
17 And let's come back at 13:25.

18 (Whereupon, the above-entitled matter
19 went off the record at 12:12 p.m. and resumed at
20 1:35 p.m.)

21 DR. HILLMAN: Okay, I want to thank
22 Judge Castle and Judge Redford for your patience

1 while we got back in from the thunderstorm that
2 moved through the -- lower Manhattan here and
3 made it a little bit trickier for us to navigate
4 lunch in short order.

5 I'm grateful to have everybody back.

6 I'm excited to have Dr. Wells with us.

7 To introduce him, Ms. Tagert.

8 MS. TAGERT: Good afternoon.

9 I'm excited to have the opportunity to
10 introduce Dr. Wells today.

11 If we look like drowned rats, it's
12 because we were outside for part of that storm.
13 So, we apologize for that.

14 But for your reference, Dr. Wells'
15 biography is in Tab 7 of your materials.

16 He is currently the Director for the
17 Center of Intelligence and Crime Analysis at Sam
18 Houston University as well as a professor there
19 in the Department of Criminal Justice and
20 Criminology.

21 And today, Dr. Wells is going to be
22 discussing the science of research methods to

1 conduct effective site visits in order to collect
2 reliable information.

3 And although the methods to be
4 described by Dr. Wells can be applied to any of
5 the teams that are working on specific research
6 questions, the intent presently is for the
7 structure team to be using some of the methods
8 that Dr. Wells is going to be explaining to go
9 out into the military communities and to talk to
10 people about the new OSTC as well as the
11 perceptions of justice within the system, and
12 then, any other topics that potentially come up
13 tomorrow in our working sessions.

14 So, again, the goal of the listening
15 tours that is to collect consistent and reliable
16 information and to learn about the community's
17 perception of the new military justice system
18 that will be basically starting in December.

19 So, without further ado, I'm going to
20 pass it to Bill.

21 DR. WELLS: All right, thanks, Kate.

22 Good afternoon, thanks for having me

1 today. It's a real pleasure for me to talk to
2 you all about data collection as it pertains to
3 perceptions of the military justice system.

4 Data collection isn't something that
5 a lot of people get excited about, so I was happy
6 to be invited to come talk about this. I love
7 this topic. I love teaching it.

8 So, I want to do something with my
9 presentation today that I hope is beneficial and
10 useful to you all and give you some things to
11 think about and plan as you move forward with
12 your data collection plan.

13 Kate gave you the background on
14 myself, so I don't have to say a whole lot more
15 other than the fact that it's been a pleasure to
16 work with her and the staff here. I've been
17 working with them since 2018, so five years now.
18 And we're talking about how that seems like a
19 long time. It's gone really fast and we've
20 gotten a lot of good things done.

21 So, I'll jump right into it.

22 So, my purpose is pretty

1 straightforward. I'm going to talk to you about
2 some things that I hope you will consider as you
3 plan to go out into the field and collect data
4 via listening sessions and site visits, a very
5 powerful method for going out and learning from
6 the community.

7 So, what you have here in front of you
8 in terms of the opportunity is very good. I
9 think this can be a very fruitful way of
10 understanding what the community thinks of the
11 OSTC and the justice system more broadly.

12 So, I'm going to talk about that. And
13 one of the things I want you to keep in mind is,
14 when you go out into the field and collect data,
15 things can and do go wrong.

16 And it's all about planning to
17 minimize those errors.

18 And the reason you want to plan for
19 things that will go wrong and to prevent problems
20 up front is, you want your conclusions to be
21 sound.

22 In other words, if you're going to

1 spend a lot of time going out in the field
2 collecting data, you want to be able to draw
3 conclusions that you can be confident in, that
4 it's accurate information, and it's
5 generalizable.

6 In other words, it applies to a larger
7 population of people. We'll talk about that.

8 And then, I'm going to go over just a
9 brief discussion of listening sessions to give
10 you some examples of what these have recently
11 looked like.

12 Measuring perceptions of the justice
13 system, really important research task. I'm
14 really happy to know, when Kate told me about
15 this, I was really happy to know that you all are
16 going to go out and pull this off.

17 It's something that criminal justice
18 system scholars have been doing for many decades,
19 municipalities pay a lot of attention to this for
20 a couple of reasons.

21 The Department of Justice pays
22 attention to this. In fact, they just launched a

1 new initiative a couple of months ago to
2 challenge to the research community to come up
3 with new and innovative ways of measuring
4 perceptions of the justice system, particularly
5 among members of the community that are hard to
6 reach, that are hard to engage in survey work,
7 that don't want to participate, don't have easy
8 access to a lot of electronic materials where
9 they can fill out a survey on a phone or at a
10 computer.

11 So, a really good research task for a
12 couple of reasons.

13 One, it's a really important
14 performance metric of the justice system, how we
15 think of the justice system in terms of the trust
16 we have in it, our perceptions of legitimacy is a
17 performance measure for that, that organization.

18 But more important is that we know,
19 peoples' perceptions of the justice system impact
20 their behaviors.

21 So, we know that when perceptions of
22 trust, legitimacy, and bias alter and change,

1 then peoples' willingness to engage in the
2 justice system also change. The willingness to
3 report a crime, the willingness to provide
4 information to an investigator who might be
5 asking some questions, the willingness to show up
6 in court on time, the willingness to work with an
7 advocate. Those things will change as our
8 perceptions of the justice system change.

9 If we believe it's not trustworthy, if
10 we believe it's illegitimate and biased, then
11 people are less likely then to participate and
12 cooperate with that justice system.

13 So, all of that is to say that the
14 study that you all are talking about doing is
15 right on the mark. It's a very good study to
16 undertake for those reasons.

17 But at the same time, it's hard. It's
18 a complicated research task to go out and
19 effectively measure peoples' perceptions.

20 But again, a primary goal is to do a
21 study in which you can have confidence in your
22 conclusions. You don't want to spend a lot of

1 time performing data collection methods or
2 performing data collection activities, analyzing
3 your data, recording, managing it, and then, get
4 to the end and realize that your conclusions
5 don't really reflect back on what your original
6 purpose was or that things went wrong that will
7 undermine your ability to be confident in those
8 conclusions.

9 So, it's really important that we use
10 a systematic plan. And that's what I'm going to
11 talk about for the bulk of the presentation
12 today.

13 It's really important to come up with
14 a systematic plan.

15 I'm really going to focus on two areas
16 right now, it's measurement and sampling.

17 We want to measure what we intend to
18 measure and not something else. And believe it
19 or not, that happens pretty frequently.

20 We go out and we want to measure X.
21 Well, we actually end up measuring Y. And that's
22 a mistake.

1 So, we want to measure what we intend
2 to measure.

3 And then, we want to measure it
4 accurately. Okay? So, our measure must be
5 focused on the mark, on the target. And then, we
6 want to be able to do it accurately and
7 consistently.

8 And the second part, so there's
9 measurement, one, the second part is sampling.

10 And this has to do with the accuracy
11 of the conclusions we make in terms of how they
12 generalize to a larger population.

13 So, we might do studies on 300, 400
14 people, but we really want to draw conclusions
15 maybe about 20,000 or 30,000 people in a
16 community, for instance.

17 It's very important that that sample
18 look like that larger population, look like in
19 quotes. It's got to reflect that larger
20 population.

21 If it doesn't, if there's error in
22 that, then we're going to have a difficult time

1 generalizing our results.

2 So, I'm going to go through seven
3 points. Why seven? I don't know, that's just
4 the number of important parts of a research and
5 design that I came up with, no rhyme or reason to
6 that.

7 First one, very critical, state your
8 purpose up front. What are we trying to
9 accomplish with this study?

10 Again, it seems obvious and it is to
11 a certain extent. But this oftentimes goes
12 wrong, especially if you have a large research
13 team working on a project. And we often have
14 that in our field.

15 If there's not a consensus and a clear
16 set of identifiable objectives and research
17 questions, then the study can spiral off. And
18 that's when you end up measuring something that
19 you're really not interested in.

20 So, getting this nailed down up front
21 is really important because it will keep you on
22 track. And then, it will help you make all the

1 decisions you make later on, like who to sample,
2 what to measure, how to measure. It's got to be
3 focused back on that original purpose and intent.

4 And that's going to help you, again,
5 obtain useful information at the end of your
6 work.

7 The population, I just mentioned this.
8 So, you need to decide what the population of
9 interest is when you're coming up with your plan
10 up front.

11 Who or what group do you want to draw
12 your conclusions about?

13 In a municipality study, for instance,
14 you might say, we want to talk about everybody in
15 the city. Or maybe we want to talk about people
16 just in a particular community.

17 Or just people who've had interactions
18 with the police. Right?

19 So, those are two different groups,
20 the community and then, people who interact with
21 the police.

22 We know that interactions with the

1 police are not randomly distributed in a
2 community. There are pockets of concentration.

3 One of the things that this will do
4 for you is, it will help you determine the method
5 you're going to use to pick people to include in
6 your study.

7 If you want to draw conclusions about
8 Population A, then that's going to dictate the
9 methods you use to get people into your study.

10 Because you then want to be able to
11 draw conclusions about Population A.

12 Measurement, as part of this planning
13 process, you want to think about and become
14 clearly focused on what it is you want to
15 measure.

16 And when you talk about perceptions,
17 it's, again, it's going to be one of the themes,
18 it's easy to get off track.

19 Are you talking about perceptions of
20 the police as an industry and as a set of
21 authority figures? Or are you talking about the
22 police in a particular city? Or the police that

1 work in your community?

2 So, when you talk about perceptions,
3 it's always good to begin in a big, broad level
4 and then, narrow it down to the group you're
5 really interested in, again, going back to point
6 number one, that will meet your purpose.

7 Same with -- same thing with
8 prosecutors or any other component of the
9 military justice system.

10 It's important to think about exactly
11 what you're trying to measure.

12 And then, that's going to then point
13 you in the right direction in terms of coming up
14 with the best way to ask those questions.

15 So, if we're talking about listening
16 sessions and site visits, when you go out there,
17 especially if it's a large team, again, 15, 20
18 people going out, you want people asking similar
19 things in similar ways so when you pull all the
20 data back together, you have a common measurement
21 in place.

22 And then, again, you can draw sound

1 conclusions at the end of your study.

2 We've already talked about the next
3 one quite a bit, sampling method.

4 Again, it's important to carefully
5 plan this because sampling is difficult.

6 Sampling is a big challenge of picking the group
7 that you want to invite to participate.

8 And that group might even be different
9 than the people who actually end up
10 participating.

11 So, there are many steps in this
12 sampling process that can introduce error.

13 But the standard we use in social
14 scientific methods is, we want our sample to be
15 reflective of and representative of the larger
16 population that we want to draw conclusions
17 about.

18 So, it's really important that we use
19 a method that's going to generate a sample that
20 represents the diversity of that larger
21 population of interest.

22 And I'll give you a couple of examples

1 from some listening sessions here in just a
2 moment.

3 So, after we've gone through this
4 process of getting our focus in place,
5 identifying exactly what we want to measure,
6 understanding our sampling strategy, then we have
7 to determine exactly what method we're going to
8 use to collect our data.

9 This is where we -- I mean, there's a
10 lot of planning in place before you go about
11 collecting your data.

12 So, and that's one of the things that
13 Kate and I worked on several years ago with a
14 project with DAC-IPAD.

15 So, there's a lot of planning, a lot
16 of up front work before you get into the actual,
17 actually collecting data and it feels like you're
18 doing the work.

19 A lot of the hard work, the difficult
20 and necessary work is up front in the planning
21 phase.

22 Well, this is when you get to think

1 about what are we going to do to get our
2 information? How are we going to get this
3 information from people?

4 We've got a bunch of different tools
5 at our disposal. We can do paper and pencil
6 surveys, online surveys, face to face interviews
7 in a group setting, face to face interviews one
8 on one. We can use Zoom or Teams. There are a
9 whole variety of different research techniques
10 or, I'm sorry, measurement techniques we can use
11 to actually extract the information that we want.

12 Consistency is very important here.
13 When we give a survey instrument to a person to
14 complete on their own, that instrument needs to
15 be the same across all 100 people.

16 Because we're eliciting a response.
17 We're giving them a stimulus. We're giving them
18 a piece of paper with some words on it.

19 And we want that to be interpreted the
20 same way across people.

21 Same thing if you're going out and
22 doing interviews.

1 So, I'm part of a project right now.
2 We have a large team of interviewers that are
3 going to different cities and we're interviewing
4 homicide investigators.

5 It's very important that we are all on
6 the same page, so to speak, about the questions
7 we're asking, the probing questions, the follow
8 up, so we're eliciting the same kind of
9 information from people across interviewers.

10 So, that's the value of planning up
11 front and focusing on the measurement technique
12 that you're going to use is consistency.

13 Next is six, and we've got one more
14 after this.

15 CAPT. SCHRODER: You've got one more
16 after this.

17 DR. WELLS: Oh, yes, yes.

18 You have to test this. Right? And
19 this is something we always do, especially if we
20 have large research teams.

21 So, if we are going to go out and
22 interview people or code information from a case

1 file, we'll practice so that we get used to using
2 the similar language, similar terms, similar
3 kinds of follow up questions.

4 And then, that's going to, again,
5 generate that consistency later on.

6 And sometimes, we have to do some sort
7 of refinement. You know, if someone isn't quite
8 doing it the same way as everybody else, like,
9 oh, let's video record somebody doing it, watch
10 them, and let's get it done like a particular
11 way.

