

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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HEARING

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FRIDAY
OCTOBER 9, 2015

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The Panel met in the Holiday Inn,
Ballston, 4610 N. Fairfax Drive, Arlington,
Virginia, at 9:12 a.m., Hon. Elizabeth Holtzman,
Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman
Hon. Barbara Jones
Victor Stone
VADM(R) Patricia Tracey

WITNESSES

Hon. Frank D. Whitney, United States Chief
District Judge, Western District of North
Carolina (by telephone)
Steven J. Grocki, Deputy Chief for Litigation,
Child Exploitation and Obscenity Section,
Criminal Division, United States
Department of Justice
Thomas F. Fichter, Assistant Prosecutor,
Monmouth County Prosecutor's Office and
Director, Special Victim's Unit, Monmouth
New Jersey

WITNESSES (cont.)

Darlene Sullivan, Defense Sexual Assault
Incident Database (DSAID) Program Manager,
Department of Defense Sexual Assault
Prevention and Response Office (SAPRO)

Katherine E. Robertson, Family Advocacy Program
(FAP) Manager, Department of Defense Office
of Family Readiness Policy

Colonel Walter M. Hudson, U.S. Army, Chief,
Criminal Law Division, Office of The Judge
Advocate General

Lieutenant Colonel Julie L. Rutherford, U.S. Air
Force, Air Staff Counsel, Air Force Sexual
Assault Prevention and Response Office

Lieutenant Colonel Angela B. Wissman, U.S. Marine
Corps, Branch Head, Judge Advocate
Division's Military Justice Branch,
Headquarters, U.S. Marine Corps

Stephen P. McCleary, U.S. Coast Guard, Senior
Military Justice Counsel and Chief
Prosecutor, Office of Military Justice,
Office of the Judge Advocate General

Lieutenant Commander Stuart Kirkby, U.S. Navy,
Staff Attorney, Navy-Marine Corps Appellate
Review Activity

STAFF:

Colonel Kyle W. Green, U.S. Air
Force, Staff Director

Maria Fried, Designated Federal Official

Lieutenant Colonel Kelly McGovern, U.S. Army,
Staff Deputy Director

Doug Nelson, Staff Advisor-Attorney

Julie Carson, Staff Advisor-Attorney

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2 (9:12 a.m.)

3 CHAIR HOLTZMAN: Can this come to
4 order, please? We're about to begin.

5 MS. FRIED: Thank you, Madam Chair.
6 This meeting is now open. Welcome to the 14th
7 Public Meeting of the Judicial Proceedings Since
8 Fiscal Year 2012 Amendments Panel. My name is
9 Maria Fried and I'm the Designated Federal
10 Official for the JPP. Colonel Green is the Staff
11 Director to the JPP. He's on my left. This
12 Panel was established by Section 541 of the NDAA,
13 National Defense Authorization Act, Fiscal Year
14 2012, as amended by Section 1731 of the National
15 Defense Authorization Act of Fiscal Year --

16 CHAIR HOLTZMAN: Excuse me, Ms. Fried,
17 is your mic on?

18 MS. FRIED: I thought it was. I'll
19 talk a little louder. The Department has
20 appointed the following distinguished members to
21 the Panel. The Honorable Elizabeth Holtzman
22 serves as the chair, who has also previously

1 served on the Respond Systems Panel. The
2 Honorable Barbara A. Jones also served on the
3 Respond Systems Panel, Vice Admiral Patricia
4 Tracey, Professor Tom Taylor, and Mr. Victor
5 Stone. The members' biographies are available at
6 the JPP website at <http://www.jpp.whs.mil>.

7 This Panel is a Federal Advisory
8 Committee and must comply with the Federal
9 Advisory Committee Act and the Sunshine Act.
10 Publicly available information provided to the
11 JPP is posted on the website, to include the
12 transcripts of the meetings. Any information
13 provided by the public to the Panel members must
14 be made available to the public. This includes
15 any notes or emails sent or passed to the Panel
16 members relating to their work as members of the
17 JPP. Thank you, Madam Chair.

18 CHAIR HOLTZMAN: Thank you very much,
19 Ms. Fried, and good morning, everyone. I'd like
20 to welcome you all to the October meeting of the
21 Judicial Proceedings Panel. Four of the Panel
22 members are here today. Regrettably, Mr. Taylor

1 could not join us for this session. Today's
2 meeting is being transcribed and the meeting
3 transcript will be posted on the JPP's website.

4 The Judicial Proceedings Panel was
5 created by the National Defense Authorization Act
6 for Fiscal Year 2013, as amended, by National
7 Defense Authorization Act for Fiscal Years 2014
8 and 2015. Our mandate is to conduct an
9 independent review and assessment of judicial
10 proceedings conducted under the Uniform Code of
11 Military Justice involving adult sexual assault,
12 and related offenses, since the most recent
13 amendment to Article 120 of the UCMJ in 2012.

14 The agenda for today was updated from
15 the initial schedule posted in the Federal
16 Register notice for this meeting. We moved our
17 presenter sessions to the morning and our
18 deliberation sessions to the afternoon. As
19 indicated in the Federal Register notice, all
20 updates to JPP meeting agendas are posted to the
21 JPP website.

22 This morning we will continue our

1 review of the tasks assigned to the Panel
2 regarding trends and statistics of the military's
3 judicial response to sexual assault crimes. In
4 our first session, we are pleased to be joined by
5 three distinguished presenters with substantial
6 experience in both the military and civilian
7 justice systems. They will speak with us about
8 comparing punishments to sexual assault crimes in
9 military and civilian courts.

10 Next, we will hear from the program
11 managers of the Department of Defense Sexual
12 Assault Prevention and Response Office and the
13 DoD Family Advocacy Program, as well as criminal
14 law representatives from the Judge Advocate
15 General's Corps of the military services about
16 how DoD and the services manage military justice
17 data for sexual assault cases.

18 After lunch, we will return to our
19 continuing deliberations on two important JPP
20 topics: restitution and compensation for victims
21 of sexual assault crimes in the military, that's
22 one topic. And the second topic is the

1 prevention and response to retaliation and
2 ostracism against victims of sexual assault
3 crimes. Our Staff prepared additional materials
4 based on our previous deliberation discussions
5 which we will use with other materials we have
6 previously received to assist our deliberations.

7 Finally, each public meeting of the
8 Judicial Proceedings Panel includes time to
9 receive comments and input from the public. The
10 Panel received one written submission and request
11 from the public for today's meeting, and we will
12 hear from that individual following our
13 deliberation sessions. All written materials
14 received by Panel members for today's meeting and
15 previous meetings are available on the JPP's
16 website which is jpp.whs.mil.

17 Thank you very much for joining us
18 today. We're ready to begin our first session on
19 comparing punishments for sexual assault crimes
20 in military and civilian courts. Our first
21 presenter, the Honorable Frank D. Whitney, U.S.
22 Chief District Judge for the Western District of

1 North Carolina is joining us by phone. Judge
2 Whitney, are you there? Are you on the phone?

3 JUDGE WHITNEY: I am here. Thank you.
4 I'm sorry, I had you on mute for a moment while I
5 was organizing my notes.

6 CHAIR HOLTZMAN: I guess a lot of
7 people like to do that.

8 JUDGE WHITNEY: I was going through my
9 notes. And I thank the Panel for having me, as
10 this is a very, very important issue in my
11 opinion. I'm delighted that Congress has created
12 the Panel to look into this issue. It's an issue
13 that I believe has led to injustice in certain
14 court martials that I personally presided over.

15 Let me very briefly give you my
16 history so you understand my -- I'd like to say
17 my unique perspective, without patting myself on
18 the back. But I am the only Article 3 federal
19 judge that has ever deployed into a combat
20 theater of operations to preside as an Article 1
21 military judge over court martials, at least
22 according to Fred Borch, who is the historian for

1 the United States Army JAG Corps.

2 I spent 15 years of my life as a
3 prosecutor with the Department of Justice, 11 as
4 an AUSA, and 4 as the United States Attorney for
5 the Eastern District of North Carolina. I also
6 was in private practice two different times where
7 I had to impart a white collar criminal defense
8 practice. And at the same time I was a career
9 Army reservist, 11 years, military intelligence,
10 and 19 years in the JAG Corps with the last 4 as
11 a certified military judge.

12 So I do come from two perspectives.
13 That is the perspective of an active participant
14 in the federal courtroom and sitting in the three
15 major chairs of the courtroom as judge,
16 prosecutor, and defense counsel, and as an Army
17 reservist, military judge who primarily in the
18 military justice system served as a military
19 judge.

20 I was also a TDS attorney, but I've
21 never -- as a Trial Defense Service attorney, I
22 never was in court-martials, but I was involved

1 in 50 or more administrative separation boards
2 representing soldiers in their separation boards.
3 So that's why I feel comfortable in giving you
4 this presentation this morning comparing the
5 military justice system to the federal criminal
6 justice system. If you move to the next slide,
7 please.

8 CHAIR HOLTZMAN: Excuse me, Your
9 Honor. Excuse me, this is Liz Holtzman. I just
10 want to get the screen moved here so members of
11 the Panel can see it. The other way. That's it,
12 that's fine. We want the members of the audience
13 to see it, too, but we couldn't. Good. Thank
14 you.

15 JUDGE WHITNEY: So this first slide,
16 this presentation was created with Colonel Tudor
17 and Attorney General Randolph is just to remind
18 everybody that there is one sovereign when you're
19 a dealing with a federal system and the military
20 justice system, that's the sovereign of the
21 United States of America. And of course, that's
22 not true with the state system, and I'll go into

1 more detail in this in a moment.

2 In the state system, you can be
3 separately prosecuted at the same time that you
4 are federally prosecuted. And then that's
5 something of note for understanding how justice
6 can be achieved by working between the various
7 systems of government in adjudicating cases
8 involving sexual abuse. Next slide, please.

9 This is your slide that we've added
10 some comments to which I'm not going to go into
11 detail at this time. I'll discuss this during
12 the course of my brief presentation this morning.
13 But the additional comments, to give you some
14 guidance on how what I'm going to be saying fits
15 into the courts martial process.

16 The next slide also is just a sampling
17 of the 25 court martials that I presided over in
18 Iraq, Afghanistan, and Kuwait in 2011 when I was
19 deployed. So you see that it was an array of
20 cases. At least four of the cases involved some
21 form of sexual abuse, but there are cases
22 involving fraud on the government, drug cases,

1 disrespect for senior officers, or
2 noncommissioned officers, drugs, shootings, a
3 \$300,000 robbery of an Iraqi national. So those
4 are a full collection of cases, a broad level of
5 experience in theater.

6 The next slide is the DoD Sexual
7 Assault Prevention and Response Strategic Plan.
8 I'm sure you're probably aware of this. The only
9 reason I had this slide is to highlight what I
10 want to emphasize today is the issue of
11 accountability. And I think there's a serious
12 problem with diverse and disparate sentences in
13 the military system, because the military system
14 puts too much reliance on a Panel system of
15 punishment without giving the Panel any roots or
16 analysis or to find an appropriate sentence. And
17 you have the result of terribly disparate
18 sentences in certain cases.

19 One defendant receives a lengthy
20 sentence and another accused or defendant
21 receives a shorter sentence for the exact same or
22 nearly the same misconduct. But it's because

1 panels, the adjudicators of sentencing in the
2 military system do not have any basis as to
3 determine what's a comparable sentence.

4 Now let me run through a series of
5 slides discussing procedure. These slides,
6 particularly the ones that have the headings that
7 are in green such as this on the courts were
8 originally put together by Colonel Lee Vinicky
9 and myself about five years ago. Colonel
10 Vinicky, like me, was also a career prosecutor in
11 the Middle District of Tennessee, an AUSA, and
12 also a career Army reservist. He was mobilized
13 for several years and served as the Clerk for the
14 Guantanamo Commission and because both of us came
15 from a federal prosecution background and had
16 extensive reserve military experience, we put
17 this together to give presentations to mostly
18 other Judge Advocates about a comparison of the
19 systems.

20 And starting with this slide, of
21 course, the federal system is primarily driven by
22 Article 3 lifetime appointees. And the lifetime

1 appointment process, as you know, is a process
2 that has a very thorough vetting. The judges
3 are, of course, nominated by the President. The
4 ABA does an analysis. And then the Senate does a
5 thorough review of the ABA's analysis and, of
6 course, we have hearings. And ultimately, if we
7 are lucky enough, by the grace of God, we are
8 confirmed by the Senate.

9 The military justice system is made up
10 of Article 1 courts. And I'm not in any way
11 saying an Article 1 judge is less qualified than
12 an Article 3 judge, but the distinction is, of
13 course, an Article 1 judge doesn't have the sense
14 of independence that I think that an Article 3
15 judge has. But the military, and particularly in
16 the Department of the Army from my experience,
17 has bent over backwards to allow the military
18 judge system to evolve since its creation in
19 1969.

20 When it was created in 1969, I think
21 it was one of the biggest advances in the
22 fairness of the UCMJ process, because it did take

1 away the -- it changed from a legal advisor to
2 the president of a panel to a military judge
3 doing much of the same functions that a federal
4 judge does, ruling on evidentiary matters and
5 pre-trial motions, etcetera.

6 Counsel, of course, in the federal
7 system has there's prosecutors, career federal
8 defenders, or community defenders, and also
9 private counsel that are retained under the
10 Criminal Justice Act. All these attorneys are
11 very, very experienced in what they do. In the
12 military system, you have a wonderful collection
13 of attorneys and they go through career steps,
14 but they usually, what happens in the JAG system,
15 they leave the military justice system for a
16 while and then come back into it. But the Army,
17 in particular, has tried to do many things to
18 help increase the quality of counsel, both
19 defense counsel and trial counsel.

20 The biggest thing I think on the
21 defense counsel was the creation of the Trial
22 Defense Service in the mid-1980s where the trial

1 defense counsel will report directly to
2 Washington instead of to the commander. And I
3 think that was an extraordinary step forward in
4 advancing and protecting the rights of the
5 accused.

6 Next slide, please. Jurisdiction.
7 Federal jurisdiction is primarily based on
8 special maritime and territory jurisdiction in
9 the United States when you're dealing with sexual
10 abuse cases, sexual assault cases. All military
11 installations on the United States generally are
12 within the special maritime and territory
13 jurisdiction in the United States. So a uniform
14 personnel on a military installation may be
15 prosecuted by the Department of Justice, as an
16 alternative to the Department of Defense and that
17 has happened. I'll talk briefly about Doctor -
18 slash-Captain Jeffrey MacDonald in a moment, the
19 worst domestic violence case in the history of
20 the Army and the Eastern District of North
21 Carolina.

22 Also within, of course, federal

1 jurisdiction are Indian tribes. That's not as
2 important here. But also interesting for the
3 military system, you have the Patriot Act, and
4 MEJA ability to reach out overseas to service the
5 company or the force or civilians that are on
6 military installations. So the Department of
7 Justice does have extra territory jurisdiction.

8 David Passaro, as listed at the
9 bottom, David Passaro was a Department of the
10 Army civilian at Fort Bragg that became a CIA
11 contractor. Deployed to Asadabad base in
12 Afghanistan where, as a CIA contractor,
13 improperly interrogated Abdul Wali. He killed
14 Mr. Wali in the process of the interrogation, and
15 he, David Passaro, was criminally prosecuted in
16 Wali for the assault that he committed 6,000
17 miles away. So that's unusual. That's an extra
18 of the Patriot Act, extra territory jurisdiction.

19 Of course, military jurisdiction is
20 based on the fact that the service member -- and
21 that's universal jurisdiction, from the
22 perspective that that service member can be

1 anywhere on the planet in uniform and they're
2 subject to prosecution. The broader jurisdiction
3 of the military, but what's important here is
4 that nearly concurrent jurisdiction between
5 federal and military jurisdiction, the Department
6 of Justice can usually find a way to add
7 jurisdiction.

8 But the Department of Justice and DoD,
9 under an MOU that you're probably aware of, do
10 generally send uniform personnel to court-
11 martials and civilians to federal prosecution. I
12 personally think that's offensive. I think if
13 you're on a military installation in one cubicle,
14 you're in uniform, and you're confined with the
15 guy in the next cubicle who is a civilian, you're
16 both conspiring to defraud the United States, the
17 civilian is only going to be prosecuted in the
18 federal system and the uniform personnel is going
19 to be prosecuted in the military system.

20 I think that leads to disparate
21 sentences for virtually the same criminal
22 conduct. I actually fought that battle at Fort

1 Bragg once and as U.S. Attorney in Raleigh, I
2 directed that all defendants, whether in uniform
3 or not, were going to be prosecuted by the U.S.
4 Attorney's Office. This involved a fight amongst
5 all through the MPs and locals in the Fort Bragg
6 area, and all of them that were charged in
7 federal court pled, so whether in uniform or not.

8 Now as I mentioned a few moments ago,
9 while the United States Government is the
10 plaintiff in either a federal or military
11 prosecution, the states are separate sovereigns,
12 and there's no double jeopardy restriction. To
13 your right, Specialist Gray was convicted in
14 state or pled in state court, and convicted in a
15 court martial of the same crimes of rape. And to
16 the left you see Staff Sergeant or Sergeant First
17 Class Hennis.

18 In 1985, he was prosecuted by the
19 State of North Carolina for rape and I believe
20 murder. He was convicted initially at trial, but
21 the State of -- the appellate courts of North
22 Carolina threw it out for some major defects. He

1 became a member of the community after he left
2 the military and years and years later with DNA
3 evidence, the use of DNA evidence proved there
4 was -- I'm not sure whether it was hair fibers or
5 skin or whatever, but taken from the scene, but
6 he was brought back on active duty and found
7 guilty in 2006 of what he had been -- the
8 appellate court, as I said, in North Carolina had
9 thrown out in 1985, because of better DNA
10 evidence.

11 Next slide, please. Federal -- I
12 already somewhat discussed this under courts, but
13 federal judges, like I've said, are primarily
14 Article 3. We do have magistrate judges for
15 preliminary hearings that are Article 1. The
16 military, the Department of Defense, has really
17 improved its military judiciary. All trial
18 judges in the Department of Defense, whatever
19 service, go to a three-week long course at
20 Charlottesville, the U.S. Army JAG School. You
21 have to pass that course before you can be
22 certified by your service judge advocate as a

1 trial judge. That is not true for military
2 appellate judges. That is also not true for, of
3 course, the Court of Appeals for the Armed
4 Forces, because they are nonmilitary, as a matter
5 of law.

6 Next slide -- well, I also want to
7 mention on the left. You see Federal Judicial
8 Center, the federal court system has an excellent
9 training arm for all the Federal Judicial
10 Centers. So federal judges constantly go through
11 training in particular subject matter areas, so
12 we also have initially what's called a baby
13 judge course that goes on for several weeks and
14 it's very similar to the trial judiciary's 20-
15 week course. Next slide, please.

16 CHAIR HOLTZMAN: Excuse me, Your
17 Honor, do you think we could move rather quickly
18 until we get to the statistical part of this,
19 because I think some of us have been sitting on
20 these Panels for quite a while and are somewhat
21 familiar. I won't say obviously, deeply familiar
22 with some of what you're telling us now.

1 JUDGE WHITNEY: And I do understand.
2 And I apologize for doing that.

3 CHAIR HOLTZMAN: There's no need for
4 you to apologize. We appreciate. Don't take
5 anything for granted about our knowledge, but I
6 think we can skip, and we'll obviously include
7 the slides that we have completely in the record,
8 but maybe we can move up to --

9 JUDGE WHITNEY: Let me jump to my
10 concerns.

11 CHAIR HOLTZMAN: Yes, thank you.

12 JUDGE WHITNEY: Whoever is advancing
13 my slides, if you would advance all the way to
14 jury composition, and what you're losing between
15 there is just all the procedural steps that I'm
16 sure you're aware of. So, of course, in the
17 federal system, you have 12 civilians as jurors
18 and the jurors only adjudicate guilt. In the
19 military system, with a general court martial,
20 five or more officers with one third enlisted,
21 but the distinction is that not only is the jury
22 or the panel members empowered to adjudicate

1 guilt, they also can adjudicate the sentence, and
2 that's where I'm troubled, myself.

3 Next slide, please. This is merely
4 jury selection of the voir dire process. We can
5 advance the next slide after that. Rules of
6 evidence is just saying -- generally the same.
7 Next slide. Trial procedures, generally are the
8 same.

9 Next slide. Verdict. As you're
10 aware, only a two-thirds verdict is required for
11 a military conviction, but if you go to the next
12 slide, what's important is that there's only one
13 vote in that two thirds, and of course that's
14 from unlawful command influence, because the
15 president of the Panel might presumably try to
16 influence a junior officer or a senior enlisted.

17 Now next slide. This is where I
18 personally have seen serious problems in the
19 sentencing process. Under the federal system
20 it's a judge alone process, and it's based on the
21 United States Sentencing Guidelines. In the
22 military system, of course, the presumptive

1 sentencer is the panel and the panel is an extant
2 collection of military personnel, officers and
3 NCOs.

4 As military personnel, they follow
5 orders very well and the orders, of course, are
6 given to them by the military judge. But the
7 problem is when it comes to sentencing, they're
8 given so many options -- next slide, please. So
9 many options with very little guidance because
10 the military is not permitted, a military judge
11 is not permitted to tell them what to do, but can
12 tell them what their options are.

13 Next slide, please. Now the next
14 series of slides, you can just run through them
15 all. The sentencing instructions are taken from
16 the military benchbook. They show all the
17 overwhelming amount of instructions given to
18 panel members in deciding what the punishment is.
19 And it's so many factors. It can just be
20 daunting to them, and they don't have any
21 baseline. So if you would just work through
22 those slides as you see them and get to

1 sentencing procedure. It's slide 44.

2 In the federal system, because the
3 Supreme Court has told us in United States v.
4 Booker, the sentencing guidelines are not only
5 appropriate, but they must be used in the process
6 of sentencing. However, they're advisory
7 ultimately and a judge may vary upwardly or
8 downwardly from the guideline range. The reason
9 we have guidelines, according to Booker, as well
10 as the Sentencing Reform Act of 1984, is to avoid
11 disparate sentencing. And it actually helps us
12 in avoiding disparate sentencing.

13 So if you're convicted in North
14 Carolina or you're convicted in California, your
15 sentence will be relatively the same except that
16 a judge, of course, can vary upwardly or
17 downwardly for reasons stated on the record. But
18 every judge in the country has an objective
19 starting point, the offense level, and the
20 criminal history category leading to a sentencing
21 range that comes out of a pre-sentence report
22 prepared by a neutral party of the U.S. Probation

1 Office. That simply is nowhere to be found in
2 the sentencing process of the military.

3 Now in my personal experience before
4 I deployed to theater, I went down to Fort Bragg
5 and sat through a sexual abuse trial. Presiding
6 at that trial was Colonel Pat Parrish, an active
7 duty military judge, a friend of mine. And I
8 wanted to kind of go through a refresher course
9 before I deployed. And the accused in that case
10 was convicted, and Colonel Parrish gave him a
11 sentence of approximately six years. They had
12 agreed to sentencing by Colonel Parrish, not by
13 panel.

14 I, a few months later, deployed to a
15 theater. My first major sexual abuse case was in
16 Baghdad at Camp Victory. A very similar set of
17 facts, an officer assaulting -- a male officer
18 assaulting -- committing aggravated sexual
19 assault on a female service member. I found the
20 accused guilty of aggravated sexual assault and
21 gave the accused a seven-year sentence.

22 I then proceeded to kind of develop a

1 track record, so to speak, of sentences in Iraq
2 and Afghanistan because I was using in the back
3 of my mind kind of the sentencing guidelines to
4 help. You can skip to Slide 49 and you can see
5 some of the -- I've read that you've seen some of
6 these sexual abuse cases handled by the
7 guidelines. There were 545 guideline sentences
8 in Fiscal Year 2014.

9 And so I was handing out sentences
10 that were more akin to guideline sentences. I
11 think the Trial Defense Service in theater
12 realized that, and they started requesting panels
13 to do sentencing and they did -- I did have
14 another sexual abuse, aggravated sexual assault,
15 court martial, in theater -- it was north of
16 Baghdad, it was in Iraq. It was a defendant
17 accused -- who had victimized a fellow service
18 member, a female who also was the roommate of
19 this service member's wife. The wife was also a
20 service member in theater.

21 With the wife unconscious or passed
22 out from alcohol, the three of them had been

1 drinking alcohol, and the wife passed out in
2 their room, in their cube, and the soldier -- and
3 the victim semi-passed out. The panel found that
4 she was substantially incapacitated and could not
5 consent and the panel found him guilty of
6 aggravated sexual assault of the roommate of his
7 wife, with his wife in the room.

8 I expected the panel to hand down a
9 relatively serious sentence. It turned out from
10 some questions coming from the panel, they knew
11 he was an El Salvadorian citizen that if he was
12 kicked out of the Army he would lose his pending
13 citizenship. This is my analysis. So they only
14 -- to offset the loss of the citizenship, they
15 handed down a sentence of three months for a
16 sentence that Pat Parrish or myself probably
17 would have been in years instead of months. That
18 was grossly disparate sentencing, not because
19 anyone did anything wrong. It's because no one
20 had a baseline, at least my baseline wasn't far
21 from Colonel Parrish, as well as from the
22 sentencing guidelines. The members of the panel

1 had no baseline in which do their analysis.

2 I have other slides available for you.
3 There's really a -- I don't want to waste your
4 time because I know I'm limited to 20 minutes.
5 But I'm more than happy to answer as many
6 questions as I can. And so I will now turn it
7 back to you, Madam Chairman.

8 CHAIR HOLTZMAN: Thank you very much,
9 Your Honor. We really appreciate your personal
10 experience and also your careful analysis of this
11 issue. Should we hear the other Panel members?
12 Your Honor, if you don't mind, we're going to
13 hear from our next Panel members on this issue.
14 Our next member on the question of comparing
15 punishments for sexual assault crimes in military
16 and civilian courts is Mr. Steven J. Grocki.

17 MR. GROCKI: It's Grocki, ma'am.

18 CHAIR HOLTZMAN: Grocki, sorry.
19 Deputy Chief for Litigation, Child Exploitation,
20 and Obscenity Section of the Criminal Division of
21 the United States Department of Justice. Mr.
22 Grocki.

1 MR. GROCKI: Thank you, ma'am. I just
2 wanted to expand a little bit on my background as
3 well, following Judge Whitney's model there.
4 I've spent the last 11 years as a federal
5 prosecutor exclusively with the Child
6 Exploitation Section, first as a trial attorney
7 and now as a supervisor of all the trial
8 attorneys. One of the things that's unique about
9 that section is that although we're at main
10 Justice, we prosecute cases all over the country.

11 So we are able to sort of see a broad
12 cross section of even U.S. district courts and
13 the way sentencing proceedings work, as well as
14 I'll explain a little bit more about how the
15 guidelines for us have been a source of issue
16 over the last -- really since the Booker case
17 that Judge Whitney mentioned.

18 On the military side, I have -- I was
19 on active duty about 7 years and have been a
20 reservist for almost 18 years. In both those
21 capacities, I served primarily on active duty as
22 a prosecutor, special prosecutor that would

1 travel around the country and do only trials.
2 But I did spend time as a defense counsel as
3 well, and then as a reservist, I was appellate
4 government counsel for a couple of years, and now
5 serve as a reserve military judge.

6 I'm going to try my best to limit my
7 comments. It's really more explanatory as
8 opposed to opinion based. I want to try to stay
9 away from that because of my position, current
10 position as a reserve military judge. But I do
11 want to offer the Panel, I think in an
12 explanatory way, some of the differences and
13 potential similarities between the federal
14 sentencing system and the military sentencing
15 system.

16 One thing I did want to note is that
17 in the context of child pornography, which my
18 section prosecutes a large, large percentage of
19 those cases, the Federal Sentencing Commission,
20 we've worked with them over the last couple of
21 years. They issued a report several years ago
22 because approximately 60 percent or more cases

1 involving child pornography, judges were
2 departing from those guidelines. They're
3 advisory, as Judge Whitney illustrated in his
4 presentation.

5 And so in our area, because they're
6 advisory, because of some other circumstances
7 where those guidelines have not kept up with
8 technology and courts have essentially lost faith
9 in them to some extent, they've been departing.

10 And so my prosecutors, we've been working with
11 the Federal Sentencing Commission, but when we're
12 trying cases, we are forced, essentially, in
13 those cases to rely and argue more heavily, not
14 from the guidelines, but from the federal
15 sentencing factors which fall under 18 U.S.C.
16 3553(a).

17 So somewhat unique there in our area
18 that our guidelines, we've been working very
19 closely in trying to sort of restructure those
20 and build those really from the bottom up and
21 identify different offense characteristics, and
22 offender characteristics associated with child

1 exploitation crimes and child pornography crimes
2 that will adequately capture, in a guideline
3 scheme, the appropriate sentencing range. And
4 it's proven quite difficult and we're still --
5 it's an ongoing process.

6 What I want to do in the interest of
7 time for the Panel is -- I'm certainly not going
8 to tell many members of the Panel the federal
9 sentencing system. You're very familiar with
10 that, I think. I think that what I will do,
11 though, is identify one of the major differences
12 that exist between the military sentencing system
13 and federal. And it sort of starts at ground
14 zero with the use of information at sentencing.

15 So the information that's available to
16 the sentencing authority, which is always a judge
17 in the federal system, by statute is really very
18 broad. It's essentially unlimited. Now
19 juxtaposing that with the military system under
20 RCM 1001, it is limited to matters of
21 aggravation, extenuation, and mitigation. And
22 matters of aggravation, in particular, on the

1 prosecution side is fairly limited. It's limited
2 and defined as impacts on specific victims for
3 offenses of conviction, as well as facts and
4 circumstances directly related to or arising from
5 the actual offense of conviction.

6 So if you put those two systems side
7 by side, a federal judge is going to have a much,
8 much broader spectrum of information to be
9 working from than a military sentencing
10 authority, whether it be judge or panel.

11 The federal system also has another
12 significant difference which is the bifurcation
13 of sentencing following the findings phase,
14 whether it be conviction at trial or plea.
15 There's typically a delay of months, if not
16 sometimes even longer in some locations. And so
17 the focus for both parties, prosecutors, defense
18 counsel, as well as the court, shifts to solely
19 beyond sentencing at that point.

20 You also have a third party which
21 essentially works for the court, probation,
22 preparing a presentence report. And in that

1 analysis, they also are entrusted with
2 determining what the guidelines should be,
3 developing a factual sort of record. They're
4 interviewing individuals and so that is another
5 kind of unique, I think, or different type of
6 system characteristic of the federal system,
7 versus the military.

8 And then, of course, once that's
9 prepared, counsel can object to that, and then
10 you have, typically, written argument that is
11 prepared and submitted to the court, and then
12 it's responded by the parties. So by the time
13 you actually get to the hearing, the actual
14 sentencing hearing, those can often be very, very
15 short, depending on the actual offenses of
16 conviction and depending on how the parties have
17 sort of -- whether they disagree or agree
18 regarding the guidelines and regarding the
19 factual underpinnings for the pre-sentence
20 report. So only when you have a real factual
21 dispute as to the offense, the facts underlying
22 the offense, that's when you're going to have

1 actual evidence during the sentencing hearing.

2 So that creates a system that is more
3 drawn out. Again, incorporates a great deal more
4 evidence for that sentencing authority, and is
5 really more deliberate between the parties back
6 and forth and laid out for the judge, both with
7 guidelines and argument before you even set foot
8 into the actual hearing.

9 The military system is quite
10 different, as the Panel knows. It follows
11 immediately the findings phase, or the plea
12 phase, of the proceedings. And as a result, and
13 there's good reasons for that, as Judge Baker's
14 article outlined which I know you've been
15 provided. Good order and discipline is certainly
16 characteristics of the military system.

17 It does not exist in the federal
18 system and so speed of hearing, speed of
19 resolution, speed of sentence is more critical
20 within that system, certainly than in the federal
21 civilian system. But it leads to consequences,
22 because when you go for speed, then you're

1 sacrificing to some extent information and focus
2 that has been provided to that particular panel.

3 In addition to the information for
4 sentencing, being, I think an issue of comparison
5 between the federal and military systems, you
6 also have the existence in the military system,
7 which I know the panel is aware of, of punitive
8 discharge. So for sexual assault offenses
9 specifically now, for sure, you have mandatory
10 minimums when it comes to that punitive
11 discharge. That characteristic, which is unique
12 to the military system, certainly changes the
13 calculation of the sentence, whether by panel or
14 by military judge because it is punishment. It
15 is considered punishment. And it is instructed
16 to court members as being one of the most severe
17 forms of punishment.

18 So in my experience as a prosecutor,
19 as well as a defense counsel, it was used
20 frequently, and I witnessed it used frequently as
21 a measure to argue to either panel or judge as
22 something that has to be considered. So if you

1 give that punishment, because it is so severe, or
2 because it's mandatory, then the confinement time
3 would necessarily be lower.

4 If you do not give it as a prosecutor,
5 I would argue, then you need to raise that level
6 of confinement to account for, essentially, not
7 giving that portion of the sentence. I think
8 this probably works more effectively with a panel
9 than with a military judge, but certainly it's a
10 component that on the military side just does not
11 have any existence at all on the civilian side.
12 And this is true for other forms of punishment as
13 well that are outlined to panels and certainly
14 are available to military judges. When you are
15 reading out your sentence, you're also reducing
16 rank, you're discharging, you're doing a lot of
17 other things in addition to confinement.

18 On the civilian side, certainly in our
19 experience with child exploitation offenses,
20 you'll have confinement terms. You'll have
21 supervisory release terms, and restitution terms,
22 typically, but that is all. So in looking at

1 what is available to you and what I'm arguing for
2 as a prosecutor in both systems, my focus
3 exclusively in the federal system is going to be
4 confinement. And that is going to be the measure
5 that I will use as a basis of success, if you
6 will, with regard to the sentence.

7 If the person gets more time, then
8 that is going to be measured as a successful
9 prosecution and a successful sentence that's
10 commensurate with the guideline range, or perhaps
11 even higher, if the characteristics of the
12 offense don't match the guidelines. In the
13 military system, that measure of success is very
14 often, and certainly my experience, has been more
15 so by obtainment of the punitive discharge.

16 That is first and foremost what is
17 sought by the prosecution side. And so when
18 looking at confinement as a comparative measure
19 between the two systems that you have to account
20 for that. And it's going to be difficult to
21 account for that, because if it's a panel doing
22 the sentencing, I mean it's very difficult to

1 know how much weight they placed on the punitive
2 discharge, how much they may have reduced the
3 confinement term because they did get a punitive
4 discharge. So looking across to the federal
5 system, all you're going to see is confinement.
6 And so that comparative measure is going to be
7 difficult I think to make.

8 The other issue with comparison is
9 that the statutes that for sexual assault and
10 child exploitation, they fall under Chapter
11 109(a) for the federal system. And those are
12 somewhat similar to the military sexual assault
13 and sexual contact offenses, but they're
14 meaningfully different as well. So on the
15 federal side you have a sexual abuse, or
16 aggravated sexual abuse, essentially an offense.
17 And then you have sexual contact, and then you
18 have incapacitation offenses as well under 2241,
19 42, and 44.

20 The difference is that in the federal
21 system a sexual act is defined to be inclusive of
22 the touching under the clothing of a person's

1 genitals. In the military system that is not
2 considered sexual abuse. That is considered
3 sexual contact. And so when you're putting those
4 side by side, and even in the federal system when
5 I'm looking at the guideline range that's
6 afforded to the offense and the ultimate
7 sentence, the guidelines -- and this kind of
8 harkens back to what I was saying about child
9 pornography -- doesn't really do a great job at
10 differentiating between different types of sexual
11 act.

12 So the guidelines themselves, a person
13 is going to receive the same guideline range if
14 they touch a person under the clothing, genitals,
15 through force or through incapacitation as if
16 they had sex with them. It does not really
17 differentiate meaningfully, between those two
18 different types of sexual act.

19 So in looking at the guidelines and
20 looking at the federal sentences, even within
21 that scheme, even within the volume that you saw,
22 which also necessarily is much lower than you

1 have in the military, I don't know -- I saw the
2 statistic that was put up a moment ago and it
3 said 546 in 2014. What I'd be interested to know
4 is how many of those involve minors, because
5 sexual abuse can include minors for, at least the
6 offense. In 2241, you can charge that for a
7 minor or an adult.

8 So as Judge Whitney articulated, we
9 see these offenses with MEJA offenses, which my
10 section handles pretty extensively in the Indian
11 territories, for sure. That's probably the
12 largest chunk for federal, and then just regular
13 subject matter territory jurisdiction under the
14 federal system. But that's going to be a much,
15 much smaller -- it's a much smaller volume than
16 you have on the military side. So that alone
17 could cause issues.

18 The other statutory difference, I
19 think, that's meaningful, perhaps less so than
20 the act or contact definition, is how force is
21 incorporated within those statutes. In the
22 military system, force continues to be kind of

1 the more classic, common law definition which is
2 requiring more of a violent act, and more of a
3 resistance by the victim.

