

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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MEETING

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FRIDAY,
NOVEMBER 6, 2015

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The Panel met in the Holiday Inn
Arlington at Ballston, 4610 N. Fairfax Drive,
Arlington, Virginia, at 9:03 a.m., Hon. Elizabeth
Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman

Hon. Barbara Jones

Victor Stone

Tom Taylor

VADM(R) Patricia Tracey

WITNESSES

**Nathan W. Galbreath, Ph.D. - Senior Executive
Advisor, Department of Defense Sexual
Assault Prevention and Response Office**

**Cassia C. Spohn, Ph.D. - Foundation Professor
and Director, Arizona State University
School of Criminology and Criminal Justice**

STAFF:

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

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

Julie K. Carson - Attorney Advisor

Nalini Gupta - Attorney Advisor

Meghan Peters - Attorney Advisor

Stayce Rozell - Senior Paralegal

Terri Saunders - Attorney Advisor

Bill Sprance - Designated Federal Official

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

2 (9:03 a.m.)

3 MR. SPRANCE: Good morning. I'm Bill
4 Sprance, the Designated Federal Official for the
5 Judicial Proceedings Panel. And this meeting is
6 now open. At this time, I'll turn the
7 proceedings over to the Chair, the Honorable
8 Elizabeth Holtzman. Good morning, ma'am.

9 CHAIR HOLTZMAN: Good morning, sir.
10 Thank you very much. Good morning to everyone.
11 I'd like to welcome everyone to the October
12 meeting of the Judicial Proceedings Panel. All
13 five Panel Members are here today. Today's
14 meeting is being transcribed and also video
15 recorded by Army Television. The meeting
16 transcript and link to the video recording will
17 be posted on JPP's website.

18 The Judicial Proceedings Panel was
19 created by the National Defense Authorization
20 Act, FY 2013, as amended by the National Defense
21 Authorization Acts for FY 2014 and 2015. Our
22 mandate is to conduct an independent review and

1 assessment of judicial proceedings conducted
2 under the Uniform Code of Military Justice
3 involving adult sexual assault and related
4 offenses since the most recent amendments to
5 Article 120 of the UCMJ in 2012.

6 The agenda for today was updated from
7 the initial scheduled posting in the Federal
8 Register notice of this meeting. We shortened
9 our planned sessions to discuss the work of the
10 Military Justice Review Group and moved our
11 deliberation session to this morning as indicated
12 in the Federal Register notice. All updates to
13 JPP meeting agendas are posted to the JPP
14 website.

15 This morning, we will spend a brief
16 time discussing the recently concluded work of
17 the Military Justice Review Group. That group's
18 director, former Chief Judge of the Court of
19 Appeals for the Armed Forces, Andrew Effron,
20 recently spoke at a meeting of the JPP
21 Subcommittee to explain the MJRG's work. Its
22 report and recommendations are not available yet

1 to the JPP or to the public, but all Panel
2 Members received copies of Judge Effron's
3 briefing slides and the transcript from the
4 Subcommittee session. Once the MJRG report is
5 available, we plan to hear from Judge Effron
6 about his recommendations for changes to the
7 Uniform Code of Military Justice to the extent
8 they affect or impinge upon Article 120 and the
9 issue of adult sexual assault in the military.

10 Next, we will continue deliberations
11 on the prevention and response to retaliation and
12 ostracism against the victims of sexual assault
13 crimes. Our staff prepared materials based on
14 our previous deliberation discussions, which we
15 will use with the materials we had previously
16 received to assist our deliberations.

17 Following our deliberations, we will
18 continue our review of tasks assigned to the
19 Panel regarding trends and statistics of the
20 military's judicial response to sexual assault
21 crimes. We will first hear from Dr. Nathan
22 Galbreath, the Senior Executive Advisor for the

1 Department of Defense Sexual Assault Prevention
2 and Response Office. Dr. Galbreath has prepared
3 statistical information for us and will brief the
4 Panel on SAPRO's reporting of case outcomes for
5 sexual assault cases in FY 2012 through 2014.

6 We will then focus on sexual assault
7 case information from military judicial
8 proceedings. Members of our staff will first
9 review the case documents and information they
10 obtained from DoD and the Services for the JPP's
11 analysis. Then we will hear from Dr. Cassia
12 Spohn, an esteemed criminologist who is now
13 working as a consultant to the JPP. She will
14 provide us with her conclusions based on an
15 initial review of the data obtained from the case
16 documents and then her recommendation regarding
17 how we should analyze this data to respond to our
18 Congressional taskings.

19 We then planned time this afternoon
20 for the Panel to discuss the military justice
21 process and data we would like Dr. Spohn and the
22 staff to compile and research for our

1 examination. Finally, each public meeting of the
2 JPP includes time to receive comments and input
3 from the public. The Panel received four written
4 submissions and two requests from the public for
5 today's meeting.

6 The written submissions were provided
7 to the Panel Members and we will hear from both
8 individuals who asked for the opportunity to
9 present to the Panel at the end of the day. All
10 written materials received by the Panel Members
11 for today's meeting and previous meetings are
12 available or will be available on the JPP's
13 website, which is jpp.whs.mil. Thank you very
14 much for joining us today. We're ready to begin
15 our discussions about the Military Justice Review
16 Group. Kyle --

17 COL GREEN: Good morning, ma'am, I'm
18 over here.

19 CHAIR HOLTZMAN: I'm sorry. I didn't
20 see you. Who is going to lead that discussion?

21 COL GREEN: Ma'am, if I can just orient
22 the Members to what you have. As the Chair

1 noted, the JPP Subcommittee heard from Judge
2 Effron at their last session on October 22.
3 Judge Effron provided about a one hour
4 discussion, an overview of how the MJRG was
5 formed, how it was authorized, how it organized
6 its work, its mission and its approach to the
7 task, and then briefed the JPP Subcommittee, not
8 on the specifics of its proposals, but on the
9 nature of its proposals and the process that's
10 now underway for Executive Branch Review of those
11 proposals in anticipation of soliciting a DoD
12 proposal to Congress regarding alterations to the
13 UCMJ.

14 Judge Effron, because their proposals
15 are still in the interagency process and not
16 available for public release at this point under
17 OMB policy, Judge Effron was not able to provide
18 and cannot provide the full Panel at this point
19 specifics regarding their recommendations. But
20 we did want to at least make sure that the Panel
21 was aware of the MJRG's work and its time line
22 and tables so that the Panel can be aware of it

1 in its own analysis of Article 120.

2 And so what we provided to the Members
3 today is a copy of Judge Effron's briefing slides
4 to the Subcommittee and also an excerpt of the
5 transcript, which is available on the JPP's
6 website, of his briefing with the Subcommittee so
7 that you can see the questions that were asked
8 and bring you up to speed. In talking with the
9 Chair, since it probably was not worth the
10 Panel's full time to bring Judge Effron to repeat
11 that briefing again and so just to orient you to
12 their work and to provide any information you
13 might have, we provided those materials. And,
14 again, the Panel can discuss whatever questions
15 you might have in anticipation.

16 Again, Judge Effron's expectation,
17 he's working the review of the MJRG proposal
18 through the Executive Branch process. He can't,
19 obviously, provide a finite time line for when
20 that review will be complete, but he does believe
21 that it should be complete within the near future
22 and he would be more than willing, once that

1 review is complete and the document has been
2 released and is available to the public, he'd be
3 more than willing to come and talk to the Panel
4 and answer any questions or provide any
5 information that the Panel might wish to receive
6 on the MJRG's process.

7 CHAIR HOLTZMAN: Just by way of
8 background, can I just make sure that I and the
9 other Panel Members understand the basic status
10 of the situation? Right now, the JPP has a
11 Subcommittee that has been studying and reviewing
12 and examining whether Article 120 needs to be
13 amended and, if so, the extent to which it should
14 be and rationale for any proposed changes. It's
15 anticipated that the Subcommittee will make a
16 presentation to the JPP in the very near future,
17 if not at the next meeting. Meantime, as I
18 understand it, the Military Justice Review Group
19 has been looking at reform of the entire UCMJ.
20 Is that correct, Colonel Green?

21 COL GREEN: That's correct, ma'am.

22 CHAIR HOLTZMAN: And it's also my

1 understanding that they have, in deference to our
2 work, or I shouldn't say in deference, in
3 acknowledgment of our work, I don't think that
4 they've undertaken a thorough review of 120, but
5 it is possible that their recommendations might
6 affect 120 or our view of 120. In any case, we
7 don't know when their report will be done. And
8 as I understand it, we're just going to proceed
9 forward with the work that we've started with
10 regard to 120. And if and when the Military
11 Justice Review Group's recommendations are made
12 public, then the JPP will decide what steps to
13 take, if any, with respect to that. Is that a
14 fair summary?

15 COL GREEN: Yes, ma'am. One of the
16 things that Judge Effron noted for the
17 Subcommittee was that, obviously the MJRG's
18 review of the entire UCMJ encompassed an enormous
19 breadth of material to analyze and so their
20 ability in the short time frame they were
21 provided to complete their review, his
22 explanation was that they simply did not cover

1 the issues at the depth that the JPP is looking
2 at. And so the depth that the JPP and the JPP
3 Subcommittee are looking at Article 120 is not
4 similar to what the MJRG's review is and so, I
5 think his explanation of it was, recognizing the
6 JPP's depth of analysis, that the JPP is
7 positioned to provide a deeper analysis than the
8 MJRG might provide.

9 CHAIR HOLTZMAN: Do any Panel Members
10 have any comments, questions, thoughts on this
11 subject? No? Okay. Hearing none, I think we'll
12 proceed to the next item on the agenda, which is
13 Deliberations on the Issue of Retaliation Against
14 Victims of Sexual Assault Crimes. Okay. Colonel
15 Green, could you point us to the materials -- oh,
16 here we go. Okay.

17 LTC McGOVERN: Ms. Holtzman, good
18 morning. Good morning, JPP Members. I can
19 orient you --

20 CHAIR HOLTZMAN: Colonel McGovern,
21 thank you.

22 LTC McGOVERN: -- to the four documents

1 that you should have in a blue folder named
2 Retaliation. The first document is a proposed
3 outline of the report we would like to start
4 drafting. These are the topics, which you have
5 received information on, in an order which is, we
6 believe, somewhat chronological to the process.
7 And we can talk through that outline this
8 morning. The second document is entitled
9 Proposed Issues for Today's Deliberations. And
10 that's a two page document. These are topics
11 which you have received information on, but going
12 through the transcripts, we do not have your
13 opinions, conclusions, or recommendations, so we
14 would like to get your thoughts on those issues.

15 The third document is what you've seen
16 in the previous meetings, which is stating the
17 issues, the background information that you have
18 received on that, along with your comments as
19 possible recommendations, analysis, or
20 conclusions, as a reference sheet for you. And
21 then finally, the last document are a set of
22 Requests for Information, which we sent to the

1 Services today, to ask additional questions on
2 retaliation based on your questions from the last
3 two meetings.

4 CHAIR HOLTZMAN: Great. Well, Colonel
5 McGovern, how do you think we should commence?
6 Should we finish the proposed issues or should we
7 start with your outline? What --

8 LTC McGOVERN: Yes, ma'am. If I --

9 CHAIR HOLTZMAN: -- would you
10 recommend?

11 LTC McGOVERN: If you wouldn't mind,
12 I'd like to just talk you through the outline
13 real quickly --

14 CHAIR HOLTZMAN: Sure.

15 LTC McGOVERN: -- then jump to the
16 issues. With all of our reports, we start with a
17 general introduction and executive summary.
18 Those are possible issues which we would throw
19 into that executive summary. But the heart of
20 the report would start with the overview of
21 retaliation, briefly touching on the definitions
22 of retaliation and the vocabulary you all will be

1 using throughout the report, as well as the
2 effects that you heard about retaliation having
3 on the victims, unit reporting, and giving the
4 background information on the protections and
5 prohibitions against retaliation in the Services
6 to educate everyone on what you've learned.

7 Then, the next item would be trying to
8 state what the scope of retaliation actually is,
9 that there is no data to give you actual numbers,
10 so we're relying on surveys and anecdotal
11 information, knowing there is a problem out
12 there, but it's not measurable at this time.

13 Then we start with the chronology of the process,
14 with how victims are reporting retaliation, who
15 responds to retaliation and the testimony that
16 they provided to you on their experiences, and
17 how Case Management Groups are monitoring those
18 responses and the support for those experiencing
19 retaliation.

20 Then we get into something which we've
21 discussed in great detail, which is investigating
22 retaliation and we would like to pick up today in

1 the outline getting to the resolution of
2 retaliation complaints. How does the military
3 respond to the victim? What remedies are
4 available? And how are offenders being held
5 accountable? Also then Section 8 of the outline
6 is preventing further retaliation. You all have
7 heard a lot of information on the initiatives,
8 which the Services are trying to do to educate
9 and increase awareness about the issues
10 surrounding retaliation, get your thoughts on
11 that. And then proposed and pending legislation,
12 make sure you're aware of that and get your
13 thoughts on those proposals.

14 So if it is okay with you all, we
15 would like to go ahead and start with the issues,
16 instead of --

17 CHAIR HOLTZMAN: Okay, wait, Lieutenant
18 Colonel --

19 LTC McGOVERN: Yes, ma'am?

20 CHAIR HOLTZMAN: -- McGovern. Before
21 we go to the proposed issues, may I ask whether
22 anybody on the Panel has a question, a comment, a

1 thought, an observation on the draft outline?

2 Yes, Mr. Stone?

3 MR. STONE: I wasn't sure where, but I
4 presume someplace in the outline there'll be a
5 place for us to put in a summary of what various
6 military witnesses before us, their views of how
7 we should deal with retaliation. That will be in
8 here somewhere?

9 LTC McGOVERN: Yes --

10 MR. STONE: Because I certainly want to
11 make sure that we canvass their best thoughts
12 about it as we move forward.

13 LTC McGOVERN: Yes, sir. We have
14 actually, the Staff has already gone ahead and
15 compiled things from the previous transcripts and
16 put them into those appropriate places. So if
17 someone spoke about training, it would be there.
18 If they spoke -- all those folks who talked about
19 their roles and experiences, the victim's SARCs,
20 VAs, SVCs, that will be covered. So we are
21 weaving in as much of that information as
22 possible to make the report reflect what you've

1 heard, their recommendations, and then receive
2 your thoughts on it.

3 Because this is a difficult topic, it
4 may be a complex topic that is in flux and
5 there's a lot of initiatives going on. We
6 recognize this may not lend itself to as many
7 recommendations, but if you all feel comfortable
8 at least reaching some conclusions about the
9 state of retaliation and your thoughts on it, we
10 will formulate it however we can to make it
11 something that the Services can find value in
12 after your review. So instead of a list of
13 recommendations, it may be conclusions, findings,
14 recommendations. But we'll work through that
15 through the drafting process with you all for
16 however you see it's appropriate.

17 CHAIR HOLTZMAN: Any other comments,
18 thoughts, observations? Okay. We're finished
19 with the outline, so we'll proceed to the
20 resolution of the proposed issues for JPP
21 deliberations. Is that where we are now?

22 LTC McGOVERN: Yes, ma'am.

1 CHAIR HOLTZMAN: Okay.

2 LTC McGOVERN: And for your reference,
3 instead of numbering these issues, we didn't want
4 to confuse it with previous documents you've had,
5 instead we reference where in the outline this
6 issue would apply.

7 CHAIR HOLTZMAN: Great.

8 LTC McGOVERN: The first issue, ma'am,
9 is in the topic Responding to the Victim. You
10 all have heard there are really three essential
11 ways that the military responds to victims.
12 First, communicating with the victim, addressing
13 their concerns, clarifying any confusion, and
14 finding out what that victim would like. Second,
15 victims testified they really just want the
16 retaliation to stop, more than anything else. So
17 that is the second step. And third, allowing
18 expedited transfers to move them into an
19 environment where they don't feel the pressure of
20 retaliation.

21 CHAIR HOLTZMAN: Excuse me, Colonel
22 McGovern. I'm just a little confused. Are we

1 still in Box 1?

2 LTC McGOVERN: Yes, ma'am. So --

3 CHAIR HOLTZMAN: Okay.

4 LTC McGOVERN: -- on that, the question
5 we posed is, does the JPP wish to comment on how
6 the leadership and command responds in those
7 three ways for victims who report retaliation or
8 do you feel that there are other responses or
9 tactics they could be taking in order to address
10 allegations of retaliation?

11 MR. TAYLOR: Yes, I'll be glad to
12 start. And it may be that you're covering this
13 somewhere else, Colonel McGovern, but it seems to
14 me that one of the responses that command ought
15 to consider is, do we have the right kind of
16 command climate here if we have a situation where
17 retaliation is occurring? So it seems to me that
18 another command response ought to be going to the
19 root cause of the problem.

20 If it involves two or three people who
21 are those who are bringing this kind of pressure
22 to bear or if it involves some misunderstanding

1 of the sort of not in my squad approach.

2 Whenever you have these kinds of allegations of
3 retaliation, once the victim's taken care of,
4 then it seems to me a command response ought to
5 include addressing the problem that caused the
6 retaliation in the first place.

7 HON. JONES: Yes, I agree. And again,
8 it may be that we discuss this somewhere else in
9 the report. Because obviously that type of
10 retaliation, for instance ostracism, which I
11 think is part of what Mr. Taylor was talking
12 about, are not things that generally will end up
13 in a prosecution, but they're very important to
14 command climate. And so I think we should
15 emphasize that in the report and it will work
16 through the Case Management Groups as they're
17 alerted to this, the commanders should be very
18 concerned about that. I suppose it will also be
19 a part of the reports on commanders, because it
20 will be part of command climate, which is another
21 thing that we should emphasize because it's
22 obviously as important as responding to the

1 sexual assault itself.

2 VADM TRACEY: I would echo that and
3 perhaps commenting to the effect that visible
4 leadership at every level on this is required,
5 that these are pernicious kinds of occurrences
6 when they're not prosecutable. I mean, they're
7 the most difficult sort of command climate action
8 to address, that it's happening at a very low
9 level, it's happening in very invisible ways and
10 so very visible leadership by, not just NCOs, but
11 by every level of the chain of command on the
12 subject.

13 CHAIR HOLTZMAN: Yes, Mr. Stone?

14 MR. STONE: I was going to say, I
15 realize this is difficult because, again, we're
16 not isolating a particular person, we're not
17 disciplining them, and it's not going to happen
18 and be over, it's sort of an ongoing course of
19 conduct. And I don't know how the other Members
20 of the Panel feel, but it reminds me a little bit
21 about when you have people who are either engaged
22 in a large organization with sloppy security

1 practices or discriminatory practices that don't
2 reach a level to be disciplined, but seem to be
3 there.

4 And it seems to me one of the
5 responses that I think people use when that
6 happens is, they immediately decide there's going
7 to be a training right then and there and all the
8 people in the group understand, we're going
9 through this training because our group as a
10 group hasn't lived up to the right standard. And
11 it's not quite a slap on any individual's record,
12 but the group, I mean, that's more of an
13 awareness than just saying, we have a problem
14 here. It emphasizes it.

15 So it seems to me one of those
16 responses is that there -- as soon as whoever it
17 is makes the response to the victim, that the
18 organizations says, okay, you guys are going to
19 undergo training. And that emphasizes to
20 everybody without pointing the finger that we
21 have a problem. And usually the training gives
22 other examples, not the one that just occurred,

1 but also gives you a couple of solutions of how -
2 - you get people to make a good training video
3 typically or I think something like that, or
4 sometimes it's on the computer or sometimes it's
5 a speaker, but that reinforces among everybody,
6 including the people who may not have recognized
7 that they were part of the problem, that just
8 giving somebody the silent treatment, if
9 everybody is doing it, that person, you think,
10 okay, I'm not going to get involved in
11 retaliating, but in fact everybody giving the
12 person the silent treatment isolates them.

13 And I guess it's almost like a form of
14 sensitivity training, it sensitizes the whole
15 group that as a team, they've got to do a better
16 job. So I'm not sure if it goes right into the
17 first box, but perhaps it does. It's part of
18 that communication. Okay, this group needs
19 training. And of course, it's not -- I don't
20 know where we'll get the training video from or
21 program, but that's something else that it's
22 difficult to do, but that's a way to address that

1 I think.

2 CHAIR HOLTZMAN: Yes. Let --

3 VADM TRACEY: If I could --

4 CHAIR HOLTZMAN: I'm sorry, go ahead.

5 VADM TRACEY: If I could just echo

6 that. But the engagement needs to not be about
7 the victim, it needs to be about the signal that
8 is being sent about the cohesion of the unit. If
9 the unit is tolerating that kind of treatment of
10 any member of the unit, it suggests that the unit
11 has a likely readiness problem in front of it.

12 CHAIR HOLTZMAN: The Admiral took the
13 words out of my mouth and said it better than I
14 could. But I do think that we need to have a
15 different box here, which is not just responding
16 to the victim, but responding to the problem --

17 LTC McGOVERN: Yes, ma'am.

18 CHAIR HOLTZMAN: -- and preparing and
19 preventing a repetition. And I don't know
20 whether that -- and that also, maybe that goes
21 later, but that also means collecting statistics.
22 I don't know if -- question about how the

1 statistics are kept about the incidents of
2 retaliation and what's been done about them.
3 Who's looking at that? And then, who's observing
4 to see what's happened and so forth?

5 So I think that, that's an extremely
6 important point because if we focus just on the
7 individual case, we're not going to be
8 necessarily addressing the root causes of the
9 problem and then trying to prevent it in the
10 future. And I think following up on what Mr.
11 Stone said, we don't even know what materials the
12 military has to do quote/unquote sensitivity
13 training.

14 LTC MCGOVERN: Yes, ma'am.

15 CHAIR HOLTZMAN: Do they have them? I
16 mean, have we been told about this?

17 LTC MCGOVERN: Yes, ma'am. To answer
18 the first part of your question, we will be
19 getting to on the second page the prevention and
20 training efforts that need to go into the
21 response to retaliation and what needs to be done
22 to collect statistics. This was specifically on

1 -- this question was designed for supporting the
2 victim. Although I do think the victim seeing
3 that training is going on can be incorporated
4 here as part of the overall response.

5 The military, specifically the Army,
6 we sent you some links to videos they've
7 produced, these CAPE videos, which are awareness
8 trainings, one was a male-on-male situation, the
9 other was a Master Sergeant who basically was
10 cyberbullied in retaliation after she was
11 supporting -- she wasn't actually the sexual
12 assault victim, but she was intervening on behalf
13 of the victim. So those materials are out there.

14 In the past, I think Mr. Taylor may be
15 able to speak to this, there have been different
16 campaigns over the years called Consideration of
17 Others training and other sorts of sensitivity
18 trainings which, when a unit identifies they have
19 a problem and they needed to pull together to
20 solve that problem to be able to move on to
21 mission, JAGs or other personnel can come in and
22 the EO in particular have packages to facilitate

1 conversations for that training.

2 CHAIR HOLTZMAN: May I just ask a kind
3 of dumb question about that? Which is, has
4 anybody ever looked at those training materials
5 to determine how effective they are? Anyone ever
6 assess their effectiveness?

7 LTC McGOVERN: I would have to get that
8 information for you, ma'am. DEOMI is the
9 Department of Defense EO Management in Florida
10 who handles all of the training and reviews it
11 and works extensively on these types of issues,
12 especially when it comes to sexual harassment or
13 discrimination. We can get that information for
14 you, ma'am.

15 CHAIR HOLTZMAN: Thank you.

16 LTC McGOVERN: Are there any other
17 issues, particularly responding to the victim?
18 Do you have any thoughts on what you heard about
19 the use of expedited transfers, for instance? Do
20 you believe that's a valuable tool? Are there
21 any concerns with Facebook or other social media
22 following the victim that you would like to

1 comment on?

2 CHAIR HOLTZMAN: Does anyone have any
3 question about that? Because I have a point I
4 would like to make. Do we have any statistics on
5 that? And how many expedited transfers were
6 requested? How many expedited transfers were
7 granted? Did the expedited transfer solve the
8 problem? Why were they rejected if they were
9 rejected? Was that justified? Who's reviewing
10 this? I mean, do we have --

11 LTC McGOVERN: We can get that
12 information for you, ma'am. I do not know if
13 they distinguish between the expedited transfers
14 requested on behalf of a sexual assault versus
15 those requested to prevent retaliation, but I do
16 know that those numbers are closely tracked by
17 the Services SAPRs.

18 COL GREEN: And statistics on expedited
19 transfers are part of the annual SAPRO report
20 produced by DoD. So they do track year-by-year
21 the number of expedited transfers requested, the
22 number of expedited transfers granted, Service-

1 by-Service.

2 CHAIR HOLTZMAN: But maybe they need to
3 break it down.

4 COL GREEN: Right.

5 LTC McGOVERN: Yes. And the SVCs and
6 victims who appeared before you all believe that,
7 that is a very good tool in these cases of
8 retaliation. Although, one mentioned that for
9 some reason hers was not approved. But we can
10 follow up with that information for you, ma'am,
11 to incorporate into your report.

12 CHAIR HOLTZMAN: Judge Jones?

13 HON. JONES: And as I recall, the
14 statistics for granting expedited transfers were
15 very, very high, 97, 98, 99 percent of the time.
16 So it would be interesting to see if that falls
17 off with respect to someone who wants a transfer
18 because of retaliation.

19 LTC McGOVERN: And --

20 HON. JONES: If that's possible to
21 figure out.

22 LTC McGOVERN: Yes, ma'am. The other

1 point which we could research for you would be,
2 at what stage in the process, possibly, they're
3 asking for an expedited transfer? Is it at the
4 time, in the beginning phase when they start to
5 perceive some sort of retaliation? Or is it
6 after an acquittal, when they may face other
7 retaliation or concerns?

8 HON. JONES: And you'd have to
9 distinguish between a sexual assault victim being
10 retaliated against and someone else being
11 retaliated against as, I think the example was
12 raised, of a support. Because they all have to
13 be segregated too.

14 LTC McGOVERN: Yes, ma'am.

15 COL GREEN: The expedited transfer
16 would not be available to somebody who would
17 experience some sort of retaliation in a
18 supporting role. I mean, the expedited transfer
19 program is limited to victims.

20 HON. JONES: Well, that simplifies that
21 then.

22 COL GREEN: Right.

1 CHAIR HOLTZMAN: But why should that be
2 the case? Isn't that person a victim? Doesn't
3 the support person who speaks up and then suffers
4 retaliation, doesn't that become a, I mean, not a
5 victim of sexual assault, but a victim
6 nonetheless of misconduct?

7 COL GREEN: And I think that, that's an
8 extension of the program that had not been
9 contemplated or even considered.

10 CHAIR HOLTZMAN: Okay. Should it be?
11 Just a question.

12 MR. STONE: Yes. It's worth a footnote
13 in whatever you're drafting that, a question that
14 arises is whether in specific circumstances where
15 the person assisting them then comes in for the
16 same behavior, they should be considered for a
17 possible expedited transfer. And just to clarify
18 the point I was making before, because I wasn't
19 sure I was putting it in the right place, I guess
20 when I was looking at the A2 stopping the
21 retaliation, it always strikes me as I'm not sure
22 exactly how you stop it.

1 So a training right then for that
2 group is a shot across the bow that sort of says,
3 there's a problem with this group. This is not
4 the annual training, this is not annual material,
5 this is a training for this group. They see it
6 as a shot across the bow that they need to change
7 their group behavior a little bit or there's
8 going to be further steps. And so that's why I
9 sort of thought it sort of slipped in there.

10 There may be other reasons to have an
11 annual training requirement, but when a group --
12 that way everybody knows something's going on,
13 whether they're participating in it or not, they
14 see it, gets this shot across the bow, this
15 special reason for the training, it's a wake-up
16 call that you need to fix this now before we have
17 to take further steps. That's all. So I think
18 that's -- otherwise, I'm not sure how you stop --
19 you can certainly have a superior officer say,
20 this has to stop, but a video like that can often
21 do more because it's by experts who can explain
22 how the situation gets out of hand and what kinds

1 of steps would be ameliorative.

2 LTC McGOVERN: Yes, sir. We had SARCs,
3 SVCs, and victims who brought up the fact they're
4 not necessarily wanting to file a retaliation
5 report, they just want the retaliation or the
6 conduct to stop. They weren't looking, I think
7 the quote was, to string anyone up. So,
8 therefore, the other concern was commanders are
9 taking actions with good intent, but to make sure
10 that they are finding out exactly what it is the
11 victim wants. The victim may not want more
12 publicity of the issue, she just wants a no
13 contact order so that, that person cannot -- and
14 that is within the DoDI of explaining how you do
15 no contact orders in sexual assault and
16 retaliation cases.

17 So those are tools for the commanders
18 to use and the testimony we heard just brought
19 that out. But first and foremost, the biggest
20 concern isn't what's happening to the offender,
21 they just want the conduct to stop. And there
22 are ways to do that by sitting down and

1 communicating with the parties involved.