12 JUDGE SOMERS: Now that you broke the
13 questions --

14 DR. WELLS: I know, I'm doing a lot of
15 talking.

16 JUDGE SOMERS: So, I think that's
17 really great that you like practice, asking
18 questions and stuff.

19 But how do you recommend we, as a
20 panel, who will be going to different places,
21 different times. We don't really have the
22 ability to practice.

1 So, what would you recommend that we
2 do to be consistent?

3 DR. WELL: Great question.

4 What we always do in these kinds of
5 situations is create guidebooks.

6 So, you know, obviously, doesn't apply
7 to you all, but it applies to graduate students,
8 how to dress, show up on time, how to present
9 yourself, how to describe the study you're doing.

10 So, when you go and sit down with
11 somebody and you explain the study to them, you
12 want them to feel comfortable, like they can be
13 open and they can be honest with you.

14 What do you say about that? What's
15 the background?

16 So, you can prepare a guide.

17 JUDGE SOMERS: So, your guide will
18 include a script kind of quasi script for us to
19 use with a way to focus our questions and
20 answers?

21 Because I think we're all really
22 interested and dedicated to this.

1 But we're, obviously, going to
2 approach it different. And having some
3 guidelines is always helpful. So I appreciate
4 that.

5 DR. WELL: Yes, absolutely, a script
6 with the questions, the order, bullet points.
7 It's easy to follow. Right? It's not written
8 out in a lot of words on a page, it's like you
9 can look at it, after you do it a few times,
10 you've got it down.

11 Yes, yes, not rocket science, just a
12 little bit of planning up front, yes.

13 COL. OSBORN: Thanks, Dr. Wells.

14 I know you've talked about whether or
15 not a large population or a specific subset of a
16 larger group.

17 I'm also interested in time. Is there
18 -- maybe there's not a set period of time, but in
19 general, how much time of data, if you will,
20 would lead to a conclusion which is
21 scientifically valid?

22 DR. WELLS: Let me ask a question.

1 Are you talking about a period of time

2 --

3 COL. OSBORN: Period of time.

4 DR. WELLS: -- that you're collecting
5 data?

6 COL. OSBORN: A period of time from
7 which you're collecting data.

8 In other words, I guess it depends on
9 the sample size, right?

10 DR. WELLS: Correct.

11 COL. OSBORN: But so, you could have
12 six months of data that you're looking at, a time
13 period, if you have a large sample size.

14 But if you had a small sample size,
15 you would probably look at a longer period of
16 time in which to draw scientifically valid
17 conclusions?

18 DR. WELLS: Yes, for a -- but for the
19 project you're talking about, I'm not sure the
20 period of time in which they have the perceptions
21 of the justice system is going to be of interest
22 to you.

1 I think your focus in going to be on
2 getting a sufficient sample size, a number of
3 people.

4 COL. OSBORN: All right.

5 So, let me just kind of put it in nuts
6 and bolts and practical.

7 DR. WELLS: Sure.

8 COL. OSBORN: Would -- do you see any
9 issues with drawing conclusions from one year of
10 fiscal data of courts-martial?

11 DR. WELLS: No, no, I think that's
12 very reasonable.

13 COL. OSBORN: Okay, thank you.

14 DR. WELLS: Yes, sure.

15 DR. HILLMAN: So, to these questions,
16 I think you're hearing sort of how we're thinking
17 about this.

18 We're not a research team that is
19 going to go out and complete a project and then
20 publish the data in a peer reviewed journal based
21 on social science methods that validate the
22 conclusions.

1 But we want to create some credibility
2 and a greater understanding and personal
3 connection between the panel and the folks who
4 are in the field.

5 So, it's a little different than the
6 sort of research design you're thinking about.

7 What we don't want to do is overread
8 the data that we get and, you know, and try to
9 frame the questions that we ask in ways that will
10 elicit useful information.

11 So, but we're not ever going to be
12 disinterested observers who drop in to try to
13 test.

14 And the other thing I'd just add is,
15 this is an arena where, depending on who we ask
16 what the perception is of the fairness of the
17 military justice system, we already know we get
18 very different responses from purportedly expert
19 folks who are, you know, who know quite a lot
20 about it and who have spent a lot of time looking
21 at the available data.

22 So, given that contentious -- given

1 what our goal is as a panel, and given the
2 contentiousness of the perspectives, which you're
3 familiar with because criminal justice is always
4 contentious and perceptions are very contentious,
5 how do we navigate creating, you know, what would
6 be threading a bit of a needle in this?

7 DR. WELLS: Yes, and that would be a
8 challenge.

9 You know, if the purpose is to build
10 relationships with the field and to collect some
11 information that would be useful to you all, it
12 can be done, right, it can be done by reaching
13 out and engaging.

14 That can send very powerful messages
15 of interesting credibility with the people that
16 you're talking to.

17 And I know this is coming -- and I
18 knew this could potentially happen, it's coming
19 off like an overstatement about the need for
20 rigidity in research design.

21 And I hope you won't walk away from
22 this at the end with that idea. Because if you

1 can just do some of these things to make your
2 methods a little bit more sound, then that's
3 going to pay big dividends later on in terms of
4 who you include in your groups that you're going
5 to speak to, the people that you're going to
6 interview.

7 If you can't use, you know, systematic
8 sampling methods, you can still then understand
9 who those people represent, their backgrounds,
10 and their experiences so you can then temper the
11 conclusions that you draw.

12 MG EWERS: Do you have a procedure for
13 dealing with what you might call hostile
14 witnesses?

15 So, you've talked about interviewing
16 people who have been involved with the criminal
17 justice system. A lot of them are going to be --
18 right out of the gate, they're going to be not
19 very happy about having been involved with the
20 criminal justice system.

21 So, is there some way you can create
22 questions that anticipates that and still can

1 kind of get something?

2 I mean, yes, I mean, it's just like
3 you go into a jail, everybody -- nobody did it,
4 right? And I guess that's a cliché, but --

5 DR. WELLS: Yes, yes.

6 So, there are a lot of things you can.

7 One, just, you know, carefully wording
8 the questions to make someone feel comfortable
9 opening up.

10 And then, as an interviewer, you want
11 to present signals to them that you're just there
12 to listen, that you're okay. You know, that
13 you're going to take in their information,
14 whether you agree with it or not, like it or not,
15 whether they're way off base, doesn't matter.
16 You're just there to hear from them. You're
17 there to show up and listen to what they have to
18 say, and record that information.

19 So, as social scientists, that's our
20 job. And there are lots of things that you can
21 do to do that.

22 You know, body language, wording of

1 questions, being open, when people are
2 responding, you're saying mm-hmm, mm-hmm, you
3 know, showing that you're interested in what they
4 have to say.

5 Yes, even when they do present and
6 come off as hostile or maybe off base or
7 inaccurate in their assumptions or information
8 that they're presenting to you.

9 MG EWERS: Thank you.

10 DR. WELLS: Just a couple more points
11 and then, they can stop it from there because I
12 think you all have copies of the slides.

13 So, think about how you're going to
14 record the information.

15 So, if people are going out and
16 interviewing, are you going to take notes? Are
17 you going to bring someone with you to take notes
18 for you during the interview? That can be very
19 helpful because it allows you to focus on the
20 person, focus on the questions, dig deeper when
21 you need to, and then, someone else can be
22 writing notes.

1 Or you can record them with an audio
2 device and then transcribe those later on.

3 But ultimately, you're going to want
4 all of that information back into an electronic
5 database.

6 When you analyze those data, when you
7 look for themes and qualitative data, in other
8 words, text, that needs to be in an electronic
9 format.

10 And if you're collecting quantitative
11 data, numbers, you want that to be in an
12 electronic format as well.

13 So, plan for that part of things.
14 That can be very time consuming and you might
15 need to bring in other staff who can help do that
16 work.

17 Last point here before the summary,
18 think ahead to your analysis plan. What do you
19 want your findings to kind of -- you don't want
20 to set your study up by saying, we want to show
21 X, but I want you think about, how would we
22 present our findings at the end?

1 Will we create a table? Would we
2 create a summary document with bullet points?

3 And then, what you do with your study
4 is fill in those blanks. Here's what we found.

5 So, it's almost a good idea, as a
6 practice case, to write up a template, set up
7 conclusions, but don't fill in the details.

8 And then, you can say, what do I have
9 to do, what am I going need to do to get the data
10 that will allow me to fill in these blanks in a
11 table or bullet points?

12 Last thing then, is -- I'll go forward
13 to the listening session examples.

14 Just sort of a summary, systematic
15 methods are good.

16 Being clear about your purpose is
17 good.

18 And the reason those two things are
19 good is, 8 months, 9 months, 12 months later when
20 you have your data in and you're analyzing your
21 results, you're going to have something useful as
22 opposed to something that's only half useful or a

1 third useful.

2 So, being clear and being systematic
3 is going to give you good information at the end.

4 And then, plan for measurement and
5 sampling, even if it's not going to be a highly
6 rigorous, systematic study, it's still important
7 to think about those things so you can say, you
8 know what, that's a real big weakness here.

9 Let's try to overcome that one.

10 Maybe not on everything, but you can
11 overcome a couple of key weaknesses.

12 And then, if you carefully plan those
13 listening sessions and site visits, you can
14 generate a lot of very, very powerful
15 information, pieces of data and information about
16 perceptions of the justice system.

17 So, with that, I will answer any more
18 questions.

19 DR. HILLMAN: Let me just ask a
20 substantive question.

21 Do you have a sense of, based on your
22 work with the DAC-IPAD so far, what are the

1 perceptions of the fairness of the military
2 justice system right now?

3 DR. WELLS: None at all, I don't. I'm
4 not aware of the studies.

5 DR. HILLMAN: What about other
6 criminal justice systems?

7 DR. WELLS: Yes, it's changing. You
8 know, it's evolving right now.

9 So, if we talk about perceptions of
10 municipal police, the last three years have seen
11 some dramatic changes in localities where
12 confidence and trust has fallen.

13 And traditionally, police have always
14 been among the most trusted public servants when
15 you collect survey data from residents of cities.

16 But we've seen in the past few years
17 that's declined.

18 DR. HILLMAN: And is that consistent
19 or are there some islands of better perceptions
20 and greater trust?

21 DR. WELLS: Yes, that's really good,
22 I don't know. I don't know. If I were to guess,

1 I would say yes, because that's what we generally
2 know about perceptions of the police as it varies
3 across the United States.

4 And even within cities, you know that
5 there are differences in communities in terms of
6 how they perceive the police.

7 JUDGE SOMERS: Let me push you on that
8 a little bit.

9 DR. WELLS: Yes?

10 JUDGE SOMERS: So, I've been very
11 fortunate in my life, but I know a lot of people
12 of color, minorities, and things like that have
13 never felt comfortable with their interactions
14 with police.

15 My sister is a cop, so I see the other
16 side. But even she sees differences in the way
17 that her colleagues behave towards different
18 ethnicities.

19 So, as us coming in as observers
20 asking questions, how do we even out what someone
21 who might have this kind of fear of talking to
22 people about the justice system and

1 investigations?

2 How can we level the playing field so
3 they feel like we're hearing them, whether or not
4 we are of the same minority or not?

5 Is there something that you have that
6 you can give us as guidance to help lead us in
7 the right path?

8 DR. WELLS: Yes, let me respond and
9 then, you can tell me if this is kind of what
10 you're getting at.

11 But it goes back to, again, going in
12 with a researcher kind of approach and mind set,
13 and that is to be understanding and open and
14 you're there to listen and learn and to very
15 clearly present that.

16 And so, we talked about the script a
17 little while ago. And the script, it should say
18 those kinds of things.

19 We're not here to judge. The
20 information you provide to us will be
21 confidential. We are here to learn from your
22 perspective and your experiences that have led up

1 to this point, you know, the point of that
2 particular interview. So, I hope you'll feel
3 open and honest with me about, you know, sharing
4 your perceptions.

5 Yes, there's a lot of things you can
6 do with body language and words to build up some
7 trust.

8 And then, as the interview goes on, to
9 continue to build up that trust.

10 CAPT. ALDANA: So, further along those
11 lines, so are you -- is your research design kind
12 of methodology or are we approaching it different
13 from different communities?

14 And I know that you probably take that
15 into consideration in your planning.

16 But in terms of perception of justice,
17 as Judge Somers pointed out, I think those groups
18 come -- who come from marginalized communities,
19 including racial groups, I think probably kind of
20 get an idea of the point that Judge Somers is
21 pointing out.

22 So, what do we need to take in to

1 special considerations for that?

2 Like, for instance, having maybe a
3 person of color doing the interviewing or helping
4 make sure we have people of color in terms of
5 designing the questions. Right?

6 DR. WELLS: Yes, great question.

7 In terms of designing the questions,
8 it's very important to get input from the people
9 who are going to be responding to those
10 questions.

11 You want to use appropriate language.
12 You want to hear from them about their -- the
13 components of the system that elicits strong
14 reactions that maybe you wouldn't consider or I
15 wouldn't consider.

16 And then, that can go into part of
17 those questions.

18 And let me give you a very specific
19 example of when I was working on my PhD, we
20 interviewed -- as part of a project, we
21 interviewed 700 inmates, newly incarcerated
22 inmates in Nebraska.

1 And we had an advisory board of
2 inmates who helped us write our questions. And
3 they were using words and terms and phrases that
4 I had never heard of before.

5 And then, when we used those on the
6 inmates, they knew exactly what we were talking
7 about. And we had to understand what we were
8 saying, have some credibility.