4 In the federal system, force has a
5 broader -- like case law is interpreted to have a
6 broader definition, so that it can be lack of
7 consent, or other types of manifestation for lack
8 of consent. But the case law is not requiring
9 resistance the way it used to. In the military
10 system that's broken out now, and that's what
11 forms your sexual assault type offenses, versus
12 force, where it's just lack of consent versus
13 force. So that's also a meaningful difference, I
14 think, between the two systems.

15 There are opportunities, I think, for
16 comparison, however. In looking at the two,
17 particularly in the context of sexual assault,
18 when you look, as I mentioned, at the sentencing
19 factors that articulate philosophies between RCM
20 1001 and 18 USC 3553(a), those philosophies are
21 essentially the same.

22 We're looking at deterring the

1 wrongdoer, deterring -- a general deterrence of
2 people that hear of the offense, punishment,
3 protection of society, and rehabilitation. Those
4 are the same in both systems. And so that can be
5 an area to look at in comparison, particularly in
6 this area of sexual assault, whereas I said very
7 often the guideline scheme for sexual assault
8 crimes, federally, doesn't capture a lot of the
9 specific characteristics of the offense.

10 And so very often, especially in the
11 crimes we're used to prosecuting with children,
12 you'll see judges going above the guidelines,
13 departing even above, because the circumstances
14 of the offense, the actual factual underpinnings
15 of the offense, the guidelines do not capture
16 that aptly. It's very difficult in these
17 offenses, sexual assault type of offenses,
18 because they vary so greatly. Even as Judge
19 Whitney was articulating, they vary so greatly to
20 capture within a guideline scheme exactly what
21 matters, and what should influence a particular
22 sentencing authority. The other area that --

1 CHAIR HOLTZMAN: Mr. Grocki, are you
2 getting near the end of your testimony?

3 MR. GROCKI: Yes, ma'am. I'm almost
4 done. I'm sorry.

5 CHAIR HOLTZMAN: Okay. Thank you.

6 MR. GROCKI: The only other areas I
7 was going to highlight that are opportunities for
8 comparison is that within the federal and
9 military systems you have a renewed -- an
10 emphasis on victim impact. The defendants do
11 allocate and I think the allocutions and the
12 victim impact statements are now used by
13 sentencing authorities in large measure to
14 determine appropriate sentences. So I'll
15 conclude on that. I apologize if I went a little
16 long.

17 CHAIR HOLTZMAN: No, very much
18 appreciate your very thoughtful testimony. It's
19 just that we're getting close to our concluding
20 time for the Panel. Our next Panel member is Mr.
21 Thomas F. Fichter, who is an assistant prosecutor
22 in Monmouth County Prosecutor's Office and

1 director of the Special Victims Unit, Monmouth,
2 New Jersey. Mr. Fichter, we welcome you to the
3 panel.

4 MR. FICHTER: Thank you so much. I
5 really appreciate -- can you hear me?

6 CHAIR HOLTZMAN: I'd pull that closer
7 to you, if you don't mind. Thanks.

8 MR. FICHTER: Closer, all right. And
9 I really appreciate the opportunity to come down.
10 This really combines two of my great professional
11 passions. I spent nearly 25 years in the Navy,
12 both active duty and reserve. I had an
13 opportunity to be a defense counsel, a trial
14 counsel, and in the reserves, a military judge
15 presiding over both general and special court
16 martials. Also, as a professional on the
17 civilian side, I have been a career prosecutor
18 since getting off active duty in 1994. And I
19 spent a vast majority of that time handling cases
20 of a sexual nature, as well as a lot of child
21 abuse cases, so I'm not going to belabor it.

22 Just to give you an idea of the

1 background, the jurisdiction that I work in is
2 Monmouth County, New Jersey. It's central,
3 coastal New Jersey. We have a population of
4 about 630,000 people. It's primarily a suburban
5 county. It's probably very typical of what New
6 Jersey -- there are some urban areas. Within
7 that, our office has about 50 prosecutors and the
8 unit that I supervise is our Special Victims
9 Bureau. We handle both child abuse and sexual
10 assault across the spectrum. We do not
11 specifically handle child pornography. That is
12 actually handled by our Computer Crimes Unit, but
13 we do sometimes have some overlap with that.

14 With regard to the -- to give you just
15 kind of a typical type of statistics, I was able
16 to pull some statistics from our investigative
17 side, and this is from 2014 annual statistics.
18 There were a total of 628 investigations. In
19 terms of breakdown of gender information on
20 victim, 456 of those were female, 291 were male.
21 And I'm not sure why they have 11 unknown, but
22 they were also too, listed as the State of New

1 Jersey.

2 Just to also give you an idea of the
3 age of the victims, the practice that I'm engaged
4 in and I think most state courts find themselves
5 engaged in, is primarily younger children and
6 children who are under the age of majority.

7 Going back from the 2014 statistics, 12 and under
8 represented 491 of the victims, 13 to 17 were 170
9 victims, adults were 160.

10 With regard to the disposition, I
11 don't have full information on disposition, but
12 we ended up with 41 arrests, 55 what we would
13 call direct presentments, and 142 post-
14 complaints. Now some of this is going to be
15 combined. The investigations and the victims may
16 be contained in one investigation. So this was
17 what I was able to pull on short notice, and we
18 do not have a great system for tracking our
19 statistics.

20 I don't want to overwhelm you with it,
21 but we also have a SANE program, which is our
22 Sexual Assault Nurse Examiner and our Sexual

1 Assault Response Team. To give you some idea,
2 we've had one in Monmouth County since 1997.
3 During that time to the present, we've had 2,200
4 reported cases where SANE and SART were
5 activated. So again, this is going back from
6 2007 through 2014. Of that, there were 278
7 indicted cases. Thirty-eight cases were
8 presented at trial with 25 resulting in guilty
9 verdicts. There were 12 pending at the time that
10 I got these statistics from our SANE nurse, which
11 was just last week. And the vast majority were
12 handled through negotiated pleas.

13 Now I'm familiar with the military
14 justice system as I know this Panel is, so I'm
15 not going to belabor, but I do want to give you
16 some structure for how the New Jersey criminal
17 code works. In terms of overall philosophy,
18 there are a lot of similarities. Our state court
19 judges would be similar on the federal side to an
20 Article 3 judge.

21 With regard to the structure of our
22 criminal code, if I could kind of start backwards

1 and explain how our sentencing system works, and
2 how the grading of our offenses works, and then
3 come back and address the issue of how our sexual
4 assaults are structured.

5 With regard to our sentencing in New
6 Jersey, we call it -- I know everybody calls it
7 different things, we have disorderly persons
8 offenses and petty disorderly persons offenses.
9 Those are not usually handled by my office.
10 Those are handled by local municipal prosecutors
11 which is something completely different.

12 With regard to crimes, things that are
13 going to be handled by the Prosecutors' Office or
14 as other places call them, local DA Offices. We
15 handle crimes that are graded from fourth degree
16 crimes up to third degree crimes. The fourth
17 degree crimes, there is a sentencing range of 9
18 to 18 months. A third degree crime it's three to
19 five years. A second degree crime, it's five to
20 ten years. And a first degree crime, it's 10 to
21 20 years. Obviously, there are different
22 penalties when you get involved with things like

1 homicides. But for purposes of our discussion
2 today, I think that kind of gives you the
3 framework of how it works.

4 Anything that is going to be below a
5 second or first degree crime, if someone has no
6 prior convictions, there is a presumption of non-
7 incarceration. So if we have someone who is
8 convicted of a third or fourth degree crime and
9 they have no prior convictions, again, there is a
10 presumption they would not be going to prison.
11 They would be placed on probation.

12 We also have in, New Jersey, for
13 offenses that are third and fourth degree, pre-
14 trial intervention which is a diversion program
15 that looks very similar to probation, but at the
16 end of it the charge is administratively
17 dismissed, technically meaning someone has no
18 criminal record, but it does show up, because you
19 only get one opportunity for PTI.

20 Above that, when you get into the
21 second and first degree range, there is a
22 presumption of incarceration. So even if it is a

1 first time offender, there's a presumption that
2 you will go to prison on that offense. So that's
3 the basic framework. Laying on top of that there
4 is sentencing law on both statutory, as well as
5 case law that guides on how sentences should be
6 imposed.

7 Now in New Jersey, New Jersey is a
8 jurisdiction where the sentencing is done by the
9 judge and this is regardless of whether it's a
10 jury trial or a plea. And very similar to what
11 you heard in the federal system, before someone
12 is sentenced, there is going to be ordered a pre-
13 sentence report. That pre-sentence report is put
14 together by Probation. It contains a basic
15 background information in an individual whether
16 they're employed, what their criminal history is,
17 their marital status, things of that nature.

18 I know that we don't necessarily do
19 that and I say when we, forgive me, I retired
20 from the reserves about two years ago, but I
21 spent the majority of my life in it, so when I'm
22 saying we, we in the military don't do a pre-

1 sentence report. Although what I found as a
2 practical matter as a practitioner in the
3 military justice system, you do have access many
4 times to the Service Record Book of an individual
5 who is coming before you. Much of the
6 information that you will find in a pre-sentence
7 report will be contained in there. And many
8 times you know more about someone from looking at
9 that Service Record Book than you would
10 necessarily from a pre-sentence report.

11 The other thing, too, that can occur
12 before sentencing is the judge can order certain
13 evaluations. Common are substance abuse
14 evaluations, psychological evaluations. And for
15 sex offenders who are convicted of certain
16 offenses, New Jersey has a Sex Offenders Act
17 where they are evaluated at the Adult Diagnostic
18 and Treatment Center to determine whether or not
19 they are repetitive and compulsive. So before
20 you go opening your DSM-IVs to see exactly what a
21 repetitive and compulsive sex offender is, don't
22 bother. It's something that is rather unique to

1 New Jersey and the law of New Jersey. It is
2 something of a statutory creation and if you can
3 talk to evaluators in Avenel you will get
4 differing opinions on this. I have my own
5 opinions on why they find certain people
6 repetitive and compulsive and others not, but I
7 will not share them in a public panel.

8 Now having said that, we have all of
9 these tools at our disposal when we go in and try
10 and sentence an offender. And the sentencing, as
11 I said, is done by a judge. So there is some
12 consistency.

13 With regard to the appellate process,
14 it further assures some consistency because there
15 does need to be proportionality. There does need
16 to be a finding of aggravating and mitigating
17 factors. A judge has to put those on the record.
18 And it will be reviewed by an appellate panel of
19 at least three judges.

20 Even without a formal appeal, New
21 Jersey does have what they call excessive
22 sentencing appeals where just a sentence can be

1 appealed in a relatively short period of time
2 when you're dealing with sentencing issues. So
3 that's the basic framework.

4 Again, further laying on top of this,
5 there are certain offenses that qualify for
6 parole disqualifiers. One of the more severe
7 ones is the No Early Release Act in New Jersey
8 which provides for an 85 percent parole
9 disqualifier for certain violent offenses. When
10 that law was first enacted, it mentioned only
11 violent offenses. It's since been amended to
12 list specific offenses, aggravated sexual
13 assault, and sexual assault involving force and
14 coercion are two such offenses that are in there.

15 So this is just a brief overview and
16 I know the Panel is coming up on your break, so
17 I'm going to move on and speak quickly.
18 Fortunately, I'm from New Jersey and have a
19 talent for doing that.

20 Now with regard to our sexual assault
21 statute, if you look at it, I'm not going to say
22 it parallels or is exactly comparable to what

1 Article 120 is. Article 120 -- and forgive me, I
2 forget when it was exactly enacted, but when I
3 first was a young prosecutor and actually a young
4 defense attorney, the fact that rape had to be
5 with someone other than your spouse, even at that
6 time I found it to be a bit offensive. So it is
7 a great improvement.

8 There are similarities in structures
9 of 120 and I say similarities -- the language
10 does not exactly parallel, but it does look at
11 some of the same things if you were to look at
12 the New Jersey statute. And I think most
13 statutes are going to look this way although I
14 haven't done a great deal of comparative
15 research.

16 You have aggravated sexual assault and
17 sexual assault in New Jersey. You also have
18 aggravated criminal sexual contact and sexual
19 contact. The primary difference between a sexual
20 assault and a sexual contact is whether or not
21 there was an act of sexual penetration. An act
22 of sexual penetration is specifically defined in

1 our statute and includes what we would obviously
2 think of acts of sexual penetration and a few
3 that are somewhat less obvious, oral genital
4 contact. I'm not going again to go into the full
5 definitions of it, but I think you can have an
6 understanding of where the split is going to be.

7 Those acts of sexual penetrations that
8 are committed in aggravated ways and those are
9 specifically listed by children who are under the
10 age of 13 which is probably our primary number
11 one thing that we see with aggravated sexual
12 assaults, but those that are also committed under
13 aggravated circumstances such as the commission
14 of a felony during the course of a kidnapping or
15 when physical force and coercion are used and
16 severe personal injury is the result. Or when
17 someone is physically or mentally incapacitated.
18 It can be temporary or it can be permanent.

19 Also, it includes some of what you
20 might want to consider -- I hate the word
21 statutory sexual assaults, but I'm going to refer
22 to status because of age, but also status because

1 of age where there is some relationship. So it
2 will incorporate our 14 to 16s, so -- which is at
3 status age, what many will call a statutory rape
4 in a less kind time, but when the offender is
5 someone who bears a legal relationship to the
6 child who is sexually assaulted, it can be an
7 aggravated sexual assault.

8 We do have also a sexual assault
9 charge for children who are under 13 who are
10 subject to criminal sexual contact. That fits in
11 a middle part of our statute. That is also
12 subject to NERA.

13 The second part of our statute is the
14 sexual assault. That includes acts of force and
15 coercion where there is not severe personal
16 injury sustained by a victim and included in
17 that, although not specifically when the statute
18 -- when you look at the case law that surrounds
19 that, that is anything less than freely and
20 voluntarily giving consent. So again, you see a
21 lot of parallels here.

22 Sexual assault, as you go further down

1 to it, it starts to get into the status, or
2 again, those type of statutory types of sexual
3 assaults with 14 to 16 being the primary with
4 more than four years. New Jersey has a
5 presumption of strict liability with that.

6 So with regard to our sexual contacts,
7 those are -- or sexual assaults, aggravated
8 sexual assault is a first degree crime. Sexual
9 assault is a second degree crime. Our aggravated
10 criminal sexual contacts tract the language of
11 the statute for aggravated sexual assault and
12 sexual assault. However, instead of being an act
13 of sexual penetration, it is an act of sexual
14 contact which includes touching, what we call in
15 New Jersey and is defined by statute, intimate
16 areas, but includes breasts, buttocks, either
17 over the clothing, under the clothing. I want to
18 say there's something else as our forensic
19 interviewers do. And it can include not just
20 someone touching someone else, but also a
21 perpetrator committing that type of conduct in
22 front of someone without their consent. And

1 that's our third and fourth degree.

2 We also have lewdness. We also have

3 --

4 CHAIR HOLTZMAN: Sir, could you try to
5 wrap up, please? We're really short on time.

6 MR. FICHTER: Absolutely. So with
7 regard to the sentencing, if someone is convicted
8 of a first or second degree crime, the ranges
9 that they are looking at are what I had
10 previously mentioned. With regard to the other
11 ones, they are limited to probationary sentences.

12 The other thing that we have that is
13 unique to New Jersey is what's called Parole
14 Supervision For Life. An offender who is
15 convicted can be sentenced for a period of
16 supervision and there are strict violations for
17 that. It is a factor that we do consider when we
18 are negotiating pleas. I would indicate too that
19 with regard to after a jury trial, if someone is
20 convicted of either a first or a second degree
21 crime, the judge will sentence them to a prison
22 term with very few exceptions. If it is a third

1 degree or a fourth degree, it is most likely
2 going to be probation.

3 And again, one of the things that we
4 do and negotiate down is not so much on the time
5 because when we are engaged in our plea
6 negotiations with defense counsel, we can't agree
7 to put someone on probation for a first degree
8 crime because that would be an illegal sentence.
9 They have to be negotiated down to lesser
10 charges.

11 So what you will see is that in terms
12 of what someone is actually convicted of, there
13 will be a uniformity, if you will, of sentence,
14 depending on the degree of the crime and the
15 prior criminal history of the offender. And
16 again, it is imposed by a judge and not a
17 military panel.

18 The only other thing that I would add
19 in conclusion because I know you want to get out
20 of here, I know you are looking at metrics --

21 CHAIR HOLTZMAN: No, we have to have
22 an opportunity ask you some questions as well.

1 MR. FICHTER: Okay, I'm sorry. It's
2 very difficult, you know, I found in my practice
3 of 25 years in dealing with a lot of survivors of
4 sexual assault, both adult and juvenile, to
5 actually come up with a metric. I would love to
6 be able to say I judge my success by how long
7 someone goes to prison, but I can't necessarily
8 do that. There are too many variables when we're
9 dealing with actual live victims.

10 And what I can tell you, too, at least
11 anecdotally from my practice, the types of cases
12 that are more routinely handled in the military,
13 as opposed to civilian jurisdictions, tend to be
14 the cases with adult-on-adult sex -- adult-on-
15 adult offenses. They also fall into the category
16 of what would probably be in New Jersey as second
17 degree sexual assault where there is physical
18 force and coercion, but there is not severe
19 personal injury. So many of them fall into the
20 consent/nonconsent type of category. And they
21 are the most difficult cases to handle other than
22 perhaps very young children with a very long

1 delayed disclosure.

2 So the results that we get in those
3 cases don't always result in prison, but we do
4 have other measures in New Jersey to assure that
5 offenders are going to be evaluated, supervised,
6 accounted for either through Parole Supervision
7 For Life and Megan's Law. And we always consult
8 with our victims.

9 CHAIR HOLTZMAN: I'm sorry, sir.
10 We've reached --

11 MR. FICHTER: I apologize.

12 CHAIR HOLTZMAN: If you have any
13 written documents, we'll include them in the
14 testimony, but I'd like to get to the question
15 period.

16 Admiral.

17 VADM TRACEY: I thank all the Panel
18 Members. I just wanted to be clear, Mr. Grocki.
19 I think I understood you to say that the
20 Sentencing Guidelines have not kept pace in all
21 cases with changes in technology, etcetera.

22 MR. GROCKI: Yes, ma'am.

1 VADM TRACEY: But you are of the
2 opinion there is value in Sentencing Guidelines?
3 Am I understanding that correctly?

4 MR. GROCKI: Yes, ma'am. Yes, ma'am.
5 I think Judge Whitney articulated that and I
6 certainly agree with what he articulated. The
7 Federal Sentencing Guidelines, currently
8 advisory, they are required to be accurately
9 calculated and must be considered by the judge in
10 posing sentence.

11 My point was -- and it's part of the
12 reason why my section is working hard to try and
13 revise the guidelines to create accurate
14 measures. My point was just that it can be very
15 difficult in these types of offenses to capture
16 the conduct of the -- that actually was engaged
17 in in a meaningful way within a guideline scheme.
18 And so even the guideline that exists for sexual
19 abuse federally has certain characteristics,
20 certain offense characteristics that increase
21 enhancements, the ultimate resulting sentence.
22 But when you look deeper at them, they don't do a

1 great job of that. And so my point was just it's
2 very challenging in trying to devise that scheme,
3 but certainly it's necessary to have because it
4 does create somewhat of a baseline.

5 VADM TRACEY: Thank you.

6 MR. GROCKI: Yes, ma'am.

7 JUDGE WHITNEY: May I add a brief
8 comment on that?

9 CHAIR HOLTZMAN: Yes, Your Honor.

10 JUDGE WHITNEY: It is a challenge for
11 the Sentencing Commission to constantly update
12 the Sentencing Guidelines by collecting empirical
13 data and looking at what is happening around the
14 country and kind of using the national averages
15 from looking at all of the sentences and then
16 helping to update and amend the guidelines. It
17 is true, it's challenging in the area of sexual
18 abuse because it's not like a fraud or drug
19 trafficking where you can measure a guideline in
20 quantity, like loss amount from fraud or drug
21 quantities as determining the sentence.

22 But the Commission, in my personal

1 opinion does an excellent job in trying to
2 constantly update the guidelines, both the base
3 offense levels and the specific offense
4 characteristics by doing this. They are
5 statutory-empowered and directed to do this, to
6 do this constant analysis by collecting empirical
7 data from all the sentencing of the country.

8 VADM TRACEY: I have one more
9 question. Is it your view that the Federal
10 Sentencing Guidelines, there may be some
11 challenges in directly translating those to a
12 military environment? I think I was understanding
13 that from your remarks.

14 MR. GROCKI: Thank you, ma'am. As I
15 indicated at the beginning, I'm trying to stay
16 away too much from opinion. I do think that in
17 looking at just factually in the way that the two
18 -- the guidelines lay out federally, that the
19 overlay to the military system would be a great
20 challenge. That was kind of the point that I was
21 trying to make. And that the child pornography
22 guideline, the one that the Sentencing Commission

1 struggled with and is -- rejected is probably the
2 wrong word but it's considered by judges
3 throughout the country, but there's a high
4 percentage of judges and has been for the last
5 number of years who have been disregarding it and
6 looking at the underlying principles under
7 3553(a) to guide them. And that's what we're
8 forced to essentially argue in most of our child
9 sex assault cases, is the underlying principles
10 in child pornography cases, the underlying
11 principles of sentence and that is driving what
12 this ultimate sentence that's arrived at.

13 So I guess I point to it as sort of a
14 cautionary measure that in those guideline
15 schemes it's not always capturing. I don't think
16 it's frequently capturing the offense conduct
17 that actually makes the best measure of what the
18 appropriate sentence should be and really what
19 ultimately does do that is the underlying
20 principles of sentence that is then, you have
21 experienced judges that are applying those
22 principles to a specific factual scenario.

1 CHAIR HOLTZMAN: Judge Jones.

2 JUDGE JONES: Judge Whitney, Barbara
3 Jones. Assuming that the military decided to try
4 to create a set of Sentencing Guidelines which I
5 think we both know is a pretty arduous task. It
6 certainly has been for the Federal Sentencing
7 Commission. How would that play with a panel or
8 are you really a proponent of putting all the
9 sentencing in the hands of the military judge?

10 JUDGE WHITNEY: I would prefer
11 sentencing by military judges because military
12 judges have the experience and have a historical
13 understanding of other sentences. But assuming
14 military judges do not become the sole sentencing
15 authority, I do think it's possible to collect
16 the data and to come up with some national
17 averages so to speak after sentences which could
18 be provided to the panel. As long as the panel
19 is fully instructed that these are just averages,
20 they're not bound by these sentencing averages,
21 but it gives them a very important piece of
22 information as to their starting point for the

1 analysis of the appropriate sentence which is
2 exactly what the United States v. Booker said
3 federal judges are supposed to do. The guidelines
4 are just the starting point. It at least gives
5 us a starting point that we can all agree on and
6 then the ultimate sentencing authority knows that
7 they can use everything else that seems relevant
8 in determining a sentence.

9 It's a challenge. I think it's doable,
10 particularly if it's done in kind of a national
11 average type of perspective. But it may be done
12 independently by the Department of Defense, but I
13 also think that using the U.S. Sentencing
14 Guidelines and analogous convictions can also be
15 very helpful to the sentencing authority, whether
16 it's a Panel or a military judge.

17 JUDGE JONES: You're suggesting then
18 that these numbers could be generated from
19 national statistics or just military statistics,
20 but either? I'm sorry, I just wanted to make
21 sure I understood you.

22 JUDGE WHITNEY: Well, I've always

1 thought it was uncomfortable that we treat
2 uniform personnel differently than we treat
3 civilian personnel, whether more severely or less
4 severely. If you're committing a crime in CONUS,
5 it shouldn't make any difference if you're in
6 uniform or not.

7 Now I think it's different in a
8 theater of operation. But if the civilian in one
9 cubicle and the Servicemember in the next cubicle
10 are two males and they gang rape a female, they
11 should be treated equally and one shouldn't be
12 sentenced in a different way than the other just
13 because one is wearing a uniform.

14 JUDGE JONES: Well I take your point,
15 but I guess all I'm asking is would you go to the
16 national sentencing statistics to create?

17 JUDGE WHITNEY: Yeah, you're right.
18 Short answer to that is the national statistics
19 are blind to whether someone is in the uniform
20 and I think that's more appropriate for at least
21 crimes committed in CONUS.

22 JUDGE JONES: And then the panel would

1 also -- and I think you've already said this,
2 have to be instructed on all of the aggravating
3 and mitigating factors for lack of -- as a simple
4 way to put it that the Sentencing Guidelines
5 provide for. Right?

6 JUDGE WHITNEY: Yes. Well --

7 JUDGE JONES: And possibly more.

8 JUDGE WHITNEY: The next step beyond
9 the guidelines calculations and analysis of
10 departures which are set forth in the Guidelines
11 Manual is the ultimate -- the ultimate sentence
12 is based on the sentencing factors which is
13 important. That's Congress' statutory mandate as
14 to these are the primary factors that should be
15 used in determining a sentence. So ultimately,
16 every sentence is individual based on the
17 sentencing factors.

18 JUDGE JONES: Right, so there would be
19 -- and I'm not saying this is a bad thing, there
20 would be a lengthy instruction for the panel on
21 how to compute the sentence or how to arrive at
22 one is a better way to put it.

1 JUDGE WHITNEY: Yes, yes. What panels
2 are told now are these are all the things you can
3 consider and these are the definitions of the
4 different things you're considering, but they
5 don't know from where to start and that's where I
6 think you have dramatically disparate sentences
7 and I think it's unjust in two ways. Someone is
8 sentenced more severely than others and some are
9 sentenced less severely than others and there's
10 no express analysis of why these sentences are so
11 disparate. Disparate sentences are appropriate
12 when there are other factors, aggravating and
13 mitigating factors considered, but you still --
14 everyone should be starting from the same sheet
15 of music and -- whether in uniform or out of
16 uniform.

17 JUDGE JONES: Well, would you have the
18 panel report, as a judge has to, how they reach
19 their sentence then, how they went through all
20 the factors and how they assigned numbers?

21 JUDGE WHITNEY: That's a very
22 interesting question. I have never thought about

1 making a panel report, but it is true, if I vary
2 from the Sentencing Guideline range, I need to
3 explain clearly on the record the basis for doing
4 that to show why my sentence is not disparate,
5 why my sentence is a reasonable sentence. And
6 that is the standard review by the appellate
7 courts is reasonableness of the sentence.

8 So I never thought about that, but it
9 actually makes sense. That might be a reason why
10 you should have military judges handing down
11 sentences involving sexual abuse rather than
12 panels.

13 JUDGE JONES: Thank you very much,
14 Judge.

15 JUDGE WHITNEY: Certainly. Thank you.

16 CHAIR HOLTZMAN: Mr. Stone?

17 MR. STONE: Thank you. I am
18 particularly interested in this panel because my
19 background, if you've looked at my resume, is
20 very similar in that I was an assistant U.S.
21 Attorney. I was a criminal division prosecutor.
22 I have some military intelligence experience.

1 And I've spent hundreds of hours working on the
2 Captain Jeffrey MacDonald case with Brian Murtagh
3 at various stages of it.

4 Thank you, Judge, because I think you
5 just made a point that I want to ask the other
6 two Panel Members because if I can summarize what
7 I heard, the military sentencing system evolved
8 in -- for a different purpose. It was looking at
9 speed and it was worried about good order and
10 discipline as the highest good. And now since
11 1986, which is quite a long time ago, the
12 civilian system decided it had to institute a
13 little more of an analysis of sentences and U.S.
14 Sentencing Guideline has consumed a tremendous
15 amount of resources. And as I sort of summarize
16 what I'm hearing, I see no reason that the
17 military sentence should not start as a starting
18 point with knowing exactly what the U.S.
19 Sentencing Guidelines would propose as a range
20 for this sentence. And then if they want to
21 depart because it happened in a military theater
22 or because of some particular military concern

1 that the defense counsel can raise or that the
2 prosecutor wants to rebut that would be perfectly
3 fine, but it would give everybody some of that
4 parity we were talking about that is gone.

5 And I'm not always sure why when these
6 kinds of crimes are committed in stateside and
7 the U.S. Department of Justice could just as
8 easily step in and if it did, the U.S. Sentencing
9 Guidelines would absolutely be used even though
10 they aren't mandatory, but they would certainly
11 be used to inform the judges that the sentencing
12 -- the person who issues the sentencing's
13 starting point.

14 And so Judge, if I've gotten you wrong
15 that you would back that being a mandatory input
16 --

17 JUDGE WHITNEY: Right. I would like to
18 see the Booker -- United States v. Booker
19 analysis process implemented in a military
20 sentencing because it is both constitutional as
21 well as a guideline ranges advisory and it does
22 prevent disparate sentences. And I don't think

1 wearing a uniform should punish you -- you should
2 be more severely punished or less severely
3 punished merely because you wear a uniform in the
4 commission of your crime. There might be other
5 more detailed reasons as to this is a good
6 Soldier who has had a great career and that's a
7 different thing. But yes, you've well-
8 articulated my perspective.

9 MR. STONE: The other thing that I
10 think informs that as we've heard is the
11 Sentencing Guidelines in this area, tough as it
12 is to keep them updated, have a funding stream
13 and experts who try and do that on an ongoing
14 basis. So for example, like in drug sentences
15 where they just drop their guideline and want to
16 make it retroactive, they're always looking at
17 the fairness of the sentencing situation and in
18 the military, this Panel, for example, isn't
19 going to have an infinite life the way the
20 Sentencing Commission is, so they've got their
21 focus day in and day out on hearing complaints
22 whether or not the system is fair.

1 And so I think those are two good
2 reasons why I can't see why we should reinvent
3 the wheel and have a military U.S. Sentencing
4 Commission as opposed to as a starting point,
5 making that a mandatory input. And I'd like to
6 hear from the other two people who are sitting
7 here.

8 JUDGE WHITNEY: May I add one last
9 comment --

10 MR. STONE: Sure.

11 JUDGE WHITNEY: To follow up on that?
12 One other big difference which also troubles me
13 about disparate sentencings between the military
14 system and the federal system is in the federal
15 system because of Sentencing Guidelines there is
16 no parole. So there's truth in sentencing in a
17 federal sentence. When the judge hands down the
18 sentence, assuming it is affirmed, it is going to
19 be the sentence for that defendant plus time off
20 for good behavior, although the Sentencing
21 Commission, as you all properly pointed out, can
22 at a later date determine across the board -- not

1 for individuals, across the board, we believe our
2 sentencing -- our sentencing offense level was too
3 high and we're reducing it as I suggest on what is
4 referred to as Drugs Minus Two.

5 So the parole is that hidden little
6 aspect of military sentences where the sentence
7 handed down by the sentencing authority is
8 probably or possibly not going to be the real
9 sentence. And Sentencing Guidelines eliminated
10 that truth in -- or lack of truth in sentencing
11 problem.

12 MR. STONE: Gentlemen, do you want to
13 tell us whether you agree or disagree with that
14 general approach or if you feel like you can't
15 because of your current position, that's okay,
16 too.

17 MR. FICHTER: I am not overly familiar
18 with the Federal Sentencing Guidelines. I have a
19 general idea how they work. But with regard to
20 the idea of having a certain range, and again as
21 I was rushing through trying to explain how New
22 Jersey sentencing and grading works, for example,

1 someone who is convicted of a first degree crime
2 will get a sentence between 10 and 20 years if
3 certain aggravating and mitigating factors. It
4 gives you a range. It wouldn't have, as His Honor
5 had indicated, someone who got a three-month
6 sentence for what they probably would have
7 normally gotten something in the six or seven-year
8 range, which again would be consistent with state
9 law in New Jersey for that type of offense as he
10 described it. So it is a less complicated system
11 to say that we're going to grade certain offenses,
12 aggravated sexual assaults -- and again I'm going
13 to default to what I am comfortable with and New
14 Jersey being first, second, and third degree
15 crimes. And over a certain seriousness of that
16 crime to say that there's going to be a
17 presumption of incarceration and this will be the
18 presumptive range.

19 The way it's set up now under the
20 Uniform Code of Military Justice, you have
21 everything that is possible from no punishment
22 which has always struck me as a bit odd to the

1 maximum. And some of the maximums are really
2 quite outrageous at the far end. And there's very
3 little guidelines given in between. And again,
4 any judge who is going to be imposing a sentence
5 is going to imply matters of aggravation, matters
6 and mitigation as a concept. And those are
7 concepts that are across the federal system, the
8 state systems and are theoretically there in the
9 military justice system. But it's very difficult
10 for people who are non-legal professionals, I
11 think, to follow, unless given specific guidelines
12 and frameworks to work with it. So I think it is
13 a good idea and again I would defer where I don't
14 have knowledge, but the idea of having a guideline
15 for you're convicted of this offense, this offense
16 is of this seriousness and setting a range. And
17 if you're going to depart from that range, having
18 to have some serious justification, either up or
19 down.

20 MR. GROCKI: So as I indicated
21 previously, I'll defer to my retired colleagues
22 that as far as the opinion as to what should be

1 done within the military system. But I do want to
2 note two issues or factual, I think, underpinnings
3 of at least this question.

4 One is that the U.S. Sentencing
5 Commission which has created a Sentencing
6 Guideline which I believe under these
7 circumstances to be 2(a)(3).1 is the offense
8 guideline for sexual abuse in the federal system,
9 that the assumption is that they're looking at
10 that guideline and honing that guideline on a
11 recurrent basis. And I would encourage the Panel
12 to look more closely at that question as to how
13 frequently that has been adjusted, how frequently
14 that has been examined. Since the Commission --
15 as the Panel is no doubt aware, is quite busy with
16 a variety of different offense areas to include,
17 as I noted before, the child pornography report
18 that they compiled and they're in the process
19 right now of continuing to try and revise the
20 child pornography guideline.

21 Drugs also a big issue in the past few
22 years. And so I don't know that within 2(a)(3).1

1 covering sexual abuse that there has actually been
2 that many changes and adjustments over the years.
3 The Chapter 109(a) offenses have not generally
4 been altered or changed during the last decade or
5 more and so that's an assumption that we need to
6 look more closely at.

7 In addition, when you look at that
8 guideline, what you're going to see is that most
9 of the enhancements have to do with status as a
10 minor. They have to do with status as a care
11 taker or in the custody of the offender. So they
12 are very much geared toward the minor, the status
13 of the victim in the case. And of course, here
14 the focus is adults. It's adult sex offenses. And
15 so that guideline, as it pertains to adult sex
16 offenses which we talked about before, are not
17 that commonly charged, are not that commonly
18 sentenced within the federal system. A lot of
19 these different factors and characteristics that
20 exist within the military system are simply not
21 going to be present and do not exist in that
22 federal sentencing scheme and would not be

1 analyzed by that Commission at all in their annual
2 duties.

3 The other issue that exists and can't
4 be ignored is the fact that in the military system
5 you have the presence of the punitive discharge
6 which for many of these offenses now is mandatory.
7 And so if that's punishment and it's articulated
8 as punishment within the code, and it's
9 acknowledged as punishment to panels, then that
10 does not exist on the Sentencing Commission side
11 and so giving that guideline to a panel, devising
12 some instructions as to how to apportion what you
13 give to the punitive discharge when it's not
14 present in that guideline is an issue. And so
15 that would be something that would need to be
16 resolved.

17 MR. STONE: Let me just probe that last
18 answer a little bit. There's a couple of items
19 there that I'm not sure I totally agree with. One
20 is there's plenty of child exploitation and sexual
21 assault in the military. The Hardy case which --

22 MR. GROCKI: I didn't mean to say that

1 there's not child -- I'm talking about adult sex
2 crimes.

3 MR. STONE: Yes.

4 MR. GROCKI: Prosecuted federally.
5 That is something that is not typically done at
6 the federal level. So it's very rare
7 circumstances. So I'm just saying when you're
8 looking at the guideline scheme for those offenses
9 as applied to adults, there's going to be some
10 sort of different information.

11 MR. STONE: I understand it's going to
12 have different factors. You talked both originally
13 and just now about the difference in discharge.
14 At least from a victim's point of view, they want
15 to see a sentence which may well -- which by
16 definition means incarceration and doesn't that
17 take care of this whole discharge issue if a
18 person goes to jail, the victim knows that that
19 means they're not going to continue participating
20 in that unit as a military person. So I don't
21 really see where a sentence, because it includes
22 discharge, is qualitatively different when it

1 includes imprisonment. And if it doesn't include
2 imprisonment, I don't think the victim feels very
3 happy just simply to know that the convicted
4 defendant was discharged.

5 So I don't really see why -- I mean
6 maybe in the past that should have played a big
7 part, but I have some serious doubt that a victim
8 takes much comfort from the fact that the person
9 is or is not discharged.

10 MR. FICHTER: If I may and with all
11 respect, I've dealt with a lot of victims over the
12 years and it's very difficult to make any sort of
13 generalization of what would make them feel
14 comfort or not comfort.

15 Many victims are, in some cases,
16 depending on the nature of the offense, can be
17 somewhat unrealistic on how long someone will be
18 incarcerated and ultimately that person will come
19 out. Within the military setting, it is a rather
20 unique setting, but again it's unique to the
21 victim factors.