2 MR. TAYLOR: I just have a couple of
3 points I'd like to add. One is to piggyback on
4 what Mr. Stone said, and that is that as
5 teachers, we always look for teachable moments.
6 And I think that one way of thinking about this
7 in terms of a unit's life and command climate is
8 as a teachable moment because, as Mr. Stone said,
9 everybody knows something's going on, they don't
10 know what.

11 But going back to the other question
12 about whether there's something else we need to
13 say about the expedited transfers. It seems to
14 me that when an expedited transfer will not work,
15 and we had at least one witness who testified
16 that he was a part of such a small and elite
17 community that it didn't really matter where that
18 person went, that record was going to follow or
19 the shadow was going to follow. I think we had a
20 Coast Guard person who made the same comment. So
21 we have at least two witnesses I can recall in
22 the last seven or eight months who have made that

1 comment.

2 So I think there ought to be room in
3 the process for job retraining for those people
4 who have already launched on a successful
5 military career, they don't want to leave the
6 military, yet they're in such a small community
7 that they can't get a meaningful transfer that
8 doesn't drag with it the baggage that led them to
9 be in the situation they were. So I think it's
10 worth a footnote of some sort or a reference that
11 there ought to be a consideration given for
12 retraining of those individuals for whom an
13 expedited transfer really doesn't solve the
14 problem.

15 LTC McGOVERN: Yes, sir. Okay. Are we
16 ready to move on to the next issue?

17 CHAIR HOLTZMAN: Yes, I think so.

18 LTC McGOVERN: Again, this is also
19 focusing on the victim. You received testimony
20 from a victim that they would like more
21 transparency in the outbrief of what has happened
22 at the conclusion of the investigation. Based on

1 the research from the regulations, we've found
2 generally the guidance is provide as much
3 information as permitted, to the extent permitted
4 by law. And that leaves room for interpretation
5 of what exactly the Privacy Act would allow.

6 So we tried to frame the issue of how
7 to give guidance or recommendation to improve
8 transparency for the victim, to provide them the
9 feedback. Would it be helpful to provide
10 specific guidance of what information you are
11 allowed to give the victim, have DoD do some sort
12 of legal review and make it clear across the
13 Services so that victims have the expectation of
14 what they're entitled to and commanders and JAGs
15 are not guessing as to what the Privacy Act may
16 limit them to?

17 CHAIR HOLTZMAN: Any comments?

18 MR. STONE: Yes. I think that at the
19 minimum, they have to know if the complaint is
20 still an open one or a closed one. And I think
21 they also can be told whether or not, if it was
22 considered to be founded or unfounded, even if

1 the disciplinary consequences aren't explicitly
2 told, which can be explained to them, they may
3 not be able to know the discipline, but if they
4 hear that it's no longer open, it was closed, but
5 the conclusion was it was founded, I mean, they
6 have an understanding that some action had to be
7 taken. And if it was unfounded, they want to
8 know that too. I mean, leaving them in limbo
9 doesn't help. And so, I think you're right, they
10 need to know what the limits are that they can be
11 told and they need to be told that much, unless
12 somebody thinks that they need to be told even
13 more.

14 CHAIR HOLTZMAN: Judge Jones?

15 HON. JONES: This is interesting. I
16 sort of assumed that almost everything is
17 knowable and reportable to a victim. Maybe I
18 need to know what the limits are. I mean, if you
19 have a Special Victims' Counsel, I would have
20 expected that he would know when an event
21 occurred and there was a decision made on a case
22 by the command structure.

1 LTC McGOVERN: Yes, ma'am. The
2 regulations do require they receive a monthly
3 consultation from the SARC before each command
4 meeting group and then at the conclusion of an
5 investigation. The concerns the victims
6 expressed to you was, what exactly they hear or
7 are told at that final outbrief is that they find
8 out whether it's substantiated or unsubstantiated
9 --

10 HON. JONES: Right.

11 LTC McGOVERN: -- but not necessarily
12 what's going to happen to the offender in a
13 substantiated case.

14 HON. JONES: In a substantiated case.
15 So they're not told it's moving on to a certain
16 type of -- if it's substantiated it's going to go
17 a variety of routes, and they're not told it's
18 going to be --

19 LTC McGOVERN: It has been --

20 HON. JONES: -- I don't know, a summary
21 or a general court-martial or --

22 LTC McGOVERN: Or an Article 15, Letter

1 of Reprimand.

2 HON. JONES: -- an Article 15, right.

3 LTC McGOVERN: Not necessarily. Some
4 cases, they're -- that's where the vagueness
5 lies. And it's not sure whether it's the
6 interpretation of the Privacy Act or a litigation
7 risk of the Privacy Act, but because there is
8 caution in explaining what exactly happens to the
9 offender, what do you believe the victims should
10 hear or should DoD do an analysis as to why and
11 what can be told to clear up any confusion?

12 HON. JONES: Well, I mean, we're
13 sitting here gathering statistics about what
14 happens at every step of the case. I had no idea
15 that the victim wasn't being told, he got X
16 punishment.

17 LTC McGOVERN: Well, I think if it's a
18 court-martial, certainly they will, ma'am. It's
19 in these cases where the commander decides to
20 take some sort of administrative or lesser action
21 or no action, the victim may not be told.

22 HON. JONES: On a substantiated --

1 LTC MCGOVERN: Yes, ma'am.

2 HON. JONES: -- case? Well, I think
3 they should be told.

4 MR. TAYLOR: I can remember that this
5 used to be a question that I used to spend a lot
6 of time thinking about, in terms of what to
7 release under the Privacy Act. And even though
8 I'm not familiar with every development in the
9 last several years, at that point in time, you
10 would take into account factors such as the
11 seriousness of the offense, the rank of the
12 individual, so the higher the ranking individual,
13 the more likely you would provide public
14 disclosure, the lower ranking individual with a
15 relatively minor offense, then you probably would
16 tilt the other way. But just a question for the
17 Staff, have you had a chance to do any research
18 on where the law is right now on how one looks at
19 balancing the right and expectations of privacy
20 as opposed to the importance of disclosure to the
21 general public on these different issues?

22 LTC MCGOVERN: Mr. Taylor, we briefly

1 looked at the issue and after reading the
2 testimony of the victims, it became clear that
3 it's not necessarily what the law says right now,
4 it's how DoD and the Services are interpreting
5 that law and applying the law. So it really is,
6 I think, on them at this point to clarify for you
7 all or for the field their interpretations so
8 that victims and lawyers and commanders are clear
9 what they can and cannot do.

10 CHAIR HOLTZMAN: Admiral Tracey, did
11 you have something?

12 VADM TRACEY: I was just going to say
13 that my recollection is that this is a conundrum
14 that applies to more than sexual assault cases,
15 right?

16 LTC McGOVERN: Yes, ma'am.

17 VADM TRACEY: So there probably would
18 be some benefit in being transparent as to the
19 DoD interpretation of what is allowable with an
20 inclination towards needing to give the victim
21 some satisfaction that appropriate action was
22 taken.

1 CHAIR HOLTZMAN: I guess my concern
2 here is how is there oversight, appropriate
3 oversight over this? In other words, let's just
4 say -- I mean, we know it's going to happen when
5 there's a court-martial, because that's all
6 public. But in the cases where it's commander
7 discretion, do we have any handle on this and how
8 do we do that? Are there any statistics on the
9 number of cases that were founded where the
10 commanders imposed no punishment?

11 And let's assume there are cases like
12 that. Who's reviewing that decision? Is it
13 reviewed? Should it be reviewed? How many times
14 does it happen? So it seems to me that this is
15 an area that is squishy, to say the least. And I
16 think understanding what the Privacy Act is, is
17 just one part of it, but also, what kind of
18 review is there of decisions like that or should
19 there be?

20 LTC MCGOVERN: Yes, ma'am. Throughout
21 the transcripts, I think the Staff would agree
22 that one of the most common themes that you heard

1 was there has not been tracking of retaliation
2 cases and, therefore, we don't have the
3 information at this time to really assess the
4 scope of the problem. We have a great quote from
5 Judge Jones a few months ago that stated that
6 without this data and knowing the real problem,
7 it's hard to define a solution. In --

8 CHAIR HOLTZMAN: Is that quote going on
9 the title page of our report?

10 (Laughter.)

11 LTC McGOVERN: In her final
12 certificate, yes, ma'am. But in March of 2015,
13 this will move on actually to another one of your
14 issues, DoD SAPRO issued a data call after the
15 POTUS report had come out and they're in
16 preparation for their SAPRO, saying we want these
17 data points covered in order to assess the
18 situation, assess the problem, rather than just
19 relying on survey data which says perceived
20 retaliation.

21 The responses from the Services --
22 because we asked for that data -- was that they

1 could not provide reliable data because that had
2 not been tracked in the past. If you could just
3 give me a moment -- those are the data points
4 that DoD SAPRO asked the Services to provide.
5 And in response to your RFIs, the Navy was the
6 only Service who was able to provide us some of
7 that information, but they qualified it that this
8 was not verifiable or complete because it wasn't
9 tracked. It was their attempt in order to be
10 responsive to the JPP.

11 So knowing that they don't have the
12 information going back, since this has basically
13 been squashed in your questions to Mr. Galbreath,
14 is there a collective agency on this, do you
15 think there should be? And his response was,
16 this may be bigger than SAPRO, but it certainly
17 is a good idea. Do you have any recommendations
18 as to whether this data call should be a
19 requirement? Should it be incorporated with the
20 SAPRO report? What are your thoughts on this?

21 HON. JONES: Can I just ask a couple of
22 questions?

1 LTC MCGOVERN: Yes, ma'am.

2 HON. JONES: We do have tracking on the
3 sexual assaults themselves.

4 LTC MCGOVERN: Yes, ma'am.

5 HON. JONES: And my question is really,
6 with respect to sexual assaults, are the victims
7 apprised every step of the way, even if it's a
8 commander -- or is that a privacy issue as well?
9 Even if it's a commander decision as opposed to a
10 court-martial? It's the same problem, in other
11 words, whether it's a retaliation issue or a
12 sexual assault issue?

13 LTC MCGOVERN: If a sexual assault is
14 disposed of in some way other than a court-
15 martial --

16 HON. JONES: Right.

17 LTC MCGOVERN: -- the commander is
18 required to brief the victim of what action is
19 going to be taken, no action, and I believe the
20 SVC and others are involved in that conversation.

21 HON. JONES: Okay. So what we're
22 talking about then really is a Privacy Act

1 problem with just the retaliation cases?

2 MS. CARSON: I think the policy choke
3 point we're getting at here is if something goes
4 to a court-martial, the outcome is technically a
5 public record. And so --

6 HON. JONES: Right.

7 MS. CARSON: -- the victim and society
8 at large has the right to know what happened,
9 what the offender's punishment was. That is less
10 clear in non-judicial punishment or anything less
11 than a court-martial. And so the legal policy is
12 adverse to litigation risk, which says this is a
13 personnel record, this is a Privacy Act issue, we
14 don't release the information about what happened
15 specifically. We can tell you all the way up to
16 and including that it was substantiated, but we
17 can't tell you what happened to the offender.

18 HON. JONES: So between substantiated
19 and court-martial --

20 MS. CARSON: There is --

21 HON. JONES: -- if something happens --

22 MS. CARSON: Something happens and so

1 there's no tracking of it for --

2 HON. JONES: Okay.

3 MS. CARSON: -- this reason, there's no
4 notification of the victim of what happened, and
5 you're also losing any potential deterrent effect
6 that people knowing what happens to people in
7 these cases --

8 CHAIR HOLTZMAN: Can I just follow up
9 because I'm not following, I'm not understanding.

10 MS. CARSON: Okay.

11 CHAIR HOLTZMAN: Are you talking now
12 about retaliation or sexual assault?

13 MS. CARSON: I'm talking about --

14 CHAIR HOLTZMAN: That's what I'm trying
15 --

16 MS. CARSON: -- anything.

17 CHAIR HOLTZMAN: So in a sexual --
18 because I saw from what Colonel McGovern said
19 that in a sexual assault case, if there was not a
20 court-martial, but there was punishment short of
21 a court-martial, that the victim was apprised.

22 MS. CARSON: Not of the punishment.

1 CHAIR HOLTZMAN: Not of the punishment?

2 MS. CARSON: That's the choke point in
3 the policy --

4 CHAIR HOLTZMAN: Oh, okay. So what
5 you're saying now --

6 MS. CARSON: -- is that anything short
7 --

8 CHAIR HOLTZMAN: -- is that both for
9 retaliation and for sexual assault, if there's no
10 court-martial, the victim doesn't know?

11 MS. CARSON: Correct.

12 CHAIR HOLTZMAN: And let me just --
13 okay. I had another question, but I'll --

14 COL GREEN: And I think Ms. Holtzman
15 echoes to Admiral Tracey's point and Mr. Taylor's
16 point. That's predominant with any disciplinary
17 issue within the command is if it's resolved
18 short of a public forum, it's treated as a
19 personnel action and the privacy of the person
20 who is being disciplined is maintained in that
21 process.

22 HON. JONES: But at least we track what

1 happens in sexual assaults and the kinds of
2 punishments, right?

3 MS. CARSON: Not if it's --

4 HON. JONES: Because I thought I --

5 MS. CARSON: -- not a court-martial.

6 HON. JONES: -- just read that so many
7 -- well, I just looked at a bunch of the
8 statistics you gave us and I thought for
9 substantiated crimes it goes through and it tells
10 you, this guy got 20 days of hard labor, somebody
11 else got whatever. Isn't that tracking of
12 something less than a court-martial?

13 MS. CARSON: In the SAPRO report, I
14 think they do have some data on non-judicial
15 punishment. But I'm -- that's true. So they do
16 have some -- they are tracking that on sexual
17 assault cases.

18 HON. JONES: Right.

19 MS. CARSON: But they're not doing it
20 at the level of letting a specific victim know.

21 HON. JONES: Okay.

22 MS. CARSON: So you're right. You're

1 right. In retaliations, since they're not
2 tracking --

3 HON. JONES: They're not doing any
4 tracking.

5 MS. CARSON: -- retaliation at all --

6 HON. JONES: Right, okay.

7 MS. CARSON: -- that isn't tracked.

8 But there --

9 HON. JONES: But in either event, the
10 --

11 MS. CARSON: -- are still some gaps --

12 HON. JONES: -- victims aren't being
13 told?

14 MS. CARSON: -- I think even in what
15 SAPRO is tracking --

16 HON. JONES: Yes.

17 MS. CARSON: -- because there are a lot
18 of questions about, well, if it was a sexual
19 assault report that never turned out to be
20 charged as a sexual assault, it goes away. So
21 it's only if it was charged as a sexual assault
22 and gets kicked back, it doesn't go to court-

1 martial, but gets a non-judicial punishment, you
2 may get a statistic on that. But it is not a
3 very clear path that we're getting all of the
4 data on it. And it's for sure that the victim is
5 not. We even heard from Special Victims' Counsel
6 and from anecdotal victims that try as they
7 might, they can't find out what's done to the
8 perpetrator and what punishment, if any, is meted
9 out. It may be substantiated, but they still
10 don't know if anything is done.

11 HON. JONES: I see. Thank you.

12 CHAIR HOLTZMAN: Can I understand what
13 it is in the Privacy Act that prohibits the
14 advice to the victim?

15 MS. CARSON: Well, my understanding of
16 it is the Privacy Act has exceptions. And the
17 exceptions are --

18 CHAIR HOLTZMAN: Well, what is the --
19 let's start with what the prohibition is first.

20 MS. CARSON: Well, the Privacy Act, I'm
21 not a scholar on the Privacy Act, but it
22 disallows any personal information from being

1 disclosed, except what is typical in routine
2 business use or routine practice or within the
3 agency, et cetera. There is no litigation --
4 because there have been no cases where they're
5 actually telling people things and then you would
6 turn around and sue because your Privacy Act was
7 violated since it's litigation risk that prevents
8 it from being done in the first place. So is
9 there a public policy that says, yes, the victim
10 should be apprised of what happens to the
11 perpetrator, then you would put that policy in
12 place and then people challenge it down the road
13 in court and you say, that is a violation of the
14 Privacy Act to let victims know, but we've never
15 gotten to that point.

16 HON. JONES: Is there a --

17 MS. CARSON: Because we've never made
18 the public policy decision to tell victims.

19 HON. JONES: Is there some interest,
20 let's leave aside the law for a minute, within
21 the military justice system itself, starting with
22 commanders through public court-martials, that

1 adds to the desire to keep this private? I mean,
2 is there any discussion about that? Is this
3 supposed to be different from the civilian system
4 for some reason?

5 MS. CARSON: The difference in the
6 civilian system is you only have court.

7 HON. JONES: Right.

8 MS. CARSON: There is no other --

9 HON. JONES: You have a lot of minor
10 sanctions in court --

11 MS. CARSON: You do have minor --

12 HON. JONES: -- but they're still
13 courts.

14 MS. CARSON: You have juvenile records
15 that aren't going to be released, but you have
16 anything that's going to go through the court
17 process is going to become a public record. So
18 that's the difference in the military. You don't
19 find out what happens to people in the workplace
20 who are sanctioned for that reason. That's the
21 most similar --

22 HON. JONES: So this is not military

1 related? That's what I'm asking, whether there's
2 some reason why --

3 VADM TRACEY: So I think, as a line
4 leader, I think there's a mental model,
5 particularly with regard to enlisted personnel,
6 that you get a chance to recover. That you -- so
7 that the record of your sins doesn't follow you
8 throughout your career if you remediate yourself.
9 And so as a commander, there's that kind of an
10 attempt to give people the opportunity to rise to
11 the occasion that governs a lot of how you think
12 about what you want to do publically about an
13 individual. So maybe not directly in line with
14 the Privacy Act law, but a commander's thought is
15 about giving people the chance to be better than
16 they were. And so you manage information a
17 little bit with that as a mental model.

18 CHAIR HOLTZMAN: All right. That's
19 helpful. Thank you.

20 MR. TAYLOR: Right. If I could just
21 add to that, my experience is that most of these
22 issues have arisen in the past when you have a

1 Freedom of Information Act request for what
2 happened to a specific person. And then, if
3 you're the lawyer providing advice on whether to
4 release that information or not, you look at
5 whether it's protected under the exemption for
6 privacy under the Privacy Act.

7 And then you do a balance and you
8 balance whether there's a greater interest in
9 public disclosure of this particular outcome or
10 this particular record than there is in the
11 privacy of the individual. Which gets back to my
12 original point that the higher in rank, the
13 higher in responsibility an individual official
14 is, the heavier the weight on the side of public
15 disclosure in the interests of letting the public
16 know that all of the rules and policies that
17 apply to everyone else also applied to this
18 individual.

19 CHAIR HOLTZMAN: If I may just
20 interject a question here, because I'm not an
21 expert on this, but you could also make the
22 argument that the failure to disclose with regard

1 to lower level violators may suggest that people
2 don't understand that these people have been
3 punished and, therefore, where is the deterrent
4 effect?

5 MR. TAYLOR: I totally agree. And
6 that's why, as I said initially when I started
7 down this path, I think it's a combination of not
8 only the rank and position of the individual,
9 which gets to Admiral Tracey's point, but also
10 the seriousness of the offense. Because if the
11 offense is of sufficient seriousness, then again,
12 there would be a public interest in letting
13 people know that the rules have been followed and
14 action was taken in an appropriate manner.

15 VADM TRACEY: And at least in the Navy,
16 NJP is, the result of NJP is published, names
17 eliminated, non-judicial punishment --

18 HON. JONES: Okay.

19 VADM TRACEY: -- the Article 15, is
20 published. So that there is that approach to
21 deterrence that this --

22 HON. JONES: But then it would never --

1 VADM TRACEY: -- event occurred and
2 this --

3 HON. JONES: -- go to the victim
4 because it's anonymous. In other words, the
5 punishments are posted, but not the name of the
6 offender.

7 VADM TRACEY: Not the name of the
8 offender, but the victim typically would be able
9 to identify something that looked like what their
10 claim was, right.

11 CHAIR HOLTZMAN: Well, does that
12 suggest, Mr. Taylor and other Members of the
13 Panel, that we ought to be supporting DoD's more
14 nuanced view of how to deal with this so that
15 people don't have to go through a Freedom of
16 Information Act request to find out what's
17 happening and maybe this can be part of the
18 initial procedure, which is helping commanders
19 understand when to disclose --

20 LTC McGOVERN: Well, and to --

21 CHAIR HOLTZMAN: -- and the
22 circumstances?

1 LTC McGOVERN: -- bring it back to the
2 retaliation, ma'am, in these cases, it's that
3 final discussion between the commander telling
4 them the outcome of the investigation, so they're
5 not having to go through filing at that point a
6 FOIA request and doing the Privacy Act analysis.
7 It is unclear what the mental gymnastics is of
8 the Services and DoD in their analysis of the law
9 and the litigation risk and, therefore, instead
10 of trying to detail it out, it may be helpful to
11 ask them to publish specific guidance so those in
12 the field aren't having to guess what they can
13 and cannot tell the victim.

14 CHAIR HOLTZMAN: But should we be
15 giving some guidance to DoD on this?

16 LTC McGOVERN: If you feel informed
17 enough to do that, we certainly will include your
18 thoughts on what's important as far as the
19 deterrent effect, is what I heard, as well as the
20 other considerations Mr. Taylor raised can all be
21 incorporated in the discussion.

22 CHAIR HOLTZMAN: Yes. And also what

1 Judge Jones raised about the concern of the
2 victim here --

3 LTC McGOVERN: Yes, ma'am.

4 CHAIR HOLTZMAN: -- of understanding
5 what's happening.

6 MS. CARSON: I think the public policy
7 question is, exactly as Mr. Taylor said, at the
8 individual case level, you have the legal office
9 who's making this balancing test for each
10 individual case over whether the incident is
11 severe enough, whether the person is high enough
12 ranking. So you can make the public policy
13 decision to say, yes, we'll let that be made at
14 every local level like that. Or you can make the
15 public policy decision to say, if it's related to
16 a sexual assault report, it's serious enough we
17 think the victim should be told in that case.

18 Or you can identify something from a
19 public policy perspective that DoD is going to
20 actually say, if you're a victim of a sexual
21 assault related crime, in those cases, we're
22 going to make it easy on everybody across the

1 board and we're going to make it consistent by
2 saying, we're going to allow you to know what
3 happened to the offender in that case or
4 enumerate whatever cases in which it's important
5 enough to let you know or the rank is high enough
6 and that may already even be policy. At this
7 certain rank, you're high enough that it should
8 be known.

9 And then there's the other, Admiral
10 Tracey's point, which is more the personnel
11 record point. Whether your non-judicial
12 punishment should follow you personally, that's
13 why it's sort of the philosophy that you should
14 get a second chance, this shouldn't ruin your
15 career, this shouldn't stick with you personally
16 as how you have been reprimanded or whatever's
17 happened to you versus is that something that
18 should actually stay in your personnel records
19 and follow you?

20 That's another public policy question.
21 That isn't currently following people who are
22 disciplined at a low level for something that may

1 be sexual harassment or sexual assault related,
2 but it does go away because of the philosophy
3 that these things shouldn't follow you. Maybe
4 sexual assaults should as policy.

5 CHAIR HOLTZMAN: Well, I think there
6 are two questions with regard to the sexual
7 assault issue. One has to do with privacy
8 regarding sexual assault non-judicial
9 punishments. And then we also have retaliation
10 in the case of sexual assault. And whether in
11 both instances those are considered serious
12 enough to obviate whatever privacy issues there
13 may be on the other side. I mean, we could make
14 such a recommendation if we wanted to, but I just
15 wanted to make sure we understood that there are
16 two separate issues here, one with regard to
17 sexual assault and one with regard to retaliation
18 in those cases.

19 MS. CARSON: I think that distills the
20 question down for you, whether you want to make a
21 recommendation one way or the other, those are
22 the competing interests with respect to the

1 Privacy Act and with respect to the public policy
2 and how DoD is going to handle sexual assaults
3 and outcomes of sexual assault cases and
4 retaliation cases. That's two separate issues.

5 CHAIR HOLTZMAN: Well, have we heard
6 enough about the policy issue on the Privacy Act
7 side for us to make a recommendation here? Do we
8 need to hear something about that? Admiral
9 Tracey, I don't know if you have a thought.

10 VADM TRACEY: I think that the Staff's
11 suggestion that we're not going to get smart
12 enough about that to do that recommendation in
13 the Panel and perhaps asking DoD to do some
14 deliberate work around what policies would
15 address being sure that victims of retaliation
16 subsequent to a sexual assault case get some view
17 that gives them some satisfaction that their
18 issues have been addressed appropriately, maybe
19 some questions about whether sexual assault
20 related privacy decisions may be different from
21 the routine sets of questions about how to manage
22 people's records, a view of the policy that makes

1 sure that the reporting and the management
2 decisions are victim-centered and accused-
3 centered kinds of views.

4 We tend to, in DoD, do things around
5 what the process needs to be instead of we're
6 trying to get a policy that takes care of the
7 victim's view of the fact that they're being
8 retaliated on. So any data collection and what
9 have you ought to be about that, not about our
10 record keeping, but about how am I going to know
11 that I'm actually addressing those kinds of
12 issues?

13 So you talked about the fact that the
14 SAPRO gets the data around the sexual assault
15 case and you ought to be able to track
16 retaliation as one of the opportunities, if you
17 will, bad choice of words, but one of the next
18 states that could happen is a victim gets
19 retaliated against. That ought to be a part of
20 the tracking as that answers either yes or no.
21 That information should be in the SAPRO record on
22 that case. The file ought to track whether any

1 retaliation happened against the victim. So I
2 think there are three things to communicate to
3 DoD about work we can't as a Panel do, but we
4 think probably needs to be done.

5 CHAIR HOLTZMAN: So should we break
6 these down in terms of questions? I mean, maybe
7 we need to take a, I don't mean a vote, but we
8 should just focus and decide whether we have a
9 consensus on each one of these points. Or, Mr.
10 Stone, did you have something you wanted to say?

11 MR. STONE: I guess some of this takes
12 me back to where I started, the victim wants to
13 know that when they make a retaliation complaint,
14 it isn't that somebody tolerated them and then
15 the complaint was shredded after they left and
16 nothing ever happened and they have this
17 unresolved feeling. I think they want to know
18 that something happened with it and it was
19 founded or not founded.

20 I don't think that they -- I think
21 that, that's more important than them necessarily
22 finding out what the level of punishment was.

1 They know that, that's going to be in the
2 commander's discretion. But they want to know
3 that if it happened two or three times, that
4 somewhere there's a record that it was founded
5 three times and at that point, their choices are
6 either to try and take it further up the line or
7 know that they have to do something to change
8 their career because it's going on. As opposed
9 to, nobody believes me, they all think I'm a
10 liar, I'm going crazy here.

11 And so I think from the victim's point
12 of view, and maybe this is what you had at the
13 beginning about them wanting more transparency,
14 they have to know was anything done,
15 investigation or otherwise, was my complaint
16 concluded to be founded or unfounded? And even
17 if they don't get what the action is that's taken
18 and I think they have a right to that.

19 And it sort of reminds me of every
20 time I go into the doctor, they have to give me a
21 form that tells me about the privacy of my data.
22 At least I know who's going to get it and what

1 it's all about. And maybe the answer is, we're
2 suggesting there should be a little written thing
3 that goes back to these people that says, we may
4 not be able to tell you the, I don't want to say
5 I guess punishment, what the level of discipline
6 is that results from your complaint, but we will
7 certainly tell you when we have decided to close
8 it and whether or not we concluded it was founded
9 or unfounded.

10 That's what the victims want to know.
11 That this isn't just a silly remedy, that it has
12 some meaningfulness, even though they're not
13 going to be the one who decides the punishment.
14 So it's just -- yes, they need more transparency,
15 I'm not sure it has to go into the transparency
16 includes what the outcome was from the personnel
17 records of the person who was disciplined, but
18 that's separate and apart from the victim feeling
19 they didn't just go into an office, say
20 something, and then they never hear again what
21 happens. Even though somebody may be tracking it
22 and something happens, if they don't get that

1 feedback, they're going to say this whole system
2 is worthless, I don't have any satisfaction to
3 know anything happened at all, even though
4 something may have happened.

5 CHAIR HOLTZMAN: Judge Jones?

6 HON. JONES: Yes. No, I thought the
7 victims were being told whether it was
8 substantiated or not. They know that, correct?

9 LTC McGOVERN: Yes, ma'am.

10 HON. JONES: The only thing that
11 happens between being told it's substantiated and
12 judicial punishment is where there's no further -
13 - they're not given any information, is that
14 right?

15 LTC McGOVERN: Yes, ma'am.

16 HON. JONES: If there's a judicial
17 punishment, then they're told about that. They
18 may end up testifying at a court-martial. But
19 they know it's been substantiated. And then if
20 it's just command discipline, that's what they
21 don't know, right?