9 But that's an example that you can use
10 is to get a small focus group in to help -- we
11 want to understand X. How would you ask that
12 question to get people to respond and in an open,
13 honest way about that?

14 And then, in terms of like interviewer
15 effects, so your presence impacts what people say
16 to you. You want to minimize those.

17 And sometimes, that might mean using
18 interviewers who are of similar age, similar
19 backgrounds, similar racial ethnic group, so that
20 that person feels more comfortable responding.

21 And that goes back to what I mentioned
22 before, the DOJ -- this is a persistent

1 challenge, right, the DOJ has a challenge right
2 now to figure out how we can improve response
3 rates among people in marginalized communities.

4 Because it's not just a distrust of
5 the police or the courts, it's a distrust of
6 authority figures in general, including survey
7 researchers, university professors who want to go
8 out and try to measure these things. Trying to
9 break that down is a pretty difficult task.

10 CAPT. ALDANA: And in terms of data
11 and along the lines with what Chair Hillman
12 asked, the recent data post-George Floyd events,
13 I mean, I know immediately, obviously, there was
14 essentially distrust.

15 DR. WELLS: Yes.

16 CAPT. ALDANA: But years after some
17 reforms have been undertaken --

18 DR. WELLS: Yes, absolutely, there
19 have been a lot of those studies that have taken
20 place.

21 And with a little bit of time, we
22 could probably dig that up and research it and

1 have a good summary for you about what that has
2 shown in terms of change over time.

3 But then, also, what you're talking
4 about in terms of differences across cities in
5 terms of change, and then, differences within
6 particular cities as well.

7 CAPT. BARNEY: Dr. Wells, I wonder if
8 you can help me here.

9 I'm trying to think about -- and maybe
10 we've queued this up as a topic where we're
11 talking about perceptions and maybe it's the word
12 and how I -- my perception of the word
13 perceptions which is, it always includes some
14 level of bias by the person who is the perceiver.

15 When we think about different ways we
16 want to look at a military justice system in
17 terms of its effectiveness, its performance and
18 things, how should we consider assessments of the
19 perception of people affected by this versus
20 other -- and I'm going to -- I apologize, I'm
21 going to say, more objective type criteria like
22 where you can count something? You can measure

1 something in very clear and absolute terms?

2 Am I -- have you had the chance to
3 think about how do you integrate these ideas?

4 DR. WELLS: Yes, that's a great
5 question. That's part of a big ongoing
6 discussion for decades about how you measure the
7 performance of the justice system.

8 And we can measure it with a whole
9 host of indicators, perceptions are one. Because
10 we know that that has an impact on how people
11 relate to authority figures and how they
12 cooperate or don't cooperate with authority
13 figures, not just the police or the courts, but a
14 whole variety.

15 So, the idea that people settle on is
16 we have to use multiple indicators of performance
17 with some quantitative indicators, is crime up or
18 down? That's not necessarily a fair measure of
19 police performance because crime is impacted by
20 so many other factors.

21 Clearance rates, you know, is another
22 quantitative indicator that we can use. Is our

1 clearance rate -- homicide clearance rates 80
2 percent? Seventy percent? Forty percent?

3 We can use those as performance
4 indicators.

5 But criminal justice scholars do tend
6 to settle on the idea that perceptions are an
7 important performance metric of the justice
8 system.

9 The legitimacy of the police is an
10 important metric of their performance in the
11 community.

12 CAPT. BARNEY: if I could just follow
13 up on that.

14 So, when I think about how you would
15 use assessment of perceptions, would it be
16 correct to say that there are probably classes of
17 participants in a justice system who tend to have
18 similar types of bias?

19 Like for example, you know, General
20 Ewers said, you know, if you go into a prison and
21 you're talking to people who've been convicted of
22 crimes, many of them have a different perspective

1 than the people who were, perhaps, the victim of
2 a crime, you know, who may feel that, you know,
3 on the one hand, the person who has been
4 convicted feels like I'm receiving a substantial
5 punishment.

6 The person who is a victim of a crime
7 who has suffered a loss because of the crime,
8 either a personal loss, a pecuniary loss, a
9 psychological, emotional, they may never feel
10 entirely satisfied with the sentence that is
11 given.

12 So, you know, ultimately, I feel like,
13 as we're looking at perceptions, I can never
14 convince the victim that the results of the
15 system are going to be just if they want more
16 from the system than what the system might
17 deliver.

18 So, how do we -- in the end, if we
19 want to come back to the American people and say,
20 hey, this is how we looked at it, this is what we
21 found, how do we account for the fact that there
22 are certain aspects of the different people with

1 different roles in the system who approach things
2 with -- and I'm not saying they're being unfair
3 or trying to be disruptive to the process, but
4 they just simply have the kind of biases that
5 they bring into the system because of how they
6 interact with the system?

7 DR. WELLS: Yes, great question, and
8 this is a great kind of scholarly discussion as
9 well.

10 So, there's been this line of work,
11 really going back to the late 1950s, but it
12 really took off in the early 1990s in the justice
13 system. And it's about perceptions of outcome,
14 which is about sentencing, for instance.

15 And then, there's perceptions of
16 process.

17 And we know that people -- we know
18 people think about those two things separately.
19 They might be dissatisfied with an outcome, but
20 they might be very satisfied with the process.

21 And people hang on to that process.
22 They pay attention to how they're treated, the

1 language that's used to them.

2 Do they have an opportunity to have a
3 voice in that?

4 That matters to people broadly, and
5 those who interact with the justice system a
6 great deal.

7 And within those outcome groups, you
8 get sentenced or you don't get sentenced, or you
9 get a harsh sentence or you get a lenient
10 sentence.

11 Even within those groups, people pay
12 attention to the process.

13 So, there's a very well-known study in
14 the early 1980s among felons who were getting
15 sentenced in court. And there was a good degree
16 of variation in how those felons who were getting
17 sentenced to prison viewed the process. And
18 there were differences.

19 So, some people were being sentenced
20 to prison, potentially for a very long time, they
21 were satisfied with the process. They felt like
22 they were treated fairly. They felt like they

1 had a voice in the process. And they had
2 positive perceptions.

3 And then, you had similar people
4 getting similar sentences in court, bad outcomes,
5 who didn't like the process. And they were
6 dissatisfied with the process.

7 Same thing with victims and how they
8 are treated by the system and they outcomes that
9 they get.

10 Similar outcomes, different processes
11 lead to different perceptions.

12 But you said something earlier, too,
13 that I want to come back to.

14 And one of the things that's possible
15 when assessing perceptions is to measure things
16 about peoples' backgrounds.

17 Like, in the last six months, have you
18 had contact with a prosecutor?

19 Have you had contact with a police
20 officer?

21 And what context was that contact?
22 Was it voluntary or involuntary? Were you

1 arrested or not?

2 And then, you know, again, but this
3 goes back to sort of bigger data analysis, you
4 can control for those kinds of factors.

5 So, the people who have had contact
6 with the police in the last six months have
7 different perceptions than those who have not had
8 contact in that time frame.

9 DR. HILLMAN: I think we need to wrap
10 here.

11 Any last questions?

12 MG EWERS: Just one on the
13 limitations.

14 So, one of the things that we're
15 concerned with, especially after today, is not
16 just what the perception of the military justice
17 system is, but how do we regain the confidence of
18 our service members in the military justice
19 system?

20 Is that the kind of thing you can
21 attack or the perception of study?

22 Or is that too -- is that a bridge too

1 far?

2 DR. WELLS: It's the beginning stages
3 of a longer bridge.

4 Because understanding what those
5 perceptions are will then allow you to think
6 about potential reforms.

7 Are reforms necessary? Big question.

8 And then, second might be, where,
9 when, and how? What kinds of reforms would need
10 to be made?

11 Let me give you a quick anecdote back
12 from my PhD days.

13 The very first project I worked on,
14 Lincoln, Nebraska Police Department, they were
15 doing surveys of citizens who had contact with
16 the police.

17 So, they had these undergraduates from
18 UNL calling up victims, people who had been
19 arrested, and asking them a series of short, ten
20 questions.

21 What they found was, there was a
22 degree of dissatisfaction among victims because

1 they said, I was told I was going to have a
2 follow up, but then I wasn't followed -- they
3 didn't follow up with me. So, their satisfaction
4 was down.

5 Chief said, okay, let's be honest with
6 our victims. If you're not going to follow up,
7 just tell them know you're not going to follow
8 up. Satisfaction went up. Right?

9 So, they found out where there was a
10 perceptual problem, victims thought they were
11 going to get a follow up when they weren't. And
12 then, they brought those two things together via
13 a short discussion by some probably shift
14 lieutenant and then, those perceptions changed.

15 That's a very small example, but it's
16 what you can do with perceptual studies.

17 CAPT. ALDANA: It seems to me that
18 part of changing that perception or getting trust
19 and confidence really focused on people. Right?

20 Whether it's training and having those
21 involved in the process do their job.

22 For the most part, I think our panel

1 is focused on process.

2 And so -- and you just said that
3 people pay more attention in the process rather
4 than the outcomes.

5 Are there specific areas in the system
6 that you think we should be focusing on in terms
7 of process?

8 DR. WELLS: Yes, that's a really good
9 question, that's thinking down the line about
10 what you want to do.

11 I feel like I'm probably a little bit
12 uninformed to even give you some advice on that
13 front.

14 CAPT. ALDANA: Well, in general, in
15 terms of the system?

16 DR. WELLS: Yes, you know, on the
17 civilian criminal justice side, a lot of the
18 attention is given to the police because they are
19 the front line first responders who represent the
20 CJ system to the vast majority of people.

21 It's rare for someone who has an
22 interaction with the police to have an

1 interaction with the prosecutor or go to court
2 for any sort of follow on procedure as a victim
3 or as a suspect.

4 So, focusing on those front line first
5 responders in terms of building up trust is the
6 way to begin, I would say.

7 DR. HILLMAN: Thank you, Dr. Wells.

8 That was really helpful for us, we
9 really appreciate your time. We look forward to
10 continuing to stay in touch as our questions
11 evolve.

12 DR. WELLS: Thanks, I appreciate it.

13 DR. HILLMAN: Okay, let's take a ten
14 minute break. We'll come back at 25 after.

15 (Whereupon, the above-entitled matter
16 went off the record at 2:14 p.m. and resumed at
17 2:25 p.m.)

18 MS. VUONO: Our next topic is one of
19 the structure team's research projects. It's a
20 comprehensive review of DoD's implementation of
21 Article 140a of the UCMJ, and all of the
22 information, the background reading is available

1 at Tab 8 of your read-ahead materials.

2 While the MJRP will assess all parts
3 of Article 140a as part of the comprehensive
4 review and report that's due to Congress in 2024,
5 today we are only focusing on the fourth prong of
6 140a, and that is the requirement that the
7 Secretary of Defense create uniform standards and
8 criteria to facilitate public access to court-
9 martial docket information, filings, and records
10 at all stages of the court-martial process,
11 including pre-trial, trial, post-trial, and
12 appellate. Slide two? Oh, I guess I have the
13 power. Look at that.

14 Our research plan begins with today's
15 panel discussion and we have assembled four
16 litigators who are experts in the constitutional,
17 common law, and statutory rights of public access
18 to trials and court records.

19 They'll also share their experiences
20 with restricted access to court-martial records,
21 but my purpose first is to just give you some
22 context on the background of Article 140a and the

1 DoD General Counsel's policy guidance.

2 So, Article 140a was created in tandem
3 with Article 146, which created you all. It was
4 part of that package of legislative reforms that
5 were sent to Congress by DoD after their internal
6 review of the entire military justice system in
7 2015.

8 Although Congress didn't hold any
9 hearings on the proposed legislation, we know
10 from the congressional record that the report of
11 the Military Justice Review Group, which is on
12 this slide here, that was the basis for the
13 changes that were enacted into law, and that
14 report is our most authoritative source of the
15 purpose that was behind each of the changes that
16 DoD proposed and Congress passed in the Military
17 Justice Act of 2016. In the case of 140a,
18 Congress enacted verbatim the draft proposal of
19 the DoD. Next slide.

20 So, what was the purpose of Article
21 140a? Why did DoD propose this new provision?
22 The stated purpose according to the MJRP report

1 was to increase transparency.

2 At the time, DoD acknowledge that the
3 military needed to modernize its military justice
4 systems and provide public access to court-
5 martial records.

6 And you all should have received a
7 printout that we handed in your materials, which
8 is just the relevant excerpt of the MJRG report.

9 And while -- I'm going to read you a
10 quote that is coming directly from this section
11 of the report, which says that the purpose of
12 Article 140a is highlighted here. Quote,
13 utilizing the experience of federal and state
14 systems, there is significant opportunities to
15 improve the concept of accessibility.

16 The civilian courts have developed
17 systems that balance public access with the need
18 to protect privacy, sensitive financial data, and
19 classified information. There are well-developed
20 models in the civilian sector which can be
21 applied in a balanced manner to provide timely
22 access to dockets, filings, and rulings. That's

1 the end of the quote.

2 The report goes on to explain that
3 there is a need for contemporaneous access at all
4 stages of courts-martial, not merely post-trial.
5 This is another quote. Quote, the proposal to
6 enact Article 140a would provide victims,
7 counsel, and members of the public access to all
8 unsealed court-martial dockets, and, quote,
9 provide appropriate public access to the military
10 justice information at all stages of court-
11 martial proceedings.

12 At a minimum, the system developed for
13 implementation should permit timely and
14 appropriate access to filings, objections,
15 instructions, and judicial rulings at the trial
16 and appellate level, and to actions at trial and
17 subsequent proceedings concerning the findings
18 and sentences of court-martial.