22 And again, just putting it out there in

1 hypothetical, if you have a victim who is a career
2 military person, that punitive discharge, making
3 sure they're not a part of the unit, the
4 organization -- and they can appreciate the
5 seriousness of that, again, if the victim is also
6 a career military person and essentially
7 banishment from our society. They would probably
8 find that to be pretty significant.

9 However, if it's someone who is not a
10 career person, it may be somewhat lost or a
11 civilian who is the victim of the sexual assault.
12 So it is difficult.

13 The other thing, too, is there is an
14 aspect and I don't know if it's quite captured
15 that I'm always mindful of as a local prosecutor
16 because when someone is released, they're coming
17 back to my community and I need to assure public
18 safety. I do have other measures other than
19 incarceration that can help me do that. Sex
20 offender registration notification, as we call it
21 in New Jersey, Megan's Law, is a passive measure
22 of trying to assure that, but we also have the

1 ability to put someone on Parole Supervision for
2 Life for an extended period of time.

3 The one time that it does balance in
4 where we balance off perhaps incarceration for a
5 lesser period of time, but never no period of
6 time, quite frankly will be sometimes when people
7 are facing deportation. We don't necessarily need
8 to feel we need to incarcerate them for a lengthy
9 period of time if they are going to be deported.
10 And that's happening more and more.

11 So there may be some parallel there
12 with someone who is being discharged as just
13 someone who is being --

14 MR. STONE: Well, it's a little
15 different in the military because what they're
16 finding is one of the most important options for
17 the victims is for themselves to ask for emergency
18 transfers to other locations so they're being
19 banished from the place they wanted to serve their
20 time just as well. So I think it's -- I think
21 this is going to be one of those areas where maybe
22 there can be an argument in the military

1 sentencing court about mitigation or aggravation.
2 But what I'm pointing out is the military itself
3 may want that person to be discharged, but I don't
4 know how much good that does to the victim or if
5 it makes a qualitative difference to the victim.

6 The last question, Mr. Grocki, that I
7 want you to comment on is I know the Supreme Court
8 decided in 2014 that in some of these -- that was
9 particularly a pornography case, but in some of
10 these -- I think it carries over to sexual abuse,
11 that in terms of restitution they didn't like what
12 the statute, the federal statute said and I'm not
13 sure if it was a proposal or if it was enacted
14 that there be a flat \$25,000 substitute statutory
15 restitution Panel fee to represent the harm to
16 victims of some of these sex crimes. And I wonder
17 if you could tell me if you think that that is --
18 that we ought to have something that parallels
19 that in the military.

20 CHAIR HOLTZMAN: Excuse me, are you
21 talking -- what kinds of crimes are you talking
22 about?

1 MR. STONE: Well, let Mr. Grocki tell
2 us. I think he's an expert on that.

3 MR. GROCKI: Well, it's specific to
4 child victim crimes, ma'am.

5 CHAIR HOLTZMAN: Well, that's why I'm
6 asking the question. So I think it's beyond the
7 scope of the Panel.

8 MR. GROCKI: Yes, ma'am.

9 CHAIR HOLTZMAN: That was your last
10 question, Mr. Stone?

11 MR. STONE: Yes.

12 CHAIR HOLTZMAN: I'm going to go to my
13 questions. First of all, how would a --
14 presumably in the Sentencing Commission and the
15 Sentencing Guidelines paradigm, there's a pre-
16 sentence report which allows the sentencer to
17 evaluate a variety of factors and come to a
18 conclusion. How does that work in a system
19 without a pre-sentencing report?

20 Anybody? Judge Whitney, do you have an
21 answer?

22 JUDGE WHITNEY: Well, because there is

1 no PSR in the military system?

2 CHAIR HOLTZMAN: Correct.

3 JUDGE WHITNEY: A pre-sentence report
4 is a very well thought out, well-prepared document
5 from a probation officer and it goes way beyond
6 the Sentencing Guidelines calculation. Probably
7 the most important part of the document is
8 Sentencing Guideline calculations. But also in
9 there is criminal -- a complete criminal record
10 including arrests, even if that criminal record is
11 at zero points added to the criminal history
12 category. It also has a history of illness,
13 mental illness in particular, a family background.
14 It's also very important to the sentencing judge
15 is that the judge -- the offense conduct section
16 which summarizes not merely the count of
17 convictions, but the whole scope of the
18 misconduct. So it's a very, very thorough
19 document.

20 I do not think -- I would not propose
21 a pre-sentence report for purposes of military
22 justice because it is a lot of work and I don't

1 think it's necessary for presenting disparate
2 sentences. It is useful for the BOP in
3 determining the scope of or the degree of
4 incarceration.

5 And I want to -- not digress, but I do
6 want to point out, the BOP already does what I've
7 heard discussed here is -- that would be hard to
8 do. That is comparing a military crime to a
9 federal crime. Most Servicemembers convicted in
10 a court-martial don't go to the disciplinary
11 barracks, they go to the BOP. And the BOP has to
12 look at the military crimes of conviction to
13 determine how this defendant relates to a federal
14 defendant and therefore what level of
15 incarceration. So the comparison between military
16 crimes and federal crimes is already done by the
17 U.S. Government by the BOP.

18 CHAIR HOLTZMAN: All right, let me ask
19 another question. As I understood one of the
20 concerns that you had raised, Judge Whitney, is
21 that the panel is confused because of all of the
22 options that it's given, or can be confused, not

1 that it is. But can be confused.

2 JUDGE WHITNEY: Right.

3 CHAIR HOLTZMAN: So if we layer on a
4 whole additional set of considerations, how does
5 that affect the confusion factor?

6 JUDGE WHITNEY: Well, I don't think
7 you're adding additional considerations. I think
8 what you're adding is this is the starting point
9 and it's not saying we're adding something else
10 for you to discuss. This is the legal starting
11 point to the analysis of the sentence.

12 Now, of course, attorneys might
13 disagree as to the guidelines calculation and that
14 is something that is adjudicated before the court,
15 but once the court calculates those guidelines,
16 that's the starting point.

17 So a panel has adjudicative guidelines
18 that they are now told this is the range you
19 should sentence the defendant unless there is
20 something else pursuant to the sentencing factors
21 or whatever that mitigates or aggravates that. I
22 don't think you're adding another thing. I think

1 you're telling them this is where you start and
2 now go forth and consider everything that I've
3 already instructed you in determining whether this
4 sentence should be in the range or out of the
5 range.

6 CHAIR HOLTZMAN: Okay. And I guess my
7 final question is on the issue of disparity
8 itself. To what extent that becomes the
9 touchstone of sentencing as opposed to the
10 examination of the specific factors. I mean you
11 say there shouldn't be a difference in the
12 sentence if two people commit the same crime, but
13 there may be other factors that go into their
14 behavior that could be taken into account.

15 JUDGE WHITNEY: Absolutely. I totally
16 agree with you. That is the process, the Booker
17 process. A judge can virtually consider anything
18 at the sentencing factor analysis step. That's
19 the third step of the Booker process. Even a
20 judge's disagreement with congressional policy,
21 the Supreme Court has said that is appropriate.
22 A judge has his or her own policy perspective.

1 And so it is -- anything, I think,
2 pretty much can be considered by a sentencing
3 judge as long as you explain why you're
4 considering it and then in determining whether
5 you're going to vary upwardly or downwardly from
6 the sentencing range.

7 CHAIR HOLTZMAN: Right, but my concern
8 is if the issue is to have a just sentence which
9 takes into account the factors of the crime, the
10 concerns of the victim, the defendant's prior
11 conduct and so forth, is disparity in and of
12 itself such an important factor to consider in
13 that decision? I mean I'm not sure that the fact
14 that this is not the same as what's happened in
15 the next jurisdiction or in some other case is a
16 critical factor and I'm just concerned that --

17 JUDGE WHITNEY: Well, it's --

18 CHAIR HOLTZMAN: Let me just finish my
19 point if you don't mind.

20 JUDGE WHITNEY: Sure. Sorry.

21 CHAIR HOLTZMAN: I'm just concerned
22 that by doing this, by giving a panel this kind of

1 instruction, that you have created -- I don't mean
2 you, but that the system has created as the
3 primary factor a lack of disparity as opposed to
4 justice in the individual case. And that would be
5 my concern. It was my concern with regard to the
6 Sentencing Guidelines themselves. I was not in
7 favor of them. I'm not sure that I still am. But
8 that's a separate point. But I am concerned that
9 this overly emphasizes the need for lack of
10 disparity as opposed to what's appropriate in this
11 specific case.

12 JUDGE WHITNEY: I think we get back to
13 congressional intent in the Sentencing Reform Act.
14 And that was -- disparity was, I would say, the
15 primary motive for the Sentencing Reform Act. And
16 the Sentencing Reform Act had tremendous
17 bipartisan support because across the country
18 sentences were so disparate.

19 And likewise, there's disparity in the
20 federal sentencing system. We have a Uniform Code
21 of Military Justice. It is a uniform code. So
22 we're trying to have, I think, equal justice meted

1 out there, too.

2 I also agree with you that you can
3 overdo disparity. Of the primary seven sentencing
4 factors, disparity is just one of them. And so
5 yes, if it's clearly articulated to a Panel that
6 disparity is important, but you need to consider
7 all of these other things. Now that you've
8 started with a uniform starting point, then
9 consider everything else. Do not -- you know, you
10 can make it clear in the instructions. Do not
11 render the sentence only because -- within the
12 sentencing range only because you're trying to
13 avoid disparity. You must consider everything
14 else which is what the Supreme Court basically
15 told us.

16 CHAIR HOLTZMAN: Thank you very much,
17 Judge Whitney. Judge Jones wanted to ask a
18 question.

19 JUDGE JONES: Just one quick question,
20 Judge. If the judge is going to decide the range,
21 that would include a lot of analysis under the
22 guidelines before you would give it to the panel.

1 JUDGE WHITNEY: Correct.

2 JUDGE JONES: So it would be bifurcated
3 -- if you're going to use the guidelines, it would
4 be both the military judge having a role and then
5 the panel going from there with additional
6 instructions and a starting range? Is that your
7 --

8 JUDGE WHITNEY: I don't believe a pre-
9 sentence report is required. I do believe with --
10 I don't think it has to be bifurcated, but I do
11 think there would be some time, some hours, so to
12 speak, maybe one day or three or four hours where
13 counsel and the court were to calculate the
14 guideline range and then that is presented to the
15 sentencing authority whether it's the judge or the
16 Panel. A complete pre-sentence report I just
17 don't think is necessary.

18 JUDGE JONES: And I guess, Judge, the
19 only other thing I would say is I think I am
20 piling on here a little bit in agreeing with Ms.
21 Holtzman with respect to the Sentencing
22 Guidelines. They've been around since 1984,

1 particularly the ranges in the sentencing area --
2 and I know you know all about this, generally
3 speaking were thought to be way too high. The
4 Commission over the last 20 years has finally
5 begun to reduce and reduce. And I'm not sure that
6 in a crime which basically makes up a huge
7 percentage of federal criminal activity --
8 statistics -- that hasn't been -- had a tremendous
9 impact tying the hands of judges who would
10 otherwise have given different sentences in many
11 instances. I'm talking about less severe
12 sentences.

13 And so the whole construct of -- and I
14 know they're not mandatory any more, but the whole
15 construct of guidelines I think is a lot more
16 questionable today than it was in 1984. When I
17 agree with you it was started in order to try to
18 have uniformity.

19 MR. STONE: This is Victor Stone. I
20 have just one short question for the judge.

21 Judge, correct me if I'm wrong, but I
22 think that you have synopsisized what the Sentencing

1 Guidelines did by -- and it really needs another
2 word. As I recall the Sentencing Guidelines
3 originally -- and I worked with the Sentencing
4 Commission before they even issued the first set
5 of guidelines as a liaison for the Department of
6 Justice, the catch phrase was unwarranted
7 disparity. And so what you're saying is that by
8 starting with a place where let's say the horse
9 race begins and at least they know where the horse
10 race begins, they can try and avoid unwarranted
11 disparity without by any means getting rid of
12 individualized sentencing. Is that correct?

13 JUDGE WHITNEY: That's absolutely --
14 that is the very phrasing of the sentencing
15 factor, unwarranted disparity.

16 MR. STONE: And the other item that I
17 simply think I'd have to point out is that the
18 Sentencing Commission, if I remember correctly,
19 every single year has a cycle where it entertains
20 proposals for change in any guideline. So it is
21 always open to consider whether or not it thinks
22 sentences are too harsh or too lenient. And it

1 seems to me that that's an ongoing function which
2 whether you think they've done it well or badly,
3 at least leaves the door open for that starting
4 point to be adjusted on a regular basis. Have I
5 got that wrong or have I got that right?

6 JUDGE WHITNEY: No, you're absolutely
7 correct.

8 CHAIR HOLTZMAN: Let me just give the
9 final word taking the privilege of the Chair. Of
10 course, disparity, unwarranted or not, is in the
11 eyes of the beholder. And when you're deciding
12 that you're not meeting a mean, that there's a --
13 that already raises a presumption that something
14 should be questioned, what does the mean consist
15 of? Does it consist of -- suppose it had the
16 disparity exist because there has been justice in
17 each individual case.

18 You're assuming that the disparity is
19 a result of an injustice and that's where I think
20 that there is a serious logical fallacy in
21 thinking about this. But I very much appreciate
22 the suggestions that have been made here and very

1 thoughtful and very important in the work of this
2 Commission and I want to thank the Panel. We will
3 take a 15 minute break.

4 (Whereupon, the above-entitled matter
5 went off the record at 10:58 a.m. and resumed at
6 11:16 a.m.)

7 CHAIR HOLTZMAN: Okay, we'll begin.
8 This panel deals with how the Department of
9 Defense and the Military Services manage military
10 justice data for sexual assault cases.

11 And, we have a very distinguished
12 panel. And I want to thank the panel members for
13 being here this morning.

14 We'll begin with Ms. Darlene Sullivan,
15 Defense Sexual Assault Incident Database, DSAID,
16 Program Manager, Department of Defense Sexual
17 Assault Prevention and Response Office, SAPRO.

18 Ms. Sullivan? Good morning. Thank
19 you.

20 MS. SULLIVAN: Well, first I would like
21 to open up by imagining, imagining before DSAID.
22 If you ask to receive the queries for data.

1 Before DSAID, imagine a staffer calls
2 you and says, you know, hey I want the data on how
3 many unrestricted and restricted reports of sexual
4 assault were received in January?

5 The normal process before DSAID was to
6 draft a data call, send it up our chain of command
7 for approval and signature. So, after you got it
8 approved, the data call approved, then you would
9 send it over to the Services. Then they would
10 collaborate with their major commands in the field
11 and get that information and then it would process
12 back up.

13 The data would have to be validated and
14 approved again all the way up their chain of
15 command then back over to DoD which we would
16 consolidate and validate that data and then send
17 it up our chain of command for approval.

18 And then, by then, it's six months
19 later and I'm calling the staffer back and saying,
20 I have your data for January and they're saying,
21 I don't need January anymore, what about July?

22 So, having said that, thank you all for

1 inviting us here today.

2 I would just like to apologize up
3 front, I'm very passionate about DSAID and almost
4 to the point of being accused often of being
5 annoying. So, I will just say that up front about
6 it.

7 But, the reason I am is because I've
8 been serving DoD either as a Soldier for 21 years
9 or DoD civilian for almost 36 years now. And this
10 is the first project I've ever been on where the
11 collaboration and the dedication between our
12 office and the Services and the users on the
13 ground has been extraordinary.

14 I couldn't have been a part of any
15 other project before that that's been the case.

16 So, with that, next slide?

17 So, thank you for allowing me to come
18 and talk to you about DSAID and the background,
19 how we evolved to here, what DSAID --

20 CHAIR HOLTZMAN: Can we just skip the
21 background because we're running late?

22 MS. SULLIVAN: Okay.

1 CHAIR HOLTZMAN: So, just get to how
2 you --

3 MS. SULLIVAN: Can do.

4 CHAIR HOLTZMAN: -- how you do get the
5 data and so forth?

6 MS. SULLIVAN: Okay, okay. Let's skip
7 to -- okay, so you got that. How we got to where
8 we are now.

9 CHAIR HOLTZMAN: And, by the way, all
10 of your slides and that information will be
11 incorporated into the record.

12 MS. SULLIVAN: Yes, ma'am, thank you.

13 Okay, so this one, I'd like to start
14 with here.

15 CHAIR HOLTZMAN: Great.

16 MS. SULLIVAN: DSAID does three things
17 primarily and that is case management and business
18 management and ad hoc reporting and querying.

19 For case management, we have about 880
20 and some odd active SARCs using DSAID. And, their
21 role in DSAID is to input -- start the case in
22 DSAID.

1 I would just say up front that all
2 users that I'm going to talk about today have to
3 go through DSAID training and we have training
4 specialized just for their user role.

5 They have to present their background
6 investigation data to us also and we require them
7 to also conduct annual PII privacy training just
8 because we want to make sure that the data remains
9 secure there.

10 So, we have about 880 active SARCs
11 using DSAID now. And, their job is to get that
12 case initiated into DSAID.

13 I would just say in the beginning, when
14 we turned on DSAID back in 2012, we did it in a
15 phased in approach. The Air Force was the first
16 to use it. The Air Force did not have a database
17 at that time, so the amount of data which is about
18 230 data points between the case management and
19 the case synopsis.

20 So, for the Air Force SARCs in the
21 beginning with, this was a little overwhelming.
22 So, we developed a tool, the DD Form 2956 for them

1 to be able to gather that information.

2 It's a voluntary tool. They don't have
3 to use it. It's optional. Once they -- if they
4 use it to fill out the data, then get that data
5 into DSAID, then they destroy that form.

6 The business management portion of
7 DSAID helps them with their day to day job. And,
8 this covers everything from notes for their case
9 management group meetings, logging in where they
10 took their training at for their own certification
11 or any training they provided their units that
12 they're providing support to.

13 For ad hoc query and reporting, this is
14 the third most important piece of DSAID. And, we
15 have several different categories of users here,
16 we have program managers that are at the
17 headquarters level. And, many of them are here
18 with us today.

19 We also have legal officers, and two
20 are on the panel with me today. And, they put in
21 a lot of time validating this data. It's an
22 extraordinary effort that they're conducting and

1 they do a wonderful job for us for that. They put
2 a lot of time and effort into that.

3 When we first stood up DSAID, we did
4 not have the case synopsis portion of DSAID. That
5 original joint working group decided we would just
6 keep that portion separate as a manual task for
7 the annual report.

8 But, soon after we turned on DSAID for
9 the program managers and the SARCs, the legal
10 officers came to us and said we've got to put this
11 in there, too. So, that's where that evolved.
12 And, we turned that feature on in January of 2014.

13 So, at that point, we have about, I
14 would say, there's probably about 30 or so legal
15 officers that use, at the headquarters level, use
16 DSAID to input the case synopsis portion that
17 populates on what we call Tab 7, the case synopsis
18 portion of the matrices, which I think Dr.
19 Galbreath has walked you through those in previous
20 sessions.

21 Next slide?

22 One thing also I would just like to add

1 also is, I have about, well, I don't, Dr.
2 Galbreath has about nine SAPRO analysts that also
3 work for him that take the data and does the trend
4 analysis and does all the analysis to write
5 portions of the annual report.

6 And, I think last time he came and
7 explained to you all the waterfall chart and how
8 that works. So, he has those folks that are also
9 working in DSAID and being able to pull that
10 information out.

11 So, how does the data get into DSAID?
12 We have three avenues.

13 The first is that case management. So,
14 either one of two ways would happen with a case,
15 a DSAID case, and that is, the victim walks into
16 the SARC's office or the Victim Advocate's office
17 and says I'd like to report, unrestricted or
18 restricted.

19 The victim would elect and use a DD
20 Form 2910. At that point, then the SARC has about
21 48 hours to input that data -- open a DSAID case.

22 They can come back later and add more

1 data as they get it that's required for DSAID.

2 Or, we could have a situation where the
3 legal -- excuse me, the MCIOs find out about it
4 and they start their investigation.

5 Now, they're required by the DoD IG
6 regulation to contact the SARC as soon as possible
7 and give them that information so then they can
8 open the case in DSAID.

9 So, once that portion is done, part of
10 what the SARC is going to input is that MCIO case
11 number. And, all three of them do it just a
12 little bit different so we train them on that
13 piece.

14 So, they put that number in and they
15 select, so say, if it's going to Army CID and the
16 Army CID case number, they put that into DSAID.

17 So, that takes us up to the second
18 entry and that is the investigative data. And,
19 what happens there is once that information is in
20 DSAID, that number's in DSAID, we do a weekly
21 interface and that goes through a secure file
22 transfer.

1 We pull out of DSAID, it automatically
2 happens, pull out of those MCIO numbers and send
3 it to the appropriate office.

4 So, we have three different interfaces
5 going on, one for CID, one for OSI and one for
6 NCIS.

7 We have this formalized through a
8 formal MOU. We collect about 45 pieces of data
9 they send back to us.

10 Now, sometimes that, this week,
11 probably get two or three items, next week as the
12 Agent is putting in their database, then that
13 information will come over to DSAID.

14 That happens on a weekly basis until
15 the DSAID case is closed.

16 Then the third is the case outcomes.
17 So, once the investigation is complete and that
18 the data populates over into DSAID and a little
19 check mark to indicate the investigation is
20 complete, then that information, a certain portion
21 of that information then moves to the legal
22 officer box.

1 And then, on their dashboards, they
2 will see all those cases that they need to go in
3 and put the case synopsis information, the
4 outcomes data.

5 Then, at the end of the day, then I am
6 able to push either a matrices button in DSAID and
7 get those matrices, those tabs you see in the back
8 of our annual report that Dr. Galbreath uses for
9 analysis.

10 Or, we also have what's called a case
11 level report and the Services use that data and
12 they can run that anytime they want to and they
13 use that data for quality control, quality
14 assurance of the data. They do a lot of work in
15 that area going back to the SARC or, in cases
16 where they need to go back to the Agents and get
17 additional data if they need to populate those
18 fields.

19 Next slide.

20 And then, what do we use it for?

21 Congress, when they mandated that we
22 build DSAID, also said once you build it, use it

1 for the annual report.

2 In FY14, we used it for the very first
3 time for the annual report to Congress. We are
4 going to use it for the report coming out in
5 December for the Military Service Academies. It
6 will be the first time we're using it for that.

7 We also use it for program management
8 as far as Dr. Galbreath sees any trends that we
9 need to identify or any other offices that he
10 thinks that we need to work with to collaborate
11 on.

12 And then, the Services use it a lot for
13 their quality checks on their data and then also
14 to provide information to leaders in the field
15 about how their cases are -- their program is
16 going for trend analysis.

17 That's it in a nutshell.

18 CHAIR HOLTZMAN: Well, thank you very
19 much.

20 I think we'll postpone questions until
21 the end.

22 Our next presenter is Ms. Katherine E.

1 Robertson, Family Advocate Program, FAP, Manager,
2 Department of Defense Office of Family Readiness
3 Policy.

4 Ms. Robertson? Thank you very much for
5 being here this morning.

6 MS. ROBERTSON: You're welcome.

7 Thank you for the opportunity to be
8 here and talk to you about the Family Advocacy
9 Program. Our processes are a reporting process
10 and, most importantly, the central registry which
11 is what I think you want to hear about.

12 Due to the scope and objectives of the
13 Judicial Proceedings Panel, the incidents you're
14 probably most interested in are our sexual assault
15 of Military spouses and intimate partners which
16 are managed by the Family Advocacy Program.

17 And, how we track them, how we report
18 them and the parallel and distinctly separate
19 process from command actions, law enforcement and
20 judicial proceedings. Ours is a clinical incident
21 database different from DSAID.

22 To give you a little bit of background,

1 the Family Advocacy Program is Congressionally
2 mandated and the central --

3 Next slide, I'm sorry. You can go
4 ahead to the next one.

5 We've been -- the central registry has
6 been in existence since the 1980s. We have been
7 tracking cases of domestic abuse and child abuse
8 and neglect for DoD.

9 Our Family Advocacy Program and the
10 scope is to track all incidents of child abuse and
11 neglect and domestic abuse to include the sexual
12 assault for all of DoD. So, we have a large
13 program, very comprehensive program.

14 We employ over 2,000 staff DoD wide.
15 We have 900 clinicians and over 300 domestic abuse
16 victim advocates. So, we have a rich, large
17 history of providing services to victims and
18 offenders in family violence cases.

19 So, part of our -- the whole goal of
20 our program for Family Advocacy is treatment.
21 It's prevention, identification and treatment of
22 both the victims and offenders. And, our purpose

1 really is to strengthen families.

2 So, what's really important to note
3 today is that the command actions, the law
4 enforcement investigation, MCIOs and judicial
5 proceedings happen in parallel process to the
6 clinical program that Family Advocacy provides
7 services.

8 So, we work together, we collaborate.
9 They are part of our Incident Determination
10 Committee, but anything investigative, legal or
11 command actions are distinctly separate from the
12 Family Advocacy Program.

13 Each of the four Services has a robust
14 clinical case management system where they track
15 these clinical cases. And, it's 46 elements of
16 those cases which are transferred via a secure
17 server to DMDC, Defense Manpower Data Center, for
18 our central registry.

19 So, it's those 46 elements that we use
20 to write an annual report and to track trends and
21 understand the scope of both child abuse, neglect
22 and domestic abuse.

1 When a Family Advocacy clinician
2 receives a report of an allegation of domestic
3 violence or child abuse, neglect, we immediately
4 notify law enforcement and they determine at law
5 enforcement whether or not it rises to the level
6 of Military Criminal Investigation.

7 And then, we notify command and we are
8 mandated reporters for all child abuse and neglect
9 cases, so we immediately notify Child Protective
10 Services.

11 One thing that's important about Family
12 Advocacy is we work very closely with our civilian
13 community through MOUs because most of our service
14 -- many of our services for our victims are within
15 the civilian community.

16 All of our child cases are handled by
17 Child Protective Services, family court. Our
18 victims of domestic abuse would be using a shelter
19 in the local civilian community. So, through MOUs
20 and collaboration with the civilian community, we
21 provide services to our victims and our families.

22 Next slide?

1 The type of data captured in our
2 central registry is administrative data on each
3 unrestricted report of domestic abuse and all of
4 our child abuse and neglect incidents.

5 And, these data points, without going
6 line by line, you have -- you know, it's
7 demographic data. It also includes the specific
8 type of abuse, child physical abuse, child sexual
9 abuse, physical assault, emotional abuse, the
10 level of severity, mild, moderate and severe and
11 any resulting fatalities.

12 We also track all fatalities related to
13 child abuse and neglect and domestic abuse in our
14 central registry.

15 Again, I said it already that it does
16 not include any command actions, law enforcement
17 data or legal dispositions in those 46 elements
18 that are in our central registry.

19 All the clinical pieces, you know,
20 we're tracking clinical treatment remains in the
21 Service clinical systems. It's only these 46
22 elements that come over and constitute our DoD FAP

1 central registry.

2 Next slide?

3 So, our central registry contains
4 reports of abuse that did not meet criterial for
5 abuse, and I'll talk a little bit more about how
6 do you meet criteria without identifiable
7 information.

8 And then, it also includes information
9 on met criteria reports and reviews that are
10 linked to Servicemembers, family members and the
11 alleged perpetrators.

12 And then, we also use --

13 CHAIR HOLTZMAN: Excuse me, what does
14 met mean?

15 MS. ROBERTSON: It's a new -- it's a
16 way we talk about substantiation. My next slide
17 will talk to it.

18 CHAIR HOLTZMAN: Oh, okay.

19 MS. ROBERTSON: So, we substantiated --

20 CHAIR HOLTZMAN: Met criteria, I got
21 it. Okay.

22 MS. ROBERTSON: Met criteria, yes.

1 CHAIR HOLTZMAN: Thank you.

2 MS. ROBERTSON: Sorry.

3 We also use the central registry for
4 background checks. So, any time a child and youth
5 program employs someone to work with children, any
6 DoD sanctioned activity, Boy Scout leader, a youth
7 sports -- like both of my sons are active duty and
8 are coaches on teams.

9 They have to do a background check in
10 the central registry to ensure that there's been
11 no incident of domestic abuse or child abuse and
12 neglect in their history or else they wouldn't be
13 able to work in a DoD sanctioned activity.

14 So, that's another main, important
15 point part of our central registry.

16 The next slide.

17 So, each quarter, the Services submit
18 a file to DMDC containing their central registry
19 data on a quarterly basis and they're submitted on
20 the secure server and then they're loaded in the
21 DMDC mainframe.

22 We have quality control as Ms. Sullivan

1 was pointing out, quality control. We call it
2 quality control at every angle.

3 The Services recheck their 46 -- all
4 those files before they come over. Then, when
5 they come to DMDC, we do another quality
6 assurance. And then, when they come to our office
7 at DoD Family Advocacy Program, we also do another
8 quality control check. So, we continually check
9 that data to validate it.

10 We do an annual report every year and
11 they use the January 20th file to do our annual
12 report. So, like for fiscal year '14, the fiscal
13 year ended September 30th. So, we give them from
14 1 October until January to go through all their
15 files and incidents from the previous year to make
16 sure all those 46 elements are valid, filled in
17 and there's no errors before they submit it. And,
18 it's that report that we use for our annual
19 report.

20 The other important thing is we do a
21 crosswalk file. So, with joint basing and units
22 on different installations, you may have an Airman

1 that has an incident of domestic abuse and they're
2 on a Navy installation. So, we do a crosswalk at
3 the service level and then they get in DMDC to
4 make sure that all the Air Force incidents are
5 captured also in the Air Force central registry.

6 So, that's an ongoing event that
7 happens and they do it quarterly, but they really
8 do it annually at the end of the year.

9 Next slide.

10 This is our incident determination
11 process. We have an Incident Determination
12 Committee that's an administrative
13 multidisciplinary committee led by a senior
14 commander, like, for the Air Force, it's the Vice
15 Wing Commander, and on that committee sits the
16 Family Advocacy clinician or manager, law
17 enforcement, legal and then the command and senior
18 enlisted of both the victim and the offender if --
19 whoever's active duty.

20 And they use a research-based decision
21 tree algorithm with standardized maltreatment
22 definitions that was piloted with all the Services

1 so they use this algorithm to look at the act and
2 the impact of that specific incident. And, it
3 takes to you different decisions and then, at the
4 end of that, you have a decision whether or not
5 that incident met criteria for inclusion in our
6 central registry.

7 And so, we end up substantiating our
8 meeting criteria about 50 percent of the reports
9 that we get in.

10 What's important to note is, because
11 we're treatment focused, is that we still offer
12 services to those families that the incident did
13 not meet criteria because we're all about
14 something happened in that home, we want to
15 prevent a future incident. So, we still provide
16 services, we just don't count it as an incident in
17 our central registry.

18 So, this is an internal to fact
19 decision. It's really -- it's a decision on
20 maltreatment. So, it's not -- it should not be
21 used as a legal or a disciplinary decision. It's
22 really to determine that this family needs

1 treatment and we have the licensed clinical social
2 workers and evidence-based programs, offender
3 treatment programs to provide treatment.

4 Again, this is internal to FAP.

5 Next slide?

6 Similar to DSAID, our data is used for
7 oversight and program planning, budget, we fund
8 all the Service Family Advocacy Program, so it
9 helps me determine if we need more personnel or
10 more resources.

11 We look at the scope of domestic abuse
12 and child abuse and neglect, identify emerging
13 trends and develop changes in our policy based on
14 the data and then the incidents.

15 We also use it to meet the DODI
16 background checks that I talked to about before
17 for DoD sanctioned activities.

18 We respond to public and congressional
19 and government inquiries.

20 And, lastly, I said it before, that the
21 central registry and the incident determination
22 should not be used to take administrative or

1 disciplinary action against a service member or to
2 determine their suitability for promotion,
3 assignment or retention. Those, again, are in the
4 investigative, legal and command action lane.

5 I tried to make it as quick as
6 possible. I'd be glad to answer any questions
7 later.

8 CHAIR HOLTZMAN: Thank you very much,
9 Ms. Robertson.

10 Now, we have Service Representatives.
11 We will begin with Colonel Walter M. Hudson, U.S.
12 Army, Chief Criminal Law Division, Office of the
13 Judge Advocate General.

14 Welcome, Colonel.

15 COL HUDSON: Thank you, ma'am.

16 Ma'am, Members of the Panel, good
17 morning.

18 And, I've been in this job for a couple
19 of months replacing the esteemed Colonel Mike
20 Mulligan. Some of you all may know, he's now in
21 the Army Court of Criminal Appeals. And, I'm
22 coming from a previous assignment at U.S. Central

1 Command where I was the Staff Judge Advocate
2 there.

3 I want to talk to you a little bit
4 today on how sexual assault case information is
5 track, collected and evaluated within the Army's
6 legal community.

7 And, of course, let me preface my
8 remarks by saying that, while the Army has
9 multiple systems that do this, no system can
10 substitute for leadership. And, of course,
11 information is only as good as the people who
12 input it. And so, good leadership is critical at
13 all phases of the creation and evaluation of this
14 information.

15 With that said, the Army essentially
16 has three systems. The Army Judge Advocate's
17 General's Corps has three systems that tracks
18 sexual assault data although one is more
19 specifically focused on sexual assault data. And,
20 let me go through each one of them in turn.

21 They're all run through a portal known
22 as JAGCNet, that's if you want to call it our

1 system of systems. JAGCNet is the entryway for
2 the all this -- for the entry of all this
3 information.

4 The first one is our Military Justice
5 Online, which is entered through, again, JAGCNet.
6 The Military Justice Online includes a Military
7 Justice Report which is the responsibility of an
8 installation and unit Staff Judge Advocate.

9 And, that report is not limited to
10 sexual assault, but includes all offenses, all
11 cases in that particular jurisdiction that are
12 ongoing. And, it includes the numbers of courts
13 martial, nonjudicial punishment, administrative
14 separations, reprimands, civil felony convictions
15 processed by each installation. And, as I said,
16 it's generated monthly.

17 There are a number of other data fields
18 that can be run in this report as well and it's
19 the responsibility of the Staff Judge Advocate to
20 input this data, everything from reports on
21 military and expert witnesses to court report of
22 productivity reports.

1 It also tracks offenses by category
2 such as AWOL, sex assault, violent crimes, drugs
3 and alcohol and senior leader misconduct.

4 So, again, that is a broad-based
5 evaluation collection system.

6 More specifically, we have a Special
7 Victim Prosecutor database. And, as you all
8 recall, the SVP program was created by the Army in
9 2009 specifically focusing on both sexual assault
10 and domestic abuse cases.

11 So, this database is geared toward
12 those sets of cases and is, to some degree, an
13 attempt to replicate the processing of the DSAID
14 program.

15 So, it uses an internal application
16 also on JAGCNet to track pending special victim
17 investigations. And, this would include -- and
18 there's a series of fields in this program and it
19 captures -- supposed to capture, depending on the
20 user -- all possible dispositions for special
21 victim offenses to include administrative action,
22 nonjudicial punishment, court martial punishment,

1 no action at all.

2 It provides, in essence a more in depth
3 analysis of SVP type cases of sexual assault,
4 domestic abuse type cases including charging
5 status, findings, motions files, summations of the
6 particular cases, et cetera.

7 And, it's used primarily by our Trial
8 Counsel Assistance Program which runs the SVP
9 program to manage caseloads and to assess training
10 and to look at trend analysis for those types of
11 cases.

12 The third system we have is on the
13 other end, if you will, and it's run by our Clerk
14 of Court. It's the Army Court Martial Information
15 System and it's also run through JAGCNet.

16 Whereas MJO deals with cases on the
17 front end by the SJA, the SVP is for special cases
18 that are ongoing.

19 The Military Judge of an installation
20 or a jurisdiction, once a court martial is
21 completed, begins the ACMIS process. So, this is
22 only run for general and special courts martial.

1 And, that's a data field to track the
2 processing of courts that have been completed,
3 court martials that have been completed and they
4 have entry fields on the types of the cases, the
5 nature of the charges. And, it looks a lot at
6 post-trial processing time and it also looks at
7 when cases are filed at the appellant court level.

8 So, those are our three systems. They
9 interrelate to some degree. Again, they have
10 different focuses but they can all be utilized in
11 some form or fashion to track sexual assault data.

12 For example, ACMIS, it has a field that
13 can run court martial convictions and acquittals
14 for sexual assault cases and it does that on a
15 monthly and annual basis.

16 Appreciate your time. And, with that
17 said, I will turn it over to my distinguished
18 colleague.

19 CHAIR HOLTZMAN: Thank you very much,
20 Colonel.

21 Our next presenter is Lieutenant
22 Colonel Julie L. Rutherford. U.S. Air Force Air

1 Staff Counsel, Air Force Sexual Assault Prevention
2 and Response Office.

3 Welcome, Lieutenant Colonel Rutherford.

4 LT COL RUTHERFORD: Thank you.

5 Good morning, Panel Members.

6 The Air Force is fortunate to have a
7 military justice tracking system that allows us to
8 track sexual assaults and, really, all military
9 justice cases from discovery through disposition.

10 The Automated Military Justice Analysis
11 and Management System, which we refer to as
12 AMJAMS, is the Air Force system that tracks all
13 cases from discovery to disposition.