22 MS. CARSON: Yes, ma'am.

1 HON. JONES: Okay. Just wanted to
2 clarify.

3 MR. STONE: And that's true in
4 retaliation as well as in sexual assault?

5 LTC McGOVERN: Yes, sir.

6 MS. CARSON: It's true in anything
7 essentially.

8 CHAIR HOLTZMAN: Excuse me, Mr. Taylor?

9 MR. TAYLOR: Yes, I just wanted to add
10 that it seems to me that the most we could
11 probably hope for from a bunch of lawyers in the
12 Defense Department are guidelines. Guidelines as
13 to how to interpret this to the extent allowable
14 by law and consider some of the factors that
15 Admiral Tracey mentioned, the rank of the
16 individual, the seriousness of the offense, and
17 those kinds of factors to go into some more
18 definite guidelines about maximizing
19 transparency, both to the victim and to the
20 public. Because I think there's a real important
21 public interest being served by publicizing to
22 the, I use the words maximum extent possible, any

1 of these offense.

2 CHAIR HOLTZMAN: Okay. I have two
3 additional comments. Number one, we don't need
4 to be bound by the Privacy Act in the sense that
5 we can also recommend to Congress that with
6 regard to the Privacy Act it be amended to the
7 extent it's necessary so in these cases, sexual
8 assault cases, the victim can be advised of
9 what's happened. I mean, I'm not saying that,
10 that's a necessary outcome or a necessarily
11 desirable outcome, but that could be done. So
12 we're not necessarily in a sense restricted in
13 terms of just relying on DoD's analysis of the
14 Act. The Act could be changed or we could
15 recommend, at least, that the Act be changed.

16 And the second part is, I have a
17 concern, aside from the victim here, which is how
18 do we assess how seriously commanders are taking
19 the problem of retaliation? I mean, obviously we
20 need statistics to do that, but I think one of
21 the problems that was found with regard to sexual
22 assault, or at least was believed with regard to

1 sexual assault, is that the military wasn't
2 taking this seriously. And I think that, that
3 was true for a substantial period of time, I
4 don't believe that, that's true any longer. It
5 may be true in isolated cases or cases here and
6 there.

7 But we don't know what's happened with
8 regard to retaliation. We don't know whether
9 that same phenomenon that was of such serious
10 import with regard to sexual assault is true or
11 not true with regard to retaliation. And how do
12 we know that if we're not somehow tracking what
13 commanders are doing in these cases? Not just
14 that they have imposed punishment when it's
15 founded, but what kind of punishment? And then I
16 think -- so I have that other concern that's
17 lurking in the back of my head here and I don't
18 know how to address it, in part because there
19 hasn't been the same focus in DoD on retaliation
20 as there was on sexual assault itself.

21 LTC McGOVERN: Yes, ma'am. I believe
22 since the POTUS report, you've received briefings

1 from SAPRO and from the Services of the
2 initiatives, the regulation changes, the command
3 management, the CMGs now having to ask about
4 retaliation, they are coming out with strategies.
5 So there's a lot in flux right now, but that
6 moves us down to actually your fourth box, about
7 holding offenders accountable and back to the
8 sheet that I just gave you, which is, again, a
9 recurring theme throughout everything you've
10 heard about retaliation is if they can't provide
11 that information to you in the past, would you
12 like to recommend that this information be
13 gathered for your future review or for DoD to be
14 giving it the same attention as sexual assault?

15 CHAIR HOLTZMAN: So you're asking -- so
16 we're skipping now to, or maybe we're just going
17 directly to Outline 7B, which is should DoD and
18 the Services begin tracking the outcome of
19 substantiated cases and adverse action taken
20 against offenders? That --

21 LTC MCGOVERN: Yes, ma'am. And if --

22 CHAIR HOLTZMAN: -- seems pretty

1 obvious to me, but --

2 LTC McGOVERN: -- that, do you also
3 want to ask them to be tracking these other nine
4 points in the DoD SAPRO call, which they were not
5 able to do in the past, but there's been no
6 indication that they're going to require it in
7 the future.

8 CHAIR HOLTZMAN: All right. So the
9 nine points are the list, the type of retaliation
10 -- oh, I'm sorry, that list. Whether a report is
11 professional, social -- okay. Oh, and do we want
12 something about whether the victim was notified
13 or the extent to which the victim was notified?
14 Should that be part of what we're keeping track
15 of too? Well, I don't know. To me, this is a
16 no-brainer, but I'd like to --

17 HON. JONES: No, I think we --

18 CHAIR HOLTZMAN: -- hear from Members
19 of the Panel.

20 HON. JONES: I think we need to ask DoD
21 SAPRO to track retaliation the same way they do
22 sexual assault.

1 LTC McGOVERN: Would you recommend it
2 be published in an annual report along with their
3 regular SAPRO report or a separate report?

4 HON. JONES: It seems part and parcel
5 of the same problem to me.

6 LTC McGOVERN: Okay.

7 HON. JONES: I would put it in the same
8 report. But that's my opinion.

9 VADM TRACEY: I agree.

10 MR. STONE: I agree too.

11 MR. TAYLOR: Yes, I agree with Judge
12 Jones.

13 CHAIR HOLTZMAN: Unanimous.

14 (Laughter.)

15 CHAIR HOLTZMAN: Judge Jones, should we
16 put this quote for you too?

17 LTC McGOVERN: She's on a roll.

18 (Laughter.)

19 LTC McGOVERN: If we could revert back

20 --

21 HON. JONES: It's Jan's cookies.

22 (Laughter.)

1 LTC McGOVERN: I think that --

2 VADM TRACEY: But I think we are not
3 recommending another one of these data calls.
4 We're doing it as part of the SAPRO --

5 HON. JONES: Yes, we don't need a data
6 -- well, we don't have time for a data call, do
7 we?

8 LTC McGOVERN: Well, and they can't --

9 HON. JONES: How many years are we --

10 LTC McGOVERN: -- provide it.

11 HON. JONES: -- going to be here?

12 Right. But we do need it tracked and become part
13 of the report.

14 LTC McGOVERN: Starting for the next
15 FY?

16 HON. JONES: Right, yes.

17 CHAIR HOLTZMAN: Well, let me just ask
18 a question about this.

19 LTC McGOVERN: Yes.

20 CHAIR HOLTZMAN: Okay. So we have this
21 information and it turns out that some commanders
22 have done nothing even though it is a serious --

1 a founded complaint and a serious allegation of
2 retaliation. What happens to that commander?
3 Who is reviewing these reports and deciding
4 whether something needs to be done?

5 LTC MCGOVERN: I'll let Julie handle
6 that question.

7 CHAIR HOLTZMAN: Is this real sensitive
8 or --

9 LTC MCGOVERN: No. No, she's just read
10 the regulations very closely.

11 MS. CARSON: Well, I don't think there
12 is any specific guidance on that. I think this
13 is the first attempt that DoD made to collect
14 this data and to have the Case Management Groups
15 tracking this, I think they're on the right
16 track. But it's -- I think there hasn't been the
17 next step taken.

18 CHAIR HOLTZMAN: Well, maybe something
19 needs to be recommended in terms of reviewing the
20 data to determine whether appropriate action has
21 to be taken vis a vis commanders, either
22 sensitivity training or other kinds of action.

1 Because the data may scream out for some kind of
2 response.

3 COL GREEN: Ma'am, if I can analogize
4 it to the sexual assault issue, because I think
5 we're in the area now of just command
6 responsibility and command discretion as to what
7 action is appropriate and what action is taken,
8 and obviously the development of sexual assault
9 policy has mirrored this, and that's why you now
10 have an initial disposition authority that says a
11 certain level of commander is the commander who's
12 responsible for deciding an action in a report of
13 sexual assault and whether case action is taken.
14 You also have, in the law, levels of review that
15 are mandated for that, that if a decision is made
16 not to pursue a policy then that's required to be
17 reviewed by a higher level of command.

18 So there is nothing like that,
19 obviously, in cases like this. And, again, I
20 think it's important to remember here, we're
21 talking about cases that may run as simple as
22 somebody who's just feeling left out of their

1 organization up to a level of professional
2 reprisal. But there are analogies in the sexual
3 assault realm.

4 CHAIR HOLTZMAN: I think that's a
5 really important point, Colonel Green. Because I
6 think that maybe one of the things we could
7 recommend also is that DoD review whether, in
8 light of the data, steps should be taken such as
9 exist with regard to sexual assault, with regards
10 to level of command review, and so forth, so that
11 --

12 LTC McGOVERN: Corresponding policies
13 apply.

14 CHAIR HOLTZMAN: Yes. I'm not saying
15 that, because I don't think we know enough now --

16 LTC McGOVERN: Right.

17 CHAIR HOLTZMAN: -- to make any
18 recommendation. But that perhaps they should be
19 looking at analogous ways of dealing with sexual
20 assault.

21 MS. CARSON: Well, they essentially are
22 kicking it up to the installation level commander

1 because they're requiring the Case Management
2 Groups, which is the monthly installation level
3 commander meeting, to assess --

4 CHAIR HOLTZMAN: Right. But suppose
5 you have the alleged retaliator as some higher
6 level person in the installation, well known to
7 the commander, and no action is taken. Well,
8 then what happens then? That's all I'm saying.
9 So, yes, even though it might be at a high level,
10 there may be some of those cases that are still
11 covered that would be dealt with under the sexual
12 assault policy, but there are no policies with
13 regard to how to handle these retaliation cases.
14 So, I mean, that would be my suggestion, I don't
15 know how anybody feels about that on the Panel,
16 whether that should be added.

17 HON. JONES: I'm just not sure -- I'm
18 sorry, Liz.

19 CHAIR HOLTZMAN: Okay. You want me to
20 --

21 HON. JONES: What are we adding?

22 CHAIR HOLTZMAN: What we're adding is

1 -- what Kyle talked about was that right now in
2 sexual assault, there are -- the action of the
3 commander is proscribed in some cases because
4 there's a concern either of conflict of interest
5 or there's a concern of appearance, so that in
6 some cases, the -- I mean, you have, for example,
7 very high level -- what is it --

8 HON. JONES: Well, the authority is
9 removed --

10 CHAIR HOLTZMAN: Right.

11 HON. JONES: -- to a higher level.

12 CHAIR HOLTZMAN: To a higher level.

13 HON. JONES: Right.

14 CHAIR HOLTZMAN: None of that exists
15 with regard to retaliation. My view is that we
16 don't know enough to make similar suggestions,
17 but the suggestion is that the DoD look at, once
18 they've collected the data, to look and see
19 whether some of the things they've done under
20 sexual assault with regard to the role of the
21 commander would be appropriate in these
22 retaliation cases. That's all.

1 VADM TRACEY: Maybe said another way
2 though.

3 CHAIR HOLTZMAN: Okay.

4 VADM TRACEY: Is that what we would
5 recommend is that the data be evaluated to
6 understand whether retaliation is being given the
7 proper attention by commanders, whether there are
8 patterns that would suggest that commanders don't
9 know how to deal with retaliation. And then we
10 would adjust the policies around review and
11 escalation up the chain of command based on that
12 set of findings.

13 CHAIR HOLTZMAN: That's fine.

14 HON. JONES: Sounds good.

15 MR. TAYLOR: Yes, I'm okay with that.

16 LTC McGOVERN: One last --

17 CHAIR HOLTZMAN: Mr. Stone --

18 LTC McGOVERN: Oh, I'm sorry.

19 CHAIR HOLTZMAN: -- did you want to
20 make a comment?

21 MR. STONE: Well, is that related to
22 the third question which we just --

1 LTC McGOVERN: No, sir. It's related

2 --

3 CHAIR HOLTZMAN: No, we jumped to 7.

4 MR. STONE: Oh, we jumped to --

5 CHAIR HOLTZMAN: Outline, yes, it's the
6 fourth, one, two, three, four, sorry.

7 MR. STONE: Yes. But the third one was
8 whether you're going to track, flag officer
9 reviews. In a sense, isn't that looking at the
10 whole --

11 LTC McGOVERN: Yes, sir. No, actually
12 we'll be coming back to that in a second. This
13 was what should they be tracking as far as the
14 process and the rate of retaliation and types of
15 retaliation?

16 CHAIR HOLTZMAN: So, we're just focused
17 on that one -- yes. So we're focused on --

18 LTC McGOVERN: But there seems to be a
19 consensus.

20 CHAIR HOLTZMAN: Right. We've agreed
21 on data collection and in using that with regard
22 to the -- and including that with regard to the

1 reports on sexual assault. And the only question
2 is should we add the way in which Admiral Tracey
3 has formulated the concern that I had?

4 VADM TRACEY: We've added a tenth item
5 to this list, though --

6 CHAIR HOLTZMAN: Oh yes.

7 VADM TRACEY: -- right? And that is
8 what information was shared with the victim,
9 right?

10 CHAIR HOLTZMAN: Right.

11 LTC McGOVERN: Yes, ma'am.

12 CHAIR HOLTZMAN: Mr. Stone, you okay
13 with that now?

14 LTC McGOVERN: I think the --

15 CHAIR HOLTZMAN: So let's go --

16 LTC McGOVERN: The preceding --

17 CHAIR HOLTZMAN: So where do we go now?

18 LTC McGOVERN: The preceding issue was
19 addressed briefly in an earlier meeting with an
20 exchange between Mr. Taylor and Mr. Galbreath.
21 In FY 2013, there was a requirement in the FY
22 2013 NDAA that anyone who reported a sexual

1 assault and was then involuntarily discharged 12
2 months later, a general officer would review that
3 discharge to ensure that it wasn't for
4 retaliation, that there was real good reason for
5 there to be an involuntary discharge.

6 There's no mechanism in place, Mr.
7 Galbreath explained, right now to track whether
8 that is being complied with. The IG actually has
9 issued a Memo though that they are going to go
10 back and look since FY 2013 at all the
11 involuntary separations to make sure that they
12 were complied with. Would you like to make any
13 recommendation that there be oversight or some
14 reporting requirement to ensure that, that
15 continues to be tracked? Or are you comfortable
16 with the policy being out there and that it's
17 being complied with?

18 MR. TAYLOR: Well, since you invoked my
19 name, I'll respond --

20 LTC McGOVERN: Yes, sir.

21 MR. TAYLOR: -- like the Republican
22 debate, I guess.

1 (Laughter.)

2 MR. TAYLOR: Yes, I think these ought
3 to be tracked. I mean, I think this is a very
4 important, it's a fundamental provision that if
5 somebody is separated within a year after making
6 an unrestricted report of a sexual assault, I
7 think somebody ought to look at that. So I'm
8 sticking to my guns on that one, I guess, I think
9 it ought to be tracked.

10 LTC McGOVERN: Yes, sir. So we
11 actually, I believe, could add that as number 11
12 to the list of things that they should report on.

13 CHAIR HOLTZMAN: I agree.

14 VADM TRACEY: Is that going to be
15 possible for the SAPRO to report on? So is the
16 victim, help me with this, the victim may have
17 moved on to another location, is being
18 involuntarily separated there, is the SAPRO going
19 to know that the separation happened because the
20 separation is going to be sort of independent of
21 SAPRO's responsibilities? It may be it works,
22 but I'm just wondering --

1 LTC McGOVERN: I know --

2 VADM TRACEY: -- how you actually
3 connect this dot?

4 LTC McGOVERN: For several years now,
5 they've had a policy in place that the Surgeon
6 General has to review all involuntary discharges
7 for those with PTSD to ensure that they weren't
8 miscategorizing those. So these types of
9 policies to review discharges, regardless of
10 where the person is stationed, are taken to such
11 a high level of oversight to ensure the discharge
12 is appropriate.

13 VADM TRACEY: It's been a while. I'm
14 just --

15 LTC McGOVERN: Yes.

16 VADM TRACEY: -- trying to understand
17 how the databases that identify these different
18 aspects actually get connected to the fact that
19 this person was given an involuntary discharge.
20 Can you actually connect that dot?

21 MS. CARSON: What they're doing --

22 VADM TRACEY: So that it --

1 MS. CARSON: The IG is doing this and
2 so we assume they have access to something that
3 can give them this information. Because they put
4 out a data call in June of 2015 for identifying
5 service members who made unrestricted sexual
6 assault reports from January 1, 2009 to January
7 30, 2015, and were involuntarily discharged
8 within 12 months of those reports. So they're
9 going to collect that data --

10 LTC McGOVERN: To connect those things.

11 MS. CARSON: -- and the IG will be
12 coming out with a report on this. They've noted
13 this as a project. But there is no annual
14 requirement to report this and so if that's
15 something you want to see on an ongoing basis,
16 that might be something you want to --

17 VADM TRACEY: I absolutely agree that
18 we want to see it on an ongoing basis. All I was
19 questioning was whether the SAPRO data, this is a
20 list of things the SAPRO report is going to
21 include, will the SAPRO report be able to include
22 that data? Does it actually connect to that

1 report?

2 LTC McGOVERN: We can look into that,
3 ma'am. A lot of this information they have to
4 get from other agencies, the JAGs and the MCIOs,
5 so we can go take a closer look at what's
6 required to get that data to see if it makes
7 sense to be combined --

8 CHAIR HOLTZMAN: Can I ask --

9 LTC McGOVERN: -- or something
10 separate?

11 CHAIR HOLTZMAN: Can I ask one
12 question, follow-up question about that? Suppose
13 they find that the involuntary discharge was
14 improper, what happens?

15 LTC McGOVERN: Then the -- two things
16 can happen, ma'am. If there is an individual
17 case, they can notify that individual that they
18 have the opportunity to apply for relief to the
19 BCMR and they can, if that is granted, they can
20 actually be reinstated into the service if it was
21 an involuntary discharge. It can be a discharge
22 upgrade. Depending on what type of relief they

1 ask for.

2 There's a new legislative provision
3 that if it's a group of people, the BCMRs will
4 now be able, like the IG, to do a complete review
5 and notify individuals that they are eligible to
6 possibly have their discharge changed or their
7 case reviewed. In the FY 2016 NDAA, it expanded
8 the authority of the Secretary to be able to do
9 those reviews.

10 CHAIR HOLTZMAN: So that's a bill, but
11 it's not been passed? Or has it been passed?

12 LTC McGOVERN: No, ma'am, it has not
13 been passed to do the sua sponte class action
14 type review. But at this time, everyone has the
15 ability to apply to the BCMR, especially if you
16 have evidence or support from the IG saying you
17 were in fact improperly involuntarily discharged.

18 COL GREEN: I wanted to check, the
19 actual requirement of the statute is for a flag
20 or general officer review of a proposed
21 involuntary --

22 CHAIR HOLTZMAN: So it's in advance.

1 COL GREEN: -- separation. So this is
2 pre-separation. So under the framework of the
3 law, the requirement would actually be, and in
4 the case that a senior official were to determine
5 that it was inappropriate, they would essentially
6 be able to turn off that separation at that
7 point.

8 CHAIR HOLTZMAN: Wait, I'm not
9 following you. Afterwards, I've been
10 involuntarily discharged --

11 COL GREEN: No, ma'am. This is prior
12 -- when I --

13 CHAIR HOLTZMAN: I understand prior,
14 I'm talking about post.

15 COL GREEN: Okay.

16 CHAIR HOLTZMAN: We get prior. Post,
17 what happens?

18 COL GREEN: Well, this law does not
19 apply to that. This law is --

20 CHAIR HOLTZMAN: Okay. So there's no
21 provision post for -- let's just say the IG comes
22 out with a report saying, 100 people were

1 improperly discharged, so that --

2 COL GREEN: Without the flag officer
3 review as required by the law, is I think the
4 issue.

5 CHAIR HOLTZMAN: What flag officer
6 review? This is post. We're talking post.

7 COL GREEN: I guess what I'm saying
8 though, ma'am, is that the IG may come back and -
9 - hypothetically, if the IG were to come back and
10 find that this was not being followed and that
11 general officers were not reviewing those
12 proposed separations, then I think you would have
13 a procedural issue that the BCMR could rectify
14 saying that the person was entitled to a flag
15 officer review of their separation and did not
16 receive it.

17 CHAIR HOLTZMAN: I understand that, but
18 that's not my point. My point is, I don't want
19 to have to go back and say, oh, they didn't look
20 at it, so now they should look at it. Do I have
21 the right, right then and there without going
22 through five other procedural steps, to get this

1 remedied? And could the -- what's it called, the
2 BC --

3 LTC McGOVERN: BCMR, yes, ma'am.

4 CHAIR HOLTZMAN: Could they do it for
5 the 100 people? Let's just say, the IG comes out
6 and says we have 100 people or ten people or 50
7 people who've been improperly discharged.

8 LTC McGOVERN: After FY 2016 NDAA, the
9 BCMRs will be able to do that. To review those
10 records and notify the individuals.

11 CHAIR HOLTZMAN: I thought that was --

12 LTC McGOVERN: At this time, it's an
13 individual --

14 CHAIR HOLTZMAN: I thought that what
15 Colonel Green was saying was that after 2016,
16 this new statute only applies to pre --

17 LTC McGOVERN: No, ma'am.

18 COL GREEN: Two statutory requirements
19 involved here. The first is that in the 2013
20 NDAA, the flag officer review was mandated.

21 CHAIR HOLTZMAN: Okay.

22 COL GREEN: The 2016 NDAA is a

1 different requirement that allows the BCMRs to
2 review classes of cases without an individual
3 application.

4 CHAIR HOLTZMAN: Okay.

5 VADM TRACEY: And the 2013 law requires
6 that, that happen prior to the discharge being
7 effected?

8 COL GREEN: Yes, ma'am.

9 CHAIR HOLTZMAN: Well, suppose the IG
10 finds that the individual flag officer review was
11 improper. What happens then?

12 COL GREEN: Again, under the current
13 status, I --

14 MS. CARSON: Nobody's looking at that.
15 It's not part of this report.

16 COL GREEN: I think that would create
17 --

18 CHAIR HOLTZMAN: It's not part of this
19 report?

20 MS. CARSON: This is just looking at
21 the discharge. This IG report is just going to
22 look at the discharges and whether or not they

1 were proper. It is not connected to the
2 requirement in the NDAA that they be looked at
3 before the discharge happens.

4 VADM TRACEY: I'm sorry, is --

5 MS. CARSON: This is going backwards.

6 VADM TRACEY: So this is going
7 backwards to review whether the discharges were
8 properly done? Or is it looking at --

9 MS. CARSON: From 2009 to 2015.

10 VADM TRACEY: -- whether the -- okay.
11 So it's making a value judgment as to whether the
12 discharge was retaliation?

13 MS. CARSON: Well, they're identifying
14 the service members who were discharged, first.
15 This is three pieces. Whether they were
16 discharged after making their unrestricted
17 reports. And then the evaluate whether service
18 members' separations for non-disability mental
19 conditions, including personality and adjustment
20 disorder, from that time period, were completed
21 as reported by DoD Instruction 1332.14.

22 VADM TRACEY: So they are not

1 evaluating whether that was a retaliation, they
2 are evaluating whether it was properly reviewed?

3 MS. CARSON: Yes. I think what they're
4 going to do -- what will come out of this will
5 be, A, the number of people who were actually
6 discharged after making a sexual assault
7 complaint and then it will be following up on did
8 a non-disability mental condition and personality
9 disorder -- and this is all based on what was in
10 an FY 2016 NDAA amendment, that I don't think
11 made it into the FY 2016 NDAA, but that's what
12 prompted this request from the Inspector General,
13 was this coming out.

14 VADM TRACEY: So this is a baselining

15 --

16 MS. CARSON: Essentially, it's looking

17 --

18 VADM TRACEY: -- exercise.

19 MS. CARSON: -- backwards.

20 VADM TRACEY: Just figuring out how
21 often is a victim of sexual assault being
22 discharged involuntarily with a year and of

1 those, how many are --

2 MS. CARSON: Right.

3 VADM TRACEY: -- being discharged and
4 the basis is these --

5 MS. CARSON: Right.

6 VADM TRACEY: -- medical --

7 MS. CARSON: Right.

8 VADM TRACEY: -- determinations? Okay.

9 LTC McGOVERN: So that is separate and
10 apart from --

11 CHAIR HOLTZMAN: Can I just understand
12 that? What does this mean the basis is the
13 medical factors?

14 LTC McGOVERN: Rep. Holtzman, many of
15 the victims believe their involuntary separations
16 are improperly classified as an adjustment
17 disorder or other pre-existing personality
18 disorders, which are not compensable by the VA.
19 So in the past, and that was part of the
20 Invisible War and everything else, they said,
21 they're just getting us out on these medical
22 discharges so we don't have any benefits. So I

1 think the IG effort is going back, making sure
2 that that is not occurring. The other allegation
3 is, they are just giving us these involuntary
4 discharges as retaliation --

5 CHAIR HOLTZMAN: Right.

6 LTC McGOVERN: -- for filing a sexual
7 assault report. And that's where it overlaps
8 with your current review. So I think the IG
9 effort is showing DoD is trying to take some
10 action to look at the whole picture. As far as
11 the FY 2013 requirement for them to follow this
12 process and then possibly looking, are these flag
13 officers doing that review properly, is somewhat
14 of a separate issue and do you want to require a
15 report that shows they are complying with the
16 statutory requirement to follow this flag officer
17 review of involuntary separations 12 months after
18 a sexual assault review to make sure that, that
19 involuntary separation was not retaliation?

20 CHAIR HOLTZMAN: So the IG report won't
21 address the compliance with the FY --

22 MS. CARSON: Correct.

1 LTC MCGOVERN: No, ma'am.

2 CHAIR HOLTZMAN: -- 2013 NDAA?

3 MS. CARSON: Correct.

4 LTC MCGOVERN: That is just additional
5 information to show you they are looking at these
6 in the past, but there is no current effort to
7 look at FY 2015 and forward to make sure that
8 there is compliance with this procedure.

9 CHAIR HOLTZMAN: And could you explain
10 to me why you would think a general flag officer,
11 or whatever the title is, is capable of making a
12 decision about the medical condition?

13 LTC MCGOVERN: In this instance, it
14 isn't the medical condition, and that's why the
15 PTSD cases have to go to the Surgeon General, who
16 is qualified. These are looking at the entire
17 case record to see if there's any evidence of
18 retaliation in the case as a basis for the
19 involuntary separation. Because as with, we'll
20 get into, maybe not today, but with the Military
21 Whistleblower Act and other allegations, victims
22 going through a sexual assault have

1 counterintuitive behavior, may engage in things,
2 you all have heard, that aren't expected of a
3 normal person because they're going through this
4 trauma. They also show up late, they may have a
5 declined performance.

6 So there are reasons to justify why,
7 or patterns of misconduct, why they should no
8 longer be in service. So a general officer may
9 be qualified to look at that entire record and
10 get a note from a doctor, is there a causal
11 connection between the mental health of this
12 victim and their behavior? To look at the
13 complete picture and say, is this involuntary
14 separation justified or is it a retaliation
15 action? To make sure that we do not have
16 professional retaliation in DoD.

17 VADM TRACEY: I do recommend that we
18 begin to track that those reviews are occurring.
19 That's a substantive enough change that it could
20 be being missed. And to the extent that we can,
21 the data on what are the dispositions? What
22 percentage of them are found to be retaliation?

1 LTC McGOVERN: Okay.

2 CHAIR HOLTZMAN: May I just ask one
3 other question? I'm sorry, I'm very confused
4 about this. Was this responsibility, before the
5 NDAA FY 2013 provision, was this responsibility
6 being carried out by the Surgeon General?

7 LTC McGOVERN: Only in PTSD cases. For
8 any involuntary discharge for any service member
9 with PTSD.

10 COL GREEN: Which is separate from the
11 issue. So --

12 LTC McGOVERN: Right.

13 COL GREEN: -- in essence, no. There
14 was -- prior to the FY --

15 CHAIR HOLTZMAN: So why would you -- I
16 mean, if we're talking about a mental health
17 issue --

18 LTC McGOVERN: No, this is --

19 CHAIR HOLTZMAN: -- in terms of
20 performance, just bear with me for one second.
21 We know the person's showing up late or not doing
22 the job properly, I got that. But the underlying

1 cause of that may be a medical or mental health
2 cause. That goes back to my original question,
3 why is a general flag officer deciding this as
4 opposed to somebody with medical training, such
5 as the Surgeon General? But was this ever -- so
6 that's just my question. I'm sorry, maybe that's
7 a --

8 COL GREEN: And this isn't a mental --

9 CHAIR HOLTZMAN: -- inappropriate
10 question, but I'm puzzled about it.

11 COL GREEN: A discharge that's based on
12 personality disorder, adjustment disorder, or
13 other mental health conditions, within the
14 Services, that medical assessment of the
15 individual is made by a medical doctor. And so
16 all of those packages, the underlying cause or
17 reason for that separation is based on a medical
18 review that says this person has this condition
19 and I deem them to be unsuitable for service.
20 And so, that becomes then the basis for the
21 discharge. And then that goes back to the
22 command to determine upon that medical judgment

1 whether to make the separation or not.

2 So the commander is not making the
3 medical judgment in the case, the commander is
4 simply acting on the recommendations of his
5 medical advisors in that case. What we're
6 talking about here with general officer review is
7 not limited to mental health conditions, this
8 could be somebody discharged for misconduct. And
9 so the only requirement is anytime you have
10 someone who's a sexual assault victim within the
11 last year and they're being proposed for
12 discharge, whether that's for misconduct or
13 whatever the cause may be, it just makes that
14 level of leadership responsible for considering
15 that case and making sure that there isn't an
16 underlying collateral cause that is concerning in
17 terms of that separation.