19 So, that was the rationale for this
20 new statutory provision. Let's look now at the
21 text of the statute, and you have a copy in your
22 read-ahead materials. You can see that the

1 statute requires that DoD adopt the best
2 practices of federal and state courts, quote,
3 insofar as practicable.

4 Notably, after Congress passed the
5 law, DoD sought relief from Congress, relief from
6 the Privacy Act in subsequent legislative cycles
7 taking the position that the Privacy Act limited
8 DoD's ability to adopt a federal approach of
9 contemporaneous access to trial records.

10 Congress chose not -- excuse me. Siri
11 is listening to us. Congress chose not to grant
12 DoD relief from the Privacy Act. However,
13 Congress did amend the text of the statute twice
14 in 2019 and 2021 to clarify the need to protect
15 the PII, the personally identifiable information,
16 of victims and minors, and clarify exemptions for
17 public release, exemptions from public release of
18 information that's classified, sealed, or subject
19 to a judicial protective order.

20 So, let's turn now to DoD's
21 interpretation of Article 140a and the most
22 recent policy guidance that was issued by the

1 General Counsel in January of this year. That's
2 at Tab 8, Subsection C.

3 So, today's panel is going to focus on
4 where DoD's policy guidance diverges from the
5 federal model. So, instead of adopting a federal
6 approach with contemporaneous public release of
7 properly redacted trial court filings, the
8 General Counsel's guidance allows the services to
9 withhold court-martial records until 45 days
10 after the certification of the record of trial,
11 which could be several weeks after the trial
12 concludes.

13 In addition, if the case ends in a
14 full acquittal, the services have discretion to
15 decide whether to release any document in the
16 case at all.

17 There are also differences in how the
18 military handles case docketing, and we don't see
19 any electronic filing in the military justice
20 system. Instead, the docket in the military
21 context is defined narrowly to mean a public
22 calendar with a list of upcoming cases,

1 locations, possibly the offenses charged, name of
2 judge and counsel, and perhaps a range of trial
3 dates. It does not include preliminary hearings
4 or any filings, motions, or court orders in the
5 case as you would see in a federal docket.

6 Since the passage of 140a, the public
7 position of the General Counsel has been that the
8 Privacy Act which applies to the federal agencies
9 like DoD, but not to the Article 3 courts, limits
10 the ability to release court-martial information
11 during and after trial, and DoD maintains that a
12 federal style docket where litigants and the
13 public can access properly redacted motions and
14 court orders is not feasible.

15 So, the staff took a deep dive into
16 the Privacy Act of 1974 and how that impacts
17 public access to court-martial records because of
18 the Department of Defense and the applicability
19 of the law.

20 Our fantastic intern, Yonah Berenson,
21 was the primary researcher and writer for that
22 white paper which is at Section D of Tab 8. This

1 is a comprehensive assessment of how the Privacy
2 Act governs public release of court-martial
3 records.

4 We don't have time to go through the
5 details of that paper, but the bottom line up
6 front is that the Privacy Act applies to the
7 Department of Defense, courts-martial produce
8 records that are covered and defined in the Act,
9 and most importantly, the Act governs the
10 mechanics of how the DoD must properly release
11 these records.

12 Proper release of court-martial
13 information is done under the routine use
14 exemption or exception in accordance with the
15 proper SORN, which is system of records notice,
16 and DoD did issue a SORN in the Federal Register
17 in 2021 that notifies the public of the routine
18 use/release authority for court-martial records.

19 There is nothing in the Privacy Act
20 that requires that these records be withheld
21 until after the conclusion of trial or only where
22 there is a conviction.

1 However, there are exceptions from
2 release for classified information, and in 2022,
3 the Department of Defense issued an updated SORN
4 that notified the public about the withholding
5 authorities for classified information.

6 And this is the last slide. The
7 services have all issued regulations that
8 currently require counsel to file all pleadings,
9 motions, and documents in a court-martial with
10 PII protected, such as using initials for
11 children and victims, and ensuring that financial
12 information is either not included in the filings
13 or is properly redacted or protected by sealing
14 or a judicial protective order.

15 So, now I'm going to turn the mic over
16 to our distinguished panelists to discuss these
17 issues and suggest any proposed solutions.

18 MR. BERLIN: Let's try that again.
19 After two years or three years of Zoom meetings,
20 I've still forgotten to unmute myself. Here we
21 go.

22 I'm Seth Berlin. I'm senior counsel

1 at Ballard Spahr in Washington, D.C. I'm also an
2 adjunct professor at Georgetown Law School where
3 I teach media law, including the subject of
4 access, press and public access to judicial
5 proceedings and records, the topic we're talking
6 about today.

7 I'm also the co-author of a treatise
8 called Newsgathering and the Law now just coming
9 out this year in its sixth edition, which also
10 covers, in significant part, access to judicial
11 proceedings and records.

12 Although I primarily practice in
13 civilian courts, I have had the privilege of
14 appearing in front of a number of courts-martial,
15 as well as at the NMCCA and the CAAF, where I'm a
16 proud member of the bar.

17 So, that's sort of my experience.
18 What I wanted to do today, in part prompted by
19 Eleanor, is to talk about the sources of the law
20 for access to judicial proceedings, and in
21 particular for purposes of today, records.

22 And there are really three different

1 sources of law that we rely on when we think
2 about this. The first is the First Amendment.
3 The second is the common law, and there is a sort
4 of body of common law that deals with access to
5 records, and the third is statutory. Let me
6 start with the First Amendment because I think
7 that will sort of inform a fair bit of today's
8 discussion.

9 As background, from 1980 to 1986, the
10 Supreme Court issued a quartet of decisions that
11 dealt with the question of access to different
12 proceedings, and in particular, some records in
13 various phases of civilian judicial proceedings.

14 The first of those cases was Richmond
15 Newspapers v. Virginia in 1980, and an opinion by
16 Chief Justice Burger found that there was a right
17 of access to criminal trial proceedings, right,
18 so, and the military courts have since followed
19 Richmond Newspapers.

20 And just as a way of background, this
21 body of case law sort of followed a body where,
22 first, there was a series of judges who were

1 issuing injunctions against the press not to
2 publish things, and the Supreme Court said you
3 can't do that, and then judges decided to close
4 courtrooms, because if they couldn't enjoin the
5 press, they could keep them out, and the Supreme
6 Court came and said you can't do that either in
7 these cases, and so that's really sort of the
8 genesis of this.

9 The second case is a case called Globe
10 Newspapers v. Superior Court, and that case
11 involved the access to testimony of a minor
12 victim of sexual abuse which categorically was
13 closed under a statute passed by the Commonwealth
14 of Massachusetts.

15 And the Supreme Court said in that
16 case that you could do that, but you couldn't do
17 it categorically, that you had to deal with it on
18 a case by case basis, that there might be victims
19 where it would be perfectly appropriate for there
20 to be press or public access, and sometimes those
21 are different things where they might let in just
22 a couple of reporters, but that there would be

1 some form of public access, and in other cases
2 there wouldn't, but it would be determined by the
3 particulars of the case rather than
4 categorically.

5 The third case is a case called Press
6 Enterprise v. Superior Court Number 1. You'll
7 not be surprised to learn that I'm about to talk
8 about Press Enterprise v. Superior Court Number
9 2.

10 The Riverside Press Enterprise in
11 California first brought a case challenging
12 access to the voir dire that preceded a criminal
13 trial, and the court basically said that's an
14 integral part of the trial and you have a First
15 Amendment right to witness that and to have that
16 be presumptively open.

17 That principle was reinforced in a
18 later case in 2010 called Presley v. Georgia,
19 which reiterated and then vacated a conviction
20 that had been, where the, it wasn't a high-
21 profile case, where the defendant's family had
22 been excluded from voir dire because it was

1 basically a closed proceeding.

2 And then lastly, there's Press
3 Enterprise v. Superior Court Number 2 which asked
4 and answered the question what happens about a
5 preliminary hearing, right? So, in the military,
6 you'd have an Article 32 hearing, and there
7 again, the court said you have a right of access
8 to those hearings.

9 So, this quartet of cases lays the
10 foundation for a First Amendment-based right of
11 access. And in figuring out whether, you know,
12 how that applies in a particular set of
13 circumstances, the court essentially asks two
14 questions.

15 The first prong of their test is to
16 look at the history and experience, right? Do we
17 always have, you know, do we have a history of
18 public access to trials?

19 And the Supreme Court, in answering
20 this question for trials in Richmond Newspapers,
21 said look, we have public trial. We don't have
22 star chamber justice. We haven't had it for

1 centuries. We didn't have it in England and
2 we're not going to start now.

3 The second is, is there a logic or
4 some policy reason for having public access? And
5 it's not sort of a squishy policy test. It's
6 asking the question does public access actually
7 add something to the process?

8 And the Supreme Court in Richmond
9 Newspapers again identifies a bunch of different
10 values that are served by public access. You
11 have, you know, there's a community and
12 therapeutic value for people who are, you know,
13 have witnessed a crime and to be able to see that
14 justice is being done and how it's being done.

15 There's a public educational value
16 about how the process works and how our legal
17 system works. There's a deterrent effect,
18 obviously, for, you know, future would-be
19 criminals.

20 There's the feeling that transparency
21 makes the outcome more widely accepted because
22 you feel like you understood what happened in the

1 process and didn't just get a result.

2 And lastly, it helps the process
3 itself work better because there's a structural
4 interest. For example, if, you know, witnesses
5 or potential jurors know that their answers to
6 questions are going to be public, they're less
7 likely to fib, you know, right?

8 So, you know, that because there's a
9 way, if some person says oh, I was a witness, but
10 I didn't see that, if somebody knows that's
11 wrong, they're going to come forward.

12 If some juror says I never was, you
13 know, I've never had, you know, experience with
14 this particular offense, and that's wrong, that
15 will be scrutinized, and it sort of operates on
16 the theory that sunlight is a good disinfectant
17 for purposes of how a judicial process works.

18 So, here in the military court system,
19 there is a tradition of public access going back
20 to cases in everything from U.S. v. Ortiz, to ABC
21 v. Powell, which a couple of my colleagues
22 litigated in the CAAF saying that there was a

1 right of access to Article 32 hearings.

2 And the role that public access plays
3 in civilian criminal proceedings applies with
4 equal force, and perhaps more so given the
5 command structure that's inherent in a military
6 tribunal to military proceedings.

7 So, the first question is do we have
8 an access right? And I think there's a pretty
9 easy answer to that with respect to court-
10 martials and military proceedings.

11 The second one is what circumstances
12 can that right be overcome? And there's
13 essentially two parts of this. One is there's a
14 substantive piece which is to ask is there some
15 sort of compelling governmental interest in
16 closure, right?

17 If you go back to the case involving
18 a minor victim of sexual abuse, that's a
19 compelling interest. It may not be categorically
20 enforced, but it's something that you could raise
21 and say well, we ought to close this for good and
22 valid reasons.

1 The second is to look at whether there
2 are alternatives to closure, right? Judges will
3 say well, we have to close this preliminary
4 hearing because otherwise, we're not going to be
5 able to seat an unbiased jury because they'll
6 hear what the suppressed evidence is.

7 Well, we can also deal with voir dire.
8 We would do with a change of venue, right. There
9 are other things that you can do and the court is
10 obliged to consider that.

11 And then you're supposed to come up
12 with as narrow a restriction on public access as
13 possible, and that sort of substantive review,
14 which sounds a lot like the scrutiny that we're
15 used to with constitutional statutes, is what the
16 court is supposed to do substantively.

17 There is also a set of procedural
18 requirements, which is that there needs to be,
19 before something can be sealed and court closed,
20 a notice to the public, which is usually
21 accomplished by putting something on the docket.
22 Again, if you don't have a docket, that's a

1 little harder, but notice and opportunity to be
2 heard, findings, and the findings have to be
3 specific enough that an appellate court could
4 review them, right. So, that's the basic
5 framework of First Amendment law.

6 So, one question might be well, how
7 does that bear on records as distinguished from
8 the proceedings, right? There was an -- it sort
9 of begun with an artificial distinction between
10 proceedings and records as a remnant of a case
11 that preceded this quartet in 1978 called Nixon
12 v. Warner Communications, and that was a case
13 about access to the actual audiotapes that had
14 been played at one of the trials in the Watergate
15 matter and Warner Communications sought access to
16 these tapes.

17 And the court in 1978, before it had
18 sort of recognized this First Amendment right,
19 had recognized a common law right to those
20 records and found that in the particular
21 circumstances of a presidential record, that
22 those, that that common law right of access had

1 been supplanted, if you will, by the Presidential
2 Records Act, right, in the sense that you pass a
3 statute that can supplant the common law, and
4 sort of in the particular circumstances of that
5 case said that you didn't have a right of access
6 to those tapes under the common law because you
7 would have a right under the Presidential Records
8 Act.

9 Since then, although the court has not
10 really taken up the question of access to
11 records, in the two Press Enterprise cases where
12 the preliminary hearing and the voir dire had
13 been closed, the court said you had a right of
14 access under the First Amendment to transcripts
15 of both of those things.

16 That was the best corrective that the
17 court could come up with and it was, of course,
18 instructing for future cases that you had a right
19 of access to be present, but it did deal with
20 those records.

21 And based on that, most of the federal
22 courts of appeal that have considered this

1 question have found that there is a public right
2 of access to the records on the theory that if
3 you don't have access to the records, you can't
4 really make sense of the proceeding, right?