14 AMJAMS is used at every level of
15 command in the Air Force from installation to
16 headquarters Air Force.

17 Judge Advocates and paralegals are
18 responsible for inputting data for each case into
19 the system. When a case is discovered, it is put
20 into the system as a pending case.

21 Data regarding a case would include
22 such information as subject and victim

1 demographics and identifying information, status
2 of the investigation, pending offenses and a short
3 narrative about the facts of the case and the next
4 step.

5 The installation legal office has used
6 this program to track the process of the cases.

7 Also included is a note section where
8 an installation can include day to day progress
9 like set up an interview with a victim or
10 contacted the area defense counsel regarding a
11 trial date.

12 A pending case many also be flagged as
13 a Special Interest Report. A SIR, which is what
14 we call our Special Interest Reports, must be
15 completed for cases such as all sexual assault
16 cases, homicides, cases involving officers and
17 cases that may garner media attention.

18 And, they also include sexual assault
19 cases where an Airman's being investigated or
20 tried by civilian authorities.

21 These cases, these SIR cases, are
22 forwarded to the Judge Advocate General's Office

1 within 24 hours of when they're input.

2 Once the investigation is complete and
3 a disposition decision is made, that will also be
4 notated in AMJAMS.

5 For sexual assault cases that don't go
6 forward to court or nonjudicial punishment, that
7 disposition is documented. So, if there is a
8 Letter of Reprimand, an administrative discharge
9 or no action is taken, that is documented in our
10 AMJAM system.

11 If the case goes forward to nonjudicial
12 punishment or court martial, AMJAMS continues to
13 track the case.

14 In the case of a court martial, AMJAMS
15 tracks such items as preferral of charges, Article
16 32 preliminary hearing recommendations, referrals,
17 speedy trial dates, results of trial and all
18 appellate actions.

19 Inputs into AMJAMS are made as close to
20 real time as possible. Often, during a court
21 martial, the case paralegal may be inputting data
22 daily, reporting the conviction or acquittal, the

1 sentence and the status of post-trial paperwork.

2 During the investigative phase, the
3 case paralegal may update AMJAMS once or twice a
4 week to notate OSI's progress or a contact with
5 victims or witnesses.

6 These continuous inputs allow the
7 installation to track their day to day
8 requirements as well as our numbered Air Force,
9 major commands and headquarters Air Force to see
10 the status of a case at any time.

11 At installations and command levels
12 above the installation, AMJAMS provides reports
13 that are used to spot trends and analyze data.

14 The Military Justice Division of the
15 JAG Corps regularly uses this information to brief
16 senior Air Force and DoD officials, respond to
17 congressional inquiries and media requests.

18 Reports can be run for an individual
19 installation, a major command or the entire Air
20 Force.

21 Installations use this data to look at
22 how long actions are taking to process and trends

1 about their specific installation.

2 Headquarters Air Force, obviously,
3 looks at bigger trends for the entire Air Force.

4 AMJAMS has been around since 1974 with
5 some updates in the '80s and '90s. So, data pulls
6 are a little antiquated.

7 That said, we're able to run reports
8 and, with a little leg work, provide leadership
9 with the information analysis they need.

10 Fortunately, we're updating AMJAMS with
11 the Air Force Disciplinary Case Management System
12 and the new system which will be online in the
13 next couple of years will make it much easier for
14 us to pull reports and search for specific search
15 terms.

16 The data in AMJAMS is also used to put
17 together the information that we release on our
18 public website regarding sexual assault cases.

19 As you've also heard, we track our
20 sexual assault dispositions in DSAID. Myself and
21 my paralegal, with the help of a Reserve Judge
22 Advocate, input every legal disposition into

1 DSAID.

2 The SARC and the legal office at our
3 installations corroborate to complete a form that
4 contain all the disposition data that we need.

5 We then use AMJAMS to cross check the
6 data and input it into the DSAID system. While
7 AMJAMS tracks the legal process, DSAID is more
8 victim focused and tracks more victim care and the
9 SAPRO program.

10 Although the focuses of the database
11 are slightly different, the legal disposition
12 piece is very similar.

13 Both systems seem to work well for the
14 intended purpose, although it'd be nice if they
15 talked to each other, right, so I didn't have to
16 put everything in by hand.

17 DSAID provides a more general overview
18 of what's happening in each case while AMJAMS
19 allows us as JAGs to really look more in depth at
20 what's happening with the military justice
21 process.

22 I look forward to answering your

1 questions.

2 CHAIR HOLTZMAN: Thank you very much,
3 Lieutenant Colonel.

4 Our next presenter is Lieutenant
5 Colonel Angela B. Wissman, is that correct?

6 LT COL WISSMAN: Yes, ma'am.

7 CHAIR HOLTZMAN: Thank you.

8 U.S. Marine Corps Branch Head, Judge
9 Advocate Division, Military Justice Branch,
10 Headquarters, U.S. Marine Corps.

11 Thank you so much for coming,
12 Lieutenant Colonel and we look forward to your
13 testimony.

14 LT COL WISSMAN: Thank you, ma'am,
15 Panel.

16 As reported in our notes, our primary
17 system of managing case information is the Case
18 Management System. It will -- cases normally
19 entered at a request for legal services, so a
20 command's request that the legal services support
21 section provides advice on whether or not to go
22 forward the court martial and then the case is

1 normally entered there.

2 And this Case Management System is for
3 all types of cases, whether it be sexual assaults
4 or for larceny or any other type of case.

5 We also have our pre-RLS cases which
6 are SVIP cases, so similar to the Army system,
7 we've incorporated into our CMS system so that
8 upon the 24-hour notice that trial counsel
9 receives from investigators of a sexual assault or
10 a domestic abuse case, that gets entered into CMS
11 at that point.

12 CMS tracks various milestones, when a
13 charge was preferred, referred, gone to Article 32
14 and if there was a disposition in the case or an
15 alternative disposition such as NJP or summary
16 court martial.

17 The CMS also tracks through the
18 appellate level.

19 It's a shared system through both Navy
20 and Marine Corps. We each have our modules but
21 they are very similar.

22 CMS has been developed since 2009.

1 There was a redevelopment in 2012 to incorporate
2 both Navy and Marine Corps.

3 The benefits of the system, it's very
4 easy to use. It's very intuitive. We have -- the
5 people that input into the system are clerks who
6 work in the offices. Those people are then
7 supervised by the trial counsel and the regional
8 trial counsel.

9 So, it's an easy to use system and that
10 provides a lot of oversight both those individual
11 offices in the trial offices and also in the Staff
12 Judge Advocate Offices also have access to it as
13 well.

14 It also allows us to make a number of
15 reports. So, if we want information on say, how
16 many sexual assault cases, we have the ability to
17 customize a report for that, either a particular
18 office or for a particular case.

19 If we wanted to know how many larcenies
20 we had or details of that, it's an easy system to
21 manipulate data for a question that is presented.

22 Typically, how the -- in most trial

1 offices, there's a weekly meeting and the, you
2 know, the officer in charge of the RTC is going to
3 go through and see -- it's going to pull up a
4 spreadsheet of all their cases and go through each
5 case and see how the case is progressing and data
6 in inputted.

7 It also -- at headquarters, we also
8 have access to see all these cases in CMS so we
9 can see how cases are progressing. Are we meeting
10 our Reno clock, the time lines to get a case or
11 meeting our speedy trial clock obligations and, in
12 general, how many acquittals, how many
13 convictions, how many cases are going on in a
14 particular region so we can compare workloads and
15 we can also see trends over the years.

16 As you probably read in our CAP reports
17 over the last couple of years, we've seen a big --
18 our court-martial cases have changed. We're
19 seeing a lot more contested cases, more GCMs and
20 our numbers of court-martials are going down, but
21 the time and complexity in those cases is higher.

22 So, CMS allows us to see those kind of

1 large trends across the board. It also -- we've
2 also seen a larger spike in the number of hours on
3 the record. So, we can see that our cases,
4 whereas, ten years ago, it might have been a lot
5 of guilty pleas, now it's a lot more contested
6 cases.

7 We also, as part of the Military
8 Justice Branch, have legal officers at the
9 headquarters level. So, we work a lot with
10 Darlene and Julie and all of our Service
11 counterparts as we're in DSAID operation.

12 We have four legal officers primarily.
13 We get our information from the field. So, in the
14 Department of the Navy, what's called a Sexual
15 Assault Disposition Report is required.

16 There is a Marine Corps version of this
17 report and the Navy version. Our versions are
18 very similar.

19 In the Marine Corps, that is -- it's
20 filled at the command or the SJ's office. A Staff
21 Judge Advocate reviews it, says who the SJ is who
22 has reviewed and then it's electronically signed

1 by the decision maker.

2 So, there's a number of people at the
3 command that are involved in review of this form.
4 That form is then sent to us and we use that form
5 to then enter information in DSAID. And, the form
6 is created so that it's answering the questions
7 that DSAID is asking us to answer.

8 The future is we are moving towards a
9 Naval Justice Information System. It's going to
10 merge both CLEOC, information from NCIS, there's
11 information from us in CMS. So, we'll have
12 multiple different data systems working on one
13 system as opposed to having different systems for
14 different players.

15 Thank you and I look forward to your
16 questions.

17 CHAIR HOLTZMAN: Thank you very much,
18 Lieutenant Colonel.

19 And now, we'll hear from Mr. Stephen P.
20 McCleary, U.S. Coast Guard Senior Military Justice
21 Counsel and Chief Prosecutor, Office of Military
22 Justice, Office of the Judge Advocate General.

1 Welcome, Mr. McCleary.

2 MR. MCCLEARY: Thank you, Madam Chair,
3 Members of the Panel.

4 The Coast Guard uses four systems and
5 we actually do use all four of them to try and do
6 a complete accounting for all of the sexual
7 assault cases that we work on.

8 The SAPRO program began using DSAID
9 earlier this year. Prior to that, we had been
10 using our own system.

11 The Coast Guard Investigative Service
12 has a case management system called FACTS that
13 they use to do all of their investigative work.

14 And then, the Coast Guard legal program
15 uses a system called Law Manager. And, while
16 there is an ability to start using it, you know,
17 prior to preferral of charges by policy, it is
18 only required to start being used when charges are
19 preferred.

20 And so, you will see Law Manager cases
21 that involve cases where there are charges never
22 preferred, but it's somewhat similar how that's

1 complied with, which is why we end up using both
2 DSAID and FACTS to help track all of those.

3 Law Manager, it's a data capture
4 system. So, like the trial counsel don't have to
5 use it to do any of their business, they file
6 their motions, they record what the sentence was
7 by going and doing data entry which then has to be
8 pulled from it. It doesn't push data out.

9 And then, for those cases that might go
10 to some form of alternative disposition, you know,
11 they go to administrative separation or
12 nonjudicial punishment, our overarching Human
13 Resources system called Direct Access is where
14 those end up getting recorded.

15 And, as you might guess, you know, no
16 one that would be designing a data management
17 system would set something up this way. It's not
18 particularly efficient, but because of our small
19 size and relatively small case load, we're able to
20 make it work relatively well.

21 But, it has a lot of inefficiencies
22 built into it and it makes the process of tracking

1 all of the cases somewhat more time consuming, you
2 know, because we're always having to check against
3 four different databases to make sure that we have
4 fully accounted for all of the sexual assault
5 cases we have.

6 Thank you for the chance to talk with
7 you and I look forward to your questions.

8 CHAIR HOLTZMAN: Thank you very much,
9 Mr. McCleary.

10 And, finally, we're hear from
11 Lieutenant Commander Stuart Kirkby, U.S. Navy
12 Staff Attorney, Navy Marine Corps Appellate Review
13 Activity.

14 Thank you very much, Lieutenant
15 Commander for coming back and talking to us.

16 LCDR KIRBY: Thank you, ma'am and Panel
17 Members, it's a pleasure to be here today.

18 CHAIR HOLTZMAN: Do you want to pull
19 the mic right in front of you?

20 LCDR KIRBY: Certainly.

21 CHAIR HOLTZMAN: Thanks.

22 LCDR KIRKBY: Hopefully that's better.

1 I'm actually from Code 20. I'm the
2 Branch Head for Military Justice Policy and I've
3 probably spoken to you on several occasions in
4 other areas.

5 This area is generally governed by Code
6 67, one of the other OJAG codes for the Navy.
7 Unfortunately, that person was unable to be here,
8 but I will do an attempt at filling some of the
9 blanks, some of the differences from Colonel
10 Wissman's presentation.

11 As she mentioned, most of our systems
12 are very similar. In fact, if we go back in
13 history, the Navy started out with JAG MIS and
14 then Time Matters and then CMTIS and then,
15 eventually, we came together with the Marine Corps
16 with CMS as our primary model and that's what we
17 use right now.

18 CMS, if you look at slide six from the
19 original presentation is how we feed into DSAID
20 and that's the information we fill in from that
21 system.

22 CMS, obviously, comes from the field.

1 The advantage from that is that's how the trial
2 counsel get to put their information into that
3 system.

4 I'm not going to reiterate everything
5 Colonel Wissman said. There's a few nuances on
6 how we do things. Obviously, the Navy has 230
7 plus ships. Every one of those potentially has
8 NJP authority. So, there's a lot of things going
9 on there.

10 So, we capture some of that information
11 outside of CMTIS when it doesn't go to a court
12 martial. That information is captured through the
13 SAPRO, as already mentioned, but also through what
14 we call the QCAR, just to throw out another
15 acronym for you because I'm sure you don't have a
16 list already.

17 And, I think there is a dictionary of
18 these somewhere. We'll get you a copy.

19 So, the QCAR, again, that's Navy and --

20 CHAIR HOLTZMAN: Is it as big as the
21 Oxford-English dictionary?

22 LCDR KIRKBY: It's probably -- there's

1 probably an abbreviation for the OED, yes.

2 And, so the QCAR is another means by
3 which the command send us information. Again,
4 they send that to Code 20 for us to keep an eye on
5 how cases are going and disposition of those
6 cases.

7 One unique thing is, we obviously don't
8 keep all of the underlying documents. And, when
9 we get requests for documents relating to NJPs
10 that happen on board a ship that may be out to
11 sea, we're not going to hold that locally.

12 Some of the information that we're
13 requested is for cases from ships that have now no
14 longer in existence. You know, they no longer
15 belong to the fleet. So, we have to go through
16 records management and storage and archives to get
17 those documents.

18 We didn't always do the best job of
19 keeping those records back in the, you know,
20 1980s, 1990s and probably early 2000s. But, with
21 the new systems and the combination of systems, I
22 think we're doing a much better job of doing

1 those.

2 As mentioned by Colonel Wissman, NJIS,
3 when it comes into being, hopefully soon, will
4 consolidate everything that we do all the way from
5 really cradle to grave.

6 At the moment, CMS doesn't do that
7 quite -- it doesn't quite cover the appellate
8 process and that's what we're going to fold that
9 in CLEOC as well and things like that.

10 So, with that kind of background and
11 information, I look forward to any questions.

12 CHAIR HOLTZMAN: Thank you very much.
13 I think we'll start from my right.

14 Mr. Stone?

15 MR. STONE: Yes, thank you.

16 The first question I have is, does
17 anybody on the panel think that you either
18 couldn't or maybe you already do but you couldn't
19 pull out by annual year or fiscal year the
20 dispositions in every court martial case by the
21 section and subsection of conviction so that you
22 could furnish prosecutors, defense counsel and

1 Judges at the beginning of whatever time period it
2 is just a list of all the different sexual offense
3 subsections of convictions and show them like
4 mean, median and one or two standard deviations or
5 something what the sentences were? Is that
6 plausible given all of these systems with
7 outcomes?

8 LCDR KIRKBY: No, sir. We don't -- we
9 have unitary sentencing. So, you have no idea
10 what somebody was given a sentence for.

11 So, if you have a -- remember, DSAID
12 tracks the most serious offense of conviction.
13 So, we have no idea in looking through our systems
14 if somebody was UA and they had a rape case and
15 they had a murder and they got 40 years, we have
16 no idea what they got the 40 years for under a
17 unitary sentencing structure. We can't tell what
18 it was.

19 MR. STONE: And, is that true of the
20 Marine Corps, too, because you use the same
21 system?

22 LT COL WISSMAN: Yes. It's -- well,

1 yes, it's true for, well, all of us are unitary
2 sentencing, sir.

3 MR. STONE: And, is there any
4 discussion or plan to get to a point where you
5 could figure out what the sentence was for or is
6 that based on the fact that the panel doesn't
7 distinguish and, therefore, you'll never know?

8 COL HUDSON: Right, that's right. Yes,
9 the unitary sentencing makes that impossible.

10 Now, what we can easily track and we
11 do, you know, the guilty convictions and the
12 acquittals. That data is easily attainable. But,
13 cracking in to specifically what sentence was that
14 for, unless there was only one charge and one
15 specification, it's going to be not possible
16 because of the unitary sentencing.

17 MR. STONE: What about the programs
18 that try and track outcomes in sexual assault
19 cases, do you not get the case if there was a
20 murder as well as a sexual assault because the
21 murder took the precedence over it?

22 MS. SULLIVAN: If there was originally

1 investigated for the sexual assault and then the
2 murder was incorporated in that, then, yes, we
3 would get that. But, if it -- the most serious
4 offense charged would be the murder in this case,
5 then not so.

6 MR. STONE: Because I noticed your data
7 was tracking outcomes for the various Services.

8 MS. SULLIVAN: Yes.

9 MR. STONE: That's why I said that.

10 MS. SULLIVAN: Yes, sir.

11 MR. STONE: So, what happens with the
12 murder case that was a murder/rape, it's not
13 tracked by you?

14 MS. SULLIVAN: If the data is inputted
15 into DSAID, then yes, sir, it is.

16 So, if that -- if it came in as a
17 sexual assault as part of that and the MCIO Agent
18 informed the SARC of that or the victim came --
19 well, in this case, the victim would be passed --
20 so, then in this case, if it came in through
21 there, then, yes, sir, it would be.

22 MR. STONE: And, what would you call

1 the outcome, the unitary sentence?

2 MS. SULLIVAN: I'd have to get back to
3 you on that one.

4 LT COL RUTHERFORD: Right, so in the
5 Air Force, we would do a search of our AMJAM
6 System and I'd look for any cases that had
7 preferrals with any 120 offense in them, you know,
8 any sexual assault related offense.

9 And then, I'd go through and make sure
10 all those cases were in AMJAMS. So, if there was
11 a homicide with a sexual assault, then I would
12 make sure that was put into AMJAMS.

13 Now, when it was -- I mean, I'm sorry,
14 into DSAID.

15 And so then, but when I disposed of it,
16 it's going to show the sentence as 40 years, 50
17 year, life, whatever it is.

18 Now, there is that case synopsis
19 section where I would probably type in, in
20 addition to the sexual assault, this, you know,
21 victim was also murdered.

22 And so, if you looked closely into that

1 case, but if you're just reviewing the data, it's
2 going to look like someone received, you know, a
3 life sentence for the sexual assault because DSAID
4 itself will, you know, pick up on the sexual
5 assault case.

6 MR. STONE: I guess the second question
7 I had is with regard to these various data
8 systems, do any of them, or do you think there
9 would be a -- do any of them capture the actual
10 documents that were filed in the case?

11 Could they capture the documents as
12 opposed to just saying motion filed, the court's
13 opinion on this issue filed or whatever, dismissed
14 with the court's opinion, could they capture the
15 documents, and is it possible that they could be
16 available as the federal PACER system is so that
17 various participants, whether it's the prosecutor
18 and defense counsel or people in Congress or the
19 public who wants to know could click on a document
20 and just get a sense of what's going on?

21 Do you think any of them could function
22 that way or that there could be a system that let

1 people understand the process that's going on in
2 each case and see the documents?

3 LT COL RUTHERFORD: The current Air
4 Force system does not allow that, but our updated
5 system will allow for document upload and will be
6 more in line with the federal systems.

7 MR. STONE: And, is that a future
8 system?

9 LT COL RUTHERFORD: Yes, within the
10 next couple of years we'll have our system
11 updated.

12 COL HUDSON: So, yes, sir. Our system,
13 Military Justice Online, could allow for the
14 downloading of documents. The problem is
15 resources.

16 And, in fact, we had this very
17 discussion about three days ago because we're
18 going to have to redact the information for PII,
19 you know, obviously. And we have to screen it.
20 But that is, at least, conceptually possible.

21 MR. MCCLEARY: Yes, sir. For the Coast
22 Guard Law Manager system, it is currently capable

1 of allowing documents to be uploaded into it.

2 It's not used for that very much and it
3 would be -- it would require a lot of
4 modifications or screening to make it publically
5 available because the way the system is set up
6 right now, there's a lot of PII that is in it.
7 And so, that would have to be screened or blocked off
8 separate and apart from the documents, but just
9 the case management data fields that are in there
10 contain a lot of PII.

11 MR. STONE: Well, with the federal
12 government PACER system data it warns people
13 that the people uploading have to redact the PII
14 from that -- from whenever you set that standard
15 out there forward so that then the documents can
16 be downloaded without having to rescreen them all.
17 So, that's how it addresses that, and I don't know
18 if you've -- any of you have thought of that, but
19 that's one way to address that issue.

20 What about the Navy, does it have
21 anything?

22 LCDR KIRKBY: CMS allows us to upload

1 documents, but we face the same problems.

2 MS. SULLIVAN: Sir, DSAID does not
3 allow -- it's not a public facing database. It's
4 behind a dot mil firewall and CAC-enabled only.

5 We only upload one document into DSAID
6 and that's an unrestricted report, the 2910, so
7 the victim can come back if they need it for
8 purposes at the VA. That's it.

9 LT COL WISSMAN: We have certain
10 documents that are uploaded on a regular basis
11 into CMS, and it's again -- but it's a closed
12 system that's only -- that is just for our
13 internal use.

14 MR. STONE: Can the prosecutors and
15 defense counsel get the documents that way?

16 LT COL WISSMAN: The prosecutors, yes.

17 MR. STONE: The defense counsel, too?

18 LT COL WISSMAN: Not in CMS.

19 MR. STONE: And, the Military Judge can
20 get it if he wants to see the documents? Is that
21 how he gets the document?

22 LT COL WISSMAN: Generally, certain

1 documents, yes. And, it's mostly those are given
2 to the counsel who need it through emails or
3 through other ways of discovery.

4 So, it is more -- it's a tracking
5 system; it's not, at the moment where -- we don't
6 have a discovery module in CMS.

7 CHAIR HOLTZMAN: Judge Jones?

8 JUDGE JONES: Ms. Sullivan, one of the
9 things that we're looking at is claims of
10 retaliation. And, I was wondering if, and this is
11 -- well, it's a new topic to us that we've reached
12 it now on the Panel.

13 What is happening in terms of how
14 you're getting that data, and do you have any
15 suggestions so that the kind of data you have on
16 every other part of the process once there's a
17 report of sexual assault that this data can be
18 incorporated and can, ultimately, be useful for
19 all of the, you know, SAPRO statistics and other
20 possible uses for enforcement or what have you?

21 MS. SULLIVAN: Yes, ma'am. We are
22 actually looking in to doing this now.

1 The Secretary of Defense -- or PNR, Mr.
2 Carson, owes the Secretary of Defense a report in
3 the next few weeks on retaliation.

4 I work closely to our retaliation
5 person in our office and for General Nichols, and
6 we've already been talking about what data points
7 we want to add.

8 At that point, we'll gather those
9 points based off of the Secretary of Defense's
10 approval of that report. And then start looking
11 at how we can incorporate those into DSAID.

12 The issues that we run into with DSAID
13 is then who would gather that information, in
14 that, we have three, pretty much three users now,
15 whether it be the SARC, or we roll it up to the
16 program manager or if it's something that would
17 have to be gathered by the legal officers.

18 So, those are things that have to be
19 addressed when we're doing that.

20 But, we've already touched base and
21 we're working with those folks, depending on what
22 the SecDef approves in the end, then we'll take

1 that and start working it.

2 JUDGE JONES: And, are you thinking of
3 a separate form for retaliation or being able to
4 capture it, I don't know, through the --
5 additional data on the 2910, I think it is?

6 MS. SULLIVAN: We've looked at the
7 2910; we've also looked at, if we do add it to
8 DSAID, then we'll add it as a data point for
9 capture on the 2965 also.

10 JUDGE JONES: You'd have to tell me
11 what that is.

12 MS. SULLIVAN: The DD Form 2965 is the
13 tool that we created for the SARCs to be able to
14 gather data for input into DSAID. But, if we want
15 to capture it on the 2910, that's also in
16 discussion also.

17 But, the big thing -- the big question
18 would be, you know, what data points do we want
19 and, at what point do we want to capture that
20 information and by who? Who is going to be the
21 point for that?

22 JUDGE JONES: We've heard a lot about

1 these case management groups. And, where are you
2 at, or how is that working in terms of data input
3 from them? Or is it happening?

4 MS. SULLIVAN: Yes, ma'am. The SARC
5 is actually in most installations the co-chair for
6 those. And the SARC is the one that's inputting
7 the data into DSAID.

8 So, the business management tool that
9 I briefly talked about has a case management group
10 meeting minutes portion of it. It's not mandatory
11 for them to use because each of the Services use
12 something a little bit different in that case.
13 But, for most of them, they use that tool for
14 them, and it eases that ability to capture notes.
15 And, they've all had processes in place to gather
16 that information.

17 JUDGE JONES: So, that's available, and
18 they can input it right now?

19 MS. SULLIVAN: Yes. Yes, ma'am.
20 Those SARCs -- we have about 880 active SARCs
21 using DSAID now. So, we have not -- and in
22 locations where that person may be also dual-

1 hatted as the Victim Advocate, it makes it a
2 little bit easier for them.

3 But, yes, we haven't had any issues
4 there.

5 JUDGE JONES: I had a couple of quick
6 questions for you, Ms. Robertson. I just want to
7 make sure I understand this.

8 Is your database available to law
9 enforcement upon an inquiry if they have a subject
10 or they have reason to believe that there's an
11 issue that would be helpful to their
12 investigation?

13 MS. ROBERTSON: Our database is not
14 available.

15 JUDGE JONES: Okay.

16 MS. ROBERTSON: It's strictly access
17 to Family Advocacy personnel and only limited
18 personnel to the central registry, Service central
19 registry and our central registry.

20 Each Service has, as I said, a robust
21 clinical Case Management System. But, we actually
22 work very closely with law enforcement. They are

1 required through the Special Victim Investigation
2 Prosecution Capability to let us know if they have
3 an incident of, you know, sexual assault, child
4 sexual abuse or serious domestic violence.

5 And so, we collaborate often, and
6 they've often requested records, and we have
7 permissions and ways to do that. And, we usually
8 go through legal to see what we can release and
9 not release.

10 So, we have processes in place, but
11 they don't have access to our database.

12 JUDGE JONES: Okay. So, there is the
13 ability for the investigative arms to work with
14 you and at least get what they are permitted to
15 get?

16 MS. ROBERTSON: Correct. And, they are
17 also part of the incident determination committee
18 I talked about.

19 JUDGE JONES: Right.

20 MS. ROBERTSON: So, they are sitting
21 there when the incident goes, and they are part of
22 that committee, so they're here for the -- they

1 usually don't say anything because usually it's
2 under investigation; they can't say much. But,
3 that might be all they say. But, they're part of
4 that process.

5 And then, we review those cases again.
6 They come back for that. So, it's an ongoing
7 collaboration.

8 JUDGE JONES: Now, am I right that if
9 a report of domestic abuse or child abuse includes
10 a sexual assault that then there's an
11 investigation? And what happens in terms of
12 statistics?

13 I'm assuming that those then move into
14 a different reporting system.

15 MS. ROBERTSON: Well, we actually refer
16 every single case, all allegations, to law
17 enforcement, and then, if it does rise to that
18 felony level, not all of our cases do, the pushing
19 and shoving --

20 JUDGE JONES: Right, right.

21 MS. ROBERTSON: -- leaving a child
22 unattended.

1 But, if it rises to that level, it's
2 going to be in their database, and they're going
3 to be tracking the information on that. And, we,
4 of course, don't have access to that, but, again,
5 we do ongoing collaboration, and that's a separate
6 process from our clinical treatment.

7 JUDGE JONES: So, anything that rises
8 to the level of your calling in an investigative
9 agency will be -- that data will be captured
10 through them?

11 MS. ROBERTSON: Correct. And then,
12 it's also captured in our database if it's a case
13 and incident.

14 JUDGE JONES: Okay. Thanks.

15 CHAIR HOLTZMAN: Admiral Tracey?

16 VADM TRACEY: I don't have any
17 questions.

18 CHAIR HOLTZMAN: Thank you panel.
19 Thank you very much for your helpful information.

20 I guess I have a question about your
21 program, Ms. Robertson, and maybe this is a
22 question that you can answer, too, Ms. Sullivan.

1 If there is a marital rape, who keeps
2 track of that?

3 MS. ROBERTSON: Family Advocacy
4 Program.

5 CHAIR HOLTZMAN: Is that a part of the
6 DSAID?

7 MS. SULLIVAN: No, ma'am.

8 CHAIR HOLTZMAN: So, your statistics on
9 rape or sexual assault, let's call it in the right
10 term, a sexual assault would exclude all cases of
11 relationship or marital rape. What is excluded
12 from your database? I want to understand that, if
13 you don't mind.

14 MS. SULLIVAN: Yes, ma'am. Our --
15 DSAID is mandated through our policy, the sexual
16 assault policy. And, we cover cases where,
17 include information where the victim or the
18 alleged offender is active duty, with the
19 exception of the FAP cases.

20 So, if it's a domestic violence or
21 intimate partner or marital, as you mentioned, get
22 covered under the FAP program. Those are

1 excluded.

2 CHAIR HOLTZMAN: So, intimate partner,
3 if there's a rape between two intimate partners or
4 two married people, you don't -- it's not part of
5 your data system?

6 MS. SULLIVAN: No, ma'am, because it's
7 not covered under our policy, it's covered under
8 --

9 CHAIR HOLTZMAN: Okay, so if I wanted
10 to know, just ordinary Member of the public or
11 Congress or whatever or the press, I wanted to
12 know how many rapes were alleged against Members
13 of the military, how do I get that number? You
14 don't have it. You don't have the totals of the
15 non-family, so who's putting all those numbers
16 together? Do they exist? I don't know, maybe
17 it's a stupid question. I don't know.

18 MS. SULLIVAN: It's not a stupid
19 question, ma'am.

20 We, in fact, have talked about that in
21 our -- between our two organizations, and we have
22 actually laid the groundwork now to form a working

1 group to possibly combine those two efforts.

2 CHAIR HOLTZMAN: So, right now --

3 MS. ROBERTSON: They're totally
4 separate per our policies.

5 CHAIR HOLTZMAN: So, if I ask that
6 question, how many rapes or sexual assaults were
7 alleged against, let's just say, active duty
8 Members of the military, I couldn't get an answer
9 to that?

10 MS. SULLIVAN: I could give you all of
11 it except for --

12 CHAIR HOLTZMAN: I mean a complete
13 answer to that?

14 MS. SULLIVAN: Correct. You would
15 have to come to both organizations to be able to
16 do that.

17 CHAIR HOLTZMAN: And then, do the
18 arithmetic?

19 MS. SULLIVAN: Yes, ma'am. Well,
20 actually, that's true. Law enforcement would be
21 able to answer it also.

22 CHAIR HOLTZMAN: So, where would that

1 information be kept? If you say law enforcement
2 has the answer, where do they keep that answer?

3 MS. SULLIVAN: They each have their own
4 databases that, for my cases, I interface on that
5 on a weekly basis. But, yes, ma'am.

6 JUDGE JONES: So, when I see the SAPRO
7 statistics, the annual statistics, then I would be
8 looking at what you've captured in DSAID, and then
9 I would go to FAP and look at your numbers and add
10 them. Is that what we're talking about here?

11 MS. ROBERTSON: Yes, they're in two --
12 because we were two distinctly different programs.

13 JUDGE JONES: No, I understand, right.

14 MS. ROBERTSON: But, if you went to
15 the military criminal investigators, it's a sexual
16 assault whether it happened to a military spouse
17 or an intimate partner or to an active duty Member
18 who wasn't in that category.

19 So, the military criminal
20 investigations, if they investigate it, it should
21 have that information for you.

22 But, yes, otherwise you would have to

1 -- we'd have to add them together.

2 For sexual abuse within Family Advocacy
3 Program, it's a subset of domestic abuse. And so,
4 I track physical abuse, emotional abuse and sexual
5 abuse.

6 If there's any sexual abuse, it's its
7 own distinct category. And like for fiscal year
8 '14, four percent of our domestic abuse cases that
9 met criteria were sexual abuse.

10 So, our numbers, it's not as large as
11 what we support for domestic abuse. But, we
12 provide all the -- there's certain risk and safety
13 issues when you are dealing with a military spouse
14 or an intimate partner because they generally want
15 to stay with that person. So, we continue to
16 provide safety assessments, risk assessments. We
17 are closely -- we are -- Victim Advocates give a
18 Protection Order, if needed.

19 And we work closely with Command. We
20 really monitor those because they chose to stay
21 with them. That's what one thing that's different
22 about our two programs is in a marital

1 relationship, that spouse tends to want to stay
2 there and try to work things out.

3 JUDGE JONES: Well, you have an
4 incredibly important mission that is really
5 totally unrelated from keeping statistics, so I
6 understand that.

7 And, I guess only because we're talking
8 about statistics today are we asking this question
9 as to whether we can get the full picture.

10 And, I guess we can if we look at your
11 results and then look at FAP's results.

12 CHAIR HOLTZMAN: I just want to follow
13 up on that because you just said something that
14 triggered another question in my mind, Ms.
15 Robertson.

16 You say you only keep track of the ones
17 that meet criteria. So, what about the quote,
18 unquote, misdemeanor or less serious, non-felony
19 types of sexual abuse? It could be sexual contact
20 or something else. Do you record it? Who records
21 that?

22 I don't mean this to be a hassle. I'm

1 just trying to understand how we get this universe
2 of information.

3 MS. ROBERTSON: No, I understand.

4 When I say met criteria, I mean met
5 criteria for maltreatment. We have standardized
6 maltreatment definitions. So, it's maltreatment.

7 Mine is not an investigative or legal
8 decision. That's -- they run parallel processes.
9 So, when I get an allegation, a report, I
10 immediately within 24 hours report that to the law
11 enforcement. They determine where that falls in
12 law enforcement and under UCMJ.

13 Ours is a clinical maltreatment
14 definition.

15 CHAIR HOLTZMAN: So, the MCIOs, if we
16 looked at their information, we would get a better
17 sense of the universe of allegations?

18 MS. ROBERTSON: Correct.

19 CHAIR HOLTZMAN: With regard to this
20 category that you're not keeping under DSAID?

21 I'm sorry -- did you -- I didn't mean
22 to take your time.

1 JUDGE JONES: No, no.

2 So, where do we find -- I mean it
3 sounds like the investigative agencies feed into
4 everybody's database, depending on which Service
5 they're in.

6 So, but we still don't think that DSAID
7 is capturing everything?

8 MS. SULLIVAN: We capture those items
9 that are covered under our policy. And, since her
10 categories are not covered under our policy, it
11 wouldn't be in there.

12 JUDGE JONES: Okay.

13 MS. SULLIVAN: So, that's the trigger
14 for us; we're only mandated -- we are mandated by
15 those things that are covered under the DoDI for
16 sexual assault.

17 JUDGE JONES: Now, so does that mean
18 that, for instance, you would see something in an
19 investigative report, but it wouldn't be something
20 you'd capture because it might have come from an
21 FAP situation?

22 MS. SULLIVAN: No, ma'am, I wouldn't

1 get those in there. Remember --

2 JUDGE JONES: It wouldn't go to you at
3 all?

4 MS. SULLIVAN: No, ma'am.

5 CHAIR HOLTZMAN: Okay. I just want to
6 -- I had some questions I didn't finish, but let
7 me just --

8 JUDGE JONES: Sorry.

9 CHAIR HOLTZMAN: No, that's okay.

10 So, you say you're considering this,
11 Ms. Sullivan? I mean your shop is considering
12 this whole issue?

13 MS. SULLIVAN: Well, actually, it was
14 an RSP recommendation that we consider adding --

15 CHAIR HOLTZMAN: Right. So --

16 MS. SULLIVAN: -- her data --

17 CHAIR HOLTZMAN: Into your --

18 MS. SULLIVAN: -- into our annual
19 report.

20 JUDGE JONES: It was all coming back
21 to me as I was listening to you.

22 CHAIR HOLTZMAN: So, where do we stand

1 on that? What's the time frame?

2 MS. ROBERTSON: It's number 66 on your

3 --

4 CHAIR HOLTZMAN: No, I understand that,

5 but where is it in terms of implementation? I

6 mean what is your time frame? When could we

7 expect --

8 MS. ROBERTSON: We're just in our

9 initial stages.

10 CHAIR HOLTZMAN: Oh, okay.

11 MS. ROBERTSON: I have a quarterly

12 meeting in October that Darlene and her staff are

13 coming to to talk to Family Advocacy.