18 HON. JONES: So do I have this right?
19 Our recommendation would be, if we wanted to make
20 one, that, yes, we should be tracking the
21 involuntary separations of service men and women
22 who alleged they were sexually assaulted?

1 LTC McGOVERN: Who were involuntarily
2 separated within 12 months.

3 HON. JONES: I'm sorry, who were
4 involuntarily separated and -- because I think
5 we're looking to see if there are statistics that
6 might support retaliation? I mean, is that what
7 we're going for here? I'm confused as between --

8 LTC McGOVERN: Yes, ma'am.

9 HON. JONES: -- the NDAA this and the
10 NDAA that. Would this be everybody, whether it's
11 a PTSD or -- no? So anything medical we're not
12 even going to look at?

13 VADM TRACEY: No, it's all involuntary
14 separations --

15 HON. JONES: Okay, that's what it
16 wanted --

17 VADM TRACEY: -- occurring within a
18 year --

19 HON. JONES: -- to know.

20 VADM TRACEY: -- of a sexual assault --

21 HON. JONES: Okay.

22 VADM TRACEY: -- filing. Are they

1 being reviewed and what are the results of those
2 reviews?

3 CHAIR HOLTZMAN: That's my problem.

4 Because I'm looking at, okay, who's reviewing?
5 You're going to a general flag officer, let's say
6 me, and I see that this person is being removed
7 from the military because they're not showing up
8 on time. But there's also a letter in there from
9 somebody or other saying that there's a medical
10 problem or a mental health problem. How am I
11 supposed to make that decision as to whether
12 that's legitimate or not?

13 LTC MCGOVERN: The commander takes the
14 complete picture with all the evidence before
15 them to see if they are suitable to continue to
16 serve in the military. For instance, if someone
17 began to have a drug problem, so that is clearly
18 a violation of the UCMJ. But there's a doctor's
19 note saying they are struggling, their drug use
20 started after the sexual assault, there's a
21 causal connection, they may look and say, instead
22 of this being an involuntary separation, it

1 should be a medical discharge and reassessed.

2 There is that opportunity if there's
3 a flag officer review. It's taking the overview
4 sight instead of an O6 Colonel deciding whether
5 or not someone should receive a general
6 discharge, taking up to a higher level with
7 senior JAG advisors and medical staff all
8 weighing in on a complete packet to make an
9 informed decision.

10 CHAIR HOLTZMAN: Okay. So medical
11 staff will be looking at this. I'm sorry, maybe
12 I'm going in a different direction from you.

13 HON. JONES: No, I just don't know why
14 we care about the flag officer review. Aren't we
15 just saying we're going to look at the
16 involuntary separation, and I think this was what
17 you were saying, Admiral, the involuntary
18 separation of anyone who made an unrestricted --

19 MS. CARSON: Can I try to clarify that
20 just a little bit?

21 HON. JONES: Yes.

22 MS. CARSON: It's already a requirement

1 that the flag, that's already in the NDAA that
2 the flag officer -- it's actually in the NDAA
3 that it has to be requested by the victim, but
4 DoD made the policy that all involuntary
5 separations within 12 months of making a sexual
6 assault report have to be reviewed for the
7 adequacy of what's happening by a flag or a
8 general officer.

9 HON. JONES: Right. But there's no
10 doubt they're not reviewing them, right? We're
11 not tracking whether they're reviewing them or
12 not.

13 VADM TRACEY: It's a new requirement --

14 HON. JONES: I think this is semantics
15 here.

16 VADM TRACEY: It's a new requirement,
17 we don't actually know how well it is being
18 fulfilled.

19 HON. JONES: I see.

20 MS. CARSON: So there's three
21 questions. The first question is how many are
22 actually being discharged?

1 HON. JONES: Right.

2 MS. CARSON: The second question is,
3 are these cases being reviewed as they are
4 supposed to be under the law?

5 VADM TRACEY: And the third question is
6 --

7 MS. CARSON: The third question is why?

8 VADM TRACEY: -- what's the finding of
9 those reviews?

10 MS. CARSON: -- why? Exactly. So
11 there's three things you could recommend --

12 CHAIR HOLTZMAN: And my question was,
13 the adequacy of the review given that there may
14 be mental health issues here and we don't have
15 someone with medical capability reviewing it.
16 That's my --

17 MS. CARSON: And that's something that
18 --

19 CHAIR HOLTZMAN: If you're telling me
20 that --

21 MS. CARSON: -- we want to collect the
22 data first --

1 CHAIR HOLTZMAN: -- that's part of it

2 --

3 MS. CARSON: -- to see what --

4 CHAIR HOLTZMAN: But you're telling me
5 that's part of the review because the commander's
6 going to be calling in medical personnel to make
7 this decision? Is that correct?

8 COL GREEN: I guess, Admiral Tracey, as
9 a former senior flag officer --

10 VADM TRACEY: I mean, I think what may
11 not be clear is the decision to discharge is
12 being made at one level.

13 CHAIR HOLTZMAN: Correct.

14 VADM TRACEY: The review is happening
15 at a higher level --

16 CHAIR HOLTZMAN: Right.

17 VADM TRACEY: -- which will look at
18 whether the decision to discharge for medical
19 reasons was properly supported in the --

20 CHAIR HOLTZMAN: Okay.

21 VADM TRACEY: -- document by people who
22 are charged with making that kind of review. And

1 at the end, it is a line officer's role to be
2 able to take the whole picture and evaluate
3 whether the decision making makes sense. And you
4 have to do that across things over which you are
5 not an expert. And you find ways in which you
6 get expert advice. So I think that this is the -
7 - there isn't any other recourse than this kind
8 of a structure inside DoD.

9 HON. JONES: I don't quarrel with the
10 structure, I'm just trying to figure out what
11 statistics we're looking for.

12 VADM TRACEY: And I think it's those
13 three questions, right?

14 HON. JONES: Okay.

15 MS. CARSON: Correct.

16 HON. JONES: Got it.

17 CHAIR HOLTZMAN: So any opposition to
18 the recommendation? I think it's -- did you
19 formulate a recommendation, Admiral?

20 VADM TRACEY: Actually, I think the
21 Staff formulated a recommendation.

22 CHAIR HOLTZMAN: Okay. Did you

1 formulate a recommendation, Staff?

2 LTC McGOVERN: Yes.

3 CHAIR HOLTZMAN: Okay. Any opposition
4 to it? None? Okay. So we approve that. Yes,
5 let's take a 15 minute break.

6 LTC McGOVERN: Thank you.

7 CHAIR HOLTZMAN: Thank you.

8 (Whereupon, the above-entitled matter
9 went off the record at 10:44 a.m. and resumed at
10 11:02 a.m.)

11 CHAIR HOLTZMAN: All right. Dr.
12 Galbreath --

13 DR. GALBREATH: Good morning.

14 CHAIR HOLTZMAN: -- happy to welcome
15 you back.

16 DR. GALBREATH: Thank you.

17 CHAIR HOLTZMAN: You are really a
18 glutton for punishment.

19 (Laughter.)

20 CHAIR HOLTZMAN: We very much
21 appreciate that.

22 DR. GALBREATH: Happy to help.

1 CHAIR HOLTZMAN: Thank you. Yes, okay.
2 So I guess without further ado, we're ready to
3 hear your testimony --

4 DR. GALBREATH: Very good.

5 CHAIR HOLTZMAN: -- presentation.

6 DR. GALBREATH: Well, I don't have
7 anything prepared this morning. The Staff asked
8 me to come and help you walk through some of the
9 outcome data, the case attrition charts that the
10 Department publishes every year for sexual
11 assault case outcomes. So I'm happy to do that.
12 I would also just remind the Panel that I'm a
13 past criminal investigator/psychologist and so
14 I'm not an attorney. So I will just remind you
15 that if I say something that's not legally
16 correct, then please forgive me.

17 But this has been an iterative process
18 for me because this is something, as the Panel
19 heard last time, that really doesn't exist
20 anywhere else. That this ability to kind of
21 track through cases that come into a jurisdiction
22 and follow them all the way through final

1 disposition. And so it required -- what you see
2 in front of you and the waterfall charts that I'm
3 going to talk about were designed in 2008 by a
4 conglomeration of criminal investigators,
5 attorneys, and representatives from the Sexual
6 Assault Prevention and Response Office.

7 These were done in response to a
8 greater interest in understanding how cases flow
9 through the criminal justice system, to also
10 comply with Congressional reporting requirements
11 that asked us to tell them about all of the case
12 dispositions associated with sexual assault.

13 That was in the reporting law and it still
14 remains. In order to be able to understand what
15 happens in the criminal justice system and track
16 it all the way through, we had to kind of
17 flowchart this and once we did, I also had to
18 figure out the criminal investigator part of this
19 as well.

20 And that's what you see in front of
21 you, that's on this first slide right here, is
22 just my ability to track through what comes in

1 the door as far as reports of sexual assault.
2 What you see in front of you is FY 2014 data,
3 this is the most recent data that the Department
4 has. We are currently assembling our 2015 report
5 right now for Congress, which is due in April.
6 But, as you all know, our data reflects a
7 snapshot in time. And so it's good for the last
8 day of the fiscal year every year. And that's
9 what you see in front of you. Because if we snap
10 the chalk line the next day, the numbers will
11 shift and move a little bit because this is a
12 live system.

13 This is something that DSAID does for
14 us now. In years 2013 and before, it was all
15 stubby pencil hand done with information from the
16 Services. FY 2014 was the first year that we
17 were able to automate the vast majority of this
18 and all four Services contributed data to DSAID
19 in FY 2014. Army was the last to come on board
20 in 2014 to contribute data to this system.

21 So, I know that you are most
22 interested though in how cases flow through the

1 system. Last time we talked, I gave you a little
2 bit of an overview of how the flowcharts worked
3 without numbers, just so you can see the flow of
4 cases. But the Staff asked me to come back and
5 show you the waterfall charts now with numbers.
6 So if you'd go to the next slide please, what I'd
7 like to do is draw your attention to Point J on
8 this next slide, on Slide Number 2.

9 And Point J is really kind of where we
10 start our numbers as far as the number of
11 suspects, or what we call subjects in the
12 Department of Defense, in our criminal
13 investigations for the year. Now, keep in mind,
14 this doesn't include any information from
15 restricted reports because there is no
16 investigation there. This is only the number of
17 -- these are only subjects from cases that were
18 closed during FY 2014, so during the fiscal year.

19 As you know, not every case that is
20 referred for investigation during the fiscal year
21 will be completed at the end of the fiscal year.
22 And in addition to that, cases from prior fiscal

1 years will be completed in FY 2014 that we
2 weren't able to account for in the prior year.
3 So bottom line is you have a number of cases
4 here, or at least subjects from cases, that may
5 have been from investigations opened in a number
6 of previous years, not just FY 2014 that sits in
7 front of you.

8 CHAIR HOLTZMAN: But these are only
9 closed cases?

10 DR. GALBREATH: Only closed cases, yes,
11 ma'am. So, we have our top number on Point J,
12 you see our top number of subjects is about, and
13 now I have to start using glasses because I'm
14 old, 3,648 subjects for FY 2014. Those are all
15 of the subjects that we could identify in closed
16 cases where we had a disposition available to
17 report. Keep in mind that, once again, there's a
18 time lag between the closure of a criminal
19 investigation and when a disposition is reported.
20 And this reflects the criminal justice process,
21 the Article 15 process, administrative actions,
22 things like that.

1 So as you can see, not everybody is
2 under the jurisdiction of the Department in our
3 criminal investigations. In other words, the
4 Military Criminal Investigators investigate cases
5 where people may be outside the military justice
6 jurisdiction. This is not a differentiation that
7 is regularly recognized in the press or
8 elsewhere. I think a lot of people mistakenly
9 believe that we have legal authority over
10 everybody in our unrestricted reports and, of
11 course, we don't. So we had to have a way to
12 kind of factor out all the folks that we can't
13 take action on because we don't have an ability
14 to do so under the law.

15 In addition, there are a number of
16 cases that come in every year that there is
17 either -- that the allegation that was reported
18 was either false or baseless. False meaning that
19 evidence existed for the MCIO to demonstrate that
20 the crime did not occur or the individual accused
21 did not commit the crime. Or baseless, meaning
22 that the allegation reported did not meet either

1 one article or one element of proof for a sexual
2 assault offense under the UCMJ.

3 And those two categories of cases are
4 in that first box that's called Unfounded. We
5 have taken the RSP's recommendation to ensure
6 that all three MCIOs account for the unfounded
7 cases the exact same way and this has been
8 updated, I'm going to be able, I think, to do
9 that for FY 2015. And we've been able to do
10 that. So you will not see the box at K any
11 longer in forthcoming reports on sexual assault
12 from the Department.

13 The other boxes at Point L, M, and N
14 are all people that are also outside our
15 jurisdiction because either the offender is
16 unknown, even after a full investigation into the
17 matter, the subject might have been a civilian or
18 a foreign national who is not under the authority
19 of the Department, the legal authority of the
20 UCMJ, or subjects may have died or deserted prior
21 to action being taken against them. The vast
22 majority of folks in that box deserted.

1 Under Section O, as you know, a
2 civilian or foreign authority can exercise
3 jurisdiction over our military people. And that
4 takes them out of our jurisdiction. In most
5 cases, even though I understand and this is a
6 fine point of law that either you all can correct
7 or one of the Judge Advocates can, even though I
8 understand that we can take action when a
9 civilian authority prosecutes an individual,
10 there has been a policy decision to not follow-up
11 and take action for the same crime.

12 And so, as a result, unless there's
13 some other compelling evidence, most of the
14 active duty folks that are prosecuted by a
15 civilian or foreign national under Point O, the
16 Department will either discharge them or will
17 just let the foreign host take over. Some of our
18 folks that are in foreign prisons are still
19 technically on active duty and then they're
20 discharged upon release. At least that's how
21 it's been explained to me.

22 So those are all the people that are

1 outside. Last year, as you can see, there was
2 about -- of our 3,648 subjects, about 1,023 were
3 either individuals or people that we could not
4 take actions against because they were outside
5 the authority of the Department.

6 So the part that you all, I think, are
7 most interested in is at Point P on this chart.
8 And these are the 2,625 subjects that did fall
9 under the legal authority of a military commander
10 and it was up to that commander to make a
11 decision about how to adjudicate or how to move
12 forward on the criminal information presented to
13 him or her, given their authority under the UCMJ.
14 Again, I would just offer to you that this was an
15 iterative process that we came up on.

16 And so as we have grown our process,
17 so has the requirements for reporting from
18 Congress. So as we add a new category or as we
19 begin to resolve and answer many of our
20 questions, they have become required parts of our
21 report to Congress. One of the real challenges
22 has been is that as you know, we have four

1 Services and four traditions associated with how
2 to count the numbers and how to dispose of cases.
3 So one of the first big challenges was to lay
4 this map out and get everyone to agree to call
5 everything in one of these boxes pretty much the
6 same thing.

7 Until this process happened in 2008,
8 that did not exist across the Department. And so
9 one of the big things that I guess the Sexual
10 Assault Program has been able to do is to
11 standardize a lot of this information. So I
12 think we are all talking about apples-to-apples
13 comparisons here across the Services, although I
14 still every once in a while come across a
15 variation that I try to address with folks in
16 either policy or very long conversations with the
17 folks that are making decisions and a little bit
18 of begging and pleading to make sure that
19 everybody counts things the same way.

20 So if you look at the Point P of the
21 2,625 subjects, our first decision point
22 underneath that is, was there sufficient evidence

1 to substantiate misconduct? And you might be
2 scratching your head as to why do we use the term
3 substantiate there? That was one of the first
4 points that for many years I could not get an
5 agreement on across the Services as to what
6 substantiated meant. Why is that important?
7 Because Congress has required in their reporting
8 law for us to report only those cases in which a
9 sexual assault was substantiated. In other
10 words, case disposition information associated
11 with a substantiated case.

12 And so for many years, we had a very
13 big disagreement and then we were able to arrive
14 at a conclusion, with a little bit of help from
15 Congress, which said, make a definition. And so
16 we all agreed that substantiated in the
17 Department means that there was sufficient
18 evidence to take some kind of action against the
19 accused in a case. So that is the definition of
20 substantiated.

21 So, in Point Q and S, in the green
22 boxes, the lighter green and the darker green,

1 you will see subjects for which we were able to
2 take action for either a sexual assault offense
3 in Q or some other misconduct in S. And I'll
4 walk you through that in just a second. The
5 other side, at Point U, in the light blue, are
6 all the cases that we didn't have -- that command
7 action was precluded for all of the reasons that
8 you see underneath. And then at Point V, these
9 are the other unfounded cases, largely from the
10 Navy and the Air Force. Army largely fills the
11 unfounded cases at Point K. So that's kind of
12 the lay of the land.

13 As you see at Point Q, you can see
14 that evidence supported commander action in about
15 76 percent of cases in 2014. Command action was
16 precluded in about 22 percent of cases in 2014,
17 that's at Point U. And at Point V, you can see
18 only about two percent of our cases were
19 unfounded, at least under this analysis here.
20 All total, I would say that our unfounded rate is
21 about, given Army's numbers, about I think it's
22 16 percent last year.

1 Unfounded, remember, does not
2 necessarily mean false, it could also mean
3 baseless. And most of our unfounded cases from
4 Army are baseless. And so our false reporting
5 rate is anywhere between about five and six
6 percent, which is in line with published
7 estimates in the best research that we have in
8 the civilian community.

9 So that being said, if you take a look
10 at Point Q and at -- let's see, so my Point Q,
11 right underneath there, you'll see sexual assault
12 charge substantiated. Oh, before I move on too
13 more, you'll notice that at Point Q and U, you'll
14 see those percentages after the number of
15 subjects there. That 76 percent and 22 percent.
16 That is a statistic that I've been attempting to
17 track since about 2009 when we were first able to
18 do this analysis.

19 When we started out -- and so in other
20 words, what percentage of cases in subjects that
21 are underneath the authority of the Department,
22 what percentage of cases could we do something

1 in? Whether that is a court-martial, whether
2 that is non-judicial punishment, administrative
3 actions, or discharges. What percentage? And so
4 this last year was the highest percentage on
5 record at 76 percent. When we first started
6 tracking through this analysis, my first
7 percentage was about 57 percent.

8 So there has been an increase in the
9 percentage of cases that have received some form
10 of attention. And I'll break that down for you a
11 little bit more. It has been on the steady
12 increase since 2009, so bit-by-bit. Just for
13 reference for the record, on Page 24 of the FY
14 2014 report, you can see a chart under Figure 12,
15 I don't have it here, but for the record, chart
16 of Figure 12 that will track you through this
17 analysis since 2009. Moving along.

18 Underneath Point Q, you'll see sexual
19 assault charge substantiated 1,550 subjects.
20 This means that on the charge sheet or at least -
21 - well, let me put it this way, that the Services
22 reported to us that action was taken for the

1 sexual assault offense. It might not have been
2 the offense alleged during the investigation, but
3 it was the offense for which there was sufficient
4 evidence at the closure of the investigation.

5 So, for example, if someone is alleging a
6 penetrative offense at the outset of an
7 investigation, but there was only sufficient
8 evidence to indicate that a contact type of crime
9 occurred, then that's the logical progression
10 that I'm talking about here.

11 So underneath those 1,550 subjects,
12 you'll see that almost 1,000, 998 had a court-
13 martial charge preferred in the system. This
14 means that at least on the charge sheet, one
15 sexual assault charge under 120, 125, or 80, as
16 an attempt, was charged on the referral sheet.
17 And then of course, after that referred to
18 Article 32.

19 And so I'll track you through the
20 outcomes of those cases in just a minute, but
21 I'll cover the rest of these. For the non-
22 judicial punishments, the administrative

1 discharges, and other adverse administrative
2 actions, we rely on the legal officers from each
3 of the offices of the Judge Advocate General to
4 ascribe the appropriate disposition associated
5 with these actions. So the Judge Advocates tell
6 us about the non-judicial punishments. They also
7 look to see if there was an administrative
8 discharge associated with it or others.

9 We only count one subject one time and
10 we've kind of made an arbitrary level of severity
11 associated with these cases. So, clearly, with
12 court-martial being the most severe action taken,
13 or the most serious action taken. With non-
14 judicial punishment being the next severe action
15 taken and then administrative discharges and then
16 other administrative actions. Just to let you
17 know, I don't have real good agreement between
18 the JAG Offices as some believe that
19 administrative discharge is a more serious action
20 than a non-judicial punishment. And in some
21 cases, that's probably true. But because some
22 non-judicial punishments may not result in --

1 well, none of them usually result in any kind of
2 jail time or confinement time. And usually those
3 are fines and reductions in rank and things like
4 that that occur.

5 But that is a differentiation that we
6 asked the Services to make for us because, of
7 course, we are not attorneys at SAPRO, we are
8 just largely reporting the matters. And so we
9 had great assistance from the offices of the
10 Judge Advocates General in designing the legal
11 officer module in DSAID where all of these case
12 dispositions are reported to us. They certify to
13 us what the outcomes are and of course, I know
14 Janet Mansfield here from the Army, she spends a
15 lot of her time working through a lot of the
16 Army's data in this. So if I say something
17 wrong, Janet, please --

18 MS. MANSFIELD: I'll keep quiet.

19 DR. GALBREATH: Okay, thank you.

20 (Laughter.)

21 DR. GALBREATH: That being the case, in
22 addition to sexual assault allegations, the

1 darker green boxes under Point S and T that you
2 see, these are cases where a crime was
3 investigated based on a sexual assault
4 allegation, but at the conclusion of the case, a
5 sexual assault allegation could not be
6 substantiated or could not be identified, but
7 there was evidence to indicate that some other
8 crime occurred. These crimes are, some examples,
9 adultery, false official statement, burglary,
10 theft, other kinds of things that might have
11 occurred alongside of a sexual assault
12 allegation. So these cases, once again, are in
13 the same order or at least the same severity as
14 indicated for our sexual assault matters as well.

15 On the other side, on the U side in
16 the light blue boxes, these are cases where all
17 command action is precluded regardless of what
18 was investigated or whatever we have as far as
19 the crime that was alleged. So for 248 subjects,
20 the victim involved in their case declined to
21 participate in continuing justice action. Every
22 year, about nine percent or so of our cases, we

1 can't take action on because the victim declines
2 to participate.

3 Because this was the first year of the
4 Special Victims' Counsel program, I'm not exactly
5 sure what the impact is on that participation
6 rate, but I know that's something that the
7 Special Victims' Counsel and the Victims Legal
8 Counsel are looking at. But nonetheless, I will
9 be looking at that box as we go forward. This is
10 a metric that the Joint Chiefs have identified as
11 something that they'd like to follow and
12 something that we reported to the President in
13 2014 as one of our metrics to the White House.

14 Next box down, for 323 subjects, there
15 was insufficient evidence of any offense to
16 prosecute at the conclusion of that
17 investigation. So there may have been one or two
18 elements of the crime that were proven, but in
19 the opinion of the legal officer or the trial
20 counsel, there was not sufficient evidence to go
21 forward and I believe this is a decision based on
22 the idea of a trial counsel's ethical duty to be

1 able to put forward only those cases where they
2 believe that they have sufficient evidence to
3 prosecute the crime.

4 For nine subjects, their statute of
5 limitations expired. These are probably contact
6 cases, not penetrating crime cases. And then we
7 didn't have any subjects where a victim died
8 before they could take action. I've only had one
9 case where that happened, and that was a number
10 of years ago where a victim passed away due to a
11 drug overdose. And so this box is largely zero
12 every single year. Most of the time we have our
13 cases in the victim declined to participate and
14 insufficient evidence.

15 Before I move on from this flowchart
16 or this waterfall piece here, this case
17 attrition, does the Panel have any questions that
18 they'd like to ask me about? Because what I'm
19 going to do next is kind of walk you through the
20 court case outcomes.

21 MR. STONE: What is that Capital V?
22 What does that mean?

1 DR. GALBREATH: That is also unfounded
2 cases that could be false or baseless. But this
3 was a -- why I have -- you'll notice at Point K
4 and Point V, I have two unfounded boxes. This
5 was a disagreement between the Services about how
6 to count unfounded cases and at what point a
7 decision is made about a case being unfounded.
8 This was a recommendation from the RSP to align
9 our process and we have.

10 I've worked with the members of the
11 three MCIOs and so in the future, we won't have
12 two different points like this anymore. But,
13 once again, largely Army made their cutoff at a
14 different place in the flowchart and that's Point
15 K, and Navy and Air Force have a different way of
16 accounting for their unfounded and that's what's
17 reflected at Point V.

18 CHAIR HOLTZMAN: How do these numbers
19 compare to civilian numbers?

20 DR. GALBREATH: Good question. I don't
21 know, largely because no one in the civilian
22 community has been willing to participate with us

1 in looking at their cases. In 2010, I reached
2 out to a number of jurisdictions that had about
3 1.5 million people in them. Seattle, San Diego,
4 Philly, San Antonio are some of the places that I
5 reached out to. I talked to people in the
6 district attorney's offices, I talked to people
7 in the police departments and I asked if they
8 would be interested in helping us kind of have a
9 comparative system.

10 I could not get anybody to participate
11 with this, largely because as I talked to at
12 least a couple different jurisdictions, they
13 didn't have the ability to do this. The closest
14 thing that I've ever seen is Dr. Spohn's work
15 that the Panel is tracking out of L.A. County
16 with the Sheriff's Department and the LAPD.
17 That's the closest and even then, she had I
18 believe a really challenging time trying to track
19 cases from A to Z in the justice system.

20 So what I will tell you is, how these
21 cases break out I think ended up being
22 educational for a lot of people in the nation in

1 what percentage of cases actually go forward. I
2 know, having worked in law enforcement for the
3 greater part of my career and working with
4 civilian law enforcement, that a lot of this
5 data's not tracked this way. In addition to
6 that, the district attorney's office don't
7 necessarily keep track of the cases in this way
8 either. And so, that bridge from the law
9 enforcement side then over to the district
10 attorney's side, there's often very little
11 connection in how cases flow through a system.

12 I know members of Congress when we
13 briefed this information were quite concerned
14 when they saw how this broke out, as were many
15 people in the Department, because this work had
16 never been done before. So, as a criminal
17 investigator, I knew that the problems or crime,
18 there's a lot more crime that goes on than ever
19 gets reported. What does get reported, some of
20 those don't get investigated. Some crimes get
21 investigated and then a percentage of those get
22 prosecuted.

1 In any criminal justice textbook,
2 you'll see this kind of funnel approach to the
3 justice system. This is our system of justice.
4 Beyond a reasonable doubt is a very high bar to
5 be able to prosecute a case and not all of those
6 cases meet that requirement. And just to be very
7 clear, this is true not just for the military
8 justice system, this is true in the civilian
9 justice system as well.

10 I don't think, to be quite honest, I
11 don't know if there is a real benefit for
12 civilian communities or a real incentive for them
13 to track cases in this way because many times
14 people believe that good prevention work in crime
15 only lies in deterrence. And when you show a map
16 where so many cases fall out, people would argue
17 there's not a whole lot of deterrence argument
18 here.

19 This is why the prevention approach of
20 the Department, it does include deterrents and
21 having a credible criminal justice system, but
22 also a lot of work in with our system so that we

1 give people the proper skills and abilities so
2 when they see a situation at risk for sexual
3 assault, they do something, they say something.
4 We are empowering our folks to get to those
5 crimes before they occur. And also having our
6 commanders be kind of our lynchpin in our
7 prevention work.

8 So this is -- Judge Jones, the bottom
9 line is that this is really surprising to a lot
10 of people out there about how cases flow through
11 the system and we get a great deal of criticism
12 from folks outside that this is shocking to, that
13 they think that every report of sexual assault
14 should be prosecuted. And I can't help, as a
15 clinician and caring for victims of sexual
16 assault, I want victims to have their day in
17 court, I want them to be cared for, but I also
18 know as a realist and having worked as a criminal
19 investigator that not every single case is going
20 to lend itself to a criminal justice solution.

21 And so, one of the first things I do
22 when I treat victims of sexual assault is have

1 them focus on something other than the outcome of
2 their case in the criminal justice system because
3 it's so given to many other things as far as
4 whether or not it will reach the inside of a
5 courtroom. That being said, the Department's
6 also experimented, as you know, with the Victims
7 Legal Counsel and Special Victims Counsel, to see
8 can we increase participation rates by victims if
9 we give them an attorney and we put everybody
10 into the balance in the courtroom. And so that's
11 something that we're looking at as well.

12 But it's -- I think if I was a
13 layperson looking outside and I was looking at
14 this, I would be shocked as well. I would be
15 thinking, I thought my criminal justice system --
16 we grow up, in high school civics class you learn
17 truth, justice, and the American way, and you
18 commit a crime and you're going to go to jail and
19 this does not necessarily lend itself to that
20 narrative. Any other questions on this slide?