5 If you don't have access to a docket
6 and you know that some motion is going to be
7 argued, some hearing is going to be had, some
8 suppression hearing is going to occur, you can't
9 avail yourself of the right of attending the
10 proceeding, right.

11 So, you need access to the docket as
12 a foundation for having access to the proceeding,
13 and that if you don't have access to things that
14 go with it, the motions, the exhibits, the
15 evidence, you can't really make sense of what's
16 going on.

17 Because if you've gone to a hearing,
18 you know that the judge doesn't just say well,
19 start over and tell me everything that's in your
20 papers. The judge has read the papers and starts
21 sort of, you know, maybe at second base going
22 around the bases, and so if you want to know

1 what's happening, you need access to those
2 materials, and that's what the courts have done.

3 There are a few things that I want to
4 highlight about sort of what this means and what
5 it might mean for purposes of your exercise
6 today.

7 One is, as I mentioned based on the
8 Globe Newspapers case, categorical closures are
9 not allowed, right. A rule that says we will
10 always do X is prohibited by Globe Newspapers.

11 A rule that says we may do X, but we
12 have to have particularized findings that in the
13 particular case, there's a compelling
14 governmental interest, it's narrowly tailored, et
15 cetera, that you can do, right, so we don't have
16 categorical closures.

17 The second is that the right of access
18 is a contemporaneous right, right, so the notion
19 that we would delay access for some period of
20 time is generally frowned upon by the Supreme
21 Court and the federal court system.

22 In fact, there is a body of case law.

1 There is an organization called Courthouse News
2 Service which reports on court systems and they
3 have gone around suing different courts around
4 the country to say you are delaying too long in
5 giving us new case filings.

6 And just to give one recent example,
7 one of these cases went up to the Ninth Circuit
8 which said a 48-hour delay in providing access to
9 new case filings is actually too long a delay.

10 Now, what the exact magic number is,
11 is a different story, and I want to talk about
12 sort of the practical consequences of a rule like
13 that in a minute, but what it says is that you
14 really can't delay because in effect the court is
15 saying access delayed is access denied because
16 you have a right to know what's going on when
17 it's going on.

18 Third, you can't seal dockets as a
19 matter of course. There are a number of cases,
20 United States v. Valenti in the Eleventh Circuit,
21 Hartford Courant v. Pellegrino, which a couple of
22 my colleagues litigated in the Second Circuit,

1 which stand for the proposition that sealing a
2 docket basically cuts off access at the front end
3 because you can't know what's going on in a
4 proceeding if you can't know that the proceeding
5 is happening or what's happening in it.

6 And by docket, and I just want to
7 emphasize something Eleanor said, that's not just
8 sort of basic information about the case. That
9 is, you know, the docket in the sense that it
10 lists all of the case filings that are made, all
11 of the hearings, all of the orders, et cetera, so
12 that you can then find out what's going on.

13 Last, you can't seal classes of cases
14 by their outcome, right? So, there's a case
15 called *Pokaski v. Superior Court*. I think it's
16 versus *Globe Newspapers*, actually, and it's a
17 First Circuit case that basically examined a
18 statute that was passed by the Commonwealth of
19 Massachusetts that said look, if you are found
20 not guilty, if the grand jury failed to indict
21 you or a court found no probable cause, the
22 record of your case was automatically sealed,

1 right?

2 And it also went on and said when the
3 case ended in a nolle pros or other dismissal,
4 the case could be sealed, the case file could be
5 sealed if, quote, substantial justice would best
6 be served by doing so.

7 And the court invalidated the
8 automatic sealing provisions, right, finding that
9 the present prospect to future access -- oops,
10 sorry. That was a note for me to file something
11 with the court and I've now just done that, so
12 when we get to how easy is it to file things
13 remotely --

14 DR. HILLMAN: Mr. Berlin, I'll take
15 advantage of the alarm then just to say can you -
16 - I feel well-informed on, you know, the breadth
17 of law that's behind this, but I'm not clear on
18 exactly where you're going to land with respect
19 to 140a and the Privacy Act collision here that
20 we have, so.

21 MR. BERLIN: Sure, so I would say a
22 couple of things on that, and I was basically

1 getting to -- that was the very next thing, so
2 that was a perfect segue, so thank you very much
3 for that.

4 The statute, it's not really a problem
5 with 140a, right? So, the problem is that the
6 guidance that's been provided does a number of
7 things under a statute that on its face says you
8 should do this consistent with the practices that
9 are in the federal and state courts and then
10 departs from them significantly, right?

11 So, you have this weird thing where
12 you have a statute, 140a, which on its face
13 incorporates what goes on in federal and state
14 court, which is largely governed by this body of
15 constitutional law, and then does not follow it,
16 right? That's a tension that's in there.

17 The second part of your question which
18 is about the Privacy Act, the civilian courts
19 deal with this with privacy, not the Privacy Act
20 because it's not covered by the Privacy Act,
21 quite regularly, right?

22 There are a lot of things where people

1 say I have a privacy interest. I have a privacy
2 interest in not disclosing some, you know, when
3 I'm the juror, that I was a victim of sexual
4 abuse in open court, and I'm allowed to approach
5 the bench and say I'd like to talk to you about
6 that at the bench.

7 There are provisions when you file
8 things on PACER that require lawyers who use
9 PACER and the CM/ECF system to file things to
10 remove personally identifying information from
11 them, and so in that sense, there's a lot of
12 experience dealing with private information.

13 On the very specific question of the
14 Privacy Act, if the military court system is
15 deemed to be a court system, and I think that the
16 case law -- and I've had to look at this,
17 unfortunately, for a couple of cases.

18 As a civilian and often representing
19 civilian media parties that are before your
20 courts, one of the questions is, well, is this a
21 court system or is this an administrative agency?

22 And the weight of the authority, and

1 I don't purport to be an expert on this, but from
2 my looking at it seems to be that it's a court
3 system at least to the extent that it's
4 dispensing justice, right?

5 If one of your judges on the court
6 system, you know, discriminated against their law
7 clerk, it might be an administrative agency if
8 they got sued for that, but to the extent that
9 this is actually functioning like a judiciary, it
10 would have that and the Privacy Act could not
11 trump the constitutional imperative to have a
12 presumptively open court proceeding, right?

13 So, you have basically the First
14 Amendment coming in and trumping your Privacy Act
15 concerns and you have it to the extent that you
16 had a common law right that was then supplanted
17 by statute, in this case 140a, would essentially,
18 but its terms, be saying we expect you to do
19 what's being done in the federal and state
20 courts.

21 And I would say just, and I'll end
22 here, as somebody who has practiced in front of

1 your courts, you know, one of the things that is
2 difficult is the sort of mechanics of it, filing
3 something, right?

4 You take it -- you know, I've had to
5 go -- this is now a little while ago, but I've
6 had to go to the court-martial and actually bring
7 my papers and say I need to see the judge. Can I
8 bring them? Because there's no place to just
9 file it, and this is an impediment not only to
10 litigants, but also to the public being able to
11 see what's going on.

12 And the civilian court system has, you
13 know, now several decades of experience with
14 PACER and, you know, the ECF system that could, I
15 assume from the administrative office of the
16 courts, be easily borrowed by the military, and
17 set up, and to the extent that I'm here with a
18 point of view, I would urge that the military do
19 so.

20 And with that, unless there's
21 questions -- I think we're going to do questions
22 at the end? So, I'm going to turn my mic off and

1 --

2 PROF. ROSENBLATT: My observations on
3 the Privacy Act come from my experience both as a
4 military counsel where I served for 20 years in
5 the Army JAG Corps, and then as a private
6 counsel.

7 In the JAG Corps, I served as a
8 military prosecutor and defense counsel,
9 including as the lead military defense counsel,
10 including as the lead military defense counsel
11 for Sergeant Bowe Bergdahl in the most publicized
12 case in American history, and this was a case
13 where our main effort was based on public access.
14 We wanted it. Not all defendants want public
15 access, but it was important to us and that
16 shaped my observations.

17 So, as a nontraditional career path,
18 after my Army career, I went to be a law clerk in
19 the U.S. District Court for the District of
20 Columbia. Every day, high-profile national
21 security cases are handled with ease, full access
22 to public dockets and involving really pressing

1 matters of national security.

2 And I look back on that, I'm like wow,
3 the antediluvian practice I was engaged in in the
4 military of emailing my motions and filings to
5 the judge and the opposing party, there's this,
6 you know, the PACER and the online system.

7 After a year and a half as a law
8 clerk, I went to work in an law firm where I
9 first chaired cases in both federal and state
10 courts and saw that this is really doable, even
11 in state systems that are maybe not as robust as
12 the federal system.

13 I then became a law professor down in
14 Mississippi where I teach classes such as
15 constitutional law and First Amendment. I've
16 engaged in scholarship on this, co-authored three
17 books on military justice, and also engaged in
18 other writings on like public access to Article
19 32 hearings, and most recently, filed an amicus
20 brief in the case that Sarah Matthews will talk
21 about at ProPublica, and I was the primary author
22 of a letter to the DoD General Counsel, Caroline

1 Krass, and the amicus to the court in the
2 Southern District of California where I argued
3 against the DoD's construal of Article 140a,
4 which I viewed as this great term of public
5 access, and how DoD was turning this instead as a
6 mandate for secrecy.

7 So, with that, I'd like to step back
8 for one minute and, just more philosophically,
9 who is the public? What is public access? And I
10 think that will help advance what the Chair has
11 urged us to do.

12 We think of the public in terms of the
13 news media, but it's often more than that. The
14 public includes crime victims and those affected
15 by military crimes. It includes other members of
16 the military such as January 6.

17 A lot of people really wanted to know
18 how far they could go in the tumult between the
19 transition between the Trump Administrative and
20 the Biden Administration with their political
21 expression. What could they do? They're looking
22 to see what other cases have done.

1 So, it enforces the own discipline of
2 the military if they can see how these things are
3 interpreted and where discretion lies with
4 commanders.

5 The population includes the population
6 at large. We passively confer this standing.
7 What does the American public think about things?
8 And we talk about that in unlawful command
9 influence and others.

10 The public includes our adversaries.
11 This is a national security law concern. And
12 usually, I think, we fixate on the idea of we
13 can't have courts that release information that
14 our adversaries might get.

15 And I would suggest that there is
16 another side to the coin that is just as
17 important. If we send someone credibly accused
18 of misconduct from the combat zone back to the
19 United States and we enshroud it in secrecy
20 whatever happens, the affected population will
21 look and say huh, they just let them off the
22 hook. That's all that happened.

1 So, there's a national security
2 interest in making sure that we have, that we are
3 sharing, you know, following the Constitution and
4 sharing with the public access to our
5 proceedings.

6 Okay, public access, in one sense, you
7 know, we think anyone can go to court. That's
8 not so simple with the military. First of all,
9 these cases take place on military bases. Not
10 everyone can just go ahead and walk on.

11 That's usually not the problem though.
12 Interested members of the public, such as Sarah
13 Matthews in May's court-martial, were able to get
14 access to the military courtroom.

15 Our courts often occur in austere
16 environments. They may occur in dangerous
17 locations in the combat zones, and so maybe not
18 everyone who wants to go to the court can, but is
19 there some other way that they can find out what
20 is going on?

21 The transcripts, and, you know, in
22 addition to the public access that we talked

1 about, I would suggest that we need to be
2 thinking very carefully about two barriers to
3 constructive access to courts. One is what this
4 group has already studied with Article 32
5 preliminary hearings, the changes that have made
6 things very lax.

7 For the prosecution to advance a case,
8 they no longer have to call live witnesses. And
9 so, even interested members of the public who
10 appear before those hearings and want to see
11 what's going on may only see this, the
12 prosecution picking up a stack of papers and
13 moving it from one side of the room to the other
14 saying please consider that, so it frustrates
15 public access. Someone who wants to know what's
16 going on can't really see that.

17 Another barrier to constructive access
18 is when you don't put everything online. Often,
19 the peak of public interest is at the start of
20 the case, and news media and others really want
21 to see what's going on during the Article 32
22 preliminary hearing, but if we don't put the

1 preliminary hearing information on public
2 dockets, then no one can go. So, they can't go
3 to something that they don't know about.

4 And finally, the access to documents
5 like what you would have on CM/ECF and PACER, you
6 know, the battles of courts are decided on the
7 motions, and there's no real way in the military
8 for people to see right now what's going on with
9 those motions.

10 I would also suggest from my time
11 reflecting in service that there's something
12 about the culture too. Within the military, we
13 have thousands of security officials. We have
14 very few First Amendment lawyers. We have very
15 few historians.

16 So, what that means is what DoD is
17 really good at is siphoning, classifying,
18 destroying information, and we're not as good at
19 taking that information, like where does this
20 need to go and how do we get this out?

21 Another aspect of the culture is I
22 think that it's largely hostile or even averse to

1 the news media. We don't trust that we're going
2 to get the story we want when meddlesome
3 reporters are coming to cover our cases, and
4 that's how I think we got to a point where we've
5 taken 140a as a mandate for secrecy.

6 And the insight that I've had in
7 preparing for this and thinking about this is
8 that's not something that's unique to the
9 military. You know, Microsoft doesn't want the
10 public to walk into corporate headquarters and
11 find out what's going on, just like the Social
12 Security Administration doesn't want that either.

13 What's unique about the military is
14 that we're the only organization that also runs a
15 court system. So, Microsoft doesn't have its own
16 court. You know, you have the expert courts on
17 the side that deal with judicial stuff.