14 But, this would not just be a SAPRO and

15 FAP working group. We would include legal, law

16 enforcement. It would be a working group that we

17 want to have an informed process of how we do

18 this, and then we would provide guidance to the

19 field.

20 So, right now, we don't have a time

21 line, but we are starting that process.

22 CHAIR HOLTZMAN: I'm glad to hear that

1 you're starting it.

2 Just one other quick question that just
3 may not be -- well, maybe I'll ask it afterwards
4 because it's not really relevant to the subject
5 matter of this inquiry.

6 Admiral Tracey had a question.

7 VADM TRACEY: Can I just get a little
8 bit of clarification of what you do include? You
9 say that you generate a response to Congressional
10 reports out of DSAID database. Now, I'm confused
11 as to what you're counting if you eliminate cases
12 where there's a Family Advocacy aspect to it.

13 MS. SULLIVAN: I don't eliminate
14 because those cases, they're not included in our
15 database. Our database is governed by our DoDI
16 6495.02.

17 And so, in our policy, it specifically
18 does not include those cases.

19 VADM TRACEY: Let me give you an
20 example. If the Servicemembers in a -- if the
21 family members in this Family Advocacy case are
22 both Servicemembers, and there's a sexual assault

1 aspect to it, do you get that report?

2 MS. SULLIVAN: No, ma'am, that is
3 covered under the FAP program.

4 VADM TRACEY: Okay. So, when you
5 respond to congressional reports, what are you
6 telling them?

7 MS. SULLIVAN: Those cases that are
8 covered under our policy, which is everything
9 except her cases.

10 VADM TRACEY: Okay.

11 MS. SULLIVAN: Our policy spells it out
12 very clear on those cases. Her cases are not
13 included under our policy, therefore, not included
14 in DSAID.

15 MR. STONE: And, that also doesn't
16 include sexual assaults on somebody under 18,
17 right?

18 MS. SULLIVAN: If they fell under her
19 program.

20 MR. STONE: Well, when --

21 MS. SULLIVAN: If they're dependents.

22 MR. STONE: -- would it possibly

1 include a sexual assault on somebody like the
2 child of another Service person who is 17 and a
3 half?

4 MS. SULLIVAN: UCMJ qualifies that as
5 not a child. So, if that was the case, then it
6 didn't qualify under her program, then, yes, it
7 could be in DSAID.

8 MR. STONE: Okay. And then, the other
9 question I had was, I wasn't sure which of you got
10 intimate partners in terms of that definition.
11 Does that include people who are dating but live
12 together, or does it include people who are
13 engaged but don't live together?

14 I mean, I wasn't sure -- I mean we know
15 that a lot of the sexual assaults are people who
16 certainly know each other and may have been dating
17 while in a particular unit. And so, I didn't know
18 which of you got dating but not married.

19 MS. ROBERTSON: Our intimate partner
20 definition is in policy, our DoDI 6400.06, and
21 it's a spouse or former spouse or someone with
22 whom you share a child in common.

1 So, if they have a child in common,
2 they are formerly married or currently married but
3 separated, that's an intimate partner.

4 So, it's a very broad definition. That
5 DoDI is currently being revised and under
6 revision. I know that that's a much broader
7 category than the CDC definition of dating.

8 So, it hasn't been a problem. And,
9 what happens if a victim reports that they've been
10 sexually assaulted by someone they're dating.
11 They go to a SARC or they come to our program.
12 Then we collaborate and determine which is the
13 appropriate program to be in.

14 I mean, at the installation level,
15 there's a lot of collaboration between Family
16 Advocacy and the SAPRO program because we're all
17 victim focused.

18 And so, they collaborate and determine,
19 well, this one, you know, falls under FAP because
20 this is a former marriage or something like that,
21 or they have a child in common. And then, they
22 would walk them over, you know, they do a warm

1 handoff to the other program.

2 Because most importantly, we want to
3 get them the support that they need.

4 MR. STONE: Is there -- in other words,
5 if they're living together but were never married
6 together and don't have a child together, you pick
7 them up, Ms. Sullivan, in your numbers?

8 MS. SULLIVAN: Again, if it doesn't
9 fall under her category, then, yes, sir, it would.

10 MS. ROBERTSON: We look at each
11 individual situation, and we collaborate between
12 the two programs, but we provide them services.
13 It's hard to -- we just have that board
14 definition.

15 CHAIR HOLTZMAN: I just have a couple
16 of quick questions.

17 One of you had indicated that it would
18 be nice if your systems interacted with or could
19 talk to each other. Is that something that's in
20 the future? Is anybody working on that?

21 COL HUDSON: Our SVP system was built
22 with that premise in mind, ma'am. But we aren't

1 there yet. But, yes, we deliberately tried to
2 duplicate the kind of binning of categories in the
3 DSAID database, but we just don't have the
4 capability at this point to get there.

5 CHAIR HOLTZMAN: So, how is this all
6 going to work? You all have your separate
7 systems; they don't talk to DSAID. DSAID also
8 doesn't include this other category that we were
9 just discussing.

10 So, when is this nirvana going to
11 happen when it all gets combined, and we have a
12 modern, up-to-date, 21st century computer system
13 for keeping track of this in the U.S. Military?

14 MS. SULLIVAN: Yes, ma'am.

15 CHAIR HOLTZMAN: I don't know who can
16 answer that question. I mean I didn't mean to be
17 so loaded, yes, but --

18 MS. SULLIVAN: Provided a whole bunch
19 of resources.

20 CHAIR HOLTZMAN: Right.

21 MS. SULLIVAN: Ma'am, the original
22 working group had talked about adding the legal

1 portion into it. But, because of -- as you've
2 heard today, they were at different stages when
3 DSAID was being designed in the beginning.

4 CHAIR HOLTZMAN: Right.

5 MS. SULLIVAN: We do that interface
6 with the MCIO database, so we are -- each one of
7 them have their own, and they are updating those,
8 and we're keeping -- we're enmeshed with them
9 already.

10 The Navy and the Marine Corps, their
11 new database that they are providing for NJIS, we
12 have already started working with them to be able
13 to do that interface in January when they stand
14 that up.

15 Now, however, we don't have the
16 interface portion established yet for their legal
17 portion. And so then, that would be into the next
18 phase.

19 But, again, a lot of this is dependent
20 upon resources, and we've already got a long list
21 of improvements for DSAID starting out in '17 when
22 we have our next ability to collect RDT and e-

1 funds so we can expand DSAID and collect more
2 information.

3 CHAIR HOLTZMAN: Okay. That's probably
4 the last question I have.

5 And, we're really right on time.
6 Anybody else have a question?

7 Well, thank you very, very much for
8 trying to enlighten us about a very complicated
9 system, and we appreciate your time and your
10 thoughtful testimony.

11 Thank you.

12 And, we'll stand adjourned for I guess
13 an hour. An hour. Thank you.

14 (Whereupon, the above-entitled matter
15 went off the record at 12:31 p.m. and resumed at
16 1:30 p.m.)

17 CHAIR HOLTZMAN: We are now ready for
18 our deliberations on Restitution and Compensation
19 for Victims of Sexual Assault Crimes.

20 I think, Kyle, how do you recommend we
21 proceed on this?

22 COL GREEN: Ma'am, if I could give you

1 an overview of the materials --

2 CHAIR HOLTZMAN: Yes.

3 COL GREEN: -- that we have, it might
4 help orient the discussion. You have held
5 multiple deliberation sessions on this topic going
6 through the issues list. Now that we have gotten
7 through all of that issues list, then I think the
8 Panel finalized discussions at last month's
9 meeting, and so the Staff has incorporated all of
10 the materials received and information that you
11 have received into its report. We provided you an
12 earlier draft of that.

13 Now what we have done is incorporated
14 in blue text in this draft report, a summary of
15 your analysis on the issues that you covered in
16 this topic. So we sent you that out earlier this
17 week or the end of last week, the end of last
18 week. And we did get some comments back.

19 Ms. Holtzman, you had some substantive
20 comments. And so in your folders, we have the
21 copy of the report that you received. And then on
22 the right is a track changes version of the report

1 that notes some of the changes that Ms. Holtzman
2 made, and then there are some bubble comments
3 there where I think you had some questions about
4 whether the Panel wanted to make recommendations
5 and where the Staff felt you were indicating
6 perhaps some discussion might be warranted.

7 And so my recommendation is that the
8 Panel review or consider the analysis sections of
9 the report combined with the comments that you had
10 and any other comments that, obviously, the Panel
11 Members might have.

12 CHAIR HOLTZMAN: Okay. Well, it seems
13 to me that before -- that there are some stylistic
14 issues that we might want to address, and there
15 are some substantive issues that we want to
16 address.

17 The stylistic issues we can deal with
18 -- I think I would like to, if it's okay with
19 Panel Members, focus on the substantive issues
20 because the stylistic ones we can circulate drafts
21 and so forth and deal with it that way.

22 So the substantive issues, let's start

1 with the ones that the Staff identified, which are
2 -- am I right, Kyle, they are on page 56 of the
3 report on the left hand side, and they are in
4 yellow. Is that correct?

5 COL GREEN: Doug Nelson did -- Doug
6 tried to go back and review everything of the
7 Panel's discussion from last month. Yes, ma'am,
8 that's -- I'm --

9 CHAIR HOLTZMAN: Those are the three,
10 as I recall -- Doug, is that correct? The three
11 policy --

12 MR. NELSON: Yes, ma'am.

13 CHAIR HOLTZMAN: -- issues that we have
14 not addressed. These are substance issues. So we
15 won't focus on the language as much as the
16 substance. And so I think if we go through them
17 in order, that would probably be a good idea,
18 unless anyone objects.

19 So the first issue is on page 56. It
20 says, "The Panel has not resolved the separate
21 issue of, for incidents that occurred since 2005,
22 whether there should be a requirement that the

1 victim must have filed his or her claim within a
2 particular period of time after the incident and
3 if so, the length of the period of time."

4 I guess there are two questions. One
5 is, do we feel we need to address this issue at
6 this point at all or just leave that to the
7 Congress or to the DoD to make a decision, or do
8 we want to address it? Should we? I mean, what's
9 the feeling of the Panel Members? Do we want to
10 address that now? I don't --

11 MR. STONE: I thought we decided for
12 new claims there would be no period within which
13 they have to make it. Didn't we decide that?

14 MR. NELSON: There was some discussion
15 of that, and that was expressed, but I don't think
16 everyone came to a conclusion to agree on it.

17 MR. STONE: Okay. So this is not just
18 old --

19 CHAIR HOLTZMAN: No. This is the --

20 MR. STONE: -- this is --

21 MR. NELSON: The Panel decided --

22 MR. STONE: -- for all the claims?

1 MR. NELSON: Right. The Panel --

2 MR. STONE: Since 2005.

3 CHAIR HOLTZMAN: Right.

4 MR. NELSON: -- decided that the
5 program would be retroactive to 2005.

6 MR. STONE: To 2005.

7 MR. NELSON: But this issue is for new
8 claims.

9 CHAIR HOLTZMAN: Since 2005?

10 MR. NELSON: How that --

11 MR. STONE: Even today's claims?

12 CHAIR HOLTZMAN: Yes.

13 MR. NELSON: Yes.

14 CHAIR HOLTZMAN: From 2005 to the
15 present moment and in the future, should there be
16 a time period within which those claims have to be
17 filed? And if they should, there are three
18 questions.

19 Do we need to address that in this
20 report?

21 Second question, if we do want to
22 address it in the report, should there be -- what

1 should that time period be?

2 MR. STONE: I actually thought that the
3 Panel --

4 CHAIR HOLTZMAN: All right. Well, he
5 says we didn't.

6 MR. STONE: -- all together actually
7 expressed when we were there that we were not
8 going to have a time period, because we didn't
9 like the way they differed everywhere between some
10 were 30 days and 60 days and six months and
11 whether there was a restricted report, whether
12 they hesitated. So I thought we said we were not
13 going to -- I thought that was the decision that
14 we made, that we would not have a jurisdictional
15 period. It would just be harder for them to
16 establish a claim the further away they got.

17 CHAIR HOLTZMAN: Yes.

18 JUDGE JONES: I think I remember that
19 as well, because I -- but what I don't remember,
20 and I don't know if anyone else does either is
21 exactly what are the variations in time periods
22 within the regular -- you know, the state

1 compensation programs? Do we know? Doug?

2 MR. STONE: They varied all over the
3 place.

4 JUDGE JONES: All over the place.

5 MR. NELSON: That's right. I think it
6 ranged from 24 hours to several months.

7 MR. STONE: But there was no time line
8 in certain states, so --

9 MR. NELSON: Yes, there --

10 JUDGE JONES: So it could have --

11 MR. STONE: -- so literally, it was the
12 whole gamut.

13 MR. NELSON: No time.

14 JUDGE JONES: So the incident could
15 have occurred at any time, and you can walk in?

16 MR. NELSON: In a few states, yes.

17 JUDGE JONES: Okay.

18 MR. NELSON: And I think that --

19 CHAIR HOLTZMAN: But most states have
20 a time limit.

21 MR. NELSON: Right.

22 CHAIR HOLTZMAN: And if you were to say

1 what that time limit was, even though they may be
2 -- some states may have 24 hours, and some states
3 may have 24 years --

4 MR. NELSON: The most common one was 72
5 hours.

6 CHAIR HOLTZMAN: That you have to file
7 a claim within 72 hours otherwise you are barred?

8 MR. NELSON: You have to have reported.

9 CHAIR HOLTZMAN: No, no, no, no, no.

10 MR. NELSON: That's a separate issue.

11 CHAIR HOLTZMAN: That's a separate
12 issue.

13 MR. NELSON: Right.

14 CHAIR HOLTZMAN: We are talking about
15 filing the claim.

16 MR. NELSON: Okay. The filing
17 requirement is -- I think the most common one is
18 one year.

19 CHAIR HOLTZMAN: Yes.

20 MR. NELSON: But --

21 CHAIR HOLTZMAN: Okay. Let's just
22 check. Why don't you check?

1 JUDGE JONES: So since it's a new
2 compensation program, everybody since 2005 is
3 entitled to file claims.

4 CHAIR HOLTZMAN: Correct.

5 JUDGE JONES: So going forward --

6 CHAIR HOLTZMAN: Right.

7 JUDGE JONES: -- we would put a time
8 limit on it.

9 CHAIR HOLTZMAN: Going from the year
10 2005.

11 MR. STONE: No, that would exclude
12 everybody who didn't file since 2014, if it was a
13 one-year filing.

14 CHAIR HOLTZMAN: Correct. The reason
15 we picked 2005 is because that was the date that
16 -- that restricted reporting went into effect.

17 JUDGE JONES: But I think claim and
18 report are different.

19 CHAIR HOLTZMAN: Yes. This is for
20 claim.

21 JUDGE JONES: Right.

22 CHAIR HOLTZMAN: That the victim must

1 have filed the claim within a particular period of
2 time.

3 JUDGE JONES: But there -- no one would
4 have filed a claim -- you know, every claim of
5 somebody who had an incident in 2005 or '06 for
6 instance or up until 2014, they couldn't possibly
7 file their claim.

8 CHAIR HOLTZMAN: Right, because there
9 wouldn't have been a federal program.

10 JUDGE JONES: It wouldn't what?

11 CHAIR HOLTZMAN: There wouldn't have
12 been a federal program.

13 JUDGE JONES: Right. So --

14 CHAIR HOLTZMAN: But the question is
15 are we going to have -- if we don't have any time
16 limit --

17 JUDGE JONES: Yes.

18 CHAIR HOLTZMAN: -- then everybody
19 since 2005 could file a time limit. If we had a
20 10-year period or whatever it is, a 15-year
21 period, they could file. If we had a 2-year
22 period, then they wouldn't be able to file. If we

1 had no time limit, they would.

2 JUDGE JONES: Well, I guess here is
3 what I think this was, was that if your incident
4 occurred in 2005 or until the date of the
5 institution of our compensation program, you could
6 make a claim.

7 CHAIR HOLTZMAN: I see.

8 JUDGE JONES: Now going forward --

9 CHAIR HOLTZMAN: Oh, okay.

10 JUDGE JONES: -- we could set a limit
11 on how fast you should make a claim after your
12 incident occurred, you know. I mean, I think that
13 is how we would do it.

14 CHAIR HOLTZMAN: Or you could do --
15 combine those two and say if you -- from 2005 to
16 the date of this program, it doesn't matter.

17 JUDGE JONES: Right.

18 CHAIR HOLTZMAN: But starting, you will
19 be treated as though the date of this program --

20 JUDGE JONES: Right.

21 CHAIR HOLTZMAN: So let's say you had
22 a two-year period, so even if it was 2005, you

1 would still have two years to file.

2 JUDGE JONES: Yes.

3 CHAIR HOLTZMAN: You could do it that
4 way.

5 JUDGE JONES: Yes.

6 CHAIR HOLTZMAN: That's another way to
7 do it.

8 JUDGE JONES: Right, right.

9 CHAIR HOLTZMAN: So you could give
10 everybody a two-year period. I'm just picking
11 that out of a hat.

12 JUDGE JONES: Right. So anybody who
13 had a claim from, beginning at January 1, 2005,
14 and everybody else has two years. So we could
15 pick a -- all right. Well, I think that explains
16 the purpose of the 2005 and would work.

17 Now, the question is do we want to set
18 that time frame now?

19 MR. STONE: We've heard from lots of
20 people who said they delayed reporting until they
21 were out of the Service, because they knew it
22 would wreck their career or because they waited to

1 hear that somebody else filed a claim against that
2 individual, because they hated to be the only one,
3 and then they support someone else.

4 JUDGE JONES: What are you talking
5 about though here now, Mr. Stone? I think the
6 question is how much time do we want to permit a
7 victim to file a claim?

8 MR. STONE: I agree. I agree.

9 JUDGE JONES: So how much time? We're
10 going to let everybody file a claim who had an
11 incident from January 1, 2005 to the date we
12 institute the program.

13 MR. STONE: That's right.

14 JUDGE JONES: And forward.

15 MR. STONE: Right. And I think that if
16 we can tolerate those claims by saying the burden
17 of proof is on them to show that there was an
18 assault, if we are going to do it on the people
19 from 2005 and 2006, I don't have any problem,
20 basically, taking that same standard and moving it
21 forward.

22 I think most people are going to file

1 a timely -- because they want to get their
2 compensation in a reasonable time period. And the
3 ones that don't will have a harder burden
4 persuading the decision maker that it happened and
5 that they have injuries.

6 VADM TRACEY: But it was true that most
7 of the states had some, right?

8 MR. NELSON: There are only three that
9 do not.

10 MR. STONE: Part of the problem, and I
11 have seen this in Maryland for example, is that
12 you can wait over a year to find out whether or
13 not -- let's say you are not covered by the
14 military medical system and you have Blue
15 Cross/Blue Shield, they can wait over a year
16 sometimes to find out what Blue Cross/Blue Shield
17 is covering. By the time they finally find out
18 what their, in effect, deductible was, the two
19 years has run because they waited a period of time
20 to do it, and then they waited until after the
21 conviction or whatever.

22 In other words, they are waiting to see

1 what they are going to get back. So I have found
2 that I think two years is definitely too short.
3 You know, if you want to go to a longer period, I
4 guess I don't have as much trouble. But I think
5 the two years, it puts pressure on these people,
6 and a lot of them throw up their hands and say
7 well, then the heck with that thing. I'm more
8 interested in getting myself together.

9 JUDGE JONES: Well, it seems to me
10 though that if this giving people a shorter period
11 of time seems to be working, it must be working
12 because you just have to file your claim. And
13 then as the process continues, if you get monies,
14 you don't get what you are asking for before the
15 particular state compensation program.

16 I mean, I don't know how they work in
17 that regard, but that would be an insoluble
18 problem. It's a big problem.

19 MR. STONE: Well, it's not. It's that
20 a lot of people don't get -- what happens is the
21 state restitution programs are worried about the
22 size of their funds, so they want a limitation,

1 because they have to appropriate X number of
2 dollars from their legislature within a certain
3 time period, so they like to keep a sort of a
4 little tighter rein on what is happening. And
5 they don't have the same supervisory feelings
6 towards the people involved that we do, that they
7 were, you know, on base when it happened.

8 JUDGE JONES: You know, we never talked
9 about -- I think what we all were thinking as I
10 look back on it was that only people who had no
11 insurance coverage would be applying.

12 MR. STONE: Yes.

13 JUDGE JONES: So the issue of what you
14 got paid and what you didn't get paid didn't
15 really -- we hadn't -- we didn't really think
16 about that, because then we are also assuming most
17 of the military folks will have a few, you know,
18 compensable categories, because, you know, they
19 are taken care of by the military.

20 MR. STONE: I guess I would have -- my
21 concerns would be minimized if we went to
22 something like a four-year period. So it's not --

1 because just trying a case and getting it
2 together, reporting it and going through the
3 steps, you burn through a whole year before that
4 is done. And so there is a lot of pressure on
5 people to get things together. So I would like to
6 see a period that where the period itself doesn't
7 cut people off, but it does require them to move
8 with some dispatch.

9 JUDGE JONES: I guess I would just like
10 to know a little bit more, because if there are
11 states that are giving you 72 hours --

12 MR. NELSON: That's the reporting
13 requirement, ma'am.

14 JUDGE JONES: Oh.

15 MR. NELSON: I misstated that.

16 JUDGE JONES: Okay. Not the --

17 MR. NELSON: I can tell you --

18 JUDGE JONES: -- claim. What is the
19 claim range?

20 MR. NELSON: So it ranges from six
21 months to no limit.

22 JUDGE JONES: Okay.

1 MR. NELSON: And there are four states
2 on each end with those, and then in the middle
3 it's -- the most common one is one year. There
4 are 13 states that have two years, nine states
5 have three years, two states have five years.

6 JUDGE JONES: Okay. That makes more
7 sense. All right.

8 CHAIR HOLTZMAN: So it's mostly around
9 one year. And my concern, I share your concerns,
10 Mr. Stone, but my concern here, too, is that we
11 put the Panel to, you know, unnecessary work on
12 stale claims which can't be proven. So when we
13 really want to encourage people to make their
14 claims as quickly as possible, so they won't be
15 stale, so I don't know what the -- maybe we --
16 maybe, Barbara, you are right that we don't have
17 enough information to make a judgment on it, but
18 four years seems like a long time --

19 JUDGE JONES: I would --

20 CHAIR HOLTZMAN: -- particularly --

21 JUDGE JONES: I could go for -- well,
22 certainly, I think a year, I could go for a year.

1 But I could be persuaded to go a little longer
2 than a year. We are already front-loading a lot
3 of claims by starting with 2005.

4 CHAIR HOLTZMAN: Correct.

5 JUDGE JONES: Which is going to take up
6 a lot of time and effort. I'm not opposed to it,
7 but --

8 CHAIR HOLTZMAN: Well, the other
9 possibility is for claims -- the other way to cut
10 this or skin this cat is take the period of time
11 -- anybody who has a claim that arose before this
12 new procedure --

13 JUDGE JONES: Yes.

14 CHAIR HOLTZMAN: -- they get two years,
15 maybe or whatever. And for the rest of the
16 claims, it's one year or something like that.

17 JUDGE JONES: Yes.

18 CHAIR HOLTZMAN: So they can -- or give
19 them one year and give everybody else two years,
20 but you don't have to have the same time frame.

21 JUDGE JONES: Right.

22 CHAIR HOLTZMAN: I mean, the people who

1 have the old claims should have all their
2 paperwork together. I mean, they are not waiting
3 for anything from 2005.

4 MR. STONE: Okay. That's true.

5 CHAIR HOLTZMAN: So for those people,
6 I don't have a problem with a one-year limit.

7 JUDGE JONES: No, me either.

8 MR. STONE: Unless it happened last
9 year or earlier this year. So you would say
10 anybody who is not within whatever the new time
11 limit is.

12 CHAIR HOLTZMAN: Yes, whatever it is.

13 MR. STONE: Would have a year --

14 JUDGE JONES: Right.

15 MR. STONE: -- from now. In other
16 words, if it was within the last two years, then
17 they -- or if it happened yesterday, then they
18 would have -- if it's two years, then two years,
19 but anybody not falling within that time period
20 would get a year.

21 CHAIR HOLTZMAN: Okay. But what about

22 --

1 MR. STONE: So they would be able to --

2 CHAIR HOLTZMAN: -- going forward? How
3 do you feel about that?

4 JUDGE JONES: You know, if the program
5 is -- if there is enough information out there
6 given to the victims about this program, I would
7 prefer a year to get your claim in. Admiral
8 Tracey, we haven't heard from you.

9 VADM TRACEY: The timing is important.
10 I do think that, you know, this is -- to the
11 extent that these are military people who might be
12 filing claims, you know, it will take them a while
13 to figure out what they are allowed to do and what
14 they are not. So one to two years would seem to
15 me to be an important kind of a time frame to give
16 them to sort it out.

17 CHAIR HOLTZMAN: So what do you think
18 about one year for anybody prior --

19 VADM TRACEY: Prior.

20 CHAIR HOLTZMAN: -- and then two years
21 for --

22 VADM TRACEY: As the standard going

1 forward.

2 CHAIR HOLTZMAN: -- as the standard
3 going forward. And calling Congress to reexamine
4 whether those are appropriate or the DoD to
5 determine whether those are appropriate --

6 VADM TRACEY: I think, yes.

7 CHAIR HOLTZMAN: -- time frames.

8 VADM TRACEY: I can go for that.

9 MR. STONE: I would like to see three
10 years going forward, but if there isn't a
11 consensus on three years, then -- and you want to
12 go with two years, then I agree. Then we simply
13 put in and say let -- and if Congress wants to
14 adjust the period --

15 VADM TRACEY: Right.

16 MR. STONE: -- we realize this might
17 not be the best time frame.

18 JUDGE JONES: Okay. Sounds good.

19 CHAIR HOLTZMAN: Okay. The next issue,
20 due process. The Panel has not addressed the
21 issue of who should adjudicate the claims. In
22 other words, what kind of a body is this we're

1 talking about. Is it going to be a commission, a
2 panel, whatever? Anybody have any thoughts about
3 it? I mean, I could, just for starters, throw
4 mine out which is we haven't really focused on
5 this, and it doesn't really make that much
6 difference, so I would be perfectly happy to let
7 DoD decide how they want to get this up
8 administratively, you know.

9 JUDGE JONES: Yes, because there is a
10 lot of other administrative things that they need
11 to set up. I would be happy to let them do that
12 as well.

13 CHAIR HOLTZMAN: What do you think, Mr.
14 Stone?

15 MR. STONE: I wouldn't mind a
16 suggestion that they should consider that same
17 office that was considering the foreign claims,
18 which can be what -- he said he had some with five
19 rapes that he figured out what the military was
20 going to compensate overseas people, because he
21 already has some expertise in looking at a
22 compensation program for people who have been

1 injured by military people.

2 In other words, at least I would want
3 to make a suggestion that they consider on an
4 initial basis adding that to his portfolio. I
5 mean, that's --

6 VADM TRACEY: Does that mean that there
7 may be some relevant competence or experience --

8 CHAIR HOLTZMAN: Right.

9 VADM TRACEY: -- in that organization
10 to be correct.

11 CHAIR HOLTZMAN: When you put it that
12 way -- I would put it that way. That's a very
13 good way.

14 MR. STONE: Yes, yes.

15 JUDGE JONES: Because they may need a
16 very large group --

17 CHAIR HOLTZMAN: Correct.

18 JUDGE JONES: -- for the first --

19 CHAIR HOLTZMAN: Right.

20 JUDGE JONES: -- year or so.

21 CHAIR HOLTZMAN: Correct.

22 JUDGE JONES: While all these claims

1 are coming in.

2 CHAIR HOLTZMAN: Correct. One person
3 may not be sufficient, but I think that's a very
4 good way of putting it, Admiral Tracey. Thank you
5 for your comments. Okay.

6 Now, the last one we have to deal with
7 is, "DoD program should provide a mechanism for
8 claimants to appeal from the decision."

9 But this was only two Members who
10 agreed with that, so I guess we have to decide
11 whether we agree with an appeal mechanism. Is
12 that correct, Doug?

13 MR. NELSON: Yes.

14 CHAIR HOLTZMAN: Do we agree with an
15 appeal mechanism?

16 VADM TRACEY: Aren't appeal mechanisms
17 sort of standard?

18 JUDGE JONES: Yes.

19 COL GREEN: I think the recommendation
20 or the discussion was more specific in that it was
21 to a senior-level political appointee with
22 authority to dispose of the cases. And so I think

1 the Staff's question was whether that was the
2 consensus of the Panel or whether the Panel had
3 other consensus ideas in terms of the appellate
4 level that this should go to.

5 CHAIR HOLTZMAN: We might refer that to
6 DoD.

7 VADM TRACEY: Similarly deferred to
8 DoD?

9 JUDGE JONES: Absolutely.

10 VADM TRACEY: That's standard practice
11 to have appeals.

12 CHAIR HOLTZMAN: Right. They have done
13 it in other areas.

14 MR. STONE: Right.

15 JUDGE JONES: We may want to do that.

16 MR. STONE: They could look at the
17 other areas including maybe that same person who
18 has experience with the other claims. What
19 happens when you want to appeal?

20 CHAIR HOLTZMAN: Maybe they don't have
21 an appeals process in place.

22 MR. STONE: Well, I don't know, but I

1 mean they could look at that to see if there is --

2 CHAIR HOLTZMAN: Well, I would

3 definitely --

4 MR. STONE: -- a parallel process only,
5 that's all.

6 CHAIR HOLTZMAN: Well --

7 MR. STONE: They should look at it in
8 parallel.

9 CHAIR HOLTZMAN: I think that this
10 suggestion, I don't know where it came from, that
11 a senior-level political appointee with authority
12 to dispose of the case, I don't ever even recall
13 a discussion of that kind. So I don't --

14 MR. NELSON: I think Mr. Taylor was
15 talking about his experience --

16 MR. STONE: Oh.

17 MR. NELSON: -- in the Army.

18 CHAIR HOLTZMAN: Oh, well --

19 JUDGE JONES: So the DoD may decide
20 that same thing.

21 CHAIR HOLTZMAN: Right.

22 JUDGE JONES: But we should let --

1 CHAIR HOLTZMAN: Let's leave it up to
2 them. Okay.

3 COL GREEN: Can I make one note on
4 this, ma'am? There is --

5 CHAIR HOLTZMAN: No.

6 COL GREEN: -- the pink --

7 CHAIR HOLTZMAN: Sorry.

8 COL GREEN: The pink text highlights
9 that the Panel discussed the SVCs should have the
10 responsibility to be informed about this program
11 and advise clients of their eligibility and
12 capacity to make claims.

13 CHAIR HOLTZMAN: Yes.

14 COL GREEN: And you raised the question
15 about victim assistance personnel and whether
16 there should be-- and the Panel didn't discuss
17 this in terms of is there any role of the SARCs
18 and the Victim Advocates and the other base-level
19 personnel, does the Panel wish to express anything
20 in terms of their responsibility for advising
21 people who file reports?

22 JUDGE JONES: I think SARCs should

1 definitely. That whole -- yes, the Victim
2 Advocates should be fully educated about this.

3 CHAIR HOLTZMAN: Yes.

4 JUDGE JONES: Everybody.

5 CHAIR HOLTZMAN: My view is that, you
6 know, just putting it in the hands of the SVCs
7 sort of legalizes it too much. It's not
8 necessarily a legal thing.

9 VADM TRACEY: Yes, this is an avenue of
10 assistance that is available.

11 CHAIR HOLTZMAN: Yes.

12 JUDGE JONES: Right.

13 CHAIR HOLTZMAN: Exactly. It should
14 not be --

15 MR. STONE: Even in a restricted case,
16 so it--

17 CHAIR HOLTZMAN: Yes, it shouldn't be
18 --

19 COL GREEN: The SVC would never see it.

20 CHAIR HOLTZMAN: I don't think the SVC
21 -- I mean, if the SVC wants to help, but I don't
22 think the prime responsibility should be on the

1 SVC.

2 JUDGE JONES: No. I think everybody
3 who has contact.

4 MR. STONE: Right. And this sort of
5 reminds me, and it'll be -- it's a little bit like
6 when you are filing a personal income tax form;
7 you've got a form, and it's a little technical, so
8 the back either has to have some instructions or
9 a sample, because the person who gets it sees the
10 form, and the legal terms are beyond them. They
11 often need someone to talk to, to say does this
12 expense count? Does that one count? And the
13 person will say yes or no. You know, they will
14 need to hear no, it doesn't include pain and
15 suffering. Yes, it does include if you went to
16 the doctor for the pain and suffering. You know,
17 you sort of need that kind of thing.

18 JUDGE JONES: Well, I'm presuming that
19 the SARCs are going to be or the Victim Advocates
20 are going to be trained in this when you have the
21 program. Assuming they put the program into
22 place, they are going to train people on that.

1 Absolutely.

2 MR. STONE: Does that answer what you
3 were hoping to get?

4 COL GREEN: Yes.

5 CHAIR HOLTZMAN: Okay. What's next?

6 COL GREEN: Well, I guess the --

7 CHAIR HOLTZMAN: That's it for the
8 substantive issues that the Staff recommended?

9 COL GREEN: Yes.

10 CHAIR HOLTZMAN: Okay. So now we can
11 go to any -- I mean, I made -- apparently I
12 recommended some substantive issues. Does anybody
13 else have any substantive issues they want to
14 raise with regard to restitution?

15 MR. STONE: I was on other urgent
16 matters. I didn't actually get to go through this
17 line-by-line, so I'm unable to say whether I have
18 issues until after this, I'll go through this
19 version. Though I thought generally we had
20 consensus on most of it.

21 CHAIR HOLTZMAN: Right.

22 MR. STONE: So I'm not --

1 CHAIR HOLTZMAN: Okay. So let's --
2 anybody? So if no one else has a substantive
3 issue to address, Kyle, do you want to go through
4 the ones, at least that I recommended? I don't
5 know where they are.

6 COL GREEN: Sure.

7 MR. NELSON: The first one is on page
8 13.

9 COL GREEN: 12.

10 MR. NELSON: Oh, we're getting the
11 copies, but, yes, that's it. It's about training
12 for victim assistance personnel on seeking
13 restitution in pretrial negotiations. The Marine
14 Corps has begun to do this, but the other Services
15 have not.

16 So, Ms. Holtzman, you had raised the
17 question as to whether the Panel wants to make a
18 recommendation in this area.

19 CHAIR HOLTZMAN: Well, I guess the
20 question is if there is no restitution program in
21 the military, what would they be training them on?

22 COL GREEN: Well, the --

1 CHAIR HOLTZMAN: I mean, I guess --
2 yes.

3 COL GREEN: -- the use of restitution
4 as a term of a pretrial agreement was a specific
5 focus that you heard testimony on.

6 CHAIR HOLTZMAN: Right.

7 COL GREEN: And you raised a number of
8 issues in terms of the, I think, the general
9 consensus that you heard was that it's available,
10 but not utilized often, and I don't know that you
11 have heard from any witnesses who said that they
12 had heard it used in a sexual assault case.

13 And so a number of your questions in
14 this area regarding restitution really focused on
15 that in terms of a theme developing the prominence
16 of this, that people are more aware of this as a
17 tool that exists under the current system, without
18 any modification that this is available to the
19 victims.

20 MR. STONE: I tend to think that since,
21 you know, the overwhelming majority of cases are
22 disposed of by pleas, there ought to be a little

1 focus on it, so that at least the defendants who
2 are going to plead guilty and want to get some
3 credit with the judge understand that they can
4 offer, and often it is to pay restitution, before
5 anything, before sentencing which makes, you know,
6 the victim a lot happier and reduces the number of
7 compensation claims.

8 So I think it would be useful for it at
9 least to be mentioned. I mean, I don't know that
10 it has to be extensive training, but it should get
11 a mention. It shouldn't just be ignored.

12 VADM TRACEY: I think that's right.
13 And I think you could make a recommendation that
14 other Services consider following Marine Corps'
15 lead on this. Judge Jones?

16 JUDGE JONES: Yes. I mean, I'm
17 assuming that trial counsel knows the value of
18 offering restitution, so we are only talking here
19 about assistance, victim assistance personnel,
20 right, training them on seeking it during pretrial
21 negotiations?

22 MR. NELSON: There was testimony that

1 the Marine Corps trained on this, trained their
2 trial counsel on this. The other Services did not
3 testify one way or the other.

4 VADM TRACEY: I see.

5 MR. NELSON: But --

6 CHAIR HOLTZMAN: And the SVCs are they
7 all trained on this, too?

8 MR. NELSON: You didn't get much
9 information on that.

10 CHAIR HOLTZMAN: Well, also maybe --
11 I'm sorry. Barbara?

12 JUDGE JONES: Well, I can imagine --

13 VADM TRACEY: Excuse me.

14 JUDGE JONES: -- not wanting --

15 VADM TRACEY: That they train victim
16 assistance personnel.

17 MR. NELSON: Right.

18 JUDGE JONES: -- yes. They just train
19 victim assistance personnel, right.

20 MR. NELSON: Right.

21 JUDGE JONES: Well, you would certainly
22 want the SVC to know, because there is -- you

1 know, there are tactical decisions to be made
2 about whether or not you are going to ask for
3 restitution. I don't have a problem with
4 everybody knowing that it is available. So if
5 they want to --

6 CHAIR HOLTZMAN: Right.

7 JUDGE JONES: -- I don't see any
8 reason. Maybe they only do victim assistance
9 personnel because they assume trial counsel and
10 defense counsel understand that restitution can be
11 part of a pretrial agreement. So I mean, I have
12 no problem with this.