21 VADM TRACEY: Just two --

22 DR. GALBREATH: Yes, ma'am.

1 VADM TRACEY: If I understood the
2 hierarchy here correctly, the 111 administrative
3 discharges in R, those are individuals who had no
4 other action, no NJP, they went to administrative
5 discharge direct?

6 DR. GALBREATH: That is correct. That
7 is the primary action in their case.

8 VADM TRACEY: And if I understood the
9 trend data since 2009 that you cited in the
10 report, do you have any definitional concerns
11 about that? You said you had to do a lot of
12 definitional work to get to common?

13 DR. GALBREATH: I have been able, along
14 with my team, been able to keep everybody calling
15 an apple an apple on this. So I have good
16 confidence that what you're seeing is fairly
17 consistent over time. I think we've all gotten
18 better and more precise as the process goes along
19 in making sure that everything tracks. But I'd
20 say, in 2009, I have lower confidence than I do
21 in 2014.

22 VADM TRACEY: Okay. So there may be

1 some anomalies over time --

2 DR. GALBREATH: There may be.

3 VADM TRACEY: -- with how valid those
4 trends are until you go forward?

5 DR. GALBREATH: I would tell you that
6 I have the most confidence in 2012, 2013, and
7 2014 data, which --

8 VADM TRACEY: Okay.

9 DR. GALBREATH: -- is what's presented
10 to you today.

11 VADM TRACEY: Okay.

12 MR. STONE: If I may ask --

13 DR. GALBREATH: Yes, sir?

14 MR. STONE: -- what are the difference
15 between other adverse administrative actions and
16 non-judicial punishments?

17 DR. GALBREATH: These would be Letters
18 of Reprimand, general officer Letters of
19 Reprimand, Letters of Admonishment, Letters of
20 Counseling, associated with misconduct if that
21 was the only way that we could take action in the
22 case.

1 MR. STONE: And that wouldn't be as the
2 result of an Article 15?

3 DR. GALBREATH: No. No, this would be
4 -- even though you could receive a Reprimand in
5 an Article 15, that case would instead be counted
6 under the NJP. If the only action that the
7 individual received was just an LOR or an LOA or
8 an LOC, Letter of Admonishment, Letter of
9 Counseling, then that's what's in this box here.

10 MR. STONE: I guess I'm wondering why
11 the non-judicial punishment doesn't cover all
12 three of those boxes or alternatively, why
13 doesn't administrative discharges and other
14 administrative actions in light green and dark
15 green belong on the other side? In effect,
16 that's like command action, but it's not really
17 something that's listed as a result of the case.
18 It's sort of like, well, we're going to get rid
19 of it with something else.

20 DR. GALBREATH: Actually, when we walk
21 through this, because of the differential levels
22 of proof associated with or the available

1 evidence in these cases, commanders may not have
2 been able to take the case to court. But we also
3 knew that they were taking action on the sexual
4 assault allegation or the other misconduct that
5 was turned up during the investigation. When we
6 broke out these four boxes, we realized that
7 there were going to be mutually exclusive actions
8 taken in these cases that could fit in these
9 buckets. And so, we tried to at least track that
10 and illustrate that the best that we could. Does
11 that answer your question?

12 MR. STONE: Well, not exactly. I would
13 still think that was all non-judicial. Like you
14 said, if there wasn't quite enough authority, it
15 would be non-judicial.

16 DR. GALBREATH: So under non-judicial
17 punishment, what we're looking at is actions
18 taken under Article 15. But the admin discharges
19 and the other adverse actions may not have been
20 Article 15 actions. Those were standalone
21 actions under either an administrative discharge
22 regulation or some kind of administrative

1 corrective action with the delivery of a Letter
2 of Reprimand or Counseling or Admonishment. Most
3 of those in there are Letters of Reprimand.

4 MR. STONE: I mean, I just, I guess
5 what's striking me from the victim's point of
6 view, are they going to say, it was neither a
7 court-martial nor an Article 15, they negotiated
8 their way into nothing? Something happened to
9 them, but it isn't ever going to show up as a
10 sexual assault.

11 DR. GALBREATH: That is a narrative
12 that we hear from folks sometimes when the
13 subjects in their cases receive that level of
14 punishment. But also keep in mind, this is based
15 on the evidence available. Sometimes there just
16 isn't sufficient evidence of the crime to be able
17 to take that action. And so, the commanders are
18 trying to do something to address the misconduct
19 related to that report.

20 And also, don't forget too that when
21 we talk about sexual assault, not everything that
22 we're talking about is a penetrating crime like

1 rape or sexual assault, the named offense under
2 Article 120. Sometimes it's abusive sexual
3 contact, very low level things, for example,
4 groping and stuff like that, which might not be
5 appropriate for an Article 15 or a crime in the
6 eyes of that commander and that attorney who's
7 advising him on what appropriate action is in
8 that case.

9 MR. STONE: I guess I'm looking for the
10 reason that you have behind not taking some of
11 those categories and putting them on the light
12 blue side under insufficient evidence of any
13 offense to prosecute. If you didn't have
14 sufficient evidence, then why didn't it wind up
15 over on that side?

16 DR. GALBREATH: I think largely because
17 in the Department we wanted to at least
18 demonstrate that where action could be taken in
19 some way, it was being taken. And so that's why
20 we have the additional categories on the green
21 side.

22 So even though action might have not

1 been sufficient for a court-martial or a non-
2 judicial, the decision was made that at least
3 maybe we can show action for a discharge or for
4 other corrective actions being taken, which don't
5 exist in the civilian world, and it allows us to
6 at least correct people's behavior even if it
7 doesn't rise to the level of a court-martialable
8 offense.

9 MR. STONE: We were hearing earlier
10 that stuff that happens in a personnel situation
11 is not always reported to the victim. Would the
12 victim have learned about administrative
13 discharges, other adverse administrative actions,
14 or Article 15s? Will the victim get the details
15 of those?

16 DR. GALBREATH: Under our policy, they
17 are to be informed of all case outcomes and
18 dispositions. That's why we keep their case open
19 in the Case Management Groups that happen at each
20 installation until that disposition decision has
21 been made. If they're represented by a Special
22 Victims Counselor or Victims' Legal Counsel, they

1 are to be informed of the outcome. If they're
2 not, then the SARC or their Victim Advocate is
3 informed of the outcome and is supposed to tell
4 the victim. If that does not happen, that's not
5 in compliance with Department policy.

6 MR. STONE: Okay. I don't know if that
7 ameliorates what we just heard before that you
8 get a Letter of Reprimand, but they do find out
9 about it.

10 HON. JONES: No, I hope that the policy
11 is exactly as you just described it, Doctor.
12 That, I think, is the preferred method so that
13 victims know what happened.

14 DR. GALBREATH: Absolutely and that is
15 a commander responsibility to make sure that
16 victim is informed of the status of their case.
17 However, when they're represented, we usually
18 will go through the Victims' Legal Counsel and
19 the Special Victims' Counsel as well. Any other
20 questions on that?

21 Again, it is hard to -- when people
22 have an idea about what sexual assault is in

1 their head, and typically we all imagine the
2 worst, there is other misconduct under Article
3 120 that we have to address as well. And some of
4 that is, for lack of a better term, buffoonery
5 and bad, it's misconduct, it has to be addressed,
6 and it's bad stuff. It's illegal, but at the
7 same time, based on the amount of evidence that
8 we have to address it, it limits what we can do.

9 What I would offer is, is that, and
10 not to try to be an apologist for this because I
11 don't have any tolerance for this kind of
12 behavior and this crime, but at the same time is,
13 is that if we can, at least in our system, have
14 commanders take action in some way, at least this
15 kind of behavior is addressed. I would prefer
16 every case get to go to court, but we all know
17 that, that's not the reality of things and that's
18 not how the system works. But at the same time
19 though, at least we are trying to track what
20 we're doing in this space and if we can, at least
21 it has shown the light on what our system is and
22 maybe why you're sitting in front of us today is

1 to find out how we can better fine tune the
2 system.

3 CHAIR HOLTZMAN: I guess my question is
4 -- somebody else want to ask? Judge Jones? Mr.
5 Taylor? I guess my question is, how much do you
6 really need the cooperation of civilian
7 jurisdictions here to get some measure of
8 information? I mean, for example, the drop off
9 rate between the report of a sexual assault and
10 indictment --

11 DR. GALBREATH: Sure.

12 CHAIR HOLTZMAN: -- or misdemeanor
13 charges or something like that. I mean, I'm not
14 sure about these figures because I know there's a
15 big fall off. But can you get some kind of rough
16 way of analogizing what you're doing to the
17 civilian sector without having them compile this
18 information?

19 DR. GALBREATH: So I've looked to case
20 clearance rates in the UCR process, in the
21 Uniform Crime Reporting process that the FBI
22 tracks every year and I have a really hard time

1 trying to align how cases fall out. And then
2 that bridge between the police department and how
3 they might clear a case under UCR and how a
4 district attorney might pick it up. And also
5 with the idea that a district attorney not only
6 has multiple jurisdictions that they might be
7 prosecuting.

8 So, for example, in L.A. County, like
9 Dr. Spohn found, not only is the L.A. County
10 Sheriff's there with the cities that they patrol,
11 but also the smaller cities, South Gate, Bell,
12 Huntington Park, all sorts of smaller cities that
13 feed into the L.A. County District Attorney's
14 Office. In addition, there are also kind of
15 these lower level crimes where if the district
16 attorney's office doesn't want to take action,
17 then they kick it to the city attorney's office,
18 where they might take action. And so these
19 actions are being taken all over the place.

20 And so to get that -- to kind of
21 follow, to get the agreement of one law
22 enforcement department and then how their

1 specific cases are tracked through either the
2 district attorney or the city attorney's office
3 and follow those all the way through and then
4 what those outcomes are, that's a big challenge.
5 I've never seen a system that had that kind of
6 integration to be able to follow this all the way
7 through.

8 We even went up to visit New York
9 Police Department and their Special Victims Unit.
10 Once again, that cooperation just isn't there
11 with whatever NYPD produces and then tracking the
12 statistical data all over to what's prosecuted in
13 their courts. So it is -- you would need a great
14 deal of cooperation between a police department
15 and a district attorney's office and a city
16 attorney's office and then any other kind of
17 prosecutorial body that might be involved to be
18 able to track this all the way through.

19 Because sometimes then the federal
20 jurisdiction might come up, not often in sexual
21 assault, but if a sexual assault occurs under
22 special territorial jurisdictional issue in the

1 federal government, which is usually a prison or
2 an Indian Reservation or something like that,
3 then the federal government might exercise its
4 control. So the answer is, it's very
5 complicated, ma'am.

6 (Laughter.)

7 CHAIR HOLTZMAN: Thank you.

8 DR. GALBREATH: If you'd like, we can
9 go on to the next slide and kind of track through
10 and I'm here at your disposal, so please tell me
11 to be quiet when you're ready for me to be quiet.
12 But I can at least track you through the court-
13 martial outcomes that you see here on Page Number
14 3.

15 CHAIR HOLTZMAN: That would be good.

16 DR. GALBREATH: So of the -- and of
17 course this comes from Point R, our court-martial
18 preferrals that 998 subjects from the previous
19 page comes across over here to our court-martial
20 charges preferred. So once again, if you follow
21 the line down, you'll see that I have three
22 categories on the far left side of the slide.

1 That first one is case dispositions
2 completed in FY 2014. So even though I had
3 subjects with charges preferred in 2014, not
4 everybody had their case go through and get a
5 full disposition in that year. And so, you'll
6 see I have 137 subjects in FY 2014 that I'll be
7 probably reporting on about 98 percent of them or
8 so in 2015. It takes about two years many times
9 for cases to make it all the way through our case
10 attrition charts. And this year it was great,
11 because of DSAID, I didn't have any cases where I
12 didn't have any information, so this was a good
13 thing.

14 So following through in that top box
15 on this flowchart, so I have 861 subjects that I
16 can tell you about in the military court system.
17 At the very top box, you'll see that we had 588
18 subjects actually proceed to trial on at least
19 one sexual assault offense on the charge sheet.
20 So that means that it made it through the Article
21 32 process and it was referred to court-martial.

22 The next box down, there was a

1 discharge or resignation granted in lieu of
2 court-martial. And that happened for 97
3 subjects, or about 11 percent of our folks last
4 year that we had dispositions for. You'll see in
5 that blue box to the right the breakdown of those
6 numbers. So we have four officer resignations,
7 and as you might recall, those are all decided at
8 the Secretary of the Service level, whether or
9 not to accept them. I had one cadet
10 disenrollment associated with that.

11 And I had 92 enlisted discharges
12 associated with those, what we call RILOs or
13 DILOs, a discharge in lieu of court-martial. Of
14 those, the vast majority, 78 subjects received an
15 under other than honorable conditions discharge
16 or the most serious characterization of discharge
17 that you can receive administratively, that UOTHC
18 as we say. And then for 14 subjects, I didn't
19 have any other information available.

20 However, my attorney friends tell me
21 that if a discharge in lieu of court-martial is
22 granted, oftentimes it's given that UOTHC

1 discharge, the under other than honorable
2 conditions. Rarely, very rarely is there a
3 general or an honorable discharge granted in that
4 process. As a matter of fact, I'm aware of no
5 honorables given, only other generals, at least
6 in my data that I can recall off the top of my
7 head. So that decision -- yes, sir?

8 MR. STONE: I wonder if anybody is at
9 any point asking, by virtue of a questionnaire,
10 victims if they feel satisfied that the person
11 either resigned, disenrolled, or was discharged
12 in lieu of a court-martial? I mean, I don't know
13 that there's any acknowledgment by the defendant
14 to the victim that they were wronged, okay, I'm
15 out, I'm done. That's 100 people, that's a lot
16 of people.

17 DR. GALBREATH: You are correct. And
18 that is one of the things that we're trying to
19 get after in our Military Investigative and
20 Justice Experience Survey with victims, the MIJES
21 that we're doing. It's new this year, we're
22 asking -- we've had about 272 victims of sexual

1 assault respond to us and I'll let you know what
2 they say.

3 The challenge is, is that because it
4 is an anonymous survey, I won't necessarily be
5 able to roll back to their case and kind of find
6 out exactly, but we did ask them, what was the
7 outcome of your case and what do you think about
8 that? The other thing that we're also collecting
9 some data, and this is maybe something that, my
10 office is not, but the Special Victims' Counsel
11 and the Victims' Legal Counsel folks are
12 collecting some data, I don't know if this is
13 something.

14 But don't forget sometimes, for some
15 victims of sexual assault, and I'm not saying
16 all, but for some victims of sexual assault,
17 having to go through that court-martial process,
18 especially after that very painful Article 32
19 process, which has since been changed, but that's
20 just enough. And for them to know that the
21 person was kicked out and they got a negative
22 discharge associated with it, sometimes is enough

1 for them because they don't have to go through
2 and testify again.

3 I can't say that's true for everyone,
4 because some victims also want their day in court
5 and this would be a situation where they don't
6 necessarily get that. But oftentimes this RILO
7 or DILO occurs, from what I understand, occurs
8 after that Article 32. And so that's when kind
9 of a decision is made as to, what's the best
10 disposition for these cases? I would say that is
11 the level of my knowledge and if you have any
12 more on that, then please reach to the Judge
13 Advocates to tell you more about that process.

14 So moving right along, down underneath
15 here, you'll see where we have cases, 176
16 subjects, where the court-martial charges are
17 dismissed. It turns out that based on evidence
18 that was obtained during the Article 32, even
19 though court-martial charges may have been
20 dismissed, there was sufficient evidence for the
21 commander in that case to circle back around and
22 administer non-judicial punishment under Article

1 15 based on the facts in evidence. And so that's
2 what you see in the blue boxes underneath this
3 box here.

4 And as you notice that we had a total
5 of 46 subjects where commanders said, I'm going
6 to take some action against you. Six commanders
7 dismissed the Article 15 charges, but 40 went
8 ahead and went through. And off to the right,
9 you can see the percentage of punishments that
10 were administered in those cases. So the vast
11 majority of subjects received at least one
12 reduction in rank and a fine or a forfeiture
13 underneath that process, with almost half of them
14 receiving some kind of restriction.

15 In addition to that, for a third of
16 those subjects who received, so just over 10 of
17 those, 33 percent, that Article 15 was also
18 grounds for a discharge from the Service
19 associated with that. So that kind of -- all
20 right, so a court case was not possible, Article
21 15 punishment, and then discharge for about, I
22 won't the math, but for a third of the 40

1 subjects.

2 HON. JONES: Can I just ask you --

3 DR. GALBREATH: Yes, ma'am?

4 HON. JONES: -- in the court charges
5 dismissed, so we have 46 where non-judicial
6 punishment was administered or --

7 DR. GALBREATH: Or at least started,
8 yes.

9 HON. JONES: -- at least started. What
10 happened to the other 120?

11 DR. GALBREATH: No further action was
12 taken in their cases.

13 HON. JONES: Okay.

14 DR. GALBREATH: So the court case was
15 dismissed and that was the end of that.

16 HON. JONES: So in other words, they
17 were preferred, but then nothing happened?

18 DR. GALBREATH: That is correct.

19 HON. JONES: And do we know how that
20 happened or why?

21 DR. GALBREATH: I would have to send
22 you to the Judge Advocates from each of the

1 Services to have them explain why no further
2 additional action was taken. My assumption is,
3 is that for every time you administer non-
4 judicial punishment, you have to be ready to go
5 to court in case the person turns it down and I
6 would guess that in those cases where no NJP
7 could be taken, the Judge Advocate or the trial
8 counsel felt that they didn't have enough
9 evidence to make anything else stand up at court.
10 That would be my guess.

11 HON. JONES: Well, that might be
12 something we'd want to try to get the numbers on.

13 DR. GALBREATH: Yes, ma'am. And they
14 are -- I was just reminded, the details of these
15 cases are in the cases synopses that we publish
16 at the end of the year. Each of the Judge
17 Advocates talk about what the outcomes of these
18 cases are and there is a reference for why no
19 further action was taken.

20 HON. JONES: Thanks.

21 DR. GALBREATH: Any other questions
22 about that point? Okay. Then moving along, if

1 you go back to the top box again that says
2 proceeded to trial in that second column from the
3 left, you have at least one sexual assault
4 offense charged and then, of course, you all know
5 that there could be many different charges on
6 that charge sheet that go forward. And so the
7 individual could be convicted for none, one, or
8 any combination of what is admitted at trial.

9 And so we had to kind of make a
10 decision about how do we count cases in the
11 conviction box? So, the attorneys recommended
12 that we count any charge at trial for which an
13 individual receives a conviction. So even though
14 there might have been one sexual assault offense
15 that was charged, any conviction of that or any
16 other offense at trial, they would go into this
17 convicted box. If they're acquitted of all
18 charges, then they go into that acquitted box
19 there. Now, I do keep track of the cases where
20 the sexual assault charge was not convicted, but
21 another offense was. I don't have that analysis
22 with me, but we can do that in DSAID now. And I

1 didn't have that ability before. So now we can.

2 MR. TAYLOR: Just to be clear, if I
3 may. When you say convicted of any charge then
4 in this box for the 434 subjects, it could have
5 been a charge unrelated to sexual assault, but on
6 the same charge sheet, like theft of property or
7 something else?

8 DR. GALBREATH: Unrelated in that
9 nothing under Article 120 --

10 MR. TAYLOR: Right.

11 DR. GALBREATH: -- but most of the
12 misconduct charged here was investigated as part
13 of that sexual assault allegation. So it could
14 be theft of something of the victim's. It could
15 be a false official statement associated with the
16 criminal investigation and a statement that they
17 gave to police or to MCIOs.

18 When you follow the box across to
19 that, one, two, three, fourth column from the
20 left, you can see all the punishments associated
21 with the convictions. Confinement, reductions in
22 rank, fines and forfeitures, and a punitive

1 discharge or dismissal are the top four
2 punishments awarded at court-martial usually.
3 The punitive discharge, keep in mind that, that's
4 a bad conduct discharge or a dishonorable
5 discharge.

6 And since, and I think it's FY 2012,
7 I think the NDAA in FY 2012 required that anybody
8 not receiving a punitive discharge at court-
9 martial, that the Services are required now to
10 process that individual for administrative
11 discharge. All right. So that chart there, does
12 anyone have any other questions about the numbers
13 associated or any of the data that you have on
14 this chart here?

15 MR. TAYLOR: For purposes of when the
16 data are entered into the system, is a court-
17 martial case considered closed once the convening
18 authority takes the final action?

19 DR. GALBREATH: Yes.

20 MR. TAYLOR: Or at what point?

21 DR. GALBREATH: That's when it's closed
22 for us. We have a number of points, but to

1 capture this information, it's when that
2 convening authority says, there you go, and
3 awards the sentence, I believe. For more secure
4 information, please contact the JAGs, but that is
5 usually the point at which we're snapping the
6 chalk line.

7 MR. STONE: Is hard labor, how does
8 that compare with confinement? Is that during
9 confinement or in place of confinement?

10 DR. GALBREATH: It's separate. That's
11 --

12 MR. STONE: What would it be? What
13 would it mean? That you're on some kind of night
14 patrol every night? What would it be?

15 DR. GALBREATH: That I do not know. I
16 don't know how to answer that.

17 MR. STONE: But it doesn't involve
18 confinement?

19 DR. GALBREATH: Not that I'm aware of.

20 MR. STONE: Okay.

21 DR. GALBREATH: Any other questions on
22 this page? Okay. You'll also notice that, let's

1 see -- okay. So on the next page that you see
2 that's labeled 4, these are the non-judicial
3 punishments under Article 15 and how these fell
4 out. So, once again, there were 318 subjects.
5 Not everyone who has non-judicial punishment
6 initiated for them has it go all the way through.
7 Sometimes commanders decide to not take action.
8 Also, again, we had non-judicial punishment
9 pending for some cases as well, as you can see as
10 you go through. But out of those 318, I had 271
11 subjects have their punishment administered and,
12 of course, once again, you can see the range of
13 punishments associated with that. Any questions
14 about NJPs? Okay.

15 The next page, Page Number 5, are the
16 non-sexual assault offenses that you'll see and
17 this largely tracks through the same way that I
18 walked you through the sexual assault offenses.
19 So these are cases where at the conclusion of a
20 criminal investigation, the Judge Advocate or the
21 trial counsel didn't believe that there was
22 sufficient evidence to charge a sexual assault

1 case, but there was other misconduct that could
2 be addressed and that's how these cases break
3 out. And they're very similar data reported
4 here. Many of these cases, whereas most of the
5 cases that had a sexual assault charge associated
6 with them receive a court-martial charge, the
7 vast majority of these received non-judicial
8 punishment, just because of the less form of the
9 crime associated.

10 The other data that I've offered to
11 you is, if you take a look at Page Number 6,
12 you'll see an analysis of penetrating versus non-
13 penetrating sexual assault crimes. So, and this
14 is -- and I'll let you look this and I'd be, and
15 I know we're running out of time, I'd be happy,
16 if you want me back again, to come back and to
17 walk you through some of this.

18 But one of the things that the Joint
19 Chiefs wanted to know was if you're being
20 prosecuted for a rape or a sexual assault under
21 Article 120, what are the outcomes of those cases
22 as compared to the abusive and aggravated sexual

1 contact cases that are charged and is there a
2 difference? And so that tracks you through that.
3 And there is a little bit of a difference. As a
4 matter of fact, what we find is, is that you'll
5 note at the bottom, because of the lesser
6 included offenses that are involved, if a
7 penetrating offense is convicted, we'll have some
8 sexual -- if a penetrating offense is charged,
9 about half of those cases end up with a
10 penetrating offense convicted, 11 percent end up
11 in a sexual contact offense convicted, and 35
12 percent end up in some other offense convicted.

13 That was the analysis that I told you
14 that we could do to show you what the differences
15 is between what happens at trial, whether or not
16 someone gets convicted of a sexual assault charge
17 or something else. And then on the right side of
18 that chart is also the information as well for
19 those just contact crimes. So in those cases,
20 it's about 50/50 every year, this year is a
21 little bit lower than 50/50. So if you were
22 charged with a sexual contact offense, about 43

1 percent were convicted of a contact offense and
2 57 percent were convicted of some other offense
3 at trial.

4 So, because I know that you are
5 looking at things over time, FY 2013 and FY 2012
6 data follows this. It tracks the very same way.
7 Every year there is an effort to kind of change
8 the waterfall chart. I have successfully avoided
9 that pressure, I don't know how much longer I can
10 hold out.

11 (Laughter.)

12 DR. GALBREATH: But certainly we take
13 action based on RSP recommendations, JPP
14 recommendations, and also of course, as the law
15 changes, how we count our cases. But what I will
16 tell you is, is that this data at least has been
17 fairly steady over time. So I think you can have
18 good confidence in what you're looking at.

19 And, of course, again, this is wave
20 tops information. Every single case -- the
21 lawyers remind me all the time, as a
22 psychologist, I'm looking for ways to

1 characterize data in a summary statistic. How
2 can I give you the best kind of idea about what
3 happens in an average case? Attorneys are always
4 telling me, there is no average case, because
5 every case is adjudicated based on its merits.
6 So what we end up with is just wave tops
7 information about what happens.

8 CHAIR HOLTZMAN: Well, we very much
9 appreciate your coming and sharing your -- do you
10 have a question?

11 MR. STONE: Yes, I do have one question

12 --

13 DR. GALBREATH: Yes, sir?

14 MR. STONE: -- that I don't know where
15 to look on these charts. I mean, as I look at
16 all your numbers now, it looks to me that like
17 out of the 4,660 reports they start with, only
18 330 people were committed to jail custody total,
19 either for sexual assault or another related one,
20 which was the kind of numbers that I don't think
21 is going to motivate anybody to plead guilty.
22 And then I said to myself, well, where is pleas

1 of guilty? And is that under this convicted of
2 any charge at trial? So we can't tell how many?
3 I mean, maybe all of those are guilty pleas and
4 virtually none are court-martial convictions by
5 the panel. Is that somewhere?

6 DR. GALBREATH: I don't have that, but
7 the Judge Advocates do. I don't have the
8 individual pleas in the cases, that is not
9 information that I capture in DSAID. So that
10 would be the closer look that you all would have.
11 I can tell you though, I know that there -- I
12 stay very close to what's going on in the courts
13 and there's sexual assaults being fully
14 prosecuted and fully litigated throughout the
15 system. So not everything's a guilty plea.

16 MR. STONE: Not everything is what?

17 DR. GALBREATH: Not everything is a
18 guilty plea.

19 MR. STONE: Well, okay. But you have
20 no way of telling us of that 330 how many were
21 actually guilty pleas?

22 DR. GALBREATH: I do not.

1 MR. STONE: Thanks.

2 CHAIR HOLTZMAN: Okay. Well, I want to
3 thank you again for coming and helping share your
4 experience and your thoughts with us and we may
5 take you up on your offer.

6 (Laughter.)

7 DR. GALBREATH: Thank you, ma'am.

8 CHAIR HOLTZMAN: No guarantees. Thank
9 you. We'll take a hour break for lunch. Thank
10 you very much.

11 (Whereupon, the above-entitled matter
12 went off the record at 12:08 p.m. and resumed at
13 1:05 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (1:05 p.m.)

3 CHAIR HOLTZMAN: Okay. I think we're
4 ready to begin the afternoon session. I think,
5 Colonel Green, you're going to be leading this
6 conversation.

7 COL GREEN: Yes, ma'am. Having heard
8 the overview of slides from SAPRO, what the staff
9 has set up is to turn to the gathering of the
10 information that the staff has been conducting
11 over the past year.

12 And so, to start that out in order for
13 us to talk about what information the panel wants
14 to gather on the tasks that have been assigned to
15 it, I thought it's best if we start with an
16 orientation to let you know exactly what we have.

17 The first two slides in this deck, and
18 I'm going by the trends and statistics slides
19 that were in your folders, outline first of all,
20 and I think it's very important and one of the
21 things the staff has done consistently, is go
22 back to the tasks Congress assigned to this

1 panel. Which are three.

2 And so, in the course of our
3 discussions that we've had as a staff, and my
4 recommendation to you is too just, when we
5 decide, or when you decide what information you
6 want to receive, obviously our focus has been
7 trying to tie it back to one of the specific
8 assignments of task from Congress.

9 The second slide talks about the work
10 that the staff did. And again, I take you back
11 to the fall of last year when we initially began
12 this topic.

13 And the first thing that the members
14 of the staff did was go and meet with the
15 services, the criminal investigating
16 organizations, reviewing the reports that were
17 out there. Reviewing information that was out
18 there to try to identify what information might
19 be available to the panel.

20 And we quickly determined that the
21 level of information that was contemplated in the
22 tasks from Congress, was not available in any

1 easy to find or available resources that the
2 services or DoD were currently producing.

3 And so, that took us to realize that
4 we were going to need to go out and get case
5 information directly. Which is what we've done.

6 On slide four, it talks about the
7 current systems. And this is just an example of
8 the issues that we found. Again, the annual
9 SAPRO reports talk about when cases are listed
10 there, they talk about the most serious offense
11 charged.