18 So, there's the opportunity and the
19 real prospect of influence that this court system
20 that should be following what's very clear First
21 Amendment law is left with a lot of influence
22 about the things that we don't want opening up to

1 the military.

2 These were things that came to a clash
3 in our work on the Bergdahl case. Many
4 defendants will align with the prosecution and
5 the judge and say we don't want anyone to find
6 out about this, but in our case, we were dealing
7 with a soldier. When we looked at the facts of
8 this, we said this is a guy whose -- a
9 misjudgment. He made a mistake.

10 He has some issues and he shouldn't
11 have done that, but the narrative out there in
12 the public was completely different, that this is
13 one of the worst enemies that this country has
14 faced, that he joined the military, that seven
15 people died looking for him, you know, all of
16 these terrible things.

17 And we would like to think that our
18 institutions are going to stand firm and not bend
19 when they're under public pressure, but that's
20 not always the case. They do tend to bend.

21 So, what we saw was that the important
22 decisions in this case such as whether he should

1 be prosecuted versus administratively separated,
2 whether to refer this to a general court-martial
3 instead of following the preliminary hearing
4 officer's recommendation to not do that, how to
5 staff the case. We ended up assigning 50
6 prosecutors to a case of a junior enlisted
7 soldier who walked off a base. It's very much a
8 reflection of what happened.

9 So, all of these things were a great
10 concern that we're going to suffer a worse
11 outcome because the Army is responding to the
12 public pressures on the case.

13 So, we sought to challenge that, not
14 with classified information. We tried to be
15 fastidious about how that should be handled, but
16 we said we've got this radical idea. Why don't
17 we do this like how the federal courts do this
18 and everywhere else?

19 So, we set up a website. You can find
20 it. It's called the Bergdahl Docket. And this
21 is not sort of an advocacy website. All this is
22 is a listing of the main documents on the case,

1 the charge sheet, the motions, responses to the
2 motions, the judge's orders.

3 It sounds pretty simple, right? But
4 we were accused of being untrustworthy with
5 receiving discovery, untrustworthy with
6 classified information, threatened that we would
7 be cut off from this.

8 The military challenged our radical
9 idea to release case information, the loss at the
10 Army court, and we were eventually able to have
11 those basic transcripts, Article 32 reports, and
12 other things be available to the public.

13 So, about the point of the Privacy Act
14 and this confluence that we're at, what I would
15 say is when you look at what's going on here is
16 that the DoD has not said simply let's follow the
17 Privacy Act. They've done something a little bit
18 different from that. Their guidance does vest
19 discretion in military officials about what to
20 release and what not to release.

21 And respectfully, when you have such
22 guidance as that, it's largely going to be a

1 default towards secrecy. When there are cases
2 that the military does not want the public to
3 find out about, those will be the cases in which
4 military officials decide that they should be
5 kept.

6 And I would suggest that the, for
7 example, if you can't release any information
8 about a case that results in acquittal, what that
9 means is you can't have any public access at all,
10 because any case that's brought in the military
11 justice system might end up in an acquittal, so
12 releasing any documents or allowing people to see
13 what's going on would be a problem there, and
14 we'll stop there. Thank you.

15 MR. GUILDS: Madam Chair and members
16 of the panel, it is a privilege to offer my
17 experience and perspective on the important
18 issues of public access to information related to
19 the investigation and prosecution of crimes under
20 the Uniform Code of Military Justice.

21 I appear here today as a civilian
22 victim legal counsel, and as counsel for

1 Survivors United, a victim-created, victim-led
2 organization providing crime survivor
3 perspectives on the military justice system. By
4 way of background and explanation, I represent
5 military connected sexual assault survivors pro
6 bono.

7 My firm, Arnold and Porter, has
8 represented dozens of survivors in the military
9 justice system over the last decade, trained
10 hundreds of lawyers in the representation of
11 military connected victims, and advised important
12 civilian pro bono legal referral organizations,
13 including the largest civilian military connected
14 pro bono legal referral organization, Protect Our
15 Defenders.

16 Legal representation of crime victims
17 is now an integral part and an essential part of
18 the military justice system, particularly the
19 investigation and prosecution of Article 120
20 offenses.

21 Federal law provides all military and
22 their dependents with legal counsel free of

1 charge for certain alleged specified offenses,
2 and military detailed victim counsel represent
3 certain other civilian survivors and are
4 empowered to grant waivers for non-qualified
5 victims. As a result, the United States military
6 employs the largest victim rights direct legal
7 services organization in the world.

8 Victim counsel inform and empower
9 survivors and enforce their federally protected
10 rights. Victim counsel zealously advocate on
11 behalf of their clients, often litigating motions
12 to protect their clients' privacy and sexual
13 history information, and the assistance in the
14 assertion of other federal rights.

15 They also assist survivors in
16 understanding the complex investigatory and
17 military justice system, and they remove barriers
18 to the full and informed participation of victims
19 in the military justice process.

20 I took my first case in 2012. My
21 client was a midshipman, the accused, four
22 members of the Navy football team. At the time,

1 the legal rights of victims under the UCMJ were
2 in their infancy.

3 Case law had recently established the
4 victim's rights to be heard under Military Rules
5 of Evidence 412 and 513, but the right was
6 amorphous, largely untested, and the broader
7 rights of victims that exist today were not yet
8 law.

9 Given the status of the accused and
10 the nature of the alleged assault, media
11 attention in the case was high. News reporters
12 attending the Article 32 preliminary hearing
13 reported on the four-day cross examination of my
14 client regarding the most intimate and personal
15 details of her life. Common perception was that
16 her treatment at the preliminary hearing was
17 unfair and unnecessarily intrusive, and it was.

18 The attention of the case engendered,
19 ultimately contributed to, in significant part,
20 to the positive reforms in the military justice
21 system, including specifically the revision of
22 the preliminary hearing process.

1 In the lead up to trial, the court did
2 not know what to do with me, where I should stand
3 for argument, whether I could argue, and about
4 what, but most notably, what I had access to in
5 the way of information and court filings.

6 Ultimately, I was provided with only
7 a very limited set of filings and much of that
8 was redacted. The result was a materially
9 undermined representation of my client.

10 In the ten years since the court-
11 martial, much has changed. Significant reform
12 and progress has improved the rights of sexual
13 assault survivors, and yet I can report that my
14 limited access to filings and information as a
15 victim's counsel remains a significant impediment
16 to my ability to do my job.

17 The issues concerning victim access to
18 information are broader and more complex than
19 simply the development of a public-facing and
20 robust docketing system, although that is
21 important.

22 As an initial matter, victims do not

1 automatically receive their statements to
2 criminal investigators. Army TJAG policy, for
3 example, does not require provision of victim
4 statements to the victim pre-preferral even upon
5 request.

6 Compounding matters, unrepresented
7 victims are not automatically provided their
8 statements unless and until they request them,
9 something victims are frequently unaware of, and
10 as a result, all too often, victims receive their
11 own statements for the first time shortly before
12 trial as part of trial counsel's final
13 preparation efforts. Victim access to their own
14 statements is a necessary and important source of
15 empowerment and trial preparation.

16 An initial report to law enforcement
17 is frequently the first time a victim speaks in
18 detail about their assault to a stranger.
19 Indeed, it may be the first time the victim
20 describes the details out loud to anyone.

21 It is a time of intense anxiety and
22 frequently residual trauma. It is therefore not

1 unusual for my clients to express difficulty
2 remembering what happened during a law
3 enforcement interview or even what was said.

4 Furnishing victims their statements in
5 a proactive and timely way allows them to point
6 out additional information or facts that may not
7 have come out in the initial interview, and it
8 ensures the victim is informed and knowledgeable
9 about their prior statements before any
10 subsequent interview by investigators or trial
11 counsel.

12 For these reasons, the proactive,
13 mandatory, and timely provision of all law
14 enforcement victim statements, including
15 interview summaries, to the victim is essential
16 and should be implemented immediately.

17 Evidence submitted during the Article
18 32 hearing and access to the Article 32
19 preliminary hearing officer's report are
20 additional categories where victims and the
21 public are unnecessarily prevented from receiving
22 timely and complete information.

1 Military connected victims have a
2 federal right to be present at the Article 32
3 hearing regardless of whether they testify, an
4 obvious recognition of the importance of the
5 victim's right to participate in the Article 32
6 process.

7 Victims also have an expressed right
8 to receive the preliminary hearing transcript, a
9 further recognition that victims should know what
10 is happening during the Article 32.

11 Despite these rights, in my
12 experience, victims and their counsel do not
13 routinely receive preliminary hearing evidence or
14 the PHO recommendation.

15 The harm to the victim in not
16 receiving preliminary hearing information is
17 significant. Current Article 32 hearings are
18 largely paper affairs with few, if any,
19 witnesses. Without access to the evidence
20 submitted, the victim's rights to participate and
21 receive a transcript of the Article 32 hearing is
22 meaningless.

1 Even worse, victims are told that the
2 hearing will impact whether their assault will
3 proceed to trial, and yet the very opinions that
4 form the decision are often withheld from them
5 even though this information is not privileged
6 and even though any Privacy Act concerns can be
7 addressed with manageable and focused redactions.

8 FOIA is not a viable alternative for
9 victims to receive Article 32 or any other
10 information developed through the court-martial
11 process. Unrepresented victims do not know or --

12 (Simultaneous speaking.)

13 MR. GUILDS: Are we on a plane?

14 (Laughter.)

15 MR. GUILDS: I'm going to continue to
16 move about the cabin.

17 (Laughter.)

18 MR. GUILDS: Okay. I appreciate it.
19 All right, unrepresented victims do not know or
20 understand the process, and even represented
21 parties do not receive timely or meaningful
22 information as part of the process.

1 Unnecessary redactions obliterating
2 substance are the standard response to a FOIA
3 request and also undermine the public's right to
4 know.

5 Mandatory provision of all non-
6 privileged Article 32 evidentiary exhibits to the
7 victim or her counsel and contemporaneous victim
8 receipt of the PHO report should be implemented
9 immediately.

10 Victim and public access to
11 information is not materially better in the lead
12 up to trial. Victims are not routinely provided
13 with underlying evidence about their case even
14 when the information is directly about them.
15 Most significantly, victim's counsel is
16 frequently not served with all pleadings or
17 motions filed in the court-martial.

18 Under the current system, trial
19 counsel are largely responsible for providing
20 victim counsel with the filings in a court-
21 martial, but not all filings and not simultaneous
22 with receipt.

1 Rather, trial counsel is saddled with
2 the obligation to decide what issues relate to
3 the victim, and that burden comes on top of their
4 other obligations and duties, including preparing
5 for trial.

6 JUDGE SOMERS: Excuse me?

7 MR. GUILDS: Yes?

8 JUDGE SOMERS: I just wanted to ask
9 you, we understand that there's a lot of need for
10 documents to be shared and this is, you know,
11 across the board what you've been telling us.

12 MR. GUILDS: Yes.

13 JUDGE SOMERS: And then the
14 recommendation is to use things like PACER,
15 which, having had experience trying to get PACER
16 in an administrative court forum in the federal
17 government, is fairly impossible. So, what do
18 you recommend that we do to accomplish the things
19 that you're telling us that we need to do?

20 MR. GUILDS: Well, some of them are
21 PACER and some of them are victim access issues
22 beyond PACER, right? So, there's a public access

1 issue --

2 JUDGE SOMERS: I understand what
3 you're saying.

4 MR. GUILDS: Yeah.

5 JUDGE SOMERS: You're saying that
6 there's no access, public and victims, right?

7 MR. GUILDS: Yes.

8 JUDGE SOMERS: So, what do you
9 recommend as a solution for us to evaluate?

10 MR. GUILDS: So, I think there's
11 multiple solutions. First of all, I do think a
12 simultaneous docketing system that provides, at a
13 minimum, notification to the counsel of record in
14 the case, should be implemented, right.

15 So, the idea, to your point, that
16 we're emailing the courts and I'm relying on
17 human beings to decide what the victim needs to
18 see or not see is not a system, I don't think,
19 that's viable.

20 JUDGE SOMERS: So, to be fair, I agree
21 with you, but a lot of forums now, that's what
22 they use, like our system is a docketing system

1 in this federal administrative forum I'm talking
2 about, but it's basically emails to a docket
3 mailbox that is distributed, so it's the only
4 thing that you could do if you didn't have PACER,
5 and you can't actually just get PACER.

6 So, what would you recommend that the
7 military justice system do knowing that there's
8 five different services, or six services that
9 need to have this system, but they're not the
10 same -- they don't have the same system right
11 now, like what would you recommend?

12 MR. GUILDS: Well, I would certainly
13 recommend a uniform system, number one. I don't
14 think it makes sense to have different branches
15 have different systems, number one.

16 Number two, there are various states.
17 It's not just the federal. There are various
18 states that have the ability to file and to
19 receive simultaneous notice, and then to make
20 those notices public.

21 So, I do think that there are -- I
22 recognize that there can be challenges with

1 PACER, but I also use it every day in my private
2 practice and I think that it's, you know, it's an
3 option.

4 It is not the only thing, however,
5 that I will say that victims experience where
6 they are receiving limitations even if we cannot
7 implement that system, right.

8 So, some of the points that I'm making
9 today, for example, some of the limited access to
10 information that victims receive don't have
11 anything to do with the docketing system. They
12 have to do with unnecessary intrusions on the
13 ability of the victim to know what's happening in
14 her case.