13 CHAIR HOLTZMAN: Okay. So does the
14 Staff understand what we are going to do?

15 MR. NELSON: Yes, yes.

16 MR. STONE: If they are not already
17 training briefly --

18 CHAIR HOLTZMAN: Right.

19 MR. STONE: -- and acquainting them
20 with the availability, they can have one example
21 in the literature of where it is has been done and
22 how it helped.

1 CHAIR HOLTZMAN: Yes, okay. I guess
2 the next one is on page 13, right?

3 MR. NELSON: Right.

4 CHAIR HOLTZMAN: I guess when I read
5 it, I didn't really understand that because it
6 says, according to one practitioner, sometimes the
7 victim is not advised of the pretrial agreement
8 until after it has been signed.

9 I thought that under the new system
10 that the victim had a right to be heard in
11 connection with the pretrial agreement, so I don't
12 even understand how this could happen.

13 JUDGE JONES: I read that, too. And I
14 think it just means that the system didn't work in
15 this instance at all.

16 CHAIR HOLTZMAN: Oh.

17 JUDGE JONES: Because we have
18 definitely, and I think the Department of Defense
19 has prescribed that there has got to be some
20 communication not how, but, you know, written or
21 orally or something.

22 CHAIR HOLTZMAN: Right.

1 JUDGE JONES: So it just didn't work.

2 VADM TRACEY: But the paragraph says
3 that the victim represented by the SVC, the
4 convening authority is not currently required to
5 provide --

6 JUDGE JONES: The convening authority
7 --

8 VADM TRACEY: It's right above --

9 JUDGE JONES: Yes.

10 VADM TRACEY: -- the pink.

11 MR. STONE: Yes.

12 VADM TRACEY: Not required to receive
13 --

14 JUDGE JONES: Oh, right. That was
15 probably a recommendation of the Response Panel.

16 MR. NELSON: Right. That's in the next
17 paragraph.

18 JUDGE JONES: And hasn't been adopted.

19 MR. NELSON: Correct.

20 JUDGE JONES: It's probably the point.

21 CHAIR HOLTZMAN: So we could just say
22 we urge adoption of the RSP.

1 JUDGE JONES: What we have already
2 recommended.

3 CHAIR HOLTZMAN: Yes.

4 JUDGE JONES: Yes.

5 CHAIR HOLTZMAN: Well, what the other
6 Panel recommended. We have two new Members. So
7 maybe at the end, there could be another sentence
8 saying that the recommendation of the RSP that --

9 JUDGE JONES: Would address this.

10 CHAIR HOLTZMAN: -- yes, hasn't been
11 adopted. We urge its adoption promptly, something
12 like that.

13 MR. NELSON: And that's really what
14 your next comment is getting at on the next page.

15 CHAIR HOLTZMAN: All right. I guess
16 I've got to excise this point. Oh, so that's the
17 same thing?

18 MR. NELSON: Basically, yes.

19 CHAIR HOLTZMAN: All right. So we
20 don't need to -- we can just ignore that. And
21 then we have another one at the bottom of 14.
22 Yes, this is really something I didn't understand

1 --- that for restitution to be part of the
2 pretrial agreement, it has to be requested by the
3 accused.

4 MR. STONE: In other words, I guess the
5 defendant has to be the one coming forward, or
6 it's not a topic of discussion, that's the way the
7 restitution --

8 COL GREEN: On clemency and parole.
9 This is different from the pretrial agreement.
10 This is post-trial.

11 MR. STONE: Oh.

12 COL GREEN: In the clemency and parole
13 process.

14 MR. STONE: I see.

15 COL GREEN: Which is initiated by the
16 convicted member.

17 MR. STONE: Right.

18 CHAIR HOLTZMAN: Oh, okay. Well, then
19 I take it back. I'm sorry. I didn't understand
20 that, so I withdraw my comment about that.

21 VADM TRACEY: Can we go back to the --

22 CHAIR HOLTZMAN: Yes, sure.

1 VADM TRACEY: Are we not going to make
2 the recommendation that the RSP Panel --

3 CHAIR HOLTZMAN: No, but that --

4 VADM TRACEY: -- recommendation --

5 CHAIR HOLTZMAN: -- applies to the
6 pretrial agreement, so we are going to make that.

7 VADM TRACEY: No, no, no.

8 CHAIR HOLTZMAN: Oh, sorry.

9 VADM TRACEY: I thought that we --

10 CHAIR HOLTZMAN: Yes, we are endorsing.

11 VADM TRACEY: -- stated that we are
12 going to endorse that.

13 CHAIR HOLTZMAN: Yes.

14 VADM TRACEY: Okay. I thought I heard
15 that.

16 COL GREEN: Correct.

17 VADM TRACEY: So you withdraw that.
18 Okay. Great.

19 CHAIR HOLTZMAN: No, no, I'm
20 withdrawing the one on page --

21 VADM TRACEY: The comment.

22 CHAIR HOLTZMAN: -- 14 which applies to

1 the post. Not to pretrial agreements, but --

2 VADM TRACEY: Okay.

3 CHAIR HOLTZMAN: Okay. Whatever they
4 are called. All right. So now, okay, sorry.
5 Okay. Then on page 17, it says, "When asked about
6 the relatively low number of Article 139 claims in
7 most Services, that JPP presented/noted a lack of
8 training of commanders and insufficient guidance
9 to victims of that Article 139 process." And do
10 we want to make -- my question was, do we want to
11 make a recommendation, I guess, about training or
12 notice or something?

13 JUDGE JONES: I don't think if we were
14 to include bodily harm, then this rule doesn't
15 relate to us.

16 CHAIR HOLTZMAN: Right.

17 JUDGE JONES: I don't think.

18 CHAIR HOLTZMAN: Well, 139 is proper.
19 We decided we weren't going to include bodily
20 harm.

21 JUDGE JONES: Right.

22 MR. STONE: That's property.

1 CHAIR HOLTZMAN: It's property.

2 JUDGE JONES: Right.

3 CHAIR HOLTZMAN: But even under
4 property, there are a very small number of claims.

5 JUDGE JONES: Right.

6 CHAIR HOLTZMAN: Am I missing the
7 point?

8 COL GREEN: Well, the Services'
9 utilization of Article 139 is different. Some --
10 I think we got the statistics from the Services
11 and it was varied. Some of the Services had
12 almost none, and some of the Services had a fairly
13 substantial number of Article 139 claims. So it's
14 not --

15 CHAIR HOLTZMAN: Yes, like the Air
16 Force had two; Navy, Marine Corps and Coast Guard
17 had zero.

18 COL GREEN: Right.

19 JUDGE JONES: I can't -- well, I mean,
20 I just think it's so difficult if you are a sexual
21 assault victim who is prosecuting a case to then
22 start another proceeding under 139.

1 CHAIR HOLTZMAN: That's true.

2 JUDGE JONES: That's the only reason I
3 think I might leave it alone, because one of our
4 problems with trying to add bodily harm was you
5 would have two investigations going at the same
6 time. I'm assuming, and maybe I'm wrong, that in
7 the context of a sexual assault victim who is
8 going forward that, you know, they will get their
9 -- well, I guess it's not just getting property
10 back from evidence, it's also being recompensed
11 for the broken phone or what have you.

12 MR. STONE: Well, I wonder if this is
13 a place to drop a footnote or say that we note
14 that some of these claims might now be covered by
15 the recommended compensation system. In other
16 words, that doesn't make them have to file a 139,
17 but it recognizes they are not precluded from
18 compensation because they didn't file the separate
19 "proceeding."

20 CHAIR HOLTZMAN: Right. And that's one
21 thing. But the question is whether there should
22 be granted, your point --

1 MR. STONE: Yes.

2 CHAIR HOLTZMAN: -- which is a very
3 good one, still should people be advised about the
4 139? I mean, do the victims' advocates know about
5 that? Do the -- I guess they do. I don't really
6 know. Maybe we don't know enough about this to
7 make any point, but what is your view, Kyle?

8 COL GREEN: Well, I think the victim
9 advocates, because the Article 139 claims don't
10 include bodily harm. It's probably -- I don't
11 think we heard anything that this is the focus of
12 the victim advocate community. It's just not a
13 vehicle of service.

14 CHAIR HOLTZMAN: Yes, or the service of
15 anybody.

16 COL GREEN: Right.

17 CHAIR HOLTZMAN: Well, it just seems --
18 my view is that the victim ought to be advised of
19 all of the remedies that are out there. If they
20 want to use them, fine. If they don't want to use
21 them, fine. But if you have zero requests in the
22 Navy, I mean, you know, Admiral, there are a lot

1 of cases it would seem to me.

2 VADM TRACEY: You could do a similar
3 fix here to the one that we did previously that
4 the Marine Corps already included ample training
5 on the topic, that other Services might consider
6 following the Marine Corps.

7 CHAIR HOLTZMAN: Yes, okay. That's a
8 brilliant way of doing it. I support that. Any
9 disagreement?

10 JUDGE JONES: No.

11 CHAIR HOLTZMAN: Okay. All right.

12 MR. STONE: You know, the next
13 paragraph that goes on to (c) there that on page,
14 I guess it is, 18 that talks about the PCA
15 process, personnel and civilian claim. Somewhere
16 I would like a footnote that says, you know, the
17 failure to make these claims does not disqualify
18 a person from seeking compensation under the
19 recommended compensation system at a later time.
20 Because some of them will think that their form
21 works, you're going to get it back, don't worry,
22 it's going to be in working order or, you know,

1 the person is, you know, as it says in the top
2 here, the offender is -- you know, they are going
3 to be -- have their salary or whatever garnished,
4 and then you find out they are in no pay status.
5 I mean, I just think there has to be somewhere a
6 little catch-all that recognizes this doesn't
7 exclude them from getting it under the other
8 process.

9 CHAIR HOLTZMAN: Yes. Does anybody
10 have an objection to that?

11 VADM TRACEY: Is that a fact, or is
12 that a recommendation?

13 CHAIR HOLTZMAN: You can't say that it
14 won't preclude them, just say that in our opinion
15 if the compensation system is put into place, they
16 should not be precluded from --

17 MR. STONE: Yes.

18 CHAIR HOLTZMAN: -- applying under that
19 system.

20 MR. STONE: Yes, yes.

21 CHAIR HOLTZMAN: As opposed to having
22 to go through these --

1 MR. STONE: Right.

2 CHAIR HOLTZMAN: -- methods. Barbara,
3 you look puzzled.

4 JUDGE JONES: I don't think it's
5 necessary. I think if everybody -- if we roll out
6 a new compensation system, you are going to be
7 told that you can be compensated for --

8 CHAIR HOLTZMAN: Yes.

9 JUDGE JONES: -- you know, losses and
10 that would include losing a telephone, having your
11 car tires blown out, whatever it would be. And I
12 don't think anybody would apply a preclusion rule.

13 MR. STONE: Well, I absolutely think
14 they would have an exhaustion rule. I think there
15 is a lot of people --

16 JUDGE JONES: That you have to --

17 MR. STONE: -- want to say, "don't come
18 here unless you exhaust it." And they will say,
19 "you didn't do it under this one."

20 JUDGE JONES: But the last thing we
21 want to do here is encourage sexual assault
22 victims to start doing 139 claims while the other

1 claims are being investigated.

2 MR. STONE: I agree.

3 JUDGE JONES: So I think certainly they
4 could be advised of it if they want to do it,
5 their SVC will discuss it with them. And if we
6 have a compensation system that says, "you didn't
7 make the 139, so you don't get your phone costs
8 back," that would be wrong. So maybe we want to
9 say something about that, but --

10 MR. STONE: Right. Somewhere -- in
11 other words, we understand it, but it won't be
12 clear what we intended unless somewhere there is
13 a note of -- a footnote that says that.

14 JUDGE JONES: Well, we haven't even
15 gotten into what we were going to say the claims
16 are -- the claims cover in any detail.

17 MR. STONE: I thought we did.

18 JUDGE JONES: Except no pain and
19 suffering.

20 MR. STONE: Right.

21 JUDGE JONES: And then very
22 generalized.

1 MR. STONE: This is all about property.
2 That's about property.

3 CHAIR HOLTZMAN: Well, I think where
4 this -- if we feel that it should go somewhere,
5 maybe it shouldn't go here. Maybe it should go in
6 the compensation program description.

7 JUDGE JONES: I would feel better about
8 that. Just say property --

9 CHAIR HOLTZMAN: Put it there and --

10 JUDGE JONES: -- loss is included and
11 you need not have made a 139 claim.

12 CHAIR HOLTZMAN: Yes.

13 JUDGE JONES: Okay.

14 CHAIR HOLTZMAN: Or a claim under any
15 -- yes, something like that.

16 MR. STONE: Okay.

17 CHAIR HOLTZMAN: So that's where it
18 should go.

19 MR. STONE: Fine, or under PCA. Okay.

20 CHAIR HOLTZMAN: Okay. On page 45, I
21 guess, is the next one. I guess not, because we
22 have already talked -- the question here is: "Does

1 the Panel wish to make a recommendation as to how
2 the pretrial mechanism could be more often
3 utilized?" And I guess we have already done that,
4 haven't we, by training, by advising victims. And
5 we have already addressed that issue.

6 COL GREEN: This goes hand-in-hand with
7 that --

8 CHAIR HOLTZMAN: Yes, so we don't need
9 --

10 COL GREEN: -- issue that you raised
11 previously.

12 CHAIR HOLTZMAN: -- this. I'll
13 withdraw that. And okay, we're getting very close
14 to the end here. That's probably --

15 MR. STONE: That's the last one, yes.
16 We already discussed No. 7.

17 CHAIR HOLTZMAN: Okay. So that's the
18 rest of --

19 MR. STONE: And 57.

20 CHAIR HOLTZMAN: -- wait. Page 57.

21 MR. STONE: That's the one about SVCs
22 being responsible for the program.

1 CHAIR HOLTZMAN: Oh, yes. Okay. So we
2 have addressed everything --

3 MR. STONE: Yes, ma'am.

4 CHAIR HOLTZMAN: -- on the substance.
5 Okay. So how do we want to deal with -- so I
6 assume that there are no other substantive issues
7 to be raised?

8 Okay. If we wanted -- how are we going
9 to deal with the stylistic issues? Kyle, what do
10 you -- what's your recommendation?

11 COL GREEN: What I would propose is
12 that if -- just as we have done in previous
13 reports and this report, if you have comments on
14 the report, please, send them to us. The Staff
15 will incorporate any that are non-substantive into
16 the report as redline comments. If we feel that
17 they are anything that warrants or requires Panel
18 consideration, obviously we will raise those back
19 to you, but otherwise if it is just stylistic, we
20 can recirculate a draft of this report back to you
21 with the redline comments for your approval and
22 agreement.

1 And I think at that point if the Panel
2 is ready, then the Panel would be ready to publish
3 the report.

4 CHAIR HOLTZMAN: Any objection to that
5 procedure?

6 JUDGE JONES: No, that's fine.

7 MR. STONE: All right. So you're going
8 to send us this with whatever things we just said
9 today.

10 CHAIR HOLTZMAN: Correct.

11 MR. STONE: Okay.

12 CHAIR HOLTZMAN: Well, plus, any other
13 stylistic changes that have been proposed by
14 anybody else and if you, yourselves, have any
15 stylistic changes, you should send them in ASAP so
16 that Kyle can include them and Doug can include
17 them in the next go around.

18 JUDGE JONES: I believe I have minor
19 ones that I can get in.

20 MR. STONE: Sure. Okay.

21 CHAIR HOLTZMAN: Hopefully that is --
22 we can do it after just one round. So does this

1 conclude restitution and compensation?

2 JUDGE JONES: Wow, okay.

3 COL GREEN: At least the Panel's
4 initial analysis of it, yes, ma'am.

5 MR. STONE: I just reserve the right in
6 case I find something substantive. To let you
7 know, I'll try and flag it. I don't expect to,
8 but I'll have to read it more carefully.

9 CHAIR HOLTZMAN: Okay. But you got to
10 do it ASAP because --

11 MR. STONE: Yes, I get that. I get
12 that. I'll try and do it by the end of the week.

13 CHAIR HOLTZMAN: All right.

14 MR. STONE: Getting into next week.

15 CHAIR HOLTZMAN: Okay. So now we can
16 -- should we take a five-minute break?

17 COL GREEN: Yes, ma'am, if we could.

18 CHAIR HOLTZMAN: And then when we come
19 back we'll talk about retaliation.

20 COL GREEN: Retaliation.

21 CHAIR HOLTZMAN: Okay.

22 (Whereupon, the above-entitled matter

1 went off the record at 2:11 p.m. and resumed at
2 2:21 p.m.)

3 CHAIR HOLTZMAN: Okay. We are ready to
4 go. We are on -- if you can believe it or not, we
5 are up to retaliation. And we are going to
6 deliberate on that issue. Okay. So we are up to
7 the red folder, everybody, if you haven't already
8 figured out where we -- is that right?

9 COL GREEN: That's correct.

10 CHAIR HOLTZMAN: Okay. So, Kyle, would
11 you lead us through this wilderness, please? Give
12 us a suggestion as to how to approach it.

13 COL GREEN: I'll summarize where the
14 Panel has gotten again. This is the -- this will
15 be the third time that you have had an opportunity
16 to deliberate on retaliation. You got through the
17 issues at the back of this package of issues list,
18 that -- so Issues 8 through 12 that were
19 previously discussed, and then at the last meeting
20 you got through Issues No. 1 and 2.

21 We owe you some additional information
22 and we have highlighted and summarized the results

1 of that deliberation session. I think in red are
2 the issues that the Staff needs -- note -- we
3 know that we need to work in terms of getting you
4 more information on Issues 1 and 2.

5 You had a lot of questions about the
6 Inspector General's processes and number of
7 complaints and claims, and so the Staff is working
8 on that and can provide that to you at a future
9 meeting. Issues 3 through 7 starting with the
10 Case Management Group process are issues that you
11 have not had a chance yet to discuss or consider.

12 And so my recommendation is that we
13 start in today on those.

14 CHAIR HOLTZMAN: Okay. But I just want
15 to follow-up on the IG issue, because I think that
16 that's really a critical issue here. And it's not
17 just the IG issue. It's -- it goes to the whole
18 question of how military frames the issue of
19 retaliation. Because even in our -- even in this
20 discussion, it's retaliation, ostracism.

21 We need a term that incorporates
22 everything so that you are not putting something

1 in some pigeonhole, because if it's ostracism it
2 goes into this box and if it's retaliation it goes
3 into that box. I think it really needs to be
4 understood it's one package of what happens to a
5 human being after they report, and then what are
6 the remedies for it?

7 And maybe that's one of the problems
8 that we can't -- in my humble opinion, if we start
9 out accepting the boxes, we kind of put ourselves
10 right back in the situation where we were before.
11 I think we should be looking at this in a more, I
12 hate to use the word holistic way, but at least
13 not getting caught up in these little pigeonholes
14 and then determine what the appropriate method is.

15 I mean if you didn't call it, for
16 example, retaliation, then maybe the IG wouldn't
17 have the jurisdiction over it. I don't know
18 whether the jurisdiction is based on, you know,
19 what you call it or the reality of it. And we
20 also have to get much more of a sense of, you
21 know, what the options are vis-a-vis the IG
22 dealing with this.

1 I mean, so I think it's not just
2 getting information, but we might need to have
3 additional presentations from people who have
4 given some thought to this and also to what the
5 agencies themselves say. I mean, I don't want to
6 hear from the IG just telling me what they -- you
7 know, just a normal presentation. I would like
8 them to know -- to tell me why we shouldn't take
9 it away from them.

10 Why, for example -- that's what I would
11 like to hear -- and why, for example, you know,
12 then if we are not going to take it away from
13 them, why shouldn't they set up a separate unit in
14 their Agency to deal with this and how are they
15 going to deal with the numbers since nothing has
16 happened?

17 Why is nobody bringing them cases?
18 Maybe -- so I think we need to have not just some
19 more written materials, but I think, you know, be
20 thinking through what kinds of presentations we
21 need on this subject. Maybe I'm wrong, but that's
22 my view of that.

1 MR. STONE: Does it help any if instead
2 of talking about retaliation, we each try and
3 define it as sexual assault reporting retaliation?
4 In other words, it's a specific kind of
5 retaliation. It's not financial. It's not
6 whistleblowing. It's sexual assault reporting
7 retaliation. In other words, so that's the
8 category.

9 That way if the IG responds or somebody
10 responds, that's just what we are talking about
11 because you are pointing out that it's a slightly
12 different item we are talking about here and it
13 needs to be segregated. So I'm wondering just to
14 start by some terminology that separates it a
15 little bit. It's its own sub-category. Does that
16 help any, do you think?

17 JUDGE JONES: I don't know that it
18 addresses what your issue was. I mean, please,
19 somebody correct me if I'm wrong, but -- because
20 I learned a little bit at the last time around.
21 As I understand it, the Department of Defense IG,
22 right, has jurisdiction over whistleblower

1 complaints. Is that right or wrong?

2 COL GREEN: Not by statute, by
3 Department policy.

4 JUDGE JONES: Okay.

5 MS. CARSON: That's not DoD; it's the
6 Service IGs actually.

7 JUDGE JONES: All the Service IGs as
8 well.

9 COL GREEN: Right.

10 JUDGE JONES: Now, what else do they
11 have because whistleblower complaints are well-
12 defined and pretty narrow. They -- right? They
13 have to be retaliatory acts that relate to, you
14 know, a comment or, you know, something that you
15 have reported, for instance, and it has to affect
16 your status in the military. You know, it's like
17 a work issue.

18 It's not ostracism, which is a form of
19 retaliation. It's not whatever maltreatment is,
20 which is apparently less than a crime, but also
21 maybe it is an Articles violation. And I think we
22 just need to know jurisdictionally where

1 whistleblower, you know, is placed. But there is
2 a million -- what's this? Is that the answer?

3 COL GREEN: You just got it right
4 there.

5 CHAIR HOLTZMAN: Yes, you got the
6 answer right in front of you.

7 JUDGE JONES: Okay.

8 CHAIR HOLTZMAN: Where it says,
9 "Protected whistleblowing is defined," near the
10 bottom of the page.

11 LTC McGOVERN: If I could explain a
12 little bit, I went back this last month and read
13 the transcripts for retaliation to see if we
14 should bring additional speakers and what did
15 those people way back in April say.

16 JUDGE JONES: Right.

17 LTC McGOVERN: And I think this is a
18 good chance to revisit 10 U.S.C. 1034, the
19 Military Whistleblower Act, which if you turn to
20 the second page, it was enhanced in December 2013.
21 It has always covered, as you said Judge Jones,
22 protected communications. They went a step

1 further to ensure, in the middle of the page, the
2 language in the statute was clarified to ensure
3 communications of rape, sexual assault or other
4 sexual misconduct were protected communications.

5 So if you go to law enforcement or file
6 a restricted or unrestricted report, that is a
7 protected communication.

8 JUDGE JONES: Yes.

9 LTC McGOVERN: If you are then
10 retaliated against professionally, just as you
11 said, then you are covered under the Military
12 Whistleblower Act. Typically, this goes on, this
13 actually goes on to say if someone then reports
14 that retaliation, that professional retaliation to
15 the IG, the IG will handle it this way.

16 There is no specific requirement that
17 you can only report it to the IG. I think the
18 testimony you received in April as many of the
19 Services are trying to use these case management
20 groups more as the vehicle to handle retaliation.
21 So if it is the social ostracism or it's the
22 Facebook post by the peers, things like that ---

1 and that's where we will start with Topic 3 --
2 they are really trying to handle the majority of
3 these claims in the case management groups because
4 it has not been as successful going through the
5 IG.

6 And the IG just isn't -- their
7 testimony was they are not receiving a lot of
8 sexual assault reports.

9 JUDGE JONES: So, let me just ask this.
10 So I understand then what is prohibited by the
11 Whistleblower Statute, and that is supposed to go
12 through the IGs.

13 LTC McGOVERN: It --

14 JUDGE JONES: Or not?

15 LTC McGOVERN: -- can.

16 JUDGE JONES: It can. Okay. But they
17 can take anything and everything else as well? Is
18 that what you are saying?

19 MS. CARSON: It has to be an adverse
20 personnel action.

21 JUDGE JONES: Well, that's all I want
22 to know. The narrow -- the IGs have a narrow

1 jurisdiction, correct?

2 LTC McGOVERN: Right.

3 JUDGE JONES: It has to be an adverse
4 personnel action. The world of retaliation is
5 huge, and it is -- as far as I recall -- being
6 looked at in these case management groups starting
7 with, I guess it was ostracism at one end, and
8 ending with serious criminal conduct as the other
9 -- trying to, you know, possibly even murder
10 potential victims.

11 So I mean I guess all I'm saying is I
12 would still like to know what is going on with the
13 cases the IGs do -- are getting, but they are not
14 getting the most of the cases --

15 LTC McGOVERN: Correct.

16 JUDGE JONES: -- I assume, at all.

17 LTC McGOVERN: Right, yes.

18 JUDGE JONES: Those are being reported,
19 hopefully, to the command on the lower end of the
20 scale and hopefully to the, you know, criminal
21 investigative organizations on the higher end.

22 CHAIR HOLTZMAN: It's not really clear

1 where those -- where the complaints are made.

2 JUDGE JONES: No, I know.

3 CHAIR HOLTZMAN: Maybe at the lower
4 level. But in terms of the IG, I think that the
5 evidence is very clear. The IG was brutally
6 criticized by the GAO in a report in 2012, where
7 they said they were taking what, five years?

8 MS. CARSON: 526 --

9 CHAIR HOLTZMAN: Sorry.

10 MS. CARSON: -- days is the average.

11 CHAIR HOLTZMAN: To handle cases. And
12 they were handling very few. And that was the
13 story.

14 So they said bad, bad, bad. Okay.
15 Then they came and did a follow-up two years later
16 after saying bad, bad, bad. And nothing changed.

17 JUDGE JONES: Well -- and I think that
18 the number of complaints made can't possibly
19 reflect the amount of --

20 CHAIR HOLTZMAN: Of course.

21 JUDGE JONES: -- whistleblower-type
22 retaliation that exists.

1 So something has to be done to describe
2 it better or to encourage people to do more.

3 CHAIR HOLTZMAN: Well, my view is --

4 JUDGE JONES: Yes?

5 CHAIR HOLTZMAN: -- as I said earlier
6 -- you can't make a leopard change its spots. And
7 you can't take an agency that has basically been
8 focused on gross mismanagement, waste of funds,
9 abuse of authority, substantial and specific
10 danger to public health or safety for as many
11 years as the IGs have been doing that -- I'm not
12 being critical at all of them -- but that's been
13 their focus.

14 JUDGE JONES: Right.

15 CHAIR HOLTZMAN: Someone stealing
16 money, crooked contractors -- that kind of stuff
17 -- and all of a sudden give them sexual assault
18 cases and expect them to say hey, really this is
19 important. I mean, they've never been told that
20 it's important.

21 So to make them accept that it's
22 important -- maybe they will -- but this is a

1 real, I think, psychological adjustment if you
2 want. It's a major adjustment for an agency
3 that's never done that.

4 And my point is they've been given the
5 opportunity to do it -- GAO report, then a second
6 GAO report -- critical. They're not doing it.

7 And it may be a vicious cycle. It may
8 be that nobody's referring cases to them because
9 they know nothing's going to happen. And
10 nothing's going to change about that. So --

11 MR. STONE: And it also doesn't fit
12 into their mindset of how many dollars did I save?

13 CHAIR HOLTZMAN: Yes. Right.

14 MR. STONE: How many bad auditors did
15 I grab?

16 In other words, it doesn't fit into the
17 way they count accomplishments either.

18 CHAIR HOLTZMAN: Correct. That's a
19 very important point. Yes.

20 So maybe --

21 MR. STONE: So it's not countable.

22 CHAIR HOLTZMAN: -- it doesn't belong

1 there.

2 MR. STONE: Yes.

3 CHAIR HOLTZMAN: And my point is
4 they've been trying to shoehorn these cases into
5 the IG.

6 MR. STONE: And it's not working.

7 CHAIR HOLTZMAN: And it's not working.
8 So let's try something else.

9 I don't mean to be critical of the IG
10 in terms of its normal operations. I have no
11 basis for doing that. But it's not working here.

12 So my view is either we have to come up
13 with some alternative. This is my view.

14 I'm happy to try to make it work. But
15 I think they've been trying to make it work. And
16 it's not working.

17 And not only is it not working, but
18 nobody wants to go there. I mean, no SVC in his
19 or her right mind is going to make a
20 recommendation to file a report with them.

21 JUDGE JONES: Do we have any idea of
22 what we think the number of whistleblower

1 complaints would be with the definition --

2 CHAIR HOLTZMAN: Well, when you say
3 whistleblower, what --

4 JUDGE JONES: I'm talking about adverse
5 employment action because you've made a protected
6 communication.

7 VADM TRACEY: Around numbers per --

8 JUDGE JONES: Yes, ma'am.

9 VADM TRACEY: Around sexual assault.

10 JUDGE JONES: Around sexual assault.

11 MS. CARSON: No, we don't have it for
12 this. We have the total which includes people
13 who've reported gross mismanagement, people who've
14 reported -- they don't tell you.

15 CHAIR HOLTZMAN: Because they're not
16 keeping records. It's the same thing. They're
17 just not keeping records because this has never
18 been a major issue for the military.

19 MS. CARSON: -- 1,247. And of those --
20 that's how many were opened in 2014.

21 JUDGE JONES: Is this all the IG's --
22 Service and DoD?

1 MS. CARSON: Yes.

2 CHAIR HOLTZMAN: One thousand how many?

3 MS. CARSON: 1,247.

4 Let's see. The military reprisals in
5 2014, 232 were DoD IG, 407 were service IG. I
6 think these are closed. Yes. This is the total
7 closed.

8 So the number opened is 1247. The
9 number closed is 439.

10 LTC McGOVERN: The information is not
11 publicly on their website, but --

12 MS. CARSON: It is.

13 LTC McGOVERN: Well, I mean, that is.
14 But I mean as far as sexual assault --

15 MS. CARSON: They can't break out the
16 -- they told us the number when they presented it
17 to us.

18 LTC McGOVERN: In April. But it's like
19 single digits. I mean, they have very few --

20 MS. CARSON: And never substantiated
21 until this week. There's the first substantiated
22 IG reprisal case --

1 CHAIR HOLTZMAN: How about that?

2 MS. CARSON: -- which we discovered in
3 the IG newsletter that came out for October. So
4 this is all we know about it and this is what was
5 published in the October newsletter.

6 LTC McGOVERN: So over the last three
7 years, they average around 1,000 cases. And if
8 eight are sexual assault for professional
9 retaliation, this is not a large area of their
10 work.

11 When we spoke to them, they said that
12 they thought when the law changed in 2013 that
13 specified that a protected communication would or
14 does include your sexual assault report, they
15 thought maybe the numbers would go up. They have
16 tried the campaigns to encourage people to use the
17 DoD hotline. But people aren't complaining about
18 professional retaliation.

19 I think what you've heard also from
20 testimony in April and May from SVCs and victims
21 is that's not where the problem lies most of the
22 time right now, that the professional retaliation

1 isn't the big problem. It's the peer retaliation
2 that is occurring on Facebook and the social
3 media. It's not being included in group
4 activities. And it's post-acquittal after
5 someone's been acquitted. How are victims treated
6 then? And they feel like those actions are
7 sometimes retaliatory in nature.

8 So that's really, I think, where the
9 case management group discussion can go to say
10 this is a way they're trying to monitor the larger
11 portion.

12 But last time, I believe you all
13 concluded there needs to be a form. And so I
14 think we've identified the military whistleblower
15 program covers professional retaliation to make it
16 illegal. They have regulations that now have
17 defined retaliation to include this ostracism and
18 social to make it illegal and punitive.

19 So we've heard that their protections
20 are there. But it seems like what you all are
21 focusing now on are what is the investigative
22 process, and what can be done to ensure that

1 retaliation is addressed?

2 MR. STONE: You just said that -- in
3 that last one -- they have new protections that
4 they're looking at?

5 LTC McGOVERN: No, sir. You've heard
6 that under the regulations now, it's punitive to
7 --

8 MR. STONE: Right.

9 LTC McGOVERN: -- have ostracism and
10 these other types of social retaliation.

11 MR. STONE: And the IG recognizes that
12 as being within their jurisdiction or not?

13 LTC McGOVERN: No.

14 COL. GREEN: No.

15 LTC McGOVERN: It is not within their
16 jurisdiction.

17 MR. STONE: Oh, that's not within their
18 jurisdiction?

19 COL. GREEN: It's a separate
20 prohibition.

21 MR. STONE: Okay.

22 COL. GREEN: The professional

1 retaliation under the military was the
2 Whistleblower Protection Act. But by Service
3 regulation, there's --

4 MR. STONE: So whoever's going to be
5 responsible for those new regulations of
6 ostracism, et cetera -- and correct me if I'm
7 inferring this incorrectly -- if they were also
8 responsible for the professional retaliation, it
9 wouldn't be taking a lot away from the IGs because
10 they don't have many cases. So it could all be
11 substantively lumped together. It's not like it's
12 going to hurt the IGs. They're still going to do
13 99 percent of the cases they currently do, and it
14 would just move one little area to the rest of the
15 cases that it fits with.

16 CHAIR HOLTZMAN: Eight cases.

17 MR. STONE: Well, there may be more
18 than one. But all right.

19 CHAIR HOLTZMAN: I said eight cases.

20 MR. STONE: Well, assuming those
21 numbers are right. But yes --

22 MR. STONE: But one of the solutions

1 was it doesn't have to be a total solution. Maybe
2 there isn't a one-size-fits-all.

3 But I read in some of the materials we
4 received that one of the solutions is to have the
5 criminal statute -- not a whistleblower statute
6 -- but a normal criminal statute just called
7 retaliation, which would then clearly give
8 jurisdiction to --

9 MR. STONE: A new article --

10 CHAIR HOLTZMAN: Yes.

11 MR. STONE: -- in the UCMJ.

12 CHAIR HOLTZMAN: Right. Is that what
13 we read? Was it going to be a new article?

14 LTC McGOVERN: DoD SAPRO in April
15 presented an information paper which said they
16 were entertaining the thought of enumerating an
17 article to prohibit retaliation. But I believe
18 that it steered more towards making professional
19 retaliation punitive because social retaliation is
20 already covered within the regulations and then
21 punitive under Article 92.

22 So they wanted to make sure that

1 professional retaliation can be criminalized as
2 well.

3 MR. STONE: But it's already under the
4 regulations under what provision -- what article?
5 And who would investigate it -- the social
6 retaliation?

7 COL. GREEN: Well, it's a service
8 regulation that prohibits that kind of contact.
9 So it becomes a general order. And violation of
10 a general order is punishable under Article 92.

11 MR. STONE: Okay.

12 COL. GREEN: So it's a general orders
13 violation if someone engages in --

14 MR. STONE: Okay.

15 COL. GREEN: -- social ostracism --

16 MR. STONE: So it's --

17 CHAIR HOLTZMAN: And who investigates
18 that? Who's responsible for investigating that?

19 COL. GREEN: There is no standardized
20 investigation for Article 92.

21 CHAIR HOLTZMAN: See, that's another
22 issue I have. And I'll just put it right on the

1 table.

2 So you have let's say a sergeant
3 sexually assaults a subordinate. That goes to the
4 criminal investigative agencies. That's a sexual
5 assault.

6 That same sergeant then retaliates
7 against that person for reporting it. All of a
8 sudden, that goes someplace else. Why should that
9 go to a different agency?

10 LTC McGOVERN: All right. So would you
11 like to recommend, ma'am, that the MCIOs
12 investigate?

13 CHAIR HOLTZMAN: That is another part
14 of how this is being sliced and diced so that you
15 can't put your finger on accountability for this.

16 JUDGE JONES: They need to know who to
17 report that to.

18 CHAIR HOLTZMAN: Who it is reported to,
19 and why is it different? Why is there a
20 difference between the investigation of a
21 retaliation for reporting a rape and the rape?
22 All of a sudden, that's not as important?

1 I don't know. I'm --

2 VADM TRACEY: If it's the accused who
3 is doing the retaliating, in my jurisdiction it
4 wouldn't go someplace else. It would go back to
5 -- but if the more common events that were
6 reported had to do with the shipmates --

7 CHAIR HOLTZMAN: Right.

8 MR. STONE: That's right. The
9 associates -- the friends.

10 VADM TRACEY: -- retaliating against
11 the victim, you can't have all of those going to
12 your law enforcement people. You'll never get
13 done. Those are deliberately done
14 administratively, just as you would do sexual
15 harassment accusations administratively, or you'd
16 do hazing.