12 But a case that may involve multiple
13 offenses, say a case that involves both rape and
14 sexual assault, or rape and abusive sexual
15 contact, you're not going to have visibility
16 necessarily from the SAPRO report on any of those
17 other charges.

18 Similarly, findings as to the most --
19 the SAPRO reports will tell you the finding as to
20 the most serious offense charged, but not
21 necessarily as to those other charges.

22 And then other information such as

1 lack of information about the sentence or the
2 court-martial type, and why type of court was
3 involved, sometimes that was -- that's in the
4 reports from SAPRO, and sometimes it's not.

5 And so, in order to achieve this
6 panel's need to look at more specifics about the
7 judicial processing of these cases, we determined
8 that it was necessary to go out and get cases
9 specifically. Slide five lists the information
10 and sort of an outline of what the staff
11 determined was important for us to provide to you
12 to form the basis for your analysis.

13 And if you click over one more on
14 that, the -- one of the things we realized in
15 going through this was we tried to use -- when a
16 case is process through courts-martial, it is
17 summarized into standardized forms or there are
18 standardized forms for processing.

19 And so we looked for to those forms
20 where we could find the most information that was
21 necessary to understand the case. There are some
22 limits on this. Records of trial in the

1 military, if a case doesn't reach a certain
2 threshold, it's summarized and it's not a
3 verbatim transcript and a verbatim record of
4 trial.

5 And so those are going to be brief --
6 more brief. And so the details of those
7 individual cases may not be available to us as
8 they would be in a case that was transcribed
9 completely.

10 And also the Panel's tasks regarding
11 some of its other taskings to look at MRE 412 and
12 MRE 513 evidence. You know, rape shield law and
13 psychotherapist privilege material.

14 Most of those records within the
15 records of trial are sealed. And so our ability
16 as -- on your behalf for the Panel is limited in
17 terms of our ability to understand what happened
18 in those cases because of the sealed nature of
19 those records.

20 So, with those parameters, we -- as we
21 told you before, we went out and sought the
22 court-martial data. And we requested -- our

1 requests from the staff were based on the annual
2 reports produced by DoD, SAPRO for fiscal years
3 '12 through '14.

4 And the starting point for our
5 analysis was to request those court-martial
6 documents for all cases where a sexual assault
7 offense had been preferred in the fiscal year.

8 So, looking through the case synopsis
9 and the SAPRO report, we went through and
10 identified every one of those cases. And went
11 back to the services and requested the access to
12 the case records for that.

13 A couple of notes, just to remind you
14 that the Coast Guard is not included in the SAPRO
15 reports. And we worked with them directly.

16 It also as you heard last month, the
17 family advocacy program and those cases that are
18 covered by that program are not necessarily
19 included in the SAPRO reports. And so, it does
20 not include cases of that nature.

21 And then also, the ability of the
22 services to reach back in the SAPRO reports and

1 identify which cases are involved based on our
2 request, is somewhat limited. It was limited
3 prior to the implementation of DSAID by simply
4 whether they had the records and could reach back
5 and identify what case was being requested, as it
6 had been listed in the SAPRO report.

7 And then there's a disconnect -- or
8 had been a disconnect between DSAID and the
9 military justice systems after DSAID was
10 implemented, to where the services have
11 difficulty identifying which cases are
12 necessarily listed in the SAPRO report.

13 And so, those were some of the issues
14 we identified and went through. But with that
15 I'll -- that's kind of formed the basis of the
16 work we do.

17 And then I'll turn it over to Meghan
18 Peters to describe the information that the staff
19 has obtained.

20 MS. PETERS: All right, good
21 afternoon. On the next slide, we'll just kind of
22 give you the overarching numbers that we're

1 talking about.

2 My goal here today is give you a sense
3 of the data set that we've been working with.
4 And this is a follow-on to what you heard in
5 August.

6 In August we kind of gave you a
7 general overview of the process that the staff
8 went through to identify what sort of information
9 would address these tasks. And each of these
10 tasks mentions court-martial trends in the form
11 of convictions, results and punishments.

12 So we started there. And again, we
13 went to these records also because of some of the
14 issues that Colonel Green mentioned about looking
15 for uniformity, consistency in the centralized
16 data collection, which seems to be easiest and I
17 guess best to translate to our needs, and easiest
18 to collect from when you talk about courts-
19 martial.

20 They're just maintained more
21 centrally. And there's more record keeping
22 requirements. So we went to those first. And

1 again, they relate to all of the tasks.

2 And what we said was, if you're to
3 identify trends, can we identify a grouping of
4 years? And when we went to the services for --
5 or looked at the record keeping methods across
6 DoD and the services, it seems, you know, the
7 older a case gets, the less there are -- less are
8 the requirements for maintaining that in
9 documentary form.

10 There's tabulations, there's retired
11 cases in various places, but basically, if you
12 want more data, the kinds of information you
13 would need to look at the taskings, when you get
14 beyond three years old, that is beyond FY 12,
15 talking about FY 10 or '11, you're looking at a
16 lot less information to look at consistently.

17 So we stuck with requesting court-
18 martial records. Select documents from those
19 records for '12, '13 and '14.

20 And again, the process we went
21 through, when you see it under each year here,
22 the number requested and identified, requested

1 again was that staff process of saying, based on
2 the SAPRO reports -- and again, the SAPRO report
3 is starting out with a list of every
4 substantiated or every sexual assault allegation,
5 and anything that could have touched disciplinary
6 or legal process, not just a court-martial.

7 We're saying how many of those cases
8 looked to be completed in that FY. And were then
9 something that because they had a completed
10 disposition to report, we should request.

11 And that was kind of our universe of
12 cases to start. So, we requested a certain
13 number. And then worked with the Services to
14 then see, how many could we identify from the
15 SAPRO charts that were actually, you know, really
16 responsive to the JPP's request.

17 And we found some differences across
18 the years. But for the most part, the numbers
19 that we requested were pretty close to what we
20 identified was actually responsive to the
21 request.

22 And that just gets down to when you're

1 actually looking at actual documents or case
2 disposition, was that case actually completed in
3 the fiscal year? Do you have enough records to
4 say that this was the disposition? Was it really
5 a sex offense versus a lesser 120 offense or an
6 indecent acts offense that's really consensual
7 conduct and not the sex offenses that the JPP is
8 tasked with looking at?

9 So, when we reconciled with each
10 service sort of this process of what list of
11 cases by subject name, if possible, what list of
12 cases exists out there that would be responsive?
13 We then started working with them beginning in
14 May of this year, we started actually receiving
15 the documents from each of the Services.

16 And so when you see identified again,
17 that is something that we can -- that's a line
18 that each one of those, 624 in FY 12, is a case
19 that we can say should have -- is likely to have
20 information responsive to the taskings.

21 And then we went about trying to
22 again, obtain those records. And again, you'll

1 see our record collection rate there is then in
2 blue for each fiscal year.

3 So overall you're looking at roughly
4 90 to 95 percent. In FY 14, I think some of the
5 issues are -- and some of the things that Colonel
6 Green alluded to, if you're looking at the
7 difference there, there is just an issue with how
8 you identify cases now that they use DSAID.

9 It becomes more difficult to identify
10 a case by name. Because the report is produced
11 out of an automated system at the DoD SAPRO
12 level, whereas cases are owned by the Services.

13 So if you go and ask the Service for
14 FY14, what's the name of that case in line number
15 such and such in the DoD SAPRO report, it's
16 difficult to pin down a name to that report.
17 Because the service didn't produce it.

18 And the report is produced without any
19 indicia of identifying information for the
20 subject or anything like that. So, it's really
21 just a general descriptor of the case.

22 That's why I think that explains some

1 of the drop off in cases received. But, this has
2 been a months long process ongoing, receiving
3 cases that were completed.

4 And again, what information we have
5 and the difficulty in getting cases is, as we
6 know, the cases can take on a lot of different
7 kind of outcomes. So, depending on the outcome
8 and the disposition, there's different record
9 keeping requirements.

10 Lower level courts-martial and cases
11 that go in other directions might be housed at
12 the installation. Others might be residing at
13 the appellate courts. Others might be retired to
14 National Archives.

15 And so, where there was a case in the
16 National Capital Region, like at the appellate
17 courts or at the archives, we the staff went out
18 and collected those records ourselves.

19 But so, because of the existing case
20 keeping regulations, cases are in a variety of
21 places. The Services double backed to go to all
22 these installations and all these commands to

1 find things that hadn't yet made it up to let's
2 say, the appellate process. Or hadn't yet been
3 retired.

4 And that's where you see some of the
5 discrepancy in the percentage for which we
6 actually have a complete set of documents to
7 analyze that case. And that's sort of a summary
8 of the attrition between what we identified would
9 be responsive and what we actually have to work
10 with.

11 And so our sum total numbers there, we
12 have identified the 2,360 cases. And received
13 the 2,175. And the delta there could be -- in
14 some cases it could be -- and then there's
15 actually what we actually have to work with.

16 So by the time you get all the way
17 down to what do we have to work with, it could be
18 that there was a duplicate case somewhere. It
19 could be that it turned out when you looked at
20 the records, it was a non-sex offense, it was an
21 indecent act. A consensual offense.

22 Or the records couldn't be found in

1 some cases. Or not enough records for us to
2 discern charge and an outcome. And in that case
3 we didn't put it in the database.

4 So if you could go to the next slide,
5 I could probably illustrate it for you. Our
6 process with the Services, this breaks down by
7 Service what we have.

8 Sort of the report card for the
9 responses. And I'll just let you take a look at
10 it. But this is a by number issue.

11 And some -- by number demonstration of
12 what we requested and collected. And it's also
13 up here, and depicted in this way so you can see
14 where the bulk of the cases come from. The
15 Services with the most cases.

16 Obviously the Army's numbers are
17 making up sometimes close to half of the total
18 number of cases for each FY. So that might pose
19 some challenges in and of itself.

20 And then, you know, we again have been
21 requesting these cases since at least May of this
22 year. FY 12 and 13, and eventually 14. And I

1 think we've had probably some of the issues that
2 were -- that presented the most difficulty
3 probably for FY 14.

4 As I alluded to, it's kind of
5 surprising that it was some of the issues with
6 the DSAID database that made case identification
7 by name a little bit more difficult for the
8 Services. And thus our records collection is a
9 little bit different.

10 And in some cases just service
11 responsiveness. Maybe they haven't gone out and
12 collected the records or found them yet. And
13 that could explain some of the delta you see here
14 for FY 14. Where you see a lower collection
15 percentage for the service.

16 We wanted to present to you sort of
17 the sum total of our efforts in collecting the
18 cases. And there is another story here to talk
19 about.

20 And I think it highlights some issues
21 with data tracking when you look at documents by
22 reporting up through the chain of command all the

1 way to DoD SAPRO, you're going to see some
2 differences in our numbers from what's reported
3 in the number of cases that SAPRO has versus what
4 we might have on hand with a complete set of
5 documents in our database.

6 So we can go to the next slide. Okay,
7 so this is just the summary of a little bit of
8 our process.

9 Once again, we did some of the
10 scanning and pulling of documents ourselves. We
11 asked the Services to go down to the field if
12 that's where the case was and pull the documents
13 from us -- from those offices.

14 And again, the Services remain the
15 release authority for those documents. They've
16 all been given the appropriate protections in
17 markings according to the Privacy Act and FOIA
18 requirements.

19 And so, we've kind of kept those in
20 our -- on our database that has a secure access
21 point basically. That's for housing the
22 electronic form of the records.

1 COL GREEN: You just hit on that
2 specifically. Because that's been the point of
3 issue for the staff.

4 The staff has been able to access
5 those records as members of DoD OGC. But just
6 for the Panel's information and others, and I
7 know that there's interest in some of the
8 individual case records.

9 And the documents that were provided
10 to us were not cleared through the FOIA process.
11 And so those documents remain under the control
12 of the Services.

13 And they are subject to FOIA
14 exemptions. So, if the Panel is interested in
15 reviewing specific case records, or wants to
16 review a particular case or a group of cases, the
17 process that we've established with the Services
18 is that we'll go back and ask the Services for
19 FOIA cleared copies of those cases in order for
20 you to review.

21 And so the Panel has access to all the
22 information that we've obtained from those cases.

1 But the actual case records themselves remain
2 under service control.

3 Next slide.

4 MS. PETERS: All right. So, another
5 picture here of our process. We identified a
6 number of cases.

7 What we received from the Services, we
8 have a -- I think about 185 cases between what
9 we've identified and what we've received. For
10 about 80 or so of those cases, between the first
11 two columns, I would say that we have some
12 documents but just not all of the documents.

13 And maybe the rest we have no response
14 from the Services on 100 or so of that difference
15 between what's identified and what's received.
16 And then you'll see that there's a number of
17 those cases we received that we did not enter.

18 And again, I'll highlight that. When
19 you actually look at the case documents, while it
20 was listed as involving a 120 offense where the
21 charges preferred, and a disposition was
22 completed in the FY. When we looked at the

1 documents, we have a notion one that it was a
2 complete set, so you can track the procedural
3 outcome of the case.

4 We had to have enough to again to read
5 from. We saw duplicate cases. Because again, at
6 some point, the SAPRO list translates reports
7 that are listed by victim.

8 Which naturally means that a subject
9 could come up multiple times on an initial SAPRO
10 list. So what we found was when you actually
11 asked for a subject list, you might get the
12 subject, or the same case multiple times because
13 there are multiple victim cases out there.

14 And so, we saw some of that. We made
15 sure that duplicates were not entered in the
16 database.

17 We also again found that some cases
18 did not actually contain an Article 120 sex
19 offense. And so we couldn't enter that in.

20 Even though Article 120 now today, as
21 you'll see in the reference chart and your
22 reading materials, has subsections for indecent

1 conduct, again, that's under the heading of 120.

2 And so it could be that some cases
3 appeared to be responsive to, was a 120 offense
4 preferred? Did it go to trial? Was there an
5 outcome? And again, that's potentially
6 consensual conduct that we're not analyzing for
7 court-martial trends.

8 We made sure those didn't get into the
9 database. And we've been receiving records all
10 the way up through last week and even a -- I
11 think a few this week too.

12 And where we end up is with about
13 1,800 cases ready for analysis in our database.

14 MR. TAYLOR: Could I ask a clarifying
15 question please?

16 MS. PETERS: Yes.

17 MR. TAYLOR: When you refer to a case
18 record and documents being missing or incomplete,
19 what is it that constitutes a case record in
20 addition to the record of trial? The charge
21 sheet? The allied papers?

22 What's a case record?

1 MS. PETERS: Right. We did not
2 request the complete record of trial. Part of it
3 is because if we're looking at acquittals and
4 alternate disposition, there's not going to be a
5 complete record.

6 But what we were interested in in each
7 case was comment. Each case disposition has a
8 charge sheet, a referral decision by the
9 convening authority. A pretrial agreement to
10 show that it was a guilty plea and what the terms
11 were.

12 Or something that indicates forum for
13 the case, judge or jury. And then a report of
14 the results of trial.

15 And fortunately, a lot of these are
16 standardized DD forms or mandated parts of a
17 record of trial. And that report of the results
18 of trial indicates again, charge, plea, outcome
19 for each offense.

20 And sometimes some of those documents
21 were missing. Or if there's an Article 32
22 investigation, which is only required if you're

1 going to go to a general court-martial. And it
2 can be waived by the accused. But there should
3 be a form indicating what happened with that
4 proceeding.

5 So, if we were missing enough of those
6 pieces of documents where you just couldn't tell,
7 there's a charge sheet, but no report of result
8 of trial, we can't enter that into the database
9 without an outcome. And yes, there might have
10 been a few instances where a charge sheet was
11 missing essentially.

12 But the fidelity of the record keeping
13 certainly increased with the level of process
14 received. So, a completed trial, a completed
15 guilty plea, a case in the appellate process, you
16 know, we could see the full record of trial.

17 We just chose to produce or pull eight
18 or so key documents. Give us an indication of
19 the decision points that are key to each case.
20 And outcome and disposition.

21 And again, so the further a case went
22 along, the more documents we had. A case that

1 reached -- somebody was administratively
2 discharged after prefferal for whatever reason,
3 that case's record would be kept at the
4 installation for two, maximum three years.

5 And then the separation action is just
6 part of the soldier's personnel file. You know,
7 so you have whatever the legal office sometimes
8 kept on hand.

9 Because record keeping requirements
10 diminish with the level of action that I guess a
11 case receives. And the other is just, you know,
12 the question mark cases, so.

13 MR. TAYLOR: Thank you.

14 MR. STONE: Were you consciously
15 looking at the numbers that we just got before
16 lunch from the SAPRO, and trying to see the
17 differences? Or whether even some of the
18 annotations in those cases filled out your
19 numbers?

20 Or did you do a completely independent
21 of? Because none of the numbers exactly match
22 up. Sometimes you're higher, sometimes you're

1 lower.

2 So, I wasn't sure how you could be
3 higher. So, that's why I wondered if you had an
4 eye on those Fiscal Year '14 -- that fiscal year
5 14 data that we just heard about?

6 MS. PETERS: Absolutely. We reviewed
7 the DoD SAPRO reports because it is the
8 collective effort across all Services to
9 aggregate anything, any statistics on the
10 judicial process, right?

11 And again, they are just statistics.
12 There are no documents associated with them.
13 When we reviewed the process by which information
14 was collected and categorized, we did find that
15 it in some cases again, didn't have the level of
16 detail.

17 Like you pointed out in the earlier
18 session, would you want to know if something was
19 a guilty plea or not. You're not going to get
20 that data.

21 And again, there's so many nuances to
22 the legal process, we just felt that that

1 Sentencing Commission methodology of collecting
2 documents was going to be better than looking at
3 raw numbers. But certainly some scrutiny of the
4 statistics in that report, I think is part of the
5 analysis and informs what we need to be looking
6 at.

7 I mean, yes, we found differences in
8 what's in the SAPRO list versus what we received.
9 Some of the reasons for that are those
10 definitional issues that were, I think,
11 highlighted pretty succinctly in the last
12 session, which is, people have to get on the same
13 page with regard to what means what.

14 We had in some years pending cases,
15 included in SAPRO's data. And then we asked
16 well, if it was pending in FY 12, was the outcome
17 then reported in FY 13? And the answer we would
18 get back was no.

19 So there were some just -- some
20 interesting case counting metrics. There also
21 were some interpretive differences in the SAPRO
22 reports as far as when is a case or a matter

1 complete?

2 Case completion can mean a lot of
3 different things to a lot of different people.
4 Especially in the military system where you have
5 a trial date which gives you an adjudged
6 sentence, but that convening authority doesn't
7 take what we call final action and approve that
8 sentence, which makes it ripe for appellate
9 review, which takes into the fact of any victim
10 input, any clemency matters.

11 That convening authority action
12 doesn't happen until four, six months afterwards.
13 Sometimes a year afterwards.

14 And that does bring me back to what is
15 in our database. And that is, we just chose if
16 we're going to look at outcomes, our approach to
17 our data set was going to be, let's ask for
18 what's in the SAPRO report because that's a known
19 universe of cases.

20 We can at least tell the Services we
21 know that case is out there or we think it is.
22 Please go get it. As opposed to saying, give us

1 everything that's out there. We have nothing to
2 compare it against.

3 But when we asked for cases by the
4 fiscal year within which it's reported in the
5 SAPRO report, because of the discrepancies we
6 noticed in our analysis of the -- well, of the
7 documents, compared to some of the lists in the
8 SAPRO report, we said, let's per the JPP
9 purposes, look at that final disposition date,
10 meaning, final convening authority action.

11 And so we held that constant. So
12 we're going to be able to see if it was reported
13 in the FY 12 SAPRO report, but the convening
14 authority acted in the following year, we're
15 going to count that as an FY 13 case.

16 And that's not to say that there's
17 anything wrong with looking at when the case is
18 adjudged. It's just that for your processes, if
19 we think that convening authority action on a
20 case, the Article 60 authority of a commander
21 over a court-martial is something you want to
22 examine, then we need to call a case finished

1 when you reach final outcome.

2 So, there's some issues with
3 inconsistency in the way the Services interpret
4 and classify cases for SAPRO. And so we look at
5 that in the process of our case collection. And
6 try to identify a more consistent metric by which
7 you could really look at case outcome and get a
8 consistent set of numbers. Consistent proving.

9 And I would say in the end we have a
10 very good sampling of cases. We know that right
11 now it's a little bit -- it might be hard to say
12 what is the actual known universe of all charges
13 preferred in the last three years, right?

14 We don't have that number for you.
15 What we have is a very good, I think, robust
16 sample of the cases. Because we know that the
17 reporting requirements to SAPRO are pretty
18 extensive. And that there's a lot of attention
19 given to these cases.

20 So they're on somebody's track sheet
21 somewhere, right? And so, we use what's reported
22 to SAPRO as a good, I guess, azimuth, or a good

1 bead on exactly -- on roughly how many cases
2 might be out there for the JPP use.

3 And if you -- and please, bring your
4 questions about our case collection anytime. I
5 can move onto just one other issue with some of
6 the data if we can. And again, any questions
7 about the courts-martial, we can continue to
8 discuss.

9 But, one of the things that I think
10 the Congressional taskings looked to is let's not
11 just look internally at DoD's data. But let's
12 look comparatively at federal and state criminal
13 court data. And that's why you heard some of the
14 -- from some of the experts in October.

15 Now, because you've been asked to
16 compare punishments in the military with like
17 punishments in the civilian sector, we've gone
18 into the Sentencing Commission in the Bureau of
19 Justice Statistics, and said please give us some
20 analysis for like cases in the military. And we
21 we're pending some analysis from the Sentencing
22 Commission that's specific to the JPP.

1 And what we did was requested like
2 offenders and like offenses in that grouping.
3 So, that's where you see that we looked at first
4 time offenders.

5 Because most of the time people are
6 kicked out of the military for a serious felony.
7 So, they're not going to be a repeat offender for
8 the purposes of the military.

9 And the other thing that -- challenge
10 that we realized that we would have to look at
11 is, making sure that any civilian statistics
12 parsed out adult victim cases versus child victim
13 cases.

14 We know that Federal Sentencing
15 Guidelines give a lot of enhancements for child
16 cases. And generally I think, the prosecutors
17 you heard from last month talk about that that's
18 where a large grouping of their cases reside.
19 And where you might tend to see more serious
20 sentences.

21 So, trying to keep some of those
22 metrics equal, we asked for first time offenders.

1 And again, those adult victim cases in the most
2 recent years available.

3 What I think we're going to find from
4 the Bureau of Justice Statistics is that their
5 National statewide data, while the Sentencing
6 Commission keeps year to year, very current data,
7 the data collected on the States is going to be a
8 little bit more remote.

9 It looks like any nationally
10 representative data is from 2006 or 2009. And
11 what we'll have to look at further is what's in
12 that data?

13 Can you parse out child victim cases
14 versus adult cases? And what information beyond
15 confinement and whatnot can you look at?

16 And that's also something for the
17 panel as far as the comparative value. Knowing
18 that the military punishment options are a little
19 bit broader than confinement terms.

20 So, it will be interesting to unpack
21 all of that. But we have requested civilian data
22 for you to do that.

1 CHAIR HOLTZMAN: Can I ask one quick
2 question?

3 MS. PETERS: Um-hum.

4 CHAIR HOLTZMAN: In terms of the
5 Sentencing Commission, what's the volume of cases
6 that -- I mean, I assume you're asking for sexual
7 assault cases.

8 MS. PETERS: Yes.

9 CHAIR HOLTZMAN: And there aren't a
10 lot in the Federal system overall.

11 MS. PETERS: No.

12 CHAIR HOLTZMAN: Could you give me an
13 idea of the volume?

14 MS. PETERS: Well, I think the
15 statistics from the FY 14 report, I can start you
16 there. And I think --

17 CHAIR HOLTZMAN: Oh, I'm saying did
18 you get 20 thousand? Did you get --

19 MS. PETERS: No, it will -- I think
20 we'll be lucky if we crack 100 in --

21 CHAIR HOLTZMAN: One hundred?

22 MS. PETERS: In one year's data. And

1 that's a guesstimate. I really don't know how
2 it's going to break down if we look at adult
3 victims only.

4 So, yes, there's not -- there probably
5 will not be a lot of convictions comparatively in
6 the Federal system. We anticipate getting that
7 by the end of the month, the actual analysis
8 results.

9 CHAIR HOLTZMAN: It's all I guess
10 mostly crimes on an Indian Reservation or that
11 sort of?

12 MS. PETERS: Right.

13 CHAIR HOLTZMAN: So, it's a pretty
14 small database in other words?

15 MS. PETERS: Right.

16 COL GREEN: And the only numbers that
17 they're reporting by the Sentencing Commission in
18 their annual reports is under the broad category
19 of sexual abuse. Which includes all of the other
20 child offenses and the like.

21 CHAIR HOLTZMAN: Yes.

22 COL GREEN: And I think the number for

1 FY 14 and the Sentencing Commission report was in
2 the neighborhood of 400. And so that's the top
3 number.

4 And then obviously they have to filter
5 out, you know, the non-applicable offenses that
6 we wouldn't be interested in for military
7 comparison. And we'll see what they come up
8 with.

9 CHAIR HOLTZMAN: Great. Thanks.

10 MS. PETERS: All right. So, to
11 address some of the parts of the tasking, you
12 have that the first task mentions those initial
13 disposition decisions.

14 So, that's not just courts-martial.
15 That could mean, did a case never receive a
16 prefferal? It was never considered for that.

17 It was considered for something
18 lesser. But it might have fallen under the
19 umbrella of an initial sex assault allegation.

20 So, to the extent that the task might
21 lend itself to looking at records of non-judicial
22 punishment or adverse administrative action, we

1 had to look at again, what kind of information is
2 available out there. And the bottom line answer
3 is not much.

4 As far as even statistical data, and
5 when you get down to are there actual records
6 there, there's even more challenges. Because
7 we're talking about personnel records for the
8 most part.

9 And the records collection regulations
10 differ by service. And it's usually, you know,
11 about two years maybe sitting at the unit. And
12 then it's in the individual's personnel file.

13 So, it not being a public document and
14 the nature of those documents, you may want to --
15 it would be, I think, certainly a plausible
16 option then to go say, where's the numerical data
17 out there? The tabulations on these actions?

18 Again, the first stop would be to
19 review the DoD SAPRO reports to see what they
20 have in there. So what you see in front of you
21 is our look at the SAPRO reports' tabulations of
22 cases that involved a non-judicial punishment or

1 adverse administrative action.

2 And this is from our read of the
3 service enclosures. The charts basically, they
4 have a chart listing line by line, every case
5 that falls into the -- fell into the SAPRO
6 database of some sort.

7 So, and not by name, but just sort of
8 by allegation. And then by end result. So, we
9 looked at those numbers. And again, we will see
10 what sort of level of analysis could be performed
11 just with that collection, that sampling of
12 administrative action.

13 What level of detail could we
14 scrutinize that with? I think maybe something
15 along the lines of what sorts of offenses are
16 being disposed of through non-judicial
17 punishment?

18 And then is it possible to see what
19 sorts of conduct are captured in administrative
20 actions? Because again, they are administrative.

21 And there -- it might be a false
22 premise to presume that a sexual assault

1 allegation that has adverse administrative action
2 connected to it, actually involved a sex offense.
3 Did that letter of reprimand describe, you know,
4 a rape? Or some sort of bad behavior that the
5 military condemns?

6 And so it went into that person's
7 personnel file. And maybe that particular sex
8 offense didn't warrant action. Didn't go
9 anywhere. Something else happened to it.

10 So, we will have to kind of look at
11 what is being reported in these annual SAPRO
12 reports. Kind of scrutinize these numbers.

13 And also make sure, and see where the
14 adverse action or non-judicial punishment are, I
15 guess, assigned to the same soldier twice.
16 Basically a person can certainly receive both
17 actions.

18 They can be punished non-judicially
19 and then receive a separation from service. And
20 in fact that may happen in a lot of instances.

21 So, we can try to look at that from
22 these lists. And so there's a lot of, I think, a

1 lot to unpack from just these raw numbers. Not
2 so much in the level of detail of the action, but
3 maybe what's happening around it.

4 How did the case start? Did any of
5 these actions happen in conjunction with another
6 disciplinary action? Is the person separated or
7 not?

8 But again, it will be important to
9 look at really whether they were involved in what
10 we would call a sex offense versus collateral
11 misconduct. Versus really just some sort of bad
12 behavior.

13 All of those could be encompassed in
14 these numbers that you're looking at. So, --

15 MR. TAYLOR: I have one clarifying
16 question if I may?

17 MS. PETERS: Um-hum.

18 MR. TAYLOR: When you say that the NJP
19 and admin action info are not uniformly reported
20 in the SAPRO annual report case reports, I didn't
21 get that impression from talking -- from
22 listening this morning to the briefing on the

1 waterfall charts.

2 So, could you give me an example of
3 how they are not uniform?

4 COL GREEN: This data was taken from
5 the synopsis sections, the enclosures that were
6 reported in each of the cases. And so in a
7 particular case, the synopsis, the narrative, may
8 indicate that that case resulted in NJP and
9 nothing further.