15 MG EWERS: Just to make sure I
16 understand --

17 MR. GUILDS: Sure.

18 MG EWERS: -- some of the documents
19 that you're referring to, statements given to MPs
20 or something like that, don't fall under 140a
21 because they haven't been offered at the 32. Are
22 you still, are you suggesting we should expand

1 140a to reach all of the documents?

2 MR. GUILDS: So, I understand that
3 this panel is considering specifically 140a,
4 right, today, but there are multiple provisions
5 under the Uniform Code of Military Justice, given
6 the scope of the work that you do, that provide
7 victim access to information beyond simply 140,
8 right, so the right to a transcript, the right to
9 attend. Those rights are unique to the victim,
10 and as victim counsel, that's what I'm here to
11 speak to.

12 So, what I would say, for example, is,
13 let's just take the PHO report as an example.
14 The victim has a federal right to participate in
15 that process. Why that right doesn't extend to
16 receiving the information submitted with respect
17 to that Article 120 or specifically the report
18 that's generated as a result, those are the types
19 of reforms that I would advocate beyond simply
20 the creation of a docketing system, and those are
21 examples of continued reform that I think we need
22 to see.

1 All right, and I understand we're
2 short on time and we have a lot going on, so I
3 will try to wrap up, but I do think it's -- you
4 know, this is my one shot to give you sort of the
5 victim perspective, so I do want to, I want to
6 make sure that I hit the points that go beyond
7 simply the docketing system.

8 So, Article 140a has not led, as we've
9 discussed, to a workable and functioning
10 docketing system. Filings still occur largely
11 via direct email to the military judge, and
12 victim's counsel do not receive automatic
13 notification of filings and neither does the
14 public.

15 The creation of the public docketing
16 system we discussed that results in automatic
17 service of all filings to counsel of record is an
18 important objection that would reduce uneven
19 access to information, and victim's counsel
20 should be automatically served contemporaneous
21 with all filings in the case.

22 A return to my first case is

1 instructive on this issue. I recall vividly
2 sitting in court in the gallery listening to what
3 I gathered was a motion to suppress evidence on
4 one of the accused's law enforcement statements.
5 I was not provided filings related to the motion,
6 and thus was unable to assess the strengths of
7 the arguments or explain them to my client.

8 When the motion was granted, all I
9 could do was commit truth and tell my client that
10 the charges in that case were dismissed. I
11 couldn't tell her why. I couldn't offer her my
12 independent judgment as to the strengths or
13 weaknesses of those arguments, whether the
14 military justice system had let her down, whether
15 military investigators had violated the
16 Constitution, and needless to say, these are not
17 the results that we want to create if we want to
18 create a system that victims can trust.

19 I recognize we're short on time. I
20 would say -- I think I would conclude with this.
21 The story of victims' rights in the military over
22 the last decade is one of substantial progress.

1 There's no doubt about that.

2 Many, many reforms have been made and
3 I think there's people sitting at this table who
4 have helped to create those reforms, but more
5 work can be done, and the issue of access to
6 information for victims remains one of the single
7 greatest impediments that I see in my
8 representation on a daily basis.

9 I have to tell my clients I don't get
10 to see everything. I don't get to know
11 everything, and not because there's some
12 important investigative objective.

13 I can explain to my client why she's
14 not going to see law enforcement interview
15 statements during the course of an investigation
16 about what other people are saying, but I can't
17 explain to my client whose case is not going to
18 go to court-martial why she hasn't received the
19 preliminary hearing officer's report that did not
20 find probable cause.

21 Those types of needless restrictions
22 on victim access to information are things that

1 we can and should address, and I think they can
2 be done without significant or any real
3 meaningful impact on the defendant's rights. And
4 I guess with that, I will give back any time I
5 have.

6 DR. HILLMAN: Thank you, Mr. Guilds,
7 thank you, Mr. Rosenblatt, and thank you, Mr.
8 Berlin too, I appreciate it. I know you have one
9 more presenter.

10 MS. VUONO: Great. So, Sarah
11 Matthews, can you hear us?

12 MS. MATTHEWS: Yes, I can. Can you
13 hear me?

14 MS. VUONO: Great, yes, you have the
15 floor.

16 MS. MATTHEWS: Okay, thank you so
17 much. I'm Sarah Matthews, I'm deputy general
18 counsel at ProPublica. We are non-profit news
19 organization that is dedicated to publishing
20 investigative journalism in the public interest.
21 And I'm here to tell you that unfortunately the
22 military services are not providing timely access

1 to courts-martial records as required by Article
2 140a.

3 This has frustrated ProPublica's
4 ability to report on the military justice system.
5 In fact Article 140a has actually been used to
6 withhold courts-martial records from us. We
7 spent the past year trying to get timely access
8 to military court proceedings and records from
9 the Navy so we can report on these cases to the
10 public.

11 We have sought records that are not
12 sealed, or classified, records that would be
13 publicly available in any other criminal court in
14 the country. But the Navy has continually denied
15 our requests. Their default is always secrecy.
16 First they have cited FOIA exemptions to us as a
17 basis for withholding records. Then the Privacy
18 Act, and then Article 140a.

19 We have now been denied timely access
20 to more than 57 cases, and that number continues
21 to grow as we continue to ask for access to
22 additional court cases. We are currently

1 litigating this issue in federal court in the
2 southern district of California. By way of
3 background, last July we began reporting on the
4 Navy's case against Seaman Apprentice Ryan Mays.

5 Mays was charged with setting the fire
6 that destroyed the USS Bonhomme Richard in July
7 2020 at the San Diego Naval Base. Mays' attorney
8 was claiming that he was being scapegoated by the
9 Navy, and we learned that a military judge had
10 recommended after the Article 32 hearing that the
11 case not proceed to trial due to a lack of
12 evidence, but the commander referred the case to
13 trial anyway.

14 One of our reporters is Megan Rose,
15 she has won the Pulitzer Prize for her previous
16 reporting on the Navy. She was interested in
17 reporting on the Mays case, so last July she
18 requested all the court records in the case from
19 the Navy's Office of the Judge Advocate General.
20 We were trying to get the records before a pre-
21 trial hearing in August so we would know what was
22 happening in the case.

1 All of these records have been
2 discussed in open court, nothing had been
3 classified or sealed. We also asked for the
4 Article 32 hearing transcript, and the
5 preliminary hearing officer's report recommending
6 against trial, so we could report on why that
7 happened, and what the weaknesses were in the
8 case according to that preliminary hearing
9 officer.

10 OTJAG turned us down repeatedly for
11 about a month, even though the Navy had
12 previously released the charge sheet against
13 Mays, and search warrant materials that presented
14 the prosecution's version of the case. First
15 OTJAG cited a FOIA exemption for law enforcement
16 records where their release would quote interfere
17 with an investigation.

18 We explained that that couldn't apply
19 to court records, and it couldn't possibly
20 interfere with any investigations, these were
21 records that had already been submitted to the
22 court and discussed in open court. Then OTJAG

1 cited the Privacy Act, we disputed this, and we
2 even got Mays to agree to submit a Privacy Act
3 waiver, he wanted his records released.

4 Then OTJAG went back to FOIA again,
5 and then they cited Article 140a to us, and said
6 that that provision, and their own JAG
7 instructions interpreting that provision
8 prevented them from releasing these records. We
9 argued that Article 140a was meant to enhance
10 court access, but they disagreed.

11 Their JAG instructions, this is
12 5813.2, assumes the Privacy Act applies, and
13 based on that they prohibit release of any
14 records unless the accused is ultimately
15 convicted, and then only after the case is ended,
16 and within a 45 day period following quote
17 certification of the record.

18 So, this means that if the case is
19 fully acquitted, they never release any records.
20 It also means that you never get any timely
21 access to the records when the case is actually
22 happening, and the news media really wants the

1 records so they can report on the case when it's
2 newsworthy.

3 The JAG instructions also arbitrarily
4 prohibit the release of big portions of the
5 record. All the really informative stuff that
6 our reporters want, like any exhibits,
7 transcripts, the preliminary hearing report, pre-
8 trial matters, even certain texts of orders, the
9 JAG instructions also prohibit the Navy from
10 including Article 32 hearings on its docket, and
11 the Navy adheres to that.

12 So, we have no idea when Article 32
13 hearings are going to occur, and therefore cannot
14 attend them, and they are effectively closed from
15 the public. We then asked the military court,
16 because OTJAG denied us, we went and intervened
17 in the military court in Ryan Mays' case seeking
18 access to the records citing the 1st Amendment,
19 and the common law rights of access.

20 Mays actually filed a motion the next
21 day asking that the records be released, and
22 citing his 6th Amendment right to a public trial.

1 We actually had a hearing in the military court
2 where the parties discussed various pre-trial
3 motions unrelated to the access issue, and during
4 a break in that hearing an Associated Press
5 reporter actually came up to me, and asked what
6 was happening in the hearing.

7 Because without access to the
8 briefing, she was completely lost, none of us
9 knew what was happening. They were discussing
10 motions that had been filed with the court, but
11 not publicly available. Ultimately the military
12 judge denied both our motion for access, and the
13 accused's motion to release the records under a
14 6th Amendment right.

15 The military judge claimed he lacked
16 authority to release the records, and cited
17 Article 140a. Okay, not to be, just to keep the
18 fight going, we then went to the Reporters
19 Committee, which is a non-profit that advocates
20 on behalf of press organizations.

21 And on September 13th of last year we
22 sent a letter with the Reporters Committee and 30

1 other media organizations from across the country
2 to Defense Department General Counsel Caroline
3 Krass. We asked that Ms. Krass issue new
4 guidance under Article 140a as soon as possible,
5 because the Mays trial was about to start on
6 September 19th. We didn't hear back.

7 On September 23rd, during trial, we
8 finally published our investigation about Mays,
9 we really wanted to do it with access to the
10 court records, but we didn't have access to the
11 records, so we just did our best. But certainly
12 having access to the records would have made it
13 much more complete, and thorough.

14 But we still wanted the records to the
15 trial, so we filed suit on September 27th, since
16 we still had gotten no response from Krass'
17 office other than someone in her office saying
18 she had received the letter and was reviewing it,
19 we got no substantive response. So, we filed a
20 motion for a temporary restraining order, and a
21 preliminary injunction to enjoin the Navy from
22 continuing its policy of withholding court

1 records.

2 We also included a mandamus claim
3 asking that the court require the Secretary of
4 Defense to issue the uniform standards and
5 criteria as required by Article 140a. After we
6 sued, the Navy suddenly said they would release
7 the Mays records, but if we got a signed Privacy
8 Act waiver from Mr. Mays, which we did.

9 They subsequently produced some court
10 records, but continued to hold large portions of
11 the record. They withheld in full, or in part
12 more than 128 court records, and they cited FOIA
13 exemptions, and the Privacy Act for doing so.
14 They also continued to withhold the full Article
15 32 hearing transcript, which we had been trying
16 to get this whole time.

17 And the preliminary hearing officer's
18 report, even though portions of both of those had
19 already been submitted as exhibits during the
20 courts-martial, and nothing had been sealed. The
21 Navy claimed to us that these are not court
22 records. They also redacted third party names

1 and signature blocks in the records, again citing
2 the Privacy Act and FOIA exemptions.

3 Many pages were entirely blacked out
4 without any explanation. Some documents were
5 withheld for what seemed to be very arbitrary
6 reasons, like the claim that they were not
7 judicial documents. That included witness lists,
8 something labeled pre-trial matters, and even a
9 trial management order.

10 Eventually in March the Navy produced
11 an index listing the documents and their reasons
12 for redaction or withholding. They cited two
13 word phrases to justify vast sealing of the
14 records, such as quote personal privacy, quote
15 law enforcement, or technical. They provided a
16 key to explain these justifications, which
17 invoked FOIA exemptions, and case law related to
18 FOIA.

19 For example they claimed some records
20 fall within quote a law enforcement exception to
21 disclosure, or contain deliberative process and
22 official recommendations and conclusions. This

1 is not sufficient under the 1st Amendment, or
2 common law rights of access, these are FOIA
3 exemptions that do not apply in this context.

4 And in fact the defendants
5 acknowledged that FOIA didn't apply, but yet they
6 continued to invoke those FOIA exemptions.
7 Meanwhile in January of 2023, Ms. Krass did issue
8 new guidance interpreting Article 140a. But
9 unfortunately it just affirms and enables the
10 Navy's existing policy of secrecy.

11 It explicitly allows the Navy to
12 withhold court records when they're timely, and
13 newsworthy. It only requires release of courts-
14 martial records 45 days after the record is quote
15 certified following trial, and then only if the
16 accused is convicted, and then only certain
17 portions, excluding again, exhibits, and
18 transcripts, and Article 32 reports.

19 The new guidance also allows the
20 services to exclude Article 32 hearings from
21 their dockets. So, rather than uniform standards
22 as Article 140a requires, the new guidance gives

1 the services discretion to decide in specific
2 cases whether to release additional records.
3 This flips the presumption of access on its head.

4 In the meantime, back to our case,
5 since March we have now requested access to more
6 than 70 cases involving sexual assault, rape, and
7 related charges. We have also asked for notice
8 of other sexual assault cases that are not on the
9 Navy's public docket, and we have asked for
10 notice of when the Article 32 hearings will occur
11 in those cases so that we can attend them.

12 But we have been denied access to all
13 records except a handful of cases where the case
14 is over, and ended in at least one guilty
15 finding. And then we only get the portions of
16 the record that they typically publish, again, no
17 exhibits, no transcripts. OTJAG has repeated to
18 us that they do not provide notice of Article 32
19 hearings, even though the military rules require
20 that they be open to the public.