17 And if in the course of that you
18 determine that the event warrants being turned
19 over to some other law enforcement level for the
20 management of the issue, then you do it that way.
21 But you can't turn everything over to your law
22 enforcement organizations. Generally large

1 numbers of people who are being investigated, if
2 you're going to do that, you typically assign that
3 to a mid-grade individual to do an administrative
4 investigation.

5 Everybody gets trained in some portion
6 of their officer development in how to conduct
7 investigations. They're not all equally good at
8 doing them. And these are he-said, she-said sorts
9 of investigations in the long run. So they're the
10 more complex --

11 MR. STONE: Who would investigate it if
12 it wound up with an Article 15? In other words,
13 they got rid of it with an Article 15. Would that
14 be MCIO, or would that be somebody less?

15 VADM TRACEY: It is usually less.

16 CHAIR HOLTZMAN: What's the Article 15?

17 VADM TRACEY: It's a ---

18 MR. STONE: So the way I take it, it's
19 a misdemeanor plea.

20 JUDGE JONES: So typically the victim
21 would say they're turning their backs on me and
22 they're making nasty remarks.

1 And the victim would tell the SARC or
2 the victim might tell somebody in her command,
3 right? And then it gets talked about at the CMG.
4 Or maybe the commander hears about it and just
5 assigns someone to do an investigation. Is that
6 basically --

7 PARTICIPANT: Yes.

8 JUDGE JONES: And then it's a --

9 MR. STONE: But that's why there's no
10 good recordkeeping because it goes to different
11 people all the time, and nobody has the obligation
12 to report it.

13 JUDGE JONES: Well, CMG is the way to
14 go if it's going to ever work in terms of keeping
15 data.

16 LTC McGOVERN: Well, and if they have
17 a form like you proposed, then -- and I was just
18 informed by the Services that if it is the accused
19 retaliating against the victim, the MCIOs then do
20 maintain jurisdiction over that and add it to
21 their investigation.

22 CHAIR HOLTZMAN: Okay. So it's the

1 accused.

2 But suppose it's the accused's best
3 friend?

4 LTC McGOVERN: Right.

5 CHAIR HOLTZMAN: Then where does it go?
6 It goes to the IG.

7 LTC McGOVERN: Well, I think a lot of
8 that depends on the nature of the retaliation.

9 LTC McGOVERN: Right. So if it's --

10 CHAIR HOLTZMAN: I'm talking about
11 professional retaliation.

12 LTC McGOVERN: Oh.

13 CHAIR HOLTZMAN: Suppose it's the
14 colonel who's the best friend of the sergeant.
15 And that person takes retaliatory action. That
16 goes to the IG.

17 LTC McGOVERN: It can. Yes, ma'am.

18 CHAIR HOLTZMAN: Right. So that's --

19 LTC McGOVERN: Or it can go to the
20 commander above for some sort of investigation.

21 MR. STONE: And no defendant who's
22 either not yet been found guilty or sentenced or

1 even has been sentenced and is hoping for some
2 kind of leniency from a parole or pardoning board
3 is getting engaged in the retaliation. They're
4 always going to hint to their buddies who are on
5 the outside and not inside and don't have to keep
6 their noses clean to say what an outrageous thing,
7 blah, blah, blah, blah, blah. And they'll
8 instigate it, but they won't actually do it.

9 So I think you're absolutely right in
10 saying that it's typically the associates. That's
11 the way it gets done.

12 CHAIR HOLTZMAN: The only thing I'm
13 just saying about this is that the retaliation is
14 the biggest reason given for not reporting. And
15 we have a very good system now in place, I think
16 -- the military put in place -- for encouraging
17 reporting of the underlying sexual assault or
18 sexual crime. But I think this is a very diffuse
19 kind of system that you have for retaliation and
20 who's really responsible.

21 The CMG -- who is that? I mean, I
22 don't know. But --

1 MR. STONE: You have to go to --

2 LTC McGOVERN: Yes. You have to go to
3 issue 3.

4 CHAIR HOLTZMAN: Who is the person?
5 Who is the --

6 MR. STONE: Is that issue 3?

7 LTC McGOVERN: On page seven, yes.

8 It's a multi-disciplinary group that
9 meets each month. It includes the installation
10 commander, the SARC for the installation, and then
11 the people appropriate for that case to include
12 the SARC, the SARC VA, the military criminal
13 investigator, the other law enforcement,
14 healthcare provider, mental health, counseling
15 services, chaplain, command legal representative
16 or SJA and the victim's immediate commander.

17 So they all sit around the table and
18 review the case file.

19 MR. STONE: So do we therefore want to
20 say the FAP or SARC VA -- victim assistant --
21 that's going to be the person they report to?

22 That's what you want. You want a

1 specific category of person responsible.

2 CHAIR HOLTZMAN: Yes. I want someone
3 that the victim can say who do I get relief from.
4 Who do I go to?

5 MR. STONE: Right.

6 CHAIR HOLTZMAN: And if nothing's
7 working, who do I get relief from?

8 I mean, who is responsible for that?
9 Not just some big board or some five or six
10 people. Maybe I'm wrong. Maybe I don't
11 understand the system well enough.

12 JUDGE JONES: Well, I think we started
13 talking about this when we started talking about
14 -- so the victim has managed to report the sexual
15 assault and then that's it. But it's not it.
16 We're now trying to make sure that there's a
17 question on the form. There is already a question
18 on the form and don't forget -- or there's a
19 statement -- if you're retaliated against, you
20 should report that.

21 And so, the concentration has to be on
22 having the victim's report at a minimum to the

1 SARC, and maybe they'd report to their commander
2 if they trust the commander if we're talking about
3 ostracism and sort of command stuff that's going
4 on.

5 But I think if we can get victims
6 educated that retaliation is part of the ongoing
7 reporting system because of their sexual assault,
8 you'll get more reports. And I've only seen the
9 specifics of the Air Force CMG procedure. But it
10 is true that the SARC is there, and I guess
11 they're the deputy chair of the committee or
12 something in each one. And they will report right
13 then and there. There's also now a report of
14 retaliation by this victim.

15 And then I guess at that point, you've
16 got your installation commander and you've got
17 investigators, and they can make a decision about
18 how they're going to go forward.

19 MR. STONE: Okay. That begs the
20 question though whether when you show up to the
21 SARC or the FAP victim advocate, they say oh, this
22 is a retaliation, not sexual assault? I'm the

1 wrong person to report it to. That's the
2 question. Are they're always going to say yes,
3 it's not a sexual assault. It's just ostracism.
4 But yes, that's included now within my portfolio.
5 That's the question.

6 VADM TRACEY: For a victim to be able
7 to report through to any route the victim feels
8 comfortable reporting to --

9 JUDGE JONES: Correct.

10 VADM TRACEY: -- you want the SARC to
11 persist in whether they are experiencing any of
12 the surrounding issues to a sexual assault
13 reporting case. And if the answer is yes, I'm
14 being ostracized or excluded -- what have you --
15 you want the SARC to bring that forward into the
16 case management group because the line leader is
17 the one who has to act.

18 MR. STONE: I totally agree.

19 I guess what I'm asking is do we need
20 to enlarge the portfolio of the definition of what
21 the SARCs and the FAPs or all those people who --

22 MS. CARSON: It's already included.

1 MR. STONE: It's already included.
2 It's clear to everybody that they can go to them
3 with retaliation.

4 MS. CARSON: It's in the 6495 --

5 LTC McGOVERN: We provided you with the
6 new instruction.

7 MR. STONE: It's in the new
8 instruction?

9 LTC McGOVERN: It was updated in July.

10 MR. STONE: Okay.

11 MS. CARSON: That you go to the SARC.

12 LTC McGOVERN: And one of the questions
13 that the commander is required to ask is is there
14 any retaliation in this case, so the case
15 management group, which is an improvement or an
16 addition that was made in July to the regulation.

17 MR. STONE: Okay.

18 LTC McGOVERN: And they also have their
19 SVCs who we can bring back to speak to you again.
20 But going back through their testimony -- and we
21 attended a CLE on military sexual assault
22 yesterday -- and SVCs there spoke entirely about

1 how they're dealing with retaliation with their
2 clients.

3 MR. STONE: Okay.

4 LTC McGOVERN: So that is what they are
5 all talking about and sharing best practices.

6 The biggest concern with those victims
7 was social media -- retaliation on social media.
8 If they unfriend you, is that actionable under the
9 UCMJ? No. So the SVC is there to explain people
10 aren't nice always. And this is how I can help
11 you. But legally, this would have to happen or
12 you have your expedited transfer option.

13 CHAIR HOLTZMAN: But the other thing
14 that's not happening now is that there's no
15 tracking of this --

16 LTC McGOVERN: Right.

17 CHAIR HOLTZMAN: -- so that, and you
18 could be right. The commander has to ask is there
19 retaliation. And the SARC is the deputy of this
20 committee. But who's keeping track of the numbers
21 and what's happening in any case? Where are the
22 statistics and who's following up to make sure?

1 I mean, that's part of the report. It
2 seems to me it's part of the -- my opinion -- it
3 should all be part of the initial complaint. It
4 should be on that document that follows that
5 complaint so that you know that's what happens to
6 a human being when they go through the system.
7 And this is part of it.

8 So somehow, that information has to be
9 tallied and reviewed so there's real
10 accountability for it. I mean, I know that you
11 can't just solve everything. But there has to be
12 some idea.

13 The victim has to be told what steps
14 have been taken, what we've tried to do, maybe if
15 they're not sufficient that they can then still
16 have some opportunity to ask for an expedited
17 transfer or things like that.

18 MR. STONE: That's issue 3. That's
19 exactly what they're laying out for us here.
20 That's what's on page 70. And I think we all
21 agree with you.

22 CHAIR HOLTZMAN: All right.

1 So what do we do now? I mean, take us
2 through. What are we up to -- point number 3?

3 We're going to get more information on
4 points 1 and 2 about the IG. Are points 1 and 2
5 IG?

6 COL. GREEN: But I guess, ma'am, my
7 sense of your discussion now is that I'm not sure
8 does the Panel really need more information about
9 the IG? Or is the Panel inclined it would appear
10 to recommend that instead these types of cases
11 should be dealt with through an alternate process
12 outside of the IG?

13 JUDGE JONES: I am kind of sympathetic
14 towards that latter proposal because I think the
15 Chair is right that we don't see any results. And
16 whatever the reasons -- and I don't attribute bad
17 motive -- they're not the right agency to be doing
18 it, which is a reason to let them come in if they
19 want to keep the jurisdiction --

20 CHAIR HOLTZMAN: Right.

21 JUDGE JONES: -- or explain to us
22 what's going on.

1 But there doesn't seem to be anything
2 good happening there in terms of handling
3 whistleblower complaints unless either there are
4 only eight people who think that they've been
5 retaliated against professionally.

6 CHAIR HOLTZMAN: What are the numbers
7 of cases before the CMGs?

8 MS. CARSON: We have the statistics
9 from the SARCs who appeared before us. I remember
10 the Camp Lejeune SARC -- a marine -- said that
11 they have 60-some cases at any one time.

12 And then she said out of those, there
13 was only a small number of those that she had any
14 kind of -- she said the more common thing she'll
15 hear is victims are experiencing interference with
16 their healing for whatever reason, but they don't
17 want the SARCs to do anything. They're afraid.
18 They don't want anybody to do anything.

19 She said there was one case at Camp
20 Lejeune -- it's under actual investigation and it
21 involves both professional and sexual assault --
22 and several of the SARCs, they all seem to have

1 one case.

2 And we heard from different commanders,
3 NCOs and SARCs. And everybody can tell us about
4 one case. And a lot of those seem to have both
5 professional and social retaliation reports.

6 COL. GREEN: And in contrast, the
7 victims' counsel that you heard from when they
8 described their caseloads, all of them described
9 multiple clients who they had disclosed to them
10 that they were experiencing issues with
11 retaliation.

12 Again, instructive obviously -- and
13 then that does go to a victim's willingness to
14 talk obviously to someone that I have an attorney-
15 client relationship with versus someone who is
16 working for the command and my willingness to
17 discuss it with them.

18 MS. FRIED: It might be helpful to
19 understand a little bit more about the history of
20 the IG and its role with reprisal.

21 Part of the IG's benefit is that it's
22 independent from command. And maybe their thought

1 process was that adverse personnel action is
2 something that the IG could better address because
3 of its independence. And I realize that may not
4 be happening.

5 But I'm just wondering if there's some
6 benefit to hear from the IG whether or not the
7 thought process behind that and whether they can
8 address that.

9 CHAIR HOLTZMAN: But I think you make
10 a very good point, Maria. But remember the MCIO
11 in these cases is independent.

12 LTC McGOVERN: They actually fall under
13 the IG, too, in all the Services except for the
14 Army so that they can be in that stovepipe
15 independently.

16 MS. FRIED: I think though a
17 Servicemember may not perceive it that way.

18 MS. CARSON: The service IG is listed
19 as a tool of the command. The DoD IG may be
20 completely independent, but the Service IGs are
21 what the commands use to investigate whatever's
22 coming down the pipe that they think is a problem.

1 COL. GREEN: And at the installation
2 level, the IG is a direct conduit to the commander
3 to oversee issues at the installation.

4 And honestly, we talk about DoD IG and
5 Service IG and installation IG as being distinct
6 entities, but many of these investigations may be
7 conducted on behalf of the lowest level IG that is
8 nearest the incident. And then obviously, the
9 resolution of that may need to rise to a higher
10 level of IG.

11 But to the face of the victim or to the
12 face of somebody who walks in the IG, they're
13 walking into the installation IG office in a
14 majority of cases.

15 MR. STONE: Will the case management
16 group ever refer it to one of those low-level IGs
17 or not? Can it go that route in case --

18 MS. CARSON: Yes, they can. I mean,
19 the commander can refer it. They don't refer it
20 themselves.

21 They can say I think this is
22 professional -- in SARC -- they should tell the

1 victim that they should report this to --

2 MR. STONE: Okay. But they don't do it
3 themselves?

4 MS. CARSON: Right.

5 MR. STONE: Okay.

6 MS. CARSON: You have to report it
7 yourself.

8 VADM TRACEY: According to this write-
9 up, the CMG chair must forward information on
10 retaliation to the proper authority, such as MCIO,
11 IG or EO.

12 So according to this write-up, it is
13 the chair and not the victim who's doing this.

14 MS. CARSON: Well, that's the policy.
15 So yes, that's the policy. Yes.

16 I mean, they don't really have a way to
17 do that.

18 VADM TRACEY: What's the EO? Why don't
19 they have a way to do that?

20 MS. CARSON: The EO is the equal
21 opportunity.

22 VADM TRACEY: Okay.

1 JUDGE JONES: So is there no reporting
2 because nobody thinks that they can go to someone
3 independent?

4 I mean, I take your point, Maria. You
5 think of the Inspector General as somebody who is
6 independent from everybody else. And that's why
7 you get to go there.

8 VADM TRACEY: It seems you could go to
9 the IG or someone who's --

10 JUDGE JONES: Right. That's what I'm
11 saying.

12 VADM TRACEY: Most of these victims are
13 fairly junior personnel. No clue who the IG is.
14 It's just some other officer who's going to come
15 in and conduct another inquiry.

16 JUDGE JONES: Right. So maybe we need
17 a different group for these particular types of
18 retaliation.

19 LTC McGOVERN: I hate to rely on my own
20 personal experience, but if you file a
21 Congressional to your Congress Member or go to the
22 IG -- I mean, it's published to Servicemembers

1 that that is your channel out of the command to
2 file a report. So I do --

3 JUDGE JONES: Go directly to the IG.

4 LTC McGOVERN: -- believe that they are
5 educated that this is a hotline, that you can
6 remain anonymous, you can use this.

7 I mean, I think DoD has tried to set it
8 up so that people will understand.

9 JUDGE JONES: So there's either a --

10 VADM TRACEY: To a hotline. They don't
11 know who they're calling. All they know is that
12 it's a phone sexual abuse hotline or the sexual
13 harassment hotline.

14 So if you set that up for them, then
15 perhaps. I've been gone for a while but I know I
16 never trained a sailor to call the IG. I trained
17 them to call the hotline.

18 CHAIR HOLTZMAN: Well, that's pretty
19 important.

20 LTC McGOVERN: So you all have proposed
21 that there should be a form. And now --

22 JUDGE JONES: I thought there was a

1 question on the regular form.

2 MS. CARSON: There is notice. You have
3 to give them notice.

4 JUDGE JONES: No. It's only notice.
5 Okay, yes. So there should be another form.

6 LTC McGOVERN: A form that they can
7 file to multiple channels whether it's a chaplain
8 SVC, SARC -- whoever.

9 So then the question would be who would
10 record that data is Ms. Holtzman's concern, and
11 who's going to investigate the claim -- right?
12 The MCIO, the IG or the command?

13 JUDGE JONES: So the victim tells
14 whomever they trust. And then that person would
15 fill out the form?

16 CHAIR HOLTZMAN: Well, I think that
17 person would probably go to the SARC.

18 LTC McGOVERN: Provide that form. Yes.

19 CHAIR HOLTZMAN: That would make the
20 most sense. That person would go to the SARC who
21 would record it.

22 JUDGE JONES: Right. Well then, maybe

1 the --

2 CHAIR HOLTZMAN: And then the SARC
3 could refer it to the investigator -- the CMG or
4 the MCIO.

5 JUDGE JONES: Does it makes sense
6 though that if you already have a form started on
7 a sexual abuse victim that you would have a
8 section where you could fill in any post-
9 investigative or whatever you want to call it --
10 post-incident retaliation -- rather than looking
11 for more than one form.

12 I think I heard one of you suggest
13 that. And it seemed brilliant to me.

14 MR. STONE: Then you are going to have
15 trouble tallying it then. You're going to have
16 two different forms and they're not going to know
17 what to tally. Plus, you're going to have
18 restricted and unrestricted.

19 JUDGE JONES: No, I'm saying one form.

20 PARTICIPANT: How can you evaluate it
21 if it's restricted.

22 CHAIR HOLTZMAN: That's what I said.

1 Yes, that it should be one form and go with the
2 person.

3 JUDGE JONES: And then if the first
4 report is actually a retaliation report, okay.
5 You've got a retaliation section on this one form.
6 That's all.

7 And who knows? That may elicit the
8 actual sexual assault report at the same time.

9 It just seems to me it's best to have
10 one piece of paper.

11 MR. STONE: I want to know whether
12 there's going to be something to capture the
13 retaliation on a restricted form. Because that's
14 the person --

15 JUDGE JONES: On the restricted?

16 MR. STONE: Yes. Because that's the
17 person who's afraid to start an action.

18 JUDGE JONES: An action on the actual
19 sexual assault. But on the restricted ones, they
20 have those numbers.

21 LTC MCGOVERN: You all are I believe
22 looking at retaliation in response to making a

1 sexual assault report.

2 JUDGE JONES: Oh, I am looking at it
3 much more broadly.

4 MR. STONE: See, it's gotten around and
5 it may be on Facebook and you're afraid to make a
6 report and you're still getting retaliated
7 against, especially to chill you from making a
8 report.

9 I mean, that's what's bad. And those
10 are the women who are not going to report and then
11 going to leave the service.

12 VADM TRACEY: Are you trying to address
13 a way to capture all reports of retaliation, no
14 matter what the incident is that's causing the
15 retaliation and then --

16 LTC McGOVERN: No. A sexual assault
17 incident allegation.

18 JUDGE JONES: I'm just saying if the
19 person already has a form going because they've
20 reported it.

21 VADM TRACEY: It's an element in the
22 case.

1 JUDGE JONES: In the case. Exactly.

2 CHAIR HOLTZMAN: And I think also there
3 should be some kind of requirement when the SARC
4 or whoever it is -- assuming it's the SARC that
5 follows up -- should be calling this person once
6 a month or something saying how are you doing.
7 Are you getting retaliated against? Is everything
8 okay? Can I help you with something?

9 MS. CARSON: They're supposed to be
10 doing that before the case management group for
11 unrestricted reports. There's no Case management
12 groups are not dealing with restricted reports.

13 CHAIR HOLTZMAN: Okay. But
14 unrestricted reports are supposed to be followed
15 up on.

16 MS. CARSON: The SARC is supposed to
17 follow up and ask --

18 CHAIR HOLTZMAN: And where is that
19 reported?

20 MS. CARSON: The Air Force has it
21 clearly defined in their policy. And in the
22 6495.02, they allude to that, too, that the SARC

1 has to be talking to the victim.

2 CHAIR HOLTZMAN: Well, if one
3 government agency --

4 MS. CARSON: -- fill out the forms and
5 the case management group would help them.

6 CHAIR HOLTZMAN: Well, I think if one
7 of the services is doing that, that's a good model
8 for the others, isn't it?

9 But I think once you start keeping
10 track of the numbers and what's happening, you
11 might have a much better sense of how well the CMG
12 program is working and what's not working about
13 it, if it's not.

14 JUDGE JONES: Yes. Well, we might also
15 be able to figure out the breadth of professional
16 retaliation and why it isn't being reported or is.
17 I don't know.

18 And maybe, it should take a different
19 reporting though if we perceive that they're
20 worried about it going to the command and which is
21 a natural concern if it's someone in the command
22 who's doing it.

1 I agree with you, Admiral. I don't
2 know if just calling the hotline would make me
3 feel secure to report that somebody in the command
4 is retaliating against me.

5 VADM TRACEY: So if we can just plan a
6 scenario.

7 So the SARC becomes informed that a
8 victim they've been managing is reporting
9 retaliation. A SARC needs the specifics of that
10 report. And from those specifics, he's in a
11 position to evaluate do I report this to the chair
12 of the case management group or is the chair of
13 the case management group a part of the
14 retaliation process here, in which case, the SARC
15 is somebody you expect to be able to go the IG
16 route.

17 CHAIR HOLTZMAN: Or an MCIO route.

18 See, I'm very skeptical about the IG
19 route.

20 VADM TRACEY: The MCIO is probably not
21 empowered to investigate the commander's personnel
22 retaliation.

1 LTC McGOVERN: If it becomes a punitive
2 article, then it would be.

3 JUDGE JONES: But even if it did --

4 LTC McGOVERN: It's a crime.

5 JUDGE JONES: -- do we want them doing
6 the investigation? Not because most of them
7 wouldn't do a good job, but because of the
8 perception of the victim.

9 CHAIR HOLTZMAN: Well, the MCIO though,
10 I think they've been -- maybe I'm wrong -- but my
11 --

12 VADM TRACEY: The chair of this group
13 is the installation commander -- the senior person
14 on the installation. So the MCIO on the
15 installation is not likely to do the
16 investigation. You'd go up a level to do the
17 investigation.

18 CHAIR HOLTZMAN: Well, but if there's
19 a sexual assault, the MCIO gets to do the
20 investigation and the commander can't interfere
21 with that.

22 MR. STONE: But the sexual assault

1 isn't something that is like word-of-mouth leaked
2 information that results in retaliation. It takes
3 a real physical act. So it's going to be way more
4 rare that the person up the line who is the
5 commanding officer is going to be involved in the
6 sexual assault.

7 It's not quite the same with leaking
8 -- oh, so-and-so is still complaining about
9 retaliation. And then the retaliation is even
10 more to get her to stop -- or him -- to stop
11 complaining. It's a little different kind of
12 thing.

13 LTC McGOVERN: I think Rep. Holtzman
14 at the last meeting had mentioned the MCIOs are
15 trained in being sensitive to sexual assault
16 victims and trauma when you all were discussing
17 the IGs before.

18 So after reading the transcript last
19 time, my impression was that you were leaning
20 towards having the MCIOs be the button to push
21 when it comes to investigations.

22 CHAIR HOLTZMAN: I think the IGs don't

1 have the background -- the expertise. They may
2 have just generalized backgrounds.

3 But there's all kinds. I mean, the
4 MCIOs now are being trained specifically to handle
5 investigations involving sexual abuse victims
6 because of the kinds of experiences that they've
7 had. And everybody understands we need to have
8 specialized training.

9 Well, we don't have that in the IG's
10 office, as I understand it. And maybe you
11 shouldn't because there are only eight cases. So
12 I don't know that it makes any sense.

13 So I mean -- sorry, Admiral, I'm
14 harping on that point. But I seem to be like in
15 that rut. I don't see them really as a solution
16 here for a lot of reasons.

17 But I think they have --

18 MR. STONE: Do you think it should be
19 a subgroup of the MCIOs? In other words, you were
20 sort of hinting to that before that maybe we need
21 somebody with some specialized training. Maybe
22 that would take care of --

1 CHAIR HOLTZMAN: Well, the MCIOs could
2 get the specialized training.

3 MR. STONE: But generally, there's no
4 --

5 LTC MCGOVERN: They have special victim
6 units specifically to investigate sexual assaults.

7 MR. STONE: Okay. They already have
8 that. Okay. All right. They have specialized
9 units.

10 VADM TRACEY: Maybe its relations are
11 different from the way the rest of the
12 investigative arm on the installation is part of
13 the commander's team. And they wouldn't be asked
14 to investigate their own commander. Someone else
15 will investigate that commander.

16 That's all I'm saying is you couldn't
17 turn it over to the MCIO if the CMG chair is part
18 of the retaliation. The MCIO on that installation
19 can't be the investigating organization.

20 MR. STONE: So if you did make it the
21 MCIOs, it would be with the understanding that
22 they have the option when they feel there's a

1 conflict to turn it over to an IG?

2 CHAIR HOLTZMAN: No. Give it to the
3 higher up at the MCIO, and they send some people
4 from Idaho over to Tampa to handle it. That's
5 all. Something like that.

6 MR. STONE: In other words, they'd have
7 an option when they felt there was a conflict to
8 bump it somewhere else where there's no conflict.

9 CHAIR HOLTZMAN: You wouldn't even have
10 an option.

11 JUDGE JONES: The option now, if you
12 hear about true whistleblower retaliation is,
13 you're supposed to send it to the IG. Am I at
14 least that correct?

15 So I still don't know why we shouldn't
16 hear from the IG and see how they feel about all
17 this.

18 LTC McGOVERN: We did bring them in.
19 And they spoke about their processes in the few
20 cases that they have.

21 I just don't know how much more they'll
22 have to offer, ma'am.

1 JUDGE JONES: Okay.

2 CHAIR HOLTZMAN: We could send them a
3 written interrogatory, couldn't we?

4 LTC McGOVERN: Yes, ma'am.

5 CHAIR HOLTZMAN: I wouldn't want them
6 to come in. I don't mean an interrogatory in a
7 formal way --

8 LTC McGOVERN: I do think that some of
9 the issues on the table are if there is a punitive
10 article for professional retaliation, then MCIOs
11 are investigating crimes.

12 JUDGE JONES: Yes, but that doesn't
13 solve the problem though -- investigating your own
14 installation where you report to the commander,
15 right?

16 CHAIR HOLTZMAN: The MCIOs must have
17 some procedure where if there's a conflict of
18 interest --

19 LTC McGOVERN: Sure.

20 COL. GREEN: They do.

21 LTC McGOVERN: Just like the JAG
22 offices. Right.

1 COL. GREEN: It's referred to a neutral

2 --

3 CHAIR HOLTZMAN: Yes.

4 COL. GREEN: -- another arm of the
5 MCIO.

6 But the issue I think is across the
7 full spectrum of retaliation from social ostracism
8 up to criminal obstruction, whether the panel
9 believes that in every one of those cases is the
10 MCIO the appropriate investigating agency or
11 whether there should be some discretion within the
12 system to allow different responses based on the
13 level or scope of scale of retaliation.

14 JUDGE JONES: Yes. I thought what
15 Admiral Tracey said was right. There aren't
16 enough MCIOs to go out and investigate every
17 complaint of ostracism or some of the lower level
18 -- which are really sort of command -- I would
19 hesitate to call it climate -- but that kind of an
20 issue, and that those should not be assigned.

21 There should be discretion. Maybe
22 that's really the best way to put it. But I

1 wouldn't in the first instance go to -- and I also
2 seem to remember that a lot of these investigative
3 agencies are overloaded.

4 COL. GREEN: Right.

5 JUDGE JONES: They're pulling in people
6 that are not even full investigators or working
7 hard and they're training them as they go to help
8 out in some of these installations.

9 So I don't know that we can burden them
10 with some of the types of retaliation claims we're
11 getting.

12 COL. GREEN: Each of the MCIOs has
13 thresholds at which they say it requires a minimal
14 level of criminality at which point they will
15 investigate. If they don't, then it's the local
16 law enforcement agency of the installation that
17 generally takes responsibility and does the
18 investigation.

19 And if it doesn't reach that level,
20 then as Admiral Tracey noted, then it's a
21 commander-directed investigation internally from
22 the commander.

1 VADM TRACEY: And the power of that is
2 you don't have to have admissible evidence to take
3 action on the basis of that kind of an
4 investigation. You're actually measuring command
5 climate. You can respond to things that are
6 indicative that there's a pattern. There's an
7 investigator who's going to look for evidence they
8 can bring forward to justify and press charges.

9 JUDGE JONES: And you're acting as a
10 commander.

11 VADM TRACEY: That's right. It kind of
12 goes with the job.

13 CHAIR HOLTZMAN: Now do you need more
14 trained people? Or do you need people who are
15 trained in handling these retaliation cases?

16 VADM TRACEY: When we did sexual
17 harassment and hazing, those became top-of-the-
18 line issues, sort of a recalibration of what this
19 looks like, why it matters, how it's a breakdown
20 of command climate and leadership
21 responsibilities. Those were parts of GMT upgrade
22 for people who are going to do investigations.

1 And there's value in doing that around these sorts
2 of issues.

3 CHAIR HOLTZMAN: So what's the
4 takeaway? What's the bottom line about that?

5 VADM TRACEY: You could upgrade the
6 training for people who are going to do --

7 CHAIR HOLTZMAN: So that's one of the
8 things you would do. Do you think that makes
9 sense?

10 VADM TRACEY: Yes.

11 JUDGE JONES: And the other issue,
12 which is the professional retaliation, is unique.
13 It doesn't -- at least the reports on it are not
14 coming in. And that's a bad sign probably.

15 But I think a recommendation to do this
16 kind of training is perfect for a vast amount of
17 the kinds of retaliation apparently that we're
18 hearing about.

19 And I don't know what we would want to
20 recommend with respect to professional
21 retaliation. At the moment, it's supposed to go
22 right to the Inspector General.

1 So I guess I don't know. I don't know
2 what to say to that. Maybe if we encouraged more
3 reporting, they'll do more work. I just don't
4 know.

5 VADM TRACEY: Sorry. It's in my bones
6 that it belongs with the IG. That's the
7 independent arm that can take on -- people can
8 take serious professional retaliation of pretty
9 senior people. And so you need the independence
10 and the gravitas of the IG to carry out those
11 investigations.

12 CHAIR HOLTZMAN: But they're not doing
13 them.

14 So in theory, Admiral, you're 100
15 percent right. But in practice, nobody's going
16 there for reasons that I don't understand.
17 They're not bringing the cases, and they're taking
18 500 days to handle these cases to begin with.

19 So, yes, theoretically, they're
20 independent. But the MCIOs can be independent in
21 the same way. They are with regard to
22 investigations on the sexual assault cases. And

1 if it somehow turns out the commander is involved,
2 they still can investigate. Maybe they have to
3 use the procedure that Kyle mentioned where they
4 have to go outside.

5 But the MCIOs can't be interfered with
6 either by the commander, theoretically, in the
7 sexual assault cases.

8 And plus, the MCIOs, in those
9 professional cases, have training. They are being
10 trained. Maybe not trained in retaliation, but
11 they definitely are being trained in how to deal
12 with sexual assault victims.

13 That we know, right? Barbara, maybe
14 you heard that?

15 JUDGE JONES: Oh, yes. Absolutely.

16 CHAIR HOLTZMAN: So they have the
17 training that the IGs don't have about this. Now
18 maybe you can train the IGs. But they're already
19 undergoing that kind of training all the time
20 because they deal with these cases. They know
21 these victims.

22 I don't know. So I mean, I think in

1 theory, you're absolutely right. But in practice,
2 I'm skeptical about that as a solution.

3 JUDGE JONES: Well, you know one
4 problem for the IGs -- I don't know this -- I'm
5 just speculating -- may be that they don't know
6 enough about this one area -- professional
7 harassment.

8 And so it may not be a lack of will.
9 They may just not really understand --

10 CHAIR HOLTZMAN: Yes. Well, that's
11 what I'm saying. It's not --

12 JUDGE JONES: -- the military enough or
13 it's not a priority.

14 But I'm assuming that if there was
15 someone sent from the Department of Defense IG, he
16 would get all the cooperation -- or she would get
17 all the cooperation -- they ask for in trying to
18 investigate something. Or at least, they could
19 try. And they should be given it.

20 I guess it's just difficult to know
21 what to recommend here. A new agency through the
22 IG? I don't think so. Who knows what we'd get?

1 More money for the current IG's office
2 and a specialized group of them to take a look at
3 this? I don't know.

4 VADM TRACEY: So are we revisiting
5 Issue No. 2 or are you doing Issue No. 3?

6 JUDGE JONES: I'm sorry, did we decide
7 No. 2? I don't know. What did we decide?
8 Whatever we decided, period, about IGs -- nothing?

9 LTC McGOVERN: Well, you are getting
10 additional information in red to get you more
11 information on the IG, but it does play --

12 JUDGE JONES: Well, I mean, I would
13 love to hear more information from them. And
14 then, I guess what is recommended, maybe we should
15 send them something and, then, they can write back
16 to us. I would like more information. Maybe they
17 have a suggestion.

18 MS. CARSON: The GAO report has quite
19 a bit of information just on the quality of the
20 reprisal investigations overall, not --

21 VADM TRACEY: And they're not
22 impressed, right?

1 MS. CARSON: That's right. They said
2 -- this is the statistic that stuck with me --
3 that the DoD IG Guidance requires investigators to
4 interview the Servicemember for all complaints,
5 the one who makes the complaint, during the intake
6 process, which is your filing of the report.

7 The GAO estimates that 59 percent of
8 Service preliminary inquiry case files were
9 missing evidence of a Servicemember interview, and
10 10 percent of the full investigation case files
11 were missing a Servicemember interview.

12 VADM TRACEY: They are not doing their
13 job.

14 CHAIR HOLTZMAN: I think you're right.
15 I mean, they get probably measured on the amount
16 of money they recover, and they aren't recovering
17 money here.

18 MR. STONE: Right. It's hard to
19 measure success.

20 CHAIR HOLTZMAN: Right. How do they
21 get awarded? So, I don't know; I'm just
22 speculating. Maybe that's completely unfair to

1 them. I don't mean to be unfair, but you have two
2 GAO reports.

3 And this is a heavy-duty issue. It has
4 been in the press. The American people are
5 concerned about it. And they still seem to be
6 taking no steps that are --

7 MR. STONE: And frankly, I don't think
8 you can expect them to come in here and say, "Yes,
9 we're not able to do this. Give it away." I
10 don't think they're going to say that.

11 CHAIR HOLTZMAN: Right.

12 MR. STONE: That's why I don't think
13 it's useful. They tell you what they are doing
14 rather than what they really can't do. That's
15 expecting in the public forum more than I think we
16 can reasonably expect. So, I think we can go
17 based on what we've gotten to recognize. It's
18 just not something that's getting done.

19 And then, I don't know. I don't know
20 how you feel about this. Maybe the Staff, having
21 reviewed all the documents and heard us, maybe
22 they want to give us some alternates, give us two

1 or three alternates to look at for the next
2 meeting, as to how a good process would, alternate
3 processes to report, to investigate, and whatever,
4 and let you guys give us a couple of options to be
5 able to wrestle with. You hear what our concerns
6 are.

7 LTC MCGOVERN: Well, I think that's
8 where we are hoping to be now, sir.

9 MR. STONE: Okay.

10 MS. FRIED: I think the Panel has come
11 up with those options, Mr. Stone, the
12 alternatives.

13 LTC MCGOVERN: Right, and that Rep.
14 Holtzman and Judge Jones have said to come up with
15 this form. Admiral Tracey said you can file the
16 form with anyone.

17 We all are agreeing that the SARCs
18 would be a good place to collect that information
19 to tie it back to the original report. So,
20 whether the investigator, then, is a command
21 investigation, MCIO, or IG, discouraging the IG,
22 those are really the three investigation options

1 that we're getting hung up on.

2 CHAIR HOLTZMAN: Well, but we solved
3 one problem. On the CMG, the Admiral suggested
4 special training for people who were going to be
5 investigating retaliation. So, that is a
6 specific --

7 LTC McGOVERN: Oh, Madam, that's not
8 the CMG. The CMG is a monitor group. It's a
9 management group, a Case Management Group.

10 CHAIR HOLTZMAN: Oh, okay. Okay, I'm
11 sorry, but the investigative people that the
12 commander would use to investigate cases of
13 retaliation, they at the very minimum need to have
14 specialized training for them.

15 LTC McGOVERN: Or a specialized guide
16 probably.

17 CHAIR HOLTZMAN: Didn't we agree to
18 that? We discussed that, right?

19 LTC McGOVERN: Yes.

20 CHAIR HOLTZMAN: I don't mean to
21 misstate your position, Admiral.

22 LTC McGOVERN: Good. That's helpful

1 for report writing. And then, so it is up to you
2 to decide if you want to make any recommendations
3 as to the appropriate place to investigate these
4 and, then, how to utilize the Case Management
5 Groups to monitor these cases to make sure that
6 they are being resolved in a timely manner and
7 that the victim is getting the services that they
8 need, is where we're at.