10 Another narrative may indicate that
11 this resulted in NJP and then the soldier was
12 administratively separated. So, the combination
13 of those, I mean, both are indicated.

14 But, obviously, if there's NJP for
15 some type of a sex offense, it may have
16 ultimately resulted in administrative action.
17 It's just not captured in the narrative.

18 And so the ability to really get that
19 total fidelity about the outcome in the case, I
20 mean, we're somewhat limited by what the Services
21 reported in their enclosures.

22 MS. PETERS: Right. Yes, there's a

1 whole host of issues there. And about when these
2 actions are complete. When is the separation
3 action complete could be one interpreted issue.

4 But, absolutely, it's when the SAPRO
5 attempts to kind of give a hierarchy, assign a
6 hierarchy. And then ask what's the most serious
7 level of discipline taken?

8 Services may interpret that as, I'm
9 only going to report one action taken. And some
10 may report, well, I think this is also relevant.
11 So I'm just going to tag on the fact that he was
12 administratively separated.

13 We don't believe that we can -- that
14 we have uniform and consistent types of reporting
15 to analyze again, the exact punishment or the
16 exact types of actions taken.

17 I think what you can start to get a
18 sense of when you step back and look at these in
19 the aggregate is, what types of conduct are the
20 subject of these disciplinary actions? You know,
21 is it an aggravated sexual assault? Or a
22 wrongful sexual contact?

1 Or something even that turns out to be
2 something less? And again, that bad behavior
3 category.

4 MR. STONE: I guess one of the things
5 I'm hoping you're going to see when you're done
6 analyzing this, telling us, is what percentage of
7 the cases actually resulted in a formal finding
8 of guilt versus those that did not.

9 And the reason I say that is, you
10 know, when you look and try to compare with any
11 other system, they'll tell you which -- either
12 what percentage pled or were found guilty, versus
13 those that were not guilty.

14 They don't start telling you about all
15 the cases where there was deferred prosecution.
16 Whether there was an agreement with the
17 prosecutor or the case was dropped because the
18 guy did this or he did that or the other thing.

19 And to some extent, I feel like I
20 myself, I'm totally distracted by all of these
21 other things that are done. But nonetheless do
22 not result in a formal acknowledgment on the

1 record that shows that there was guilt or no
2 guilt.

3 And I think to some extent, that may
4 be reflective of how difficult it is to use an
5 Article 120. That it is very difficult.
6 Prosecutors are throwing up their hands and
7 accepting all kinds of other things.

8 Okay, we'll process them out. In
9 other words, they're making deals that
10 nonetheless do not reflect that there was an
11 acknowledgment, a formal acknowledgment of guilt.

12 And so I hope that you'll be able in
13 doing this to be able to tell -- you know, I am
14 frankly very unimpressed with the non-judicial
15 punishment and adverse administrative action if
16 it doesn't result also in an on the record
17 admission of guilt.

18 Because that doesn't help the victims
19 as a class. It may help an individual victim
20 that the person is out. But as a class, it tells
21 us that there's something wrong, I think, with
22 Article 120. That's it too difficult to use.

1 Which is some of the testimony we got
2 at the very beginning. That the prosecutors are
3 making all kinds of deals to avoid having to go
4 to trial on the language of that Statute.

5 So, I hope you're going to be able to
6 give us some actual numbers. Just like I think
7 the same thing is true with the number of people
8 who are actually incarcerated for these offenses.
9 Spend time in jail for the offense.

10 Because I think that if you're having
11 to deal away these sexual assault offenses on a
12 regular basis, it means, you know, that your
13 chance of getting the person to spend any time in
14 jail is slim. And alternate dispositions are
15 very nice, but that's not -- that just tells me
16 that the system is broken.

17 HON. JONES: You know, the converse to
18 that though could be that in the military, NJPs
19 and adverse administrative actions are actually a
20 broader set of remedies. Even though they're not
21 a formal conviction.

22 And look, it's very difficult. We

1 know it from the RSP to figure out what the
2 actual statistics are in terms of convictions for
3 all of the many sexual assaults that occur in the
4 civilian population.

5 But, I think the one thing that
6 everybody recognized in the Panel, was how
7 difficult it is to get from an allegation of a
8 sexual assault to a final conviction in a
9 courtroom in the civilian system. And I think
10 just anecdotally, it's pretty clear that an awful
11 lot of these cases that the ones that even make
12 it to the District Attorney's offices, you know,
13 many, many of them never get to the courtroom.

14 So, I don't think we can make quite
15 the conclusions you're suggesting from the fact
16 that there are NJP and adverse administrative
17 actions, because these are extraordinarily
18 difficult cases.

19 And I'm just suggesting these are
20 things that a prosecutor in the civilian world
21 wouldn't even have the opportunity, you know, to
22 impose.

1 MR. STONE: Well, I think in a
2 civilian world, prosecutors always have the
3 possibility of deferred prosecution or declining
4 a case. But, I guess what makes me unsatisfied
5 will be if in those circumstances, there is no
6 finding.

7 I agree with you. It's nice to have
8 a range of punishments. And I have no problem
9 with that range of punishments if they follow
10 somewhere in the system a determination that the
11 sexual assault occurred.

12 If there's no such determination, then
13 the person can go on and continue in the service
14 and do it again. Or, the victim's going to feel
15 like, you know, this whole thing -- she was not
16 believed or he was not believed, and no sexual
17 assault occurred. And our numbers aren't going
18 to be right.

19 So, it seems to me there's an
20 acknowledgment of guilt that has to come along
21 with these other lesser punishments. And I guess
22 from some of the earlier data, I couldn't tell

1 which ones did and didn't have it.

2 And I think that that's a crucial
3 component for us to know where we're going. I
4 just don't think we can compare anything if we
5 don't know whether these are ways to avoid a
6 sexual assault.

7 Or whether these are ways after you
8 have an acknowledgment of guilt to ameliorate the
9 penalty. And I think the second one is -- I have
10 no problem with. But the first one, is maybe I
11 think what got us here.

12 COL GREEN: One of the important
13 things to remember Mr. Stone, is the range of
14 conduct that's encompassed within Article 120
15 ranges from rape to abusive sexual contact. And
16 by statute, Congress has recently set a limit
17 that the only forum for resolution of a
18 penetrative sexual offense is a general court-
19 martial.

20 And so, I think some of what you're
21 talking about, and what I think I hope -- we hope
22 that our data will be able to provide, is of the

1 varying severity levels of conduct that's
2 encompassed within Article 120, what is the forum
3 in which that particular type of allegation is
4 resolved?

5 And I think what I expect to see is
6 that obviously on the more severe end, the rape,
7 the sexual assault, the penetrative offenses, I
8 highly doubt you'll see those type of conduct in
9 these numbers. But again, that's -- we'll look
10 at the statistics to determine whether any of
11 those types of offenses are involved in these
12 alternate dispositions.

13 MR. STONE: And I think maybe what
14 you're telling me, which I agree with, is that
15 when we finally get to a revised suggestion for
16 Article 120, there should be a 120(a), (b), (c),
17 (d), et cetera. So that in the future if
18 somebody wants to track, if they're tracking
19 Article 120(a) offenses, they know they're
20 dealing with that most serious category.

21 COL GREEN: Right.

22 MR. STONE: And when they deal with

1 the (b) or the (c), they're dealing with much
2 less serious offenses. And so then they can
3 understand the outcomes.

4 COL GREEN: And we've recorded the
5 information in our database by each one of those
6 specified offenses. So, we'll be able to -- and
7 we can continue in the next discussion to talk
8 about how we'll be able to break that down for
9 you to see those.

10 MR. STONE: Great.

11 MS. PETERS: Right. The documents
12 we've captured will record a finding and a
13 disposition by charge for the most part. That's
14 why we chose the prefferal stage to really start
15 focusing on the documents.

16 And we will have numbers for you. And
17 beyond that, that's maybe another level of
18 analysis.

19 And again, I would -- the earlier
20 slides did talk about some of the documents that
21 we have to capture those procedural steps.

22 Again, some of those, and I should say

1 this before we move on, we'll -- be able to tell
2 us whether there was a guilty plea involved in
3 the case because we've looked at pretrial
4 agreement. And the results of trial typically
5 record the plea by charge.

6 So, we will have access to that
7 information and see what types of analysis we can
8 do. If we could go to the next slide.

9 There is one more issue here in the
10 level of judicial process encompassed by the
11 tasks. And that would be appellate case results.

12 And I believe it's your second or
13 third task that says look at the appeal of
14 convictions or whether any sex offense conviction
15 is reduced or set aside on appeal. Aside from
16 sort of the issues maybe with the wording of the
17 task, it certainly encompasses let's look at the
18 appellate life of a case.

19 Now, the first issue I'll note is yes,
20 we collected appellate decision for FY 12, 13 and
21 14. And I have to first just make the disclaimer
22 that these appellate decisions don't necessarily

1 tie to the cases tried in that year.

2 Naturally appellate process timing is
3 going to occur a year, maybe two, after the case
4 is tried in some cases. So, we're not looking
5 longitudinally at all of the courts-martial in
6 our data base with these appellate cases.

7 It's just appellate decisions decided
8 in the last three years. Some of these cases --
9 some of the FY12 courts-martial might have been -
10 - might have reached an appellate review in FY 13
11 or 14.

12 Our goal wasn't again, to try to tie
13 those together, but really just to start to get a
14 grouping of those cases. Maybe going forward
15 with more years of data, you could tie previous
16 years' cases to current appellate results.

17 So, if I can just talk about how the
18 staff went about collecting appellate data for
19 you, in order to address the task. I want to
20 make one or two notes here.

21 And that is, again, we just looked at
22 decisions reached by fiscal year. And note that

1 there are different avenues for appellate review.

2 While the tasking may have said, when
3 somebody appealed their conviction, well, the
4 appellate process is largely governed by Article
5 66. So, there's two avenues -- there's at least
6 two avenues to appeal.

7 And that is, there's an automatic
8 review by the appellate courts if a sentence
9 reaches a certain level. And there's a whole
10 appellate counsel service, not necessarily on the
11 individual accused.

12 This is something that's happening as
13 a matter of right. There's an appellate
14 structure, you know, built into each JAG corps to
15 litigate the appellate issues of these cases.

16 So, when you have a trigger like a
17 year or more of confinement or a punitive
18 discharge, it goes up to the appellate court for
19 review. As well, the service TJAGs have a role
20 in getting a case to review by an appellate
21 court.

22 And that's regardless of whether it

1 was the result of a guilty plea or a contested
2 matter. In fact the appellate courts do
3 routinely review guilty pleas and the inquiry
4 that the judge does, the very searching inquiry
5 that a judge does with an accused.

6 So, we've just looked for cases that
7 had an Article 120 issue. Was it an Article 120
8 offense at issue?

9 And then you tried to unpack what sort
10 of issue was that? Was that an issue that was
11 germane to all cases, like suppression of a
12 statement?

13 Or was it something germane to the
14 statute or a related sex offense issue like a 412
15 or a 513 issue? Or one of the unique aspects of
16 the military appellate courts, and that is
17 factual and legal sufficiency.

18 Basically they take a review of the
19 record. And they have the -- they can question
20 the findings of the panel or the judge and choose
21 to set aside a verdict.

22 They can choose to maybe reassess a

1 sentence. They're the last arbiters of whether a
2 sentence was fair. They're sort of supposed to
3 help calibrate sentences. And they can make an
4 assessment there, too.

5 So, we looked at was there an issue
6 with the offense? Or the offense of conviction
7 or the finding? Was there action on the finding
8 or sentence?

9 And was relief granted? And what sort
10 of relief? And we also have those appellate
11 decisions obviously for your reference.

12 So, this is looking at the numbers
13 here that, you know, it's a pretty small
14 percentage of our overall case load. Well,
15 compared to the number of courts tried in a year,
16 this how many appellate decisions on 120.

17 You're going to see that's sort of our
18 ballpark. And we have to maybe parse out from
19 there, make sure again, that it's aggravated
20 sexual assault or rape and not a 120(c) offense
21 that's capturing, those indecent conduct
22 offenses.

1 But that's largely what our data pool
2 is going to look like. And the staff will be
3 giving you some analysis there. See what kinds
4 of relief and the basis for the relief that's
5 being granted at the appellate level.

6 And that's subject to your questions
7 is just some of how we unpacked the tasks, the
8 information we brought to you to examine. And
9 there's a variety of ways to do it.

10 So we hope today we can get your
11 thoughts on some areas we would like to focus on
12 in response to those tasks. It's pretty broad,
13 but I think where we have concentrated is on that
14 court-martial process.

15 Not just the outcome, but what got us
16 to that outcome. And again, by charge and by
17 final outcome.

18 CHAIR HOLTZMAN: Dr. Spohn, are we up
19 to you? Thank you. Thank you very much, Ms.
20 Peters.

21 DR. SPOHN: So, let me just say by way
22 of introduction that I've been provided with the

1 data that the staff has collected. And this is
2 the identified data on the 1,800 cases --
3 approximately 1,800 cases in which some sex
4 offense charge was preferred.

5 And they've asked me to look at the
6 data. To analyze the data in terms of outcomes
7 and also in terms of predictors of those
8 outcomes.

9 So, in terms of outcomes, there's
10 obviously a number of different ways that one
11 could conceptualize the outcome of a case. I
12 think that in conversations with Colonel Green
13 and with Meghan Peters, it's clear that one of
14 the things the Panel is interested in, and you've
15 just referenced this Mr. Stone, is what
16 percentage of cases resulted in a conviction that
17 is a finding of guilty versus dismissal of all
18 charges, acquittal on all charges, or some sort
19 of alternative disposition on all charges?

20 And we can conceptualize the
21 conviction in different ways. The SAPRO report
22 looked at penetrative offenses versus contact

1 offenses.

2 I parsed it out here in terms of
3 Article 120 sex offenses and non-Article 120 sex
4 offenses. We can really do this any way that
5 suits your purposes.

6 And then many of the offenders for
7 which sex offense charges were preferred are
8 actually convicted of non-sex offenses. So,
9 focusing on the outcome in the case, conviction
10 versus other kinds of outcomes.

11 And then for offenders who are
12 convicted, we obviously want to look at both the
13 type and the length of sentence. So, -- and
14 again, we can do that for those who are convicted
15 of the Article 120 offenses, other sex offenses,
16 non-sex offenses, or we can do it for rape,
17 sexual assault, forcible sodomy versus everything
18 else.

19 I mean, there are a number of ways
20 that we can look at the type of the sentence.
21 Although this is complicated in the military
22 system.

1 And then for offenders who are given
2 some sort of confinement, what was the length of
3 the sentence?

4 CHAIR HOLTZMAN: Excuse me, may I just
5 interrupt for a question.

6 DR. SPOHN: Um-hum.

7 CHAIR HOLTZMAN: What is the
8 difference between an adjudged sentence and an
9 approved sentence?

10 MS. PETERS: Yes, ma'am. The adjudged
11 sentence is what happens at trial from the judge
12 or the panel. And that result from trial,
13 whatever the judge or the panel adjudges goes to
14 the convening authority, the general officer that
15 dictated a court-martial will take place.

16 And he takes final action on that
17 sentence via approval in part, or not at all.
18 And that issue has been addressed in recent
19 legislation kind of curtailed somewhat convening
20 authority action on sentences in sexual assault,
21 rape and sexual assault.

22 But again, that's really when the case

1 is considered done, is when it is received by the
2 convening authority. In previous years we might
3 see more options to the convening authority to
4 approve or not as far as the sentence goes.

5 These days there's less discretion
6 that the convening authority can exercise. But
7 again, approval is what we considered a final
8 outcome of the case.

9 CHAIR HOLTZMAN: I'm still a little
10 confused. Adjudged is what happens --

11 MS. PETERS: At trial.

12 CHAIR HOLTZMAN: At trial.

13 MS. PETERS: Right.

14 CHAIR HOLTZMAN: And approved is what
15 the convening authority does.

16 MS. PETERS: Yes. You can look at the
17 findings --

18 COL GREEN: After.

19 CHAIR HOLTZMAN: After trial.

20 MS. PETER: Right. It comes with the
21 whole record and the result comes to him for
22 approval.

1 CHAIR HOLTZMAN: All right. Okay.

2 COL GREEN: And that encompass, ma'am,
3 the clemency process that you studied during the
4 Response Systems Panel, which has been, as Meghan
5 alluded to, Article 60, which has been
6 significantly altered in recent years, to limit
7 the ability of convening authorities to make
8 adjustments to findings and to sentences in
9 cases.

10 And particularly limited in sexual
11 assault cases.

12 CHAIR HOLTZMAN: Now, where do plea
13 agreed upon sentences come into this picture? Or
14 does that matter?

15 MS. PETERS: We have -- so we have
16 some data on plea agreements. And typically, the
17 restrictions under Article 60 are scaled back a
18 little bit in the realm of plea agreements.

19 So where a prosecutor and the
20 convening authority and then the accused enter
21 into an agreement, some of those -- it doesn't
22 curtail the ability of the convening authority to

1 say, cap a sentence or disapprove a dishonorable
2 discharge.

3 So, they can still have a pretrial
4 agreement that ahead of trial issues a cap on
5 rape and sex assault offenses. And then a trial
6 happens and it's -- again, that agreement's
7 walled off from the judge because the agreement's
8 between the accused, it's made on the
9 recommendation of a prosecutor and the convening
10 authority and the accused sign it.

11 And then either a guilty plea or a
12 contested trial happens before a judge or a jury.
13 And they come up with an adjudged sentence at
14 trial.

15 And what is in that agreement between
16 the convening authority, when he receives that
17 adjudged sentence, he says well, I'm going to go
18 back to that pretrial agreement, and if I said I
19 would cap sentence at so many months or so many
20 years, I'm only going to approve the sentence up
21 to the cap that I approved earlier in my
22 agreement with the accused.

1 So, that's why we found it important
2 to look at adjudged and approved. There could be
3 some real difference there in the realm of plea
4 agreements if we see a lot of guilty plea cases,
5 sure the adjudged and the approved sentence might
6 be very different.

7 CHAIR HOLTZMAN: But what about if the
8 approved sentence is based on a plea agreement
9 versus not being based on a plea agreement? Is
10 that a difference that's important to catch?

11 MS. PETERS: Yes. And I think we can
12 capture that where we have received valuable
13 pretrial agreement data that we actually have in
14 a lot of cases the actual pretrial agreement.

15 So we can see what that deal was. And
16 then we can actually see that final action and
17 see him -- see the convening authority following
18 through with the agreement and saying okay, the
19 adjudged sentence was five years. I agreed to
20 cap it at three. I'm only approving three years
21 confinement in this case.

22 And so we will be able to get a sense

1 of when that's happening. And if you want to
2 look at particular groupings of cases because we
3 could look at that.

4 CHAIR HOLTZMAN: Okay. Thank you.

5 DR. SPOHN: So, I've just begun to
6 work with the database. But I've already
7 discovered that there are a number of
8 complicating factors.

9 And the first is that in the data that
10 we have, there accused is often charged with
11 multiple counts. The range of the number of
12 counts in the data, it ranges from one to 30.

13 And the mean is about five and a half
14 charges per case. This includes non-sex offenses
15 and well as sex offenses. And the counts that
16 are included are often disposed in different
17 ways.

18 So you might have a rape charge that's
19 discussed. A sexual assault charge that is a
20 guilty verdict at a general court-martial. And
21 then other charges that are disposed of in
22 different ways.

1 The charge might be withdrawn, it
2 might be dismissed. Or the defendant might be
3 found not guilty.

4 In some cases the dispositions are all
5 consistent so that all charges are dismissed.
6 All are given an alternate disposition. Or the
7 defendant is found guilty or not guilty of all of
8 the charges.

9 But in many cases, the outcomes vary
10 depending upon the charge. And so the question
11 then becomes how best to characterize the overall
12 outcome of that case?

13 And I think our thoughts are that
14 we'll look at those charges for which the
15 defendant or the subject was found guilty. And
16 how those differ from the charges that were
17 preferred. And we can track that.

18 The other complicating factor is that
19 offenders often receive multiple punishments.
20 So, unlike a civilian justice system where when
21 we think about the type of sentence, we're really
22 talking probation or some sort of other

1 alternative to incarceration. But probation,
2 jail and prison.

3 In the military system, there are many
4 more options. And offenders can receive multiple
5 kinds of punishments. And so again, how to
6 characterize that is going to be more complicated
7 than it is in research on the civilian justice
8 system.

9 That said, we can and they have
10 obtained data on the length of confinement.
11 Which would be consistent with the civilian
12 justice system where we look only at the
13 likelihood of incarceration.

14 But then also for those offenders who
15 are given either jail or prison, the length of
16 the sentence. So we can have some consistency
17 there.

18 The other -- go to the next. So, in
19 terms of some of the questions that we've been
20 talking about, how to identify the ways in which
21 outcomes vary, depending upon the year in which
22 the case was disposed, the service.

1 We can look at it for each service by
2 year. We can compare the forum where the case
3 was disposed. That is whether it was a general
4 court-martial or a special court-martial.

5 And then we can look at whether the
6 sentence was imposed by a military judge or by a
7 panel. And there are various ways that we can, I
8 guess, tease out how these cases arrive at the
9 dispositions or the outcomes and sentences that
10 they do.

11 But, in looking at predictors, there
12 are complicating factors in that -- the database
13 does contain a number of factors that research on
14 the civilian justice system has identified as
15 being predictive of how the case is disposed, and
16 what the sentence is.

17 And that would be such things as the
18 most serious charge, the number of counts, the
19 number of victims, victim gender, victim status,
20 the accused's rank, the type of disposition, the
21 type of forum, the service and the year. So,
22 those are all variables or factors that we can

1 take into consideration in trying to decide how
2 cases are -- in trying to explain that is, the
3 outcomes of these cases.

4 CHAIR HOLTZMAN: May I ask a question
5 at this point?

6 DR. SPOHN: Yes.

7 CHAIR HOLTZMAN: I see that Service is
8 an issue here. Are you suggesting that there is
9 a difference in the outcome depending on what
10 Service the military member --

11 DR. SPOHN: I think that's an
12 empirical question.

13 CHAIR HOLTZMAN: We don't know the
14 answer -- so you're not suggesting that there is
15 such a difference --

16 DR. SPOHN: No, no, no, no --

17 CHAIR HOLTZMAN: That's --

18 DR. SPOHN: -- I am just suggesting
19 that that's --

20 CHAIR HOLTZMAN: -- something you're
21 looking at.

22 DR. SPOHN: -- a possibility --

1 CHAIR HOLTZMAN: Okay.

2 DR. SPOHN: -- that that is a factor
3 that we assume that you would be interested in
4 knowing, if there is a difference based on the
5 Service.

6 But the complicating factor is that
7 many of the variables that research on the
8 civilian justice system, specifically on sexual
9 assault cases, has identified as being predictive
10 of outcomes are not included in the database, and
11 this is particularly true with respect to the
12 characteristics of the victim.

13 We know the number of victims. We
14 know the victim's status and the victim's gender,
15 and in cases where there are multiple victims, we
16 know the status and the gender of each victim so
17 that we can characterize it as a male or a
18 female, or all males, all females, or a
19 combination of the two.

20 CHAIR HOLTZMAN: And what do you mean
21 by "status"? Excuse me.

22 DR. SPOHN: Military versus civilian.

1 CHAIR HOLTZMAN: I see.

2 VADM TRACEY: But you don't know the
3 rank if its military?

4 COL GREEN: For the victims?

5 VADM TRACEY: Yes.

6 COL GREEN: No ma'am, and this is an
7 issue with looking at the records of trial. The
8 requirements for specificity about the victim are
9 limited, and so one of the things in terms of
10 even the status of victims, the consistency of
11 that is something we're not sure about because we
12 found records where in -- in the start of a case,
13 the charge sheet might list a victim as PFC KM,
14 and then during the Article 32 hearing, it's
15 referred to as Ms., and so it may be that it is
16 simply refer differently to maybe a person that's
17 separated from service. There are a lot of
18 factors that go into that, so this is an area
19 where the specificity about the victim is
20 somewhat limited.

21 DR. SPOHN: So in terms of the
22 variables that are not included, there's no

1 information about the relationship between the
2 victim and the accused, whether the victim was
3 engaging in any kind of risk-taking behavior,
4 especially drinking or using illegal drugs, the
5 credibility of the victim, the degree of injury
6 to the victim, whether the victim was willing to
7 cooperate into the investigation and prosecution
8 of the case, whether there was delay in reporting
9 or whether the crime or the incident was
10 immediately reported, whether the victim had any
11 kind of motive to lie about the incident.

12 And then there is no indication of
13 presence of physical evidence or witnesses, so
14 those are variables or factors that we will not
15 be able to take into consideration in trying to
16 understand or to explain why cases were decided
17 in one way rather than another.

18 So those are kind of caveats to what
19 we can and cannot do and the questions that we
20 can and cannot answer.

21 MS. PETERS: And if I could talk about
22 the -- the court-martial records, one of the

1 reasons that some of this information that may be
2 very important is not at our fingertips is again
3 we looked for information that was uniform,
4 complete, and accurate, and you find that
5 something like the relationship between the
6 victim and the accused, albeit certainly of
7 interest, is not uniformly kept necessarily in a
8 record of trial.

9 Certainly where there was an acquittal
10 and you have a summarized record, summarized
11 means there's a mark that there was evidence
12 introduced in an argument and court closed,
13 essentially. It's very, very cursory.

14 So it's difficult. If we couldn't
15 consistently discern the relationship, we took
16 that off of the -- the list of possible things to
17 track with enough fidelity that it would give you
18 something meaningful.

19 So we would like to have that, and
20 could we open up every record of trial? Maybe
21 should the Panel be interested in things like
22 this that might be available in full records?

1 What we thought was if the database gives you
2 numbers that you wanted to scope out for further
3 inquiry, there is a way to shape the staff's
4 research for you by reaching back to pull case
5 records potentially.

6 But maybe rather than doing that for
7 all 2360 cases, we'd look at case outcomes
8 driving and disposition driving the tasks, so we
9 started there to give you numbers to deal with
10 first.

11 CHAIR HOLTZMAN: Any members have any
12 questions?

13 MR. STONE: Well I don't know if this
14 is a question, but it's an observation that I'd
15 kind of like you to keep in mind, particularly
16 Dr. Spohn, as you're going through this.

17 You know, criminal prosecutions not in
18 the military came under tremendous criticism in
19 the 1980s because of the amount of variables of
20 the type you were describing, and they resulted
21 in two changes that were crucial, and I think
22 maybe you can -- you can keep these in mind when

1 you're thinking about the numbers you're going
2 through.

3 The first change was a requirement
4 which the Attorney General promulgated in his
5 Principles of Prosecution that the most serious
6 charge that can be -- the most serious provable
7 charge must be pursued, that you can't deal away
8 a case in the interests of ease of getting
9 through the caseload.

10 And then the second corollary to that
11 was that the sentencing guidelines were required
12 because they found at a quick look that 20
13 percent of all the people convicted in federal
14 court were not getting any jail time, and between
15 the flexibility to charge anything you felt like
16 and make a deal that didn't include going to
17 jail, the public didn't feel like it was getting
18 what it thought it was getting.

19 And I have some of the same concerns
20 now that I heard about all these alternate
21 dispositions here today in huge numbers, and I'm
22 even more concerned about it now because I see a

1 huge number of discharges that occur from the
2 service, which sounds to me like a disservice to
3 the various states, because if people have
4 committed a rape, they need to be convicted, not
5 just discharged so they then walk around the
6 various 50 states with no accountability
7 whatsoever. The military is happy they got them
8 out, but they've passed the problem along to the
9 states that the person is going to be in.

10 And so I think if the military is
11 going to go through this process, it sounds to me
12 like there's going to need to be some
13 accountability both for going forward on the most
14 serious provable charge and for seeing that
15 there's accountability at the end of it.

16 So that's why all these alternate
17 dispositions to move the caseload along, it makes
18 me even wonder why the convening authority should
19 continue to have a lot of discretion and power in
20 the cases where the person agrees to leave the
21 military, because then the problem is no longer
22 -- I can understand the convening authority

1 wanting to have discretion if the person is going
2 to stay in the military, but if they're not going
3 to stay in the military, it seems to me that's a
4 whole different kettle of fish, and that's
5 something which the people of the United States
6 and their elected representatives are going to
7 want to know: are you just passing this problem
8 along to us?

9 And so I ask you to keep one eye on
10 that as you go through the data, and I'm glad
11 you're looking at the most serious offenses
12 individually and what some of that accountability
13 is, because I -- it's -- looking at those numbers
14 today, it sounds to me like discharge from the
15 military is the overwhelming penalty, not guilty
16 plea and time in jail.

17 DR. SPOHN: So one of the advantages
18 of this data set that they've compiled is that it
19 does list every charge that is preferred and the
20 disposition and -- of every charge, and so I mean
21 that I think is a real advantage of the data that
22 they have collected.