21 And OTJAG has also insisted that we
22 justify our need for access based on the

1 circumstances of each case, even though we don't
2 have access to the court records, so it presents
3 a catch 22 where we are denied access to
4 information about the case, yet we are supposed
5 to provide a justification to the Navy to
6 persuade them to release the records.

7 Given all of this, we amended our
8 complaint in mid May to challenge four of the
9 Navy's policies, which together prevent any
10 meaningful transparency or oversight of the
11 Navy's criminal justice system. The first is the
12 Navy's denial of access to the preliminary phase
13 of criminal cases by refusing to even provide
14 public notice of probable cause hearings under
15 Article 32.

16 The second is the Navy's denial of
17 timely access to all court records in every case.
18 Although the Navy sometimes publishes select
19 records that support the prosecution, as I
20 mentioned in the Mays case, they publish the
21 charge sheet, and also search warrant materials.
22 The third is the Navy's policy of arbitrarily and

1 permanently withholding broad portions of the
2 court record.

3 Such as all transcripts, and any
4 evidence, or exhibits submitted. And fourth, its
5 policy of permanently withholding all court
6 records in cases that end in a full acquittal.
7 Even when the case has been litigated in open
8 court, and even as in the Mays case, where the
9 accused wants the records released.

10 The defendants filed a motion for
11 partial dismissal that interestingly did not
12 challenge the core of our complaint. It did not
13 challenge our 1st Amendment, or common law
14 claims. They made a couple of sort of arguments
15 attacking other aspects of the complaint, but not
16 those key claims.

17 They argued the mandamus claim was
18 improper, that we can't challenge regulations
19 that are outdated, although they did not deny
20 that their -- they did not defend the policies
21 that we actually challenged in the complaint.
22 They also claimed we don't have standing to

1 challenge the gag order on Mays, or what is
2 effectively a gag order on Mays based on the
3 military judge's ruling.

4 And that Butler, Krass, and Secretary
5 of Defense Austin are not proper defendants,
6 Judge Butler was the military judge in the case.
7 They just argued that they are not proper
8 defendants. So, we are now actually working on
9 our opposition brief which will be filed next
10 Friday. And I know that we have limited time, so
11 I will pause there for questions.

12 DR. HILLMAN: Thank you, Ms. Matthews,
13 for sharing the long and winding road you've been
14 on. We appreciate your insight, and what you
15 have submitted, I do want to suggest to all the
16 experts that have joined us, if there is anything
17 you want to send us, links or written materials
18 that you didn't already, we would love to see
19 those.

20 And I will see if there are questions
21 for any of the panelists, or all from us.
22 General Ewers?

1 MG EWERS: I have a question, thank
2 you, ma'am. So, I'm a big fan of disinfectant,
3 and so forth, I guess my question is this. Do we
4 think that 140a when read in conjunction with the
5 precedent that you referred to, whether it be 1st
6 Amendment, or common law, how far do we think it
7 extends?

8 Do you get administrative proceedings
9 that where a courts-martial might end up, do you
10 get NJPs, where does that -- you talked about the
11 line between administrative actions within the
12 court's employment type issue, compared to the
13 proceedings of the courts. But could you use
14 that as a basis, or could you interpret 140 as to
15 require the services to release NJPs for example.

16 Summary courts-martial, administrative
17 proceedings? I mean I can make an argument that
18 you can read that from the language of 140a. I
19 just wonder whether you have thought about that.

20 MR. BERLIN: I mean, I think that
21 there is certainly a core that when what's going
22 on looks like a duck, and walks like a duck, it's

1 a duck. It's in the sense that if it looks like
2 a court proceeding it is. And then you'd have to
3 think about whether each of the examples that you
4 gave is more administrative in nature, or not.

5 So, for example, and just to use it as
6 an example, so there's an administrative process
7 in the civilian courts for doing a pre-sentence
8 report, and you can't just walk into the pre-
9 sentence office and say can I have the pre-
10 sentence report? But then when it's presented to
11 the court as a part of sentencing, then a right
12 attaches to it, right?

13 So, it's a record that is sort of
14 quasi administrative, but then becomes a judicial
15 record because it's used. And so, I think you
16 would have to sort of -- I can't say that I have
17 a crystal clear answer on each of the examples
18 that you made. But I think that the operating
19 principle is, from where I stand, would be to the
20 extent that it is analogous to a judicial or
21 quasi judicial process, or used in that way, then
22 the right of access would attach to it.

1 And then for the reasons I said
2 earlier, which is that I think 140a is
3 incorporating both from a point of view of
4 legislative history in terms of trying to
5 increase public access, but to the extent that it
6 on its face is incorporating what is going on in
7 federal and state courts, that would be
8 consistent with that.

9 And I don't know if anybody else on
10 the panel, if other folks have thoughts about
11 that.

12 PROF. ROSENBLATT: Last year more than
13 96 percent of military justice cases were NJPs.
14 The Supreme Court has categorized them as
15 administrative in *Mittendorf v. Henry*, 425 U.S.
16 25, 31-32 (1976), which talked about summary
17 courts. And I'm not aware of any challenge to
18 those NJPs, but sir, you said you read that,
19 140a, as possibly opening the door to
20 administrative hearings. And I would just like
21 to hear your thoughts on that.

22 MG EWERS: Well, I mean it's a timing

1 issue. So, just to back up a little bit, the
2 reason that we use administrative measures, which
3 include NJP, and non-punitive letters of caution,
4 for example, we do that so the marine, or sailor
5 can live to fight another day. So, you decide
6 that it's a problem, but you solve the problem,
7 and you want them, and you don't want to put it
8 in the street.

9 The timing though, what happens is you
10 send a service member to court, and the court
11 doesn't go down, and the commander decides to
12 dispose of the matter at a lesser forum,
13 administrative or otherwise. That's where I'd
14 read a case, it kind of talks about courts-
15 martial, it talks about cases, I'm not sure it
16 really talks about -- it talks pre-trial, and so
17 forth.

18 But it also says military justice
19 system at all levels, which tells me that could
20 be, I mean I think the Manual for Courts-Martial
21 talks about administrative proceedings, it
22 certainly talks about NJP. So, I can make the

1 argument that 140a says you've got to tell
2 everybody everything about every incident that
3 ever happens to a service member, and I don't
4 know if we want that.

5 That's my opinion, that's not --
6 obviously we haven't gotten far enough to decide
7 whether --

8 MR. BERLIN: Just to add to that, in
9 the civilian courts, in a number of places a
10 charge can be resolved by, for example, probation
11 before judgement. Which is, I think an analog to
12 this, where you are sort of saying if there's not
13 a further problem, we are going to let this go,
14 and you are going to be sort of on the hook for a
15 little while.

16 And it's done, because it's typically
17 done in court, not in an administrative process,
18 which is a little bit different than how it would
19 be handled in the military system. But it is
20 analogous to that. And I don't think anybody
21 would come and say if you got probation before a
22 judgement, that that's not something that would

1 be a public record.

2 Including principally because the
3 whole point of doing that is hey, we are going to
4 give you this if there is not a further problem.
5 But if the fact that you have it is secret, and
6 nobody would know, hey this person has already
7 had a violation, a strike against him or her, and
8 then if something happens again, we want to know
9 about that, that sort of undermines the whole
10 purpose of it.

11 So, it does seem to me -- I mean I
12 realize that's sort of, because of the way it is
13 handled administratively as opposed to really in
14 court, it's a little bit different. But it does
15 seem to me to be animated by the same principle.

16 MG EWERS: Thank you.

17 DR. HILLMAN: We have about three
18 minutes left. Other questions from the panel?

19 COL OSBORN: Thanks, Dr. Hillman. It
20 does not appear that the services are
21 implementing 140a uniformly. Are there any --

22 MG EWERS: That's a good addition,

1 uniformly.

2 COL OSBORN: Yeah. Is there anything
3 that one particular service is doing that is
4 progress on this issue, that the other services
5 you think could emulate?

6 MR. GUILDS: I would say the public
7 facing information across the branches varies.
8 I'm not going to call out any branch because I
9 don't want to get in trouble. But if you go to
10 the websites, and you try to figure out what's
11 going on, if you are a member of the public and
12 you want to figure out okay, is there a courts-
13 martial happening on an Article 120 offense.

14 When is it happening, and where is the
15 courtroom, what are the issues, there is
16 variability between the branches as to the
17 outcome of that. So, I would say none of that is
18 a docketing system, but at least it's some
19 information with respect to what's happening in
20 the courts-martial process.

21 COL OSBORN: So, I look at the
22 services' websites for documenting the cases?

1 MR. GUILDS: Yes. I mean, I recently
2 looked at those with colleagues, and it was like
3 some of them are like we can figure out it's
4 going to end well, if I start saying basis it's
5 going to give it away. We can go to panel ten on
6 this day, and we know there is going to be a
7 trial because we can see there's the 39a's
8 leading up to it, and this is a real date.

9 Whereas in other websites the
10 information is not as accessible, or available.
11 So, under the current system of making people
12 aware of whether or not there are trials,
13 especially members of the public that are outside
14 of the media, and don't have relations with
15 public relations on the bases that they work in,
16 or work around, I think there is a significant
17 amount of variability, and some potential
18 improvements could occur.

19 COL OSBORN: Do any of the services
20 websites include basic pleadings?

21 MR. GUILDS: No. If they do, that is
22 news to me, I just looked at it. So, no, ma'am.

1 PROF. ROSENBLATT: When it's been
2 raised case by case, we've often had results that
3 were more favorable than what Sarah Matthews had
4 with the Mays case. The Chelsea Manning, then
5 Bradley Manning courts-martial had an open access
6 similar to federal courts, and the military judge
7 that we had in Bergdahl eventually came around to
8 these arguments on public access, ordered the
9 government to setup a document release system.

10 DR. HILLMAN: Okay. Ms. Matthews, I
11 just want to, did you want to weigh in on that
12 last question at all?

13 MS. MATTHEWS: Yeah, I actually did
14 want to add that we noticed that the Army
15 actually has a bit more detail on its docket than
16 the Navy. So, we at ProPublica report on all the
17 branches of the military services, and I just
18 noticed that the Army often has -- they'll have
19 more detail as to what the various hearings that
20 occurred were, listed on the docket.

21 And they also have certain files like
22 linked to the docket pages. So, it's definitely

1 an improvement from what the Navy has, which is
2 pretty minimal. It doesn't even list the
3 accused's full name, it just has the last name
4 and the first initial, and then it will have the
5 date of the upcoming next hearing.

6 And it will just say the place, but it
7 won't have what previously happened in the case,
8 so it's pretty limiting. The biggest difficulty
9 is that they do not include Article 32 hearings
10 at all, so there is nothing, and there is really
11 nothing from the preliminary stage of the case
12 until it gets referred to courts-martial, that's
13 when apparently it is listed on the docket.

14 Although I will tell you, I don't
15 think the Navy is even consistent in that policy,
16 because I did find one time they listed an
17 Article 32 hearing, but I'm not sure if that --
18 at the time I had noticed that the hearing had
19 already occurred, so I wasn't sure if they had
20 provided notice ahead of time or not. But as a
21 general rule they do not provide that in advance.

22 CAPT SCHRODER: I just want to know,

1 does anybody know were other resources provided
2 with this to the services? I mean it says here's
3 140a, we want you to implement this. This could
4 be very costly to do what they're talking about
5 doing. And I just wonder if Congress said okay,
6 we're going to fund this too. Or is part of what
7 we're looking at the services saying we don't
8 have the resources.

9 MR. GUILDS: I think it's an unfunded
10 mandate, but I don't know that for sure.

11 CAPT SCHRODER: I'm just curious. It
12 doesn't sound like they've told you all that,
13 that they've said that. But I wonder if that's
14 an underlying issue.

15 MR. BERLIN: It seems like that may be
16 an issue in terms of doing something PACER like,
17 but there are a number of other pieces of this
18 that are not really tied to funding. We're not
19 going to give you the Article 32 hearing,
20 acquittals we're not going to give you, we're not
21 going to give you -- those things are not
22 fundamental --

1 CAPT SCHRODER: Yeah, for individual
2 cases, yeah.

3 MR. BERLIN: So, there's a little bit
4 of both I think is the answer.

5 CAPT SCHRODER: Okay, thank you.

6 PROF. ROSENBLATT: I think that's a
7 great RFI to the services. Each of them has
8 contracted for their own docketing system, and I
9 would submit that that's probably a lot more
10 expensive than being unified.

11 DR. HILLMAN: Thank you, you have
12 given us a lot to think about. Thank you, Ms.
13 Matthews, for joining us virtually. We really
14 appreciate your input, and we look forward to
15 trying to figure this out together moving ahead.
16 So, thank you so much. So, I'm just going to
17 take a moment as we wrap up here, if you just
18 stand tight for a moment.

19 Chief Trexler, we will reconvene
20 tomorrow morning at 8:30 here? Okay, and then
21 for the tour, and you're all welcome to join us,
22 we're going to have a tour of the museum,

1 although it's closed right now, you're welcome to
2 join us for a tour of the 9/11 Museum now. The
3 plan, are we just going to meet right outside
4 here?

5 Okay, so we are going to meet outside.
6 And can we leave things here, Dale, what's the
7 plan? All right, and anything else that you want
8 to add before I? All right, we got it. Thanks
9 very much.

10 (Whereupon, the above-entitled matter
11 went off the record at 3:47 p.m.)

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Before: MJRP

Date: 07-38-23

Place: New York, New York

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