9 MR. STONE: I don't know if I'm not
10 getting it. Maybe I'm not getting it, but are the
11 two options IG and MCIO? Are those the two
12 options or is there a third option?

13 LTC McGOVERN: And the command
14 investigations. So, if you have someone who goes
15 to their SVC and says, "I was unfriended by all of
16 the accused's friends on Facebook" --

17 MR. STONE: Right, "everybody else in
18 my unit, everybody."

19 LTC McGOVERN: "I'm being retaliated
20 against" --

21 MR. STONE: "They don't talk to me."
22 Right.

1 LTC McGOVERN: Right. That's not
2 actionable under the UCMJ.

3 MR. STONE: Right.

4 LTC McGOVERN: What do they do? So,
5 you all propose there is a form or there is some
6 sort of communication that goes with a commander
7 inquiry. Is there a conspiracy against this
8 individual or is it a matter of a commander just
9 sitting down with some people to make sure that it
10 doesn't escalate? That's what we heard from NCOs
11 before. So, some things are low level for command
12 investigation. If it rises to a criminal level,
13 the MCIO is --

14 JUDGE JONES: Right, and the only issue
15 is, what do we do about professional retaliation,
16 which doesn't seem to be getting the right
17 treatment from the IG's Office? Is that fair?

18 MR. STONE: So, we should recommend
19 pulling that one piece and putting it with the
20 other two?

21 JUDGE JONES: Pulling out the IG
22 case --

1 MR. STONE: Pulling the professional
2 retaliation --

3 JUDGE JONES: And doing what?

4 MR. STONE: -- the sexual assault
5 reporting, and putting it with the other two,
6 meaning either command reporting and/or MCIO,
7 moving it across the table to them. Since they
8 are doing the lesser forms of sexual assault
9 reporting retaliation, that would also be within
10 their bailiwick because it would be the same
11 thing, except the person would say, "Not only did
12 they exclude me and unfriended me and don't talk
13 to me, but, by the way, for the first time in my
14 career all my personnel evaluations are
15 unsatisfactory."

16 JUDGE JONES: Well, I mean, there is
17 either very little professional retaliation going
18 on or people are afraid to bring it up or don't
19 want it advanced, presumably because they're
20 worried it's just going to stay -- it's in the
21 command and it's not going to help to tell the
22 command, unlike the other issues. I don't know.

1 So, that's why people created this jurisdiction
2 for the IG, presumably, to begin with.

3 MR. STONE: I think they're going to
4 have exactly the same feeling, though, about
5 reporting the slightly lesser kinds of retaliation
6 that they would about in the professional report.
7 They're going to have the same feeling with
8 respect to the social isolation. Everybody goes
9 out now and parties together and I'm the only one
10 specifically not invited.

11 JUDGE JONES: Well, nothing is going to
12 happen if they don't report that at the command
13 level.

14 MR. STONE: So, why not lump this in
15 with them? I mean, I don't see it qualitatively
16 different than the others. I mean, it's got all
17 the same overtones. You have to trust the
18 commander or you're not going to report it at all.

19 LTC McGOVERN: Well, no, because you
20 have your SVC.

21 MR. STONE: To start with, to start
22 with.

1 VADM TRACEY: I am trying to be
2 organized here.

3 MR. STONE: Go ahead.

4 VADM TRACEY: I am trying to work Issue
5 No. 2 or No. 3. I think we're hung up on 2. Is
6 that right? And if it's 2, would it be helpful to
7 just walk through the three questions at the top
8 of each --

9 MR. STONE: Sure. Go ahead.

10 VADM TRACEY: Sure. So, prior
11 procedures and resources for investigating reports
12 of professional and social retaliation, are they
13 effective, including the military whistleblower
14 claims? I think our general sense is they are not
15 effective.

16 JUDGE JONES: Well, not the
17 professional ones.

18 VADM TRACEY: They are not uniformly
19 effective, and we don't have enough data,
20 actually, to know that because no one has really
21 tracked it.

22 CHAIR HOLTZMAN: Right. So, No. 1, we

1 don't know that the CMG process or anything aside
2 from the IG process about which we know -- that
3 process does not seem to be effective.

4 VADM TRACEY: Correct. Okay.

5 MR. STONE: But we don't have data that
6 they're effective.

7 VADM TRACEY: Correct. Correct.

8 MR. STONE: We have anecdotal data that
9 they're ineffective.

10 CHAIR HOLTZMAN: Well, I don't know
11 that you can say they're ineffective.

12 MR. STONE: Well, but the small number
13 are reported. That's why it is anecdotal.

14 CHAIR HOLTZMAN: To what?

15 VADM TRACEY: Five hundred days to get
16 to anything.

17 CHAIR HOLTZMAN: No, no, the IG? I
18 don't consider that anecdotal. That's not
19 anecdotal. You have a report by the GAO. That is
20 not an anecdote. I mean, GAO wouldn't consider it
21 to be an anecdote.

22 MR. STONE: Well, but as to the social

1 retaliation part of that, we don't know what is
2 not getting reported, or even is reported.

3 CHAIR HOLTZMAN: Right, but that's what
4 I think we're just saying. So, I think the answer
5 to Bullet 1 is, No. 1, we don't have enough data
6 to understand how the CMG process is working. And
7 the GAO reports suggest that the IG process is not
8 working. That's the answer, it seems to me. So,
9 we know, right?

10 MR. STONE: Okay. Now we're on
11 Question 2?

12 VADM TRACEY: Yes. Whether
13 investigation of all reports of social and
14 professional retaliation should be handled by the
15 same investigative authority.

16 MR. STONE: Okay.

17 VADM TRACEY: My bias is, no, I think
18 those three tools are what you require. If you
19 are the good order and discipline person, you need
20 things that you can do at the command, you need
21 things you can do with the MCIO investigations,
22 and you need things you can do with whatever the

1 independent body is. IG is the formal solution
2 right now, but you need at least three different
3 places you can go, depending on the nature of the
4 evidence of the retaliation.

5 This paragraph I think does describe
6 sort of the natural way in which a commander would
7 think about how to box things.

8 CHAIR HOLTZMAN: See, I disagree with
9 that because I think it's one too many. I think
10 you're absolutely right that we need to have for
11 probably the large number, the vast majority of
12 the ones that the commander -- what would you call
13 it, commander-controlled investigation? I don't
14 know the --

15 LTC McGOVERN: Commander's
16 investigation.

17 CHAIR HOLTZMAN: Commander's
18 investigation, I have no issue with regard to
19 that. But I do not think, my own personal view
20 is, that the IG should just be relieved of the
21 responsibility of dealing with professional
22 retaliation. And you can make the MCIO operation

1 as independent as you want, but I think that the
2 MCIO is something, also, that the recruits
3 understand. They deal with that. I mean, they
4 know about the police. I don't know if they
5 understand what an IG is, even if they are given
6 their --

7 VADM TRACEY: You do need a place above
8 the commander when he's not investigating for
9 possible criminal investigation.

10 CHAIR HOLTZMAN: I agree with --

11 VADM TRACEY: Because the MCIO lens is
12 going to be for possible criminal investigation.

13 CHAIR HOLTZMAN: Okay. So, give me the
14 case that would fall into that category? I'm not
15 arguing. I would just like to understand what
16 you're saying.

17 VADM TRACEY: High enough up in the
18 chain of command, that you're concerned that the
19 commander can't be trusted to do an investigation.

20 CHAIR HOLTZMAN: Okay.

21 VADM TRACEY: The commander has already
22 looked at it and not taken any action. The

1 problem persists.

2 CHAIR HOLTZMAN: So, where should that
3 go?

4 VADM TRACEY: Sorry, the IG.

5 (Laughter.)

6 CHAIR HOLTZMAN: The IG? But it's not
7 criminal. You already posited that it's not
8 criminal.

9 VADM TRACEY: That's right. IGs do
10 both.

11 CHAIR HOLTZMAN: IG does a non-criminal
12 investigation?

13 VADM TRACEY: Yes, he does.

14 MR. STONE: Yes.

15 VADM TRACEY: Yes.

16 CHAIR HOLTZMAN: Okay. So, the IG does
17 this. Have they done any of these investigations?
18 Do we know?

19 MS. CARSON: Well, this is where
20 complaints aren't criminal.

21 MR. STONE: Those are civil.

22 CHAIR HOLTZMAN: Those are not

1 criminal?

2 MR. STONE: They're civil. They don't
3 go to jail.

4 CHAIR HOLTZMAN: Yes, but I thought
5 that the underlying conduct was criminal, that if
6 you are violating, if you are misusing your power
7 to retaliate against somebody, that that was a
8 crime. Isn't it?

9 MS. CARSON: You can use Article 92.
10 The DoD instruction says, since you now have
11 retaliation, you can punitively punish someone
12 under Article 92. But we don't know if it ever
13 happened.

14 MR. STONE: Right, but that's when you
15 have proof beyond a reasonable doubt as opposed to
16 just say by a preponderance. You don't always
17 have that proof.

18 MS. CARSON: Right.

19 MR. STONE: You just have inaction by
20 the commander and it's inexplicable why it's
21 inaction.

22 JUDGE JONES: You are not likely to get

1 a whistleblower finding there, either.

2 MR. STONE: Yes.

3 JUDGE JONES: I mean, even a civil
4 resolution.

5 MR. STONE: Okay. He's participating
6 in the group parties that this one person is not
7 invited to. He's been at all these functions. I
8 mean, I don't know if I can --

9 CHAIR HOLTZMAN: To me, I think it's
10 just hopeless to have the IG involved in this.
11 I'm sorry.

12 JUDGE JONES: But do we all agree that
13 there are levels --

14 CHAIR HOLTZMAN: Yes.

15 JUDGE JONES: -- of investigation, that
16 channeling everything to the MCIO --

17 CHAIR HOLTZMAN: Yes, if it's not
18 criminal, absolutely, I'm not disagreeing with you
19 about that. Right.

20 JUDGE JONES: You are eliminating --

21 CHAIR HOLTZMAN: Right.

22 JUDGE JONES: -- the role of the

1 commander if you channel everything to the MCIO?

2 CHAIR HOLTZMAN: Agree. No, no, I
3 completely agree with you about the first option,
4 which is the commander's investigation. And I
5 don't know who should do the investigation that
6 involves the commander where it is not criminal.
7 I don't know who does that.

8 VADM TRACEY: I think the organization
9 can figure that out.

10 MR. STONE: Right. The answer to No.
11 2, though, is, no, it shouldn't be the same
12 investigative authority. Whether it is two or
13 three, that answer is easy. No. I think we all
14 agree with, no, it's not one, you know, the same
15 organization.

16 CHAIR HOLTZMAN: Right.

17 MR. STONE: That's easy. So, that's a
18 no.

19 So now, you get to three.

20 JUDGE JONES: Right.

21 VADM TRACEY: Should there be
22 standardized or otherwise coordinated processes,

1 procedures, and timelines for substantiating and
2 founding complaints?

3 CHAIR HOLTZMAN: Uh-hum.

4 MR. STONE: That's an easy yes, isn't
5 it?

6 CHAIR HOLTZMAN: Correct.

7 LTC McGOVERN: And that's where you all
8 proposed the form?

9 MR. STONE: And does that move us to
10 the third issue?

11 JUDGE JONES: The form and keeping
12 track of the form.

13 LTC McGOVERN: And that would be the
14 Case Management Group on the next page?

15 MR. STONE: Right.

16 CHAIR HOLTZMAN: Well, I think the
17 answer to No. 2 in Issue 3 is clearly yes, isn't
18 it?

19 MR. STONE: Yes, that's good.

20 JUDGE JONES: And there we have it in
21 the first bullet. I mean, I agree. I think that
22 if we are talking about professional retaliation,

1 which is going to, presumably, frequently be by
2 commanders, it has to go to an independent body.
3 I won't mention IG.

4 LTC McGOVERN: The Case Management
5 Groups do the status update once a month. So,
6 imagine you all are the Case Management Group, but
7 Rep. Holtzman is the installation commander; Judge
8 Jones is the head VA. The rest of us are
9 appearing. Maybe Mr. Stone is the victim's
10 counsel.

11 You all come with different
12 information. You also have privileges. So, you
13 are only sharing certain -- so, if Mr. Stone, as
14 the SVC, may know that there is retaliation. She
15 is feeling retaliated against, but she is not
16 ready to file a claim yet.

17 CHAIR HOLTZMAN: Yes.

18 LTC McGOVERN: So, the discussion may
19 come up, but unless the SARC has received your
20 form that there has been a report of retaliation,
21 it won't necessarily get discussed here. If there
22 is an IG investigation going on, it could perhaps

1 come up that there is still an IG investigation
2 pending.

3 But this group is to monitor the
4 process, to ensure that the victim is receiving
5 the necessary services, and to stay updated on the
6 case. They are not investigating the allegations
7 themselves.

8 VADM TRACEY: But, actually, if it is
9 an IG investigation -- sorry -- but if an IG
10 investigation had been requested, and it is taking
11 500 days, if this Case Management Group is doing
12 its job, someone in this Case Management Group,
13 probably the commander, should be raising the fact
14 there has been an IG report and it is languishing.
15 So, that is what this body does. It acts on
16 things that are not moving at the pace they need
17 to be moving.

18 MR. STONE: Right, that are old.

19 MS. CARSON: There is one other point
20 this is addressing. And that is, unique among the
21 Services, that the Air Force says in their
22 guidance that "Incidents meeting the statutory

1 definition of reprisal will not be briefed in the
2 Case Management Group."

3 MR. STONE: Uh-hum.

4 MS. CARSON: So, the DoD direction is
5 that all retaliation --

6 JUDGE JONES: Well, they are following
7 the notion that this should be looked at by an
8 independent body, but they are using the word
9 "reprise".

10 MS. CARSON: This isn't investigating.
11 This is just saying, how is it going?

12 LTC McGOVERN: Well, it is the next
13 sentence, actually, because the victim's commander
14 is sitting on that Board --

15 MR. STONE: Right.

16 LTC McGOVERN: -- because the commander
17 has an obligation. So, if the victim's commander
18 has to brief the retaliation plan, but he is the
19 subject of the allegation, then it would be not
20 addressed today.

21 MR. STONE: Right. If the IG report,
22 the IG investigation is taking time because it is

1 against him, are you going to go in and say, "Oh,
2 by the way, tell me how the IG thing is going."
3 He knows it is against him.

4 JUDGE JONES: No, I think it has to go
5 out of there. If we are going to stick to our
6 guns and say you need an independent body for
7 professional reprisal, which I think we do, then
8 I don't see how this group can actually monitor it
9 and track it.

10 MR. STONE: So, should we --

11 JUDGE JONES: I don't know. Can that
12 be done?

13 MR. STONE: So, should we endorse the
14 Air Force policy? The Air Force is doing that.
15 They're taking those actions. Should we try to
16 endorse that?

17 CHAIR HOLTZMAN: Well, who is
18 monitoring that? You know, if you endorse that,
19 who is monitoring it? That's the IG. The IG --

20 MS. CARSON: The DoD guidance says the
21 Case Management Group should be reviewing all
22 retaliation monitoring to be sure it is being

1 taken care of.

2 VADM TRACEY: I noticed that the words
3 are only those things that don't meet the
4 statutory definition will be briefed at the CMG.
5 I would like to understand, does that mean that
6 they are noted that there is such an issue, but
7 there is nothing discussed about the status of it?

8 LTC MCGOVERN: I'm sorry, ma'am. Where
9 are you reading?

10 VADM TRACEY: The last paragraph.

11 LTC MCGOVERN: Okay.

12 VADM TRACEY: All we know is what that
13 says. So, I'm not sure who would follow up beyond
14 that.

15 MR. STONE: Uh-hum, that's good.

16 VADM TRACEY: So, it may be that the
17 difference is that you actually discuss about what
18 is the plan and where are --

19 MR. STONE: I see.

20 JUDGE JONES: All you talk about is
21 that was made --

22 MR. STONE: Uh-hum.

1 VADM TRACEY: And it's working.

2 JUDGE JONES: -- and it's six months
3 later.

4 LTC McGOVERN: These are monitored, but
5 the MCIO isn't going to tell everything that is
6 going on with the investigation.

7 JUDGE JONES: No briefing on the
8 content. That is probably how that works.

9 MR. STONE: Yes. Okay. Okay.

10 VADM TRACEY: Yes, as long as it is
11 noted at the CMG that there has been such a
12 report, the CMG is in a position to do its job
13 with regard to paying attention to whether the
14 victim is being appropriately --

15 CHAIR HOLTZMAN: Well how can it if,
16 let's say, it is going to the IG? And they
17 can't --

18 VADM TRACEY: They can follow up.

19 CHAIR HOLTZMAN: They can?

20 VADM TRACEY: Sure.

21 CHAIR HOLTZMAN: Well, who would be the
22 person following up?

1 VADM TRACEY: A commander.

2 CHAIR HOLTZMAN: Suppose the commander
3 is the subject.

4 VADM TRACEY: Then, they won't be able
5 to follow up on it, that's right. But, if that is
6 the case, then you probably aren't taking this
7 case to that commander.

8 CHAIR HOLTZMAN: Well, what happens in
9 that case?

10 VADM TRACEY: It would have to go up a
11 level.

12 CHAIR HOLTZMAN: Okay. Well, I'm
13 asking that because I think we should specify
14 "except in cases...", because this is not clear
15 here what happens with the Air Force.

16 MR. STONE: Yes, right.

17 CHAIR HOLTZMAN: But in cases where the
18 commander is the subject --

19 MR. STONE: It has got to go up a
20 level.

21 CHAIR HOLTZMAN: -- it has got to be
22 handled by whoever the superior is to that

1 commander. And they figure out where it goes;
2 that's all. I think that makes a lot of sense.

3 MR. STONE: Okay. Does that get us to
4 Issue 4?

5 JUDGE JONES: Yes, if we skip what we
6 are doing about the independent body.

7 (Laughter.)

8 CHAIR HOLTZMAN: Who is the independent
9 body?

10 JUDGE JONES: No, I am saying I think
11 there has to be an independent body, and there is
12 not even a great deal of support for the
13 performance of this particular IG system. But,
14 otherwise, yes, we're on Issue 4. We haven't
15 decided what to do about the reprisal, the
16 professional reprisal cases in terms of who is
17 actually going to do the investigation and
18 prosecute them civilly.

19 COL GREEN: And I think the Panel could
20 -- I mean, certainly, the Panel, if it comes to
21 consensus on that, but the Panel could stop at a
22 recommendation that there be some independent

1 means for investigating and resolving these and
2 express any concerns or misgivings with the way
3 that the IG is currently performing, and noting
4 that in terms of that the Panel would not endorse
5 maintaining the current system with the IG being
6 in its status quo methodology for doing that. So,
7 that might be one way to --

8 MR. STONE: We could just say something
9 like "and any retaliation request referred to the
10 IG that does not result in a recommendation to the
11 IG within 120 days shall be moved to a group that
12 is capable, another group," period.

13 In other words, give them three or four
14 months. If they consider this a priority and they
15 want to do it, great. But if it is not moving, we
16 are not waiting for 500 days. We are waiting for
17 four months, and then, it gets kicked to somebody
18 else. They have their shot. We haven't taken it
19 away.

20 JUDGE JONES: Right, but we don't have
21 a somebody else.

22 CHAIR HOLTZMAN: But you are wasting

1 three months.

2 MR. STONE: I know, but they are the
3 right body for the jurisdiction. So, it just sort
4 of kicks them in the pants if they can't get to
5 it.

6 CHAIR HOLTZMAN: I think it is a waste
7 of time. I mean, that's my view. I mean,
8 obviously, I'm not a majority of this Panel. But
9 it is my view that --

10 MR. STONE: I was trying to come to
11 some kind of a --

12 LTC McGOVERN: I think we can express
13 both views, though. We state the problem, or you
14 all state the problem in the report, and we
15 express the concerns that IG is intended to be
16 this and Rep. Holtzman feels strongly that they're
17 not capable right now. So, we can draft up a
18 proposal for --

19 CHAIR HOLTZMAN: Yes, but I think we
20 should decide first whether we want to make a
21 recommendation about that.

22 What I found about what Barbara said is

1 that you limited your statement to civil
2 penalties. It could be criminal penalties.

3 JUDGE JONES: And you can criminalize
4 professional reprisals --

5 CHAIR HOLTZMAN: Yes.

6 JUDGE JONES: -- but you will end up
7 with the same problem because you're going to have
8 commanders looking at other commanders doing
9 professional reprisals, right? You still need an
10 independent body, it seems to me, when you're
11 talking --

12 CHAIR HOLTZMAN: Independent of whom?

13 JUDGE JONES: Independent of the people
14 at the CMG, the commanders.

15 CHAIR HOLTZMAN: The commander himself
16 or herself who is responsible --

17 JUDGE JONES: And the MCIO.

18 CHAIR HOLTZMAN: I'm not disagreeing
19 with that.

20 JUDGE JONES: Yes.

21 CHAIR HOLTZMAN: What I am saying is
22 that you should, when the commander himself or

1 herself is involved, it should be kicked up to the
2 next level to decide how it is to be investigated
3 in a way that preserves independence. And I
4 wouldn't limit it to civil cases. Why would we
5 want to limit it to civil cases only? Am I
6 missing --

7 LTC McGOVERN: Civil cases are not a
8 remedy under the Military Whistleblower Act.
9 There's an investigation. And then, if they find
10 that there was a problem, the victim can go to the
11 Board of Corrections. So, if you were not
12 submitted for promotion because, let's say --
13 let's take it out of sexual assault -- because
14 it's discrimination, and they investigate it and
15 they find there was discrimination, your remedy
16 isn't to sue the military for discrimination.
17 Your remedy is to go to the BCMR to have a new
18 Board convene and get all the back pay as if he
19 were promoted.

20 COL GREEN: It is to seek equitable
21 remedy.

22 JUDGE JONES: Well, let me ask you,

1 Admiral, do you feel the same -- right now,
2 professional reprisal is not criminalized,
3 correct?

4 VADM TRACEY: It could be. It is,
5 isn't it?

6 JUDGE JONES: Except that it is in
7 Article 92, I guess, already?

8 MS. CARSON: Except as Article 92.

9 JUDGE JONES: We don't yet have a
10 statute saying that it is more than that. Do you
11 feel the same way about it? I mean, it has always
12 been in Article 92 because it has to go to an
13 independent body, criminal or civil. I mean, I
14 don't see the difference.

15 CHAIR HOLTZMAN: Right, but that is if
16 you were limiting your comments only to civil.
17 And I'm saying that this still is a criminal, the
18 potentiality of a criminal penalty here. I don't
19 want to limit this to civil cases. That's what I
20 thought you were doing. Maybe I misunderstood
21 what you were saying.

22 So, my focus is just I want to make

1 sure that --

2 JUDGE JONES: Yes.

3 CHAIR HOLTZMAN: -- whatever criminal
4 penalties exist, I don't want to tamper with them.
5 I don't want to restrict them or limit them.

6 JUDGE JONES: No, me, neither.

7 CHAIR HOLTZMAN: Okay. So, that was my
8 only concern, because something you said triggered
9 that.

10 I do believe they should be
11 independent. I'm not saying they should be
12 dependent, but I think that the appropriate agency
13 or the appropriate vehicle for dealing with that
14 is the superior of whoever the commander is. And
15 they would decide how to make it an independent
16 matter.

17 MR. STONE: But sooner or later, they
18 are going to bounce it down to an investigative
19 officer in that area who --

20 CHAIR HOLTZMAN: Not necessarily.

21 MR. STONE: -- works and operates
22 there.

1 CHAIR HOLTZMAN: Not necessarily. We
2 just talked about it before. Kyle said -- maybe
3 I'm just hearing the same thing over and over
4 again --

5 MR. STONE: You would get the decision-
6 maker independent by going up, but you can't
7 necessarily, I think, get an independent
8 investigative --

9 CHAIR HOLTZMAN: Yes, you can. That's
10 just what he said. The MCIO goes to a
11 different -- let's say you have the MCIO in
12 Topeka, Kansas, is where this is taking place.
13 The MCIO then has a system for transferring the
14 investigation to a different place, different
15 people who are responsible, not the people who are
16 answerable to that commander.

17 COL GREEN: No, that's correct. With
18 criminal investigators, that is standard procedure
19 for them to refer those types of matters out to
20 another organization.

21 MR. STONE: Then, the IG doesn't need
22 to get it.

1 VADM TRACEY: I'm suggesting that, if
2 you believe that you are going to end up in a
3 criminal prosecution, I agree. There are big
4 differences in that kind of an investigation.

5 MR. STONE: If it is just an
6 administrative-type referral --

7 VADM TRACEY: And they want to act even
8 if it doesn't rise to the level of criminal
9 prosecution.

10 MR. STONE: Of Article 92, yes.

11 VADM TRACEY: You want to be able to
12 take action.

13 CHAIR HOLTZMAN: Right, but taking
14 action quickly is not the IG. That's for sure.
15 Okay?

16 (Laughter.)

17 So, my view is -- I mean, you've got
18 520 days -- my view is give this to the commander
19 over the commander who is responsible here or who
20 has a conflict and let that person, male or
21 female, make the decision about who is to do that
22 investigation. Maybe it is their own independent,

1 not independent, maybe their own command
2 investigative staff.

3 COL GREEN: Well, I think one thing
4 that is important, that the CMG and the
5 installation commander, obviously, the
6 installation commander is overseeing a large
7 number of subordinate commanders. And so, the
8 likelihood of the installation commander being
9 directly involved in the professional retaliation
10 complaint is limited.

11 And if an installation commander were
12 a named party to a complaint or a subject to that,
13 they would have a responsibility to refer it out
14 to their superior commander for consideration. I
15 think that is normal processing for anything
16 within a chain of command. If I'm the subject of
17 something, I can't resolve it; I have to pass it
18 up to my superior.

19 CHAIR HOLTZMAN: And my other
20 suggestion along these lines is, also, not just to
21 make it a matter of the commander's decision about
22 how to refer this, but also to allow the SVC to

1 move to recuse the commander and try to get it
2 bounced higher.

3 LTC McGOVERN: And, Rep. Holtzman, I
4 think it will always go to that higher commander
5 if a commander is subject to an allegation, but
6 that higher commander is either going to refer it
7 to the MCIO or the IG, you only appoint one of
8 these investigating officers who could be a signal
9 officer --

10 CHAIR HOLTZMAN: Yes, yes.

11 LTC McGOVERN: -- a communications
12 officer, and they have a JAG advisor.

13 CHAIR HOLTZMAN: Right.

14 LTC McGOVERN: There's no way to go and
15 train every --

16 CHAIR HOLTZMAN: I understand, but --

17 LTC McGOVERN: So, by just kicking it
18 up to the above commander, they are only going to
19 be, then, referring it to MCIO or IG.

20 CHAIR HOLTZMAN: Maybe or they could do
21 their own. Those commanders are probably going to
22 have their own command operation, command

1 investigations.

2 LTC McGOVERN: But, when it is a
3 serious allegation of professional retaliation, I
4 would have to look at the regulations, so we can
5 follow it up, but those command investigations are
6 limited. Once it rises to this professional
7 retaliation to fall within the Military
8 Whistleblower Act or a crime, it would be referred
9 to, it would be appropriate for that higher
10 commander.

11 CHAIR HOLTZMAN: Are we supposed to get
12 out of the crime? Because Admiral Tracey, very
13 appropriately, is saying, you know, a lot of the
14 stuff is not criminal. Okay? So, I want to be in
15 that orbit.

16 LTC McGOVERN: Okay. I'm sorry, I
17 thought we were back at professional retaliation.

18 CHAIR HOLTZMAN: I think we are at the
19 point where we are talking about -- the point I'm
20 making is that not only -- I don't care whether it
21 is professional retaliation or whatever you want
22 to call it; if it is being kicked upstairs because

1 there is some conflict of interest with the
2 commander, whether it is on the commander's own
3 suggestion or somebody else's, I also want to add
4 that the SVC should be able to petition that this
5 investigation be taken out of the hands of that
6 commander. That's all. So, you have something
7 aside from the commander making the decision
8 himself or herself or the people in that little
9 coterie of friends. Maybe you disagree.

10 MR. STONE: I have to ask Admiral
11 Tracey. I mean, I thought that we had heard about
12 a case that came from Europe where the problem
13 was, when the sexual assault allegations were made
14 against somebody fairly high-level, the problem
15 was all the people above him in that chain were
16 good friends of his. And so, the victim never
17 feels comfortable because those are the people who
18 eat together and socialize together. And while
19 the complaint is not made against the installation
20 commander, the victim and the public generally is
21 skeptical that somebody who socializes with the
22 immediate next or the two levels down all the time

1 is not really going to have the capacity to be
2 independent.

3 And that's why you go to the IG,
4 because they don't socialize with those people.
5 And so, there isn't this --

6 VADM TRACEY: They don't socialize with
7 anyone.

8 (Laughter.)

9 MR. STONE: You're right. Exactly.
10 They're an outcast.

11 But, leaving that aside, that is the
12 problem. It is not like in business or government
13 where the people don't necessarily live together
14 and outside of work they're not together. Here
15 these people socialize and eat together and
16 sometimes live on the same military housing block
17 for years. So, it creates this additional
18 problem. And I thought that is the reason that
19 you have got to have an outlet to an IG. Maybe
20 I'm wrong, but --

21 JUDGE JONES: Well, it is always the
22 appearance, too, not just the --

1 VADM TRACEY: I don't think that that
2 is a barrier to considering the notion that you
3 add an opportunity for the SVC to petition for the
4 commander to be removed from a decision.

5 COL GREEN: Ms. Holtzman, it is about
6 five minutes to 4:00 now. Do you want to take a
7 quick break? I believe Mr. Perry is here. So, if
8 you want to take a break, just a quick break, we
9 will hear from him.

10 CHAIR HOLTZMAN: Right, and then, maybe
11 conclude, at least for today?

12 COL GREEN: Yes, ma'am.

13 CHAIR HOLTZMAN: All right.

14 (Whereupon, the foregoing matter went
15 off the record at 3:52 p.m. and went back on the
16 record at 4:02 p.m.)

17 CHAIR HOLTZMAN: We're going to start,
18 everybody, if you don't mind, please. Thank you.

19 All right. We're now at the public
20 comment period. We are going to hear from Mr.
21 Perry, who has complied with whatever the legal
22 requirements are to be heard.

1 Mr. Perry, you have five minutes in
2 which to make your presentation to us. Thank you.

3 MR. PERRY: Madam Chair, Members of the
4 Panel, thank you very much for your time. I do
5 appreciate your time here today as well as your
6 efforts with this project thus far.

7 As the Chair said, my name is
8 Christopher Perry. I'm the Program Director at
9 the Center for Prosecutor Integrity, generally not
10 involved necessarily with military matters, but we
11 are involved with strengthening prosecutorial
12 ethics, trying to curb over-criminalization, and
13 generally making improvements to the criminal
14 justice system, which I believe is in a similar
15 vein to what the Judicial Proceedings Panel is
16 attempting to do with the military system.

17 Prior to my time at Center for
18 Prosecutor Integrity, I was a criminal defense
19 attorney in Pennsylvania for five-and-a-half years
20 as well, just a background on me.

21 But, recently, at the Center we have
22 become involved, mainly this year, in sexual

1 assault offenses and trying to follow some of the
2 policy and statutory construction that has been
3 going on. I know the panel is familiar with the
4 American Law Institute Project. We have been
5 following that and tried to be involved in making
6 recommendations to the American Law Institute.
7 We've also gotten involved at the college campus
8 level and, then, the military project as well,
9 having followed the ALI project.

10 Now, having reviewed the public
11 comments and the materials submitted on the JPP
12 website, No. 1, again, I commend you for your
13 effort. That is a tremendous amount of material,
14 and I think what you are doing is fantastic.

15 And we did submit a letter to the panel
16 on October the 9th, which I believe you were
17 supplied as well. I will leave the bulk of my
18 arguments in that letter. I just wanted to come
19 in and highlight a few things today for you.

20 I think there have been some excellent
21 strides made to this point in increasing reporting
22 as well as reducing the overall number of

1 assaults. And, you know, the reports that have
2 come out have indicated that in specifically areas
3 of training and education for Servicemembers with
4 regard to bystander training, things of that
5 nature, climate surveys, and then, obviously, the
6 increase in resources to the complainants once a
7 report is filed. I think those are all things
8 that are of tremendous benefit and should be
9 continued.

10 However, we did recognize a few
11 concerns based upon the materials that were
12 submitted and discussions that we have had with
13 various members of the military, the first being
14 the issue of command over referral. I think in
15 the NDAA, specifically Section 1752, essentially
16 stating that it was the sense of Congress that all
17 matters of sexual assault should be referred for
18 court martial as opposed to other administrative
19 proceedings.

20 I think that such a suggestion erodes
21 the presumption of innocence and essentially
22 presumes probable cause. If we are going to just

1 refer every case without the commander being able
2 to evaluate it, I think that it goes towards an
3 over-criminalization that we at the Center for
4 Prosecutor Integrity are trying to help prevent.

5 And the requirement that the command
6 have a healthy command climate, from what our
7 research has indicated and the conversations we
8 have had with people, it has essentially become
9 synonymous with reporting every sexual assault
10 case or having a high referral rate. I think that
11 they are developing a fear that, if they don't,
12 they will be relieved. Essentially, that is
13 stated in the NDAA. Without a high referral rate,
14 you risk being relieved.

15 The second concern we had was with the
16 Special Victim's Counsel. While we believe that
17 it is well-intentioned and extremely useful in a
18 large majority of areas, I think it is potentially
19 problematic in that there will be, there could
20 potentially be competing ethical obligations.
21 Given that the SVC's job is to zealously advocate
22 for their client, I think that in some instances

1 that could conflict with the prosecution's ability
2 to do their job.

3 And I think there has been testimony
4 either in the Subcommittee or the Committee itself
5 that has articulated some of those concerns,
6 specifically by members of the military. And I
7 did reference that in my letter.

8 The third concern that we had was for
9 affirmative consent. This has been an up-and-
10 coming policy that's garnering more attention, and
11 I think that it would end up leading, if it is
12 implemented, it would inevitably lead to having to
13 redo Article 120 again.

14 It essentially shifts the burden to the
15 defendant to disprove the case against them. I
16 think that, in so doing, it would be extremely
17 damaging to the presumption of innocence and,
18 again, would put you in a situation prior to the
19 Prather case and all the subsequent cases in that
20 line.

21 With that, I would simply ask that you
22 help improve the system, which you are doing, by

1 allowing the command to decide matters without the
2 fear of repercussions against them for failure to
3 refer cases in the sexual assault realm.

4 In terms of the SVC, as I said, I think
5 it is a potential barrier to justice in certain
6 instances where ethical obligations conflict, and
7 I hope that, while I don't necessarily recommend
8 that you eliminate the SVC position itself, I
9 think we need to find a way to maybe have them
10 more in line with the prosecution, with the JAG
11 Corps, in that they are trying to achieve the same
12 goals, whether it be instead of being an attorney
13 for the victim, be it a counselor or some other
14 position within the JAG Corps, so that they are
15 working in conjunction with the prosecution. And
16 therefore, if they come to find information that
17 is relevant or that could be useful to the
18 defense, there is an obligation to turn it over.

19 And then, with regard to --

20 CHAIR HOLTZMAN: Mr. Perry, I want to
21 remind you that the five minutes has expired.
22 I'll give you a half a minute to sum up, but I'm

1 just telling you.

2 MR. PERRY: Thank you, Madam Chair.

3 And with regard to affirmative consent,
4 I strongly urge you to fully consider all the
5 options there and not impose an affirmative
6 consent standard on our Servicemembers.

7 With that, I thank you, Madam Chair.

8 I thank the Members of the Panel for your time.

9 I also thank your staff as well. They were
10 tremendous in helping me through that process to
11 get here to be able to speak for you today. So,
12 thank you very much.

13 CHAIR HOLTZMAN: Well, we thank you
14 very much for taking the time and trouble to
15 provide us with your thoughts.

16 Any Members of the Panel want to ask
17 questions?

18 Mr. Stone?

19 MR. STONE: No.

20 CHAIR HOLTZMAN: Vice Admiral Tracey?

21 VADM TRACEY: No.

22 CHAIR HOLTZMAN: Judge Jones?

1 JUDGE JONES: No.

2 CHAIR HOLTZMAN: I have no questions.
3 So, thank you very much for your letter, for your
4 testimony, and we appreciate the time you have
5 taken to be with us.

6 MR. PERRY: Thank you very much. I
7 appreciate it.

8 MS. FRIED: Madam Chair, are we done?

9 CHAIR HOLTZMAN: I think so.

10 MS. FRIED: The meeting is closed.

11 Thank you.

12 CHAIR HOLTZMAN: Thank you. Thanks to
13 all the Panel members.

14 (Whereupon, at 4:11 p.m., the meeting
15 was adjourned.)

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In the matter of: Judicial Proceedings Panel

Before: US DoD

Date: 10-09-15

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