1 MS. PETERS: Right, and Mr. Stone,
2 your point is well taken, and I will just
3 highlight an example because you asked if we
4 revisited the DoD SAPRO report.

5 One of the SAPRO statistics is what
6 percentage of Servicemember subjects charged and
7 tried for a sex assault offense were convicted in
8 FY 12, and what kind of punishment did they
9 receive?

10 The statistic there is going to have
11 a punishment, but that doesn't tell you whether
12 that punishment is really associated with the
13 most serious sex offense charge or a sex offense
14 at all, maybe a lesser sex offense. We hope to
15 be able to look at the life of each charge on the
16 charge sheet and get a better picture of that
17 number and of that trend and differentiate it
18 again from the existing reports out there.

19 COL GREEN: One caveat to that, again,
20 in the military, with unitary sentencing,
21 multiple charges that result in conviction,
22 there's no way to differentiate obviously the

1 ultimate sentence associated with that conviction
2 relative to the different charges that were
3 involved.

4 So we will hit a limit in terms of our
5 ability to understand the nature of charges where
6 there are multiple convictions or -- and that
7 could include multiple sex assault convictions as
8 well as sex assault and non-sex-assault charges
9 involved in the same case.

10 MR. STONE: Yes, I understand that.
11 I mean, in the civilian system, plenty of charges
12 -- there may be more than one charge in a single
13 case, and there may be sentences that are run
14 concurrent to each other because the judge is
15 giving what in effect is a unitary sentence, and
16 in some states, they actually have provisions for
17 calculating the sentences, and they call them
18 unitary so the prison officials know what to do
19 with the sentences.

20 But nonetheless, if there is a
21 conviction on one of these most serious sexual
22 assault cases, then I don't -- I am less

1 concerned with the less serious offenses. I want
2 to see what that overall penalty is when there is
3 a conviction on one of the very most serious
4 offenses.

5 COL GREEN: And again, going back, I
6 think one of the things we'll be able to do is
7 look at the alternative dispositions, those cases
8 that involve administrative discharges or non-
9 judicial punishment, and identify for you which
10 of the Article 120 offenses may be associated
11 with that ultimate outcome in the case, to -- to
12 go to what you're saying in terms of the types of
13 offenses that are involved in those.

14 CHAIR HOLTZMAN: Any other questions?

15 VADM TRACEY: I do have one. So it
16 seems that we ought to be able to tease out maybe
17 some signals about consistencies or
18 inconsistencies in some of these things. I'm not
19 sure how we address the taskings about
20 appropriateness based on the facts of the case.

21 We know what people were charged with,
22 we don't really know anything about how solid the

1 evidence was or anything of that sort, right?

2 COL GREEN: We've talked a lot about
3 that ma'am, and you're right, and I will tell you
4 that in conversations with the Services since the
5 first time we started to look at this tasking and
6 trying to get records, they have the same
7 concern, and I think, you know, like Dr. Spohn's
8 limits identify, this will tell you a lot about
9 what happened, but the why is not so clear from
10 case documents or case records.

11 The staff's -- my -- our thoughts are
12 appropriateness could also be in the forum
13 selection of where the case is resolved.

14 Appropriateness of the outcome might not be
15 something that we can determine, but there may be
16 something that you can opine on as to whether or
17 not it was dealt with appropriately, and so I
18 guess my recommendation to the Panel is really
19 focused on the procedural appropriateness rather
20 than the subjective outcome appropriateness of a
21 case, because I agree with you, ma'am, it's
22 difficult.

1 VADM TRACEY: But we are asked to
2 speak to appropriateness of decisions,
3 punishments, and administrative actions, so we're
4 only going to be able to answer a question that's
5 not actually on that list, right?

6 Appropriateness of the venue, we'll be able to
7 perhaps comment on that, right?

8 COL GREEN: And I guess that -- maybe
9 I'm parsing words, but I think the procedural
10 decisions, the -- you can almost again just limit
11 that in terms of what you feel comfortable
12 reviewing.

13 MS. PETERS: And I could give an
14 example of something that might be available.
15 Again, we would have to go back and see how
16 prevalent are the detailed records on
17 proceedings. Let's say, what is the convening
18 authority considering when he makes the decision
19 to send something to a general court-martial or
20 to deal a case or to dismiss all charges?

21 If the dismissal is coming on the
22 recommendation of the Article 32 investigating

1 officer and the staff judge advocate, those are
2 procedural decisions, and that context that might
3 go to the issue of appropriateness, and again, we
4 would owe you more analysis on how in depth we
5 could go there. That might be an example of
6 something that would assist with that part of the
7 task.

8 MS. ROZELL: I'd like to comment.

9 That -- having analyzed these cases
10 and input them into the database, I've seen
11 trends over the different cases, and I have seen
12 situations where prosecutors actually charged
13 multiple charges for the actual -- the single
14 incident, so they may charge a specification of
15 rape, and they may also charge a specification of
16 sexual assault for the same incident.

17 So there are -- I have seen multiple
18 charges for the actual -- the same offense.

19 MR. STONE: You know, that's a common
20 practice typically in criminal cases because a
21 prosecutor does not know whether he is going to
22 be able in the eyes of the fact finder to prove

1 every single one of the elements that he needs
2 for the greater offense, so it is very common
3 that he will charge lesser offenses in the same
4 indictment and later, after he has got his
5 conviction, he'll dismiss those other counts,
6 which he wouldn't be able to go forward on anyway
7 under the double jeopardy clause.

8 But the idea is you're not sure what
9 your evidence is going to be and how it is going
10 to prove out until you put it on the stand.

11 There is precedent federally that you
12 can convict on a lesser included charge even
13 without charging it, but in many other
14 jurisdictions, you have to charge the lesser
15 offenses as well, although you are only going to
16 get a conviction on one, so yeah, it's --

17 MS. ROZELL: I understand that, sir.

18 I have also started to notice, now
19 that we have the SVCs available to the victims,
20 going forward, I think we've made some
21 recommendations to gather additional documents
22 that capture that information, and whenever it

1 comes to say a discharge in lieu of court-
2 martial, I have seen more times where there is
3 actual documentation in the record where the
4 victim has been -- their recommendation as far as
5 the disposition of the case, they get the
6 victim's preference as to whether they agree to
7 it or not.

8 So that is something that I think that
9 is valuable to capture in the future, as well as
10 incidences where there have been lack of victim
11 participation. I have been able to capture that
12 where I can, and I hope that we can gather that
13 information as we go forward to find out maybe
14 what is the -- you know, what is a factor in why
15 the case is not being, you know, completed at
16 trial.

17 VADM TRACEY: Those two data elements
18 are available in the data for the cases that you
19 --

20 MS. ROZELL: In the cases in which I
21 found it. I think going forward with gathering
22 information for the upcoming fiscal years, I

1 would like to get that information in all the
2 cases. That's something that we may be able to
3 capture in the future.

4 VADM TRACEY: Where it's available,
5 you have captured it --

6 MS. ROZELL: Yes ma'am.

7 VADM TRACEY: -- in this data set?
8 Okay.

9 CHAIR HOLTZMAN: But normally, it's
10 not? I mean, it seems to me in one of the -- one
11 of the data elements you should be looking for
12 then is the role of the -- one, is there an SVC,
13 and also whether the victim has had some
14 opportunity to be heard with regard to sentence
15 or with regard to -- particularly with regard to
16 sentence.

17 So that might be another actual
18 explicit factor that you --

19 MS. PETERS: Yes ma'am.

20 CHAIR HOLTZMAN: -- ought to be
21 considering.

22 MS. PETERS: -- that would be easier

1 to track as the congressional updates, the '14
2 and '15 NDAAs, are implemented as far as when
3 victim input is required to be considered at
4 referral, when pre-trial agreements are decided,
5 and one of our issues we ran into is we carved
6 out a spot in the database to look for this and
7 to look for this in records, so you really have
8 to have a complete record.

9 CHAIR HOLTZMAN: I see.

10 MS. PETERS: And you have to have --

11 CHAIR HOLTZMAN: So you -- in other
12 words, you're trying to find it, but it's not
13 there?

14 MS. PETERS: It's not always there,
15 right, yeah.

16 CHAIR HOLTZMAN: Okay.

17 COL GREEN: Because a Special Victims'
18 Counsel is not necessarily making an appearance
19 in the case, it may not be --

20 MS. PETERS: Yeah.

21 COL GREEN: -- or it may not be known
22 from the full record, and in particular, it may

1 not be known from the records we have whether an
2 SVC was involved.

3 CHAIR HOLTZMAN: Well, is one of the
4 outcomes of our consideration of this material a
5 suggestion as to additional data elements to be
6 captured in whoever is keeping the basic records
7 here, for example, noting whether there is a
8 Special Victims' Counsel, for example noting
9 whether the victim spoke?

10 I mean, if they are not capturing that
11 information now, that may be a recommendation
12 that we want to make to DoD about the future.

13 COL GREEN: Right. Ma'am, I think
14 this whole concept of the records that -- or the
15 data that we've been able to obtain is novel --

16 CHAIR HOLTZMAN: Okay.

17 COL GREEN: -- and so I think parts of
18 that, in addition, the Panel's recommendations of
19 important things that were not available that you
20 would like to see tracked obviously would seem to
21 be a good idea to think about.

22 MS. ROZELL: One of the areas that

1 I've also noticed in the case records is that
2 even though there may be a DoD form for the
3 Services to use, earlier in the FY13 -- or '12
4 and '13 and even in the '14 cases, that the
5 Services actually use their own forms, and so
6 therefore, they are not capturing the same
7 information on those forms.

8 MR. STONE: And I might add in
9 explanation of why it's going to be difficult to
10 find, until LRM, I don't think victims' counsel
11 were granted standing, which would have appeared
12 in the records, in any of these cases. They
13 could be there, but they were not allowed to --
14 they were not -- their appearance was not on the
15 record, they didn't have standing, and they still
16 don't expect in those 412 and 513 hearings. That
17 is one of the ongoing issues, whether they can
18 say anything, so many of those military judges
19 take the position that, correctly, they are not a
20 party, and so you don't find in the records, even
21 though they may have been present, so I can see
22 why it's difficult for them to find it.

1 CHAIR HOLTZMAN: Right, but they could
2 do it in the future if we suggested that.

3 VADM TRACEY: And importantly for this
4 report, you could capture the number of instances
5 in which you found evidence of those occurrences
6 and what those -- were there any patterns in
7 those outcomes.

8 CHAIR HOLTZMAN: Exactly.

9 MS. ROZELL: I think the biggest area
10 that I saw that wasn't captured on specifically
11 the charge sheet was what forum, whether it was a
12 panel, and this was in the early like FY12 and
13 some of the early FY13s as well, is that some
14 Services were using their own form that didn't
15 capture what forum was used. Some did.

16 As of January of '14, there is an
17 updated form for the Article 32 that actually
18 specifies whether or not an SVC is used or is
19 involved, so that hopefully, if those forms are
20 being used and that information is captured, then
21 we'll be able to, you know, highlight that
22 information as well.

1 That is the only -- that is the only
2 form that I have seen change to actually check
3 whether or not there is SVC involvement.

4 CHAIR HOLTZMAN: If there are no other
5 questions, then we are finished with this. Do we
6 have any other -- do you have any further
7 comments you'd like to make to us? Dr. Spohn,
8 have you finished your --

9 DR. SPOHN: Yes.

10 CHAIR HOLTZMAN: -- remarks? Well, I
11 --

12 COL GREEN: And the only thing we have
13 left is --

14 CHAIR HOLTZMAN: Colonel Green?

15 COL GREEN: -- we presented, again,
16 just to -- just to get an idea of the Panel's
17 desired area for focus --

18 CHAIR HOLTZMAN: Well, we have another
19 whole -- is this -- is this this presentation or
20 the next presentation?

21 COL GREEN: Well, we sort of blended
22 them all ma'am, so --

1 CHAIR HOLTZMAN: Well, we should take
2 a break.

3 COL GREEN: If you want to take a
4 break.

5 CHAIR HOLTZMAN: I am trying to figure
6 out about a break, so let's just take a break
7 now, okay? And if we're finished with this
8 Panel, I just want to say thank you to all of you
9 for this excellent presentation and your staff
10 work, excellent staff work.

11 (Whereupon, the meeting went off the
12 record at 2:30 p.m. and resumed at 2:47 p.m.)

13 CHAIR HOLTZMAN: We are nearing the
14 end of this hearing, so -- meeting.

15 So our next presentation is a staff
16 presentation on identifying focus areas for
17 further examination regarding military sexual
18 assault adjudications, and Colonel Green, you're
19 going to guide us again, as always, in your very
20 competent manner. Thank you.

21 COL GREEN: Thanks, ma'am.

22 And I will turn this over to the

1 staff. Our process in this, and obviously again,
2 going back to my initial discussion, was how
3 broad the scope of what could be looked at
4 through the data really is, but then getting back
5 to your key issues and what Congress has asked
6 you to do.

7 And so one of the things the staff has
8 done is try to look at each one of those
9 questions and brainstorm along with Dr. Spohn
10 what the key areas are and what the key focus
11 points might be for analysis that might provide
12 information to you, and more importantly, might
13 represent the system health of the military
14 justice system in terms of how it's processing
15 Article 120 cases.

16 CHAIR HOLTZMAN: So are we looking at
17 this pink sheet?

18 COL GREEN: Yes ma'am, and so --

19 CHAIR HOLTZMAN: Okay.

20 COL GREEN: -- I'll just pass it over
21 to Meghan and Terri to talk more specifically
22 about the ideas they've come up with.

1 CHAIR HOLTZMAN: Thank you.

2 MS. PETERS: Yes sir. And rather than
3 go through every single question, I'll just
4 begin, highlight some of those key areas.

5 And in picking apart each task, you
6 have three of them in this sheet, there is some
7 overlap here, so we tried not to duplicate
8 questions or get caught up in which question fit
9 best with each task. I think you can kind of get
10 a sense of the purpose behind the tasks
11 generally.

12 So we tried to look at the first task
13 as looking at decisions as to disposition,
14 disposition being court-martial or some type of
15 alternative disciplinary action.

16 And the questions tend to focus on
17 what happens by offense: how are offenses treated
18 in the judicial process? And they -- this
19 hearkens back to Dr. Spohn's brief and ours
20 about, you know, this is informed by what we
21 already have largely and what we think we can
22 deliver, informed by what is important.

1 But we know that we can break things
2 down by -- you can look at service, by service
3 trends, for how offenses like rape and sex
4 assault are tried or disposed of. We can look at
5 at least a trend over three years, and I think I
6 would defer to our expert as to whether three
7 years makes a trend, but it is -- it is a start,
8 and we know that this issue will continue in the
9 Panel's review in the future.

10 And then to the extent that decisions
11 -- asking to look at decisions means look at what
12 happens before the outcome, right, what happens
13 at the 32, Article 32 hearing, and what happens
14 at that referral decision, and it might also
15 encompass again what is the percentages of
16 results, like conviction or acquittal or full
17 dismissal?

18 So we tried to take a lot of those
19 factors that we said were prevalent in those
20 records of trial document and unpack them into
21 these questions. The first one is again going to
22 focus on the procedure. I think in number 2, you

1 are looking at trends in punishments by level of
2 court-martial, so we went and collected records
3 on general, special, and summary court-martials.

4 And then we also I think touched on
5 the fact that we have comparative data, to the
6 extent it's available, anyway, and we will see
7 how that bears out in the federal and state
8 level.

9 So we suggested that the Panel look at
10 how do our convictions and sentences compare, and
11 that might ask the Panel to make a qualitative
12 judgment on the value of those punishment options
13 in the military, like a punitive discharge, which
14 is often issued in conjunction with a term of
15 confinement.

16 The third task, and again, every
17 single one of these mentions courts-martial, but
18 I think they focus on a different aspect of the
19 process and try to come at it by --

20 CHAIR HOLTZMAN: You say third, you're
21 talking about number 3 on page --

22 MS. PETERS: Yes ma'am, number --

1 CHAIR HOLTZMAN: Okay.

2 MS. PETERS: -- 3 here, and I'm trying
3 to give an overview of what we tried to capture
4 generally, again, rather than walking through
5 each specific question, because I think the
6 questions -- we would defer to, you know, some of
7 the Panel's sense of where to go with this.

8 But task number 3, review and evaluate
9 courts-martial for sex assault, and you're
10 covered by --

11 CHAIR HOLTZMAN: I don't know what you
12 are reading. I am sorry.

13 MS. PETERS: I will direct you. So --

14 CHAIR HOLTZMAN: Where are you?

15 MS. PETERS: I am on page two. So on
16 the first page that you're looking at, you have
17 the first task --

18 CHAIR HOLTZMAN: Oh, you mean number
19 3? This, with the number sign?

20 MS. PETERS: Right.

21 CHAIR HOLTZMAN: Oh, I thought --

22 MS. PETERS: Yes ma'am.

1 CHAIR HOLTZMAN: -- you were talking
2 about -- okay. So this is the second page?

3 MS. PETERS: So the --

4 CHAIR HOLTZMAN: If you number the
5 pages.

6 MS. PETERS: -- document, and I'll
7 just go back to how we structured this, we listed
8 the task, statutory task, on the left, and it's
9 in italics. We designated it 1, 2, and 3, though
10 in the JPP's charter, it might have an a, b, or a
11 c designation.

12 So -- but in the order in which the
13 tasks appeared in the statute, that is the order
14 they are listed in this worksheet, in this three-
15 page worksheet.

16 So the first task is -- is listed in
17 italics there for you to revisit, decisions,
18 consistency, and appropriateness of decisions,
19 punishments, and actions based on the facts of
20 individual cases.

21 Then on the right, we associated a
22 number of potential research questions that could

1 give you information to inform your review in
2 task 1.

3 The other part of the staff's
4 undertaking is to say maybe before you get to
5 individual questions, is it valuable to go
6 through an exercise of saying well what is really
7 behind a task? Are there sub-questions,
8 categories of issues, before you get to the
9 specific questions?

10 So just to use the first page as an
11 example, you have task number 1 in italics, and
12 then what you have is the staff's suggestion as
13 to a foundational issue directly underneath it,
14 and we just highlighted it as a foundational
15 issue. That is just a staff note. That is not
16 in the charter, that is just, again, our
17 suggestions for a direction, as are the questions
18 on the right, are purely a staff product of ways
19 we can look at the data to inform the task.

20 MS. SAUNDERS: And as Meghan had
21 pointed out, you will see a lot of overlap. For
22 example, in question 1, they talk about

1 appropriateness of punishments, and they do the
2 same thing in the second question as well, so
3 rather than just keep repeating questions over
4 and over again, we just tried to consolidate
5 them, and when it comes time to ultimately put
6 all of this together into a report, it is really,
7 you know, it is really not going to matter. We
8 will deal with them all as one big group.

9 MS. PETERS: And our thought was if
10 there is -- if the Panel has some time to absorb
11 the association the staff has made here between a
12 task and a related question, are there questions
13 that you think from this list are pertinent? Are
14 there some you would add or take away in the
15 general sense?

16 MR. TAYLOR: So if I could just ask
17 this question again, it goes back to the
18 fundamental task, and that is identifying trends,
19 and it may be, Dr. Spohn, that you are the right
20 person to answer this, or at least to address my
21 question.

22 How -- do you think at this point you

1 have enough data in enough different categories
2 so that you can statistically say for any of
3 these areas you can identify a trend as opposed
4 to reporting what it is percentage-wise or some
5 sort of breakdown?

6 DR. SPOHN: Well I don't think that
7 you can say that based on three years of data
8 that there is a trend. I think you would need
9 longitudinal data over let's say a decade to be
10 able to say that there are trends in how these
11 cases are disposed.

12 That said, we can look at outcomes by
13 year and see if there are differences in the way
14 that the cases are handled.

15 MR. TAYLOR: Well that's what I
16 thought you would say based on coming from a
17 public policy school, but -- so I think we just
18 have to acknowledge up front there is only so
19 much we can do. We can say what we know, but we
20 can't obviously say what a trend might be at this
21 point as to just a starting point, is that
22 correct?

1 MS. PETERS: I think that's correct.
2 I think the trends might also exist in sort of a
3 microcosm of how many times we see a certain
4 charge go a certain way, or in the percentages of
5 guilty pleas versus contests and conviction and
6 acquittal rate.

7 It might have to grow, but if we
8 establish a baseline or a foundation for this
9 year's review that we build upon in next year's
10 review, there might be some value to that.

11 But that three years, again, is also
12 based on what we could get with reliability, I
13 think, and again, if the trend is also, going
14 back to the microcosm, just if we're not just
15 looking at how things are treated over the years,
16 but again, if we in consultation and in the data
17 analysis process and it informs your view, then
18 you can see how many times a commander -- we have
19 1800-plus decisions here, are we going to see
20 some patterns for the numbers in where cases go
21 and how many charges end up falling off every
22 outcome, and how many times generally aggravated

1 sexual assault is going to a general court-
2 martial? Do those numbers start the inquiry or
3 inform what the trends to look for might be?

4 DR. SPOHN: Patterns is probably --

5 MS. PETERS: Patterns, okay, pattern,
6 trend, okay. Not in the statistical realm, you,
7 yeah, might cling to a word that you don't know
8 exactly what we mean from the -- I guess in the
9 statistics world, but we think that there are a
10 lot of decisions to look at that, again, we might
11 see a repeat pattern enough to kind of understand
12 how the justice system is handling these cases.

13 CHAIR HOLTZMAN: I would just like to

14 --

15 MS. PETERS: And whether that is
16 consistent or appropriate might be discernible.

17 CHAIR HOLTZMAN: Well, I'd just like
18 to follow up on kind of a point that Mr. Taylor
19 made, which is that if you look at the question
20 in number 2, we have to assess the consistency --
21 I am reading from the middle of the point -- the
22 consistency of the punishments based on the facts

1 of each case. Now how are we going to do that?
2 Can we do that?

3 MS. PETERS: We don't have the full
4 records in every case.

5 CHAIR HOLTZMAN: Correct, so --

6 MS. PETERS: We don't have the
7 investigative files ma'am, so no, we can't do
8 that.

9 CHAIR HOLTZMAN: Okay. So right, so
10 just to follow up on his point, I mean, we can't
11 really answer number 2, and it's going to be very
12 hard to compare the punishments in federal and
13 state court because the statutes are not exactly
14 the same.

15 MS. PETERS: Yes ma'am, this goes back
16 to October's meeting.

17 CHAIR HOLTZMAN: Right, so -- so I
18 think some humility here is going to be in order,
19 I think. I don't know. I just raise that as a
20 kind of philosophical point, and without the
21 facts, it is very hard to know appropriateness of
22 the sentence, to follow up on the very wise

1 comment made by Admiral Tracey.

2 MS. PETERS: Agreed, and we don't
3 believe the records tell you why. They just
4 might be able to give you some numbers, and --

5 MR. STONE: But if you do have the
6 sub-categories of Article 120, that tells you
7 factually what was found to have been proven, so
8 like you were saying at the beginning, you'll be
9 able to separate penetrative from non-
10 penetrative, and maybe touchings from assaults,
11 and sexual contacts, so it seems to me that you
12 do have some basis there. Even though admittedly
13 it is defined by the legal terms, nonetheless,
14 some differences in the facts of the cases.

15 And I was even going to add that I
16 wouldn't mind if on page one, just to make a
17 note, where you deal with (i), is there a
18 difference in the types and amounts of
19 punishments a judge didn't approve in cases where
20 there's a guilty finding on at least one Article
21 120 offense, I would hope that would be by the
22 different categories of 120 offenses so I knew

1 penetrative from non-penetrative, because you
2 know, on the most serious categories, that is
3 where we're the most sort of concerned about is
4 this being handled in a way that's appropriate?

5 CHAIR HOLTZMAN: Any other thoughts,
6 comments, observations?

7 COL GREEN: Ma'am, the other --

8 CHAIR HOLTZMAN: Colonel?

9 COL GREEN: -- just one other note
10 relative to trends or patterns or whichever the
11 case may be, and that goes to the fourth page,
12 the additional areas of focus as determined by
13 the Panel.

14 This Panel was tasked with assessing
15 recent developments in the area of Article 120
16 law, and so one of the things that the Panel may
17 be able to do over time or even subsequent
18 reviews following the Judicial Proceedings Panel
19 using this as a starting point for the data is --
20 are changes in the law that have taken place
21 relative to the Article 32 proceedings, the
22 requirement that penetrative offenses go to

1 general courts-martial, the changes in Article 32
2 in December of 2014, I mean, all those establish
3 changes in the system that may be -- may create
4 benchmarks that the Panel can look for treatment
5 of cases prior to that to after the fact.

6 And again, I -- nothing that is going
7 to be available right now, but our hope is that
8 this data at least is a starting point to be able
9 to make factual judgments on those changes rather
10 than just subjective assessments.

11 CHAIR HOLTZMAN: Good.

12 MR. STONE: And maybe pose the
13 questions for further review even if we can't
14 answer them.

15 COL GREEN: Yes sir.

16 MR. STONE: Great.

17 VADM TRACEY: You'll be able to
18 categorize cases by which version of Article 120
19 they were being tried under, right?

20 MS. PETERS: Yes.

21 VADM TRACEY: Yes, okay.

22 MS. PETERS: We have marked that out

1 in the database, and we'll be able to analyze
2 that.

3 VADM TRACEY: Great.

4 CHAIR HOLTZMAN: Well, I guess then
5 that concludes this part of the -- unless you
6 have something else, Colonel?

7 COL GREEN: Well, just so -- just so
8 that the staff is clear, our intent then is to
9 use these as our research questions and to work
10 with Dr. Spohn and the information we have and to
11 try to bring you information and factual
12 information, and at our next meeting on December
13 the 11th, our goal will be to provide you factual
14 information under these categories for your
15 consideration.

16 And I guess obviously I know this is
17 a list that we just provided to you, and if -- if
18 there are other areas that individual Panel
19 members recognize or think about over the course
20 of time, please of course let me know, and we'll
21 see.

22 We're within -- and we're working with

1 Dr. Spohn in terms of the limits of the data, and
2 obviously it's a huge volume of data, and while
3 we think we've made it as manageable as possible,
4 we are in a limited time, and so with about a
5 month to really try to build this analysis
6 together, we're going to put together as much as
7 we can.

8 CHAIR HOLTZMAN: Good. Well, thank
9 you very much Dr. Spohn, Colonel Green, everybody
10 on the staff, for the wonderful presentation.

11 I guess we're up to public comment?

12 COL GREEN: Yes ma'am. If you give us
13 a moment, we'll --

14 CHAIR HOLTZMAN: Okay, thank you.

15 (Pause.)

16 CHAIR HOLTZMAN: Mr. Perry and Mr.
17 Cooley, we are ready to hear from you, please.
18 Are you testifying together, or are you -- no,
19 okay, fine.

20 Okay. Well then let's do one at a
21 time, yes sir.

22 Mr. Perry, we have you first. Sorry.

1 I don't know why that's the case, but anyway, you
2 are here first.

3 Welcome to the Panel, Mr. Perry. I
4 think you are familiar with the ground rules, so
5 you can commence.

6 MR. PERRY: Yes, Madam Chair.

7 CHAIR HOLTZMAN: Thank you.

8 MR. PERRY: Good afternoon.

9 CHAIR HOLTZMAN: Good afternoon.

10 MR. PERRY: Madam Chair, members of
11 the Panel, thank you very much again. I
12 appreciate your time in allowing me here to
13 testify here for you again.

14 As you recall, I was here at the
15 October 9th meeting representing Center for
16 Prosecutor Integrity and expressing our concerns
17 for the preservation of due process, the
18 presumption of innocence, and not shifting the
19 burden of proof in sexual assault cases onto the
20 accused.

21 Since that time, we have had an
22 opportunity to meet with several offices

1 representing the House Armed Services Committee
2 and the Senate Armed Services Committee.
3 Specifically in that time, we visited 19 offices,
4 both Democrat and Republican together, their
5 perspectives on some of these issues.

6 And during those meetings we did have
7 what I would categorize as -- as candid and open
8 discussions about these issues, and I would say
9 like us, they do want to ensure that we are
10 seeking justice here and preserving the integrity
11 of the system, which is -- is paramount.

12 So we felt it important to let you
13 know some of their thoughts and what we were
14 hearing during these meetings, and as such, we --
15 I have drafted a letter dated October 9th that
16 was submitted to the Panel for review, and
17 hopefully you have received that.

18 In that letter, we did highlight the
19 viewpoints of the staffers from the HASC and SASC
20 Committees, but just to highlight a few general
21 consensus opinions, these staffers were -- I
22 believe all but one were either vets or active

1 duty themselves, so they were very much in tune
2 with what is going on and what the most recent
3 developments have been.

4 And they did acknowledge that there
5 has been a push for more convictions, and that is
6 being felt amongst the ranks, and we did hear
7 several staffers indicate to us that in their
8 perception, there is a bit of a -- a hostile
9 environment for the Servicemembers in terms of
10 fear of allegations against them, and then also
11 on Capitol Hill as well in terms of political
12 agendas being pushed in this area.

13 So they are cognizant of the issues,
14 and they also share our concern that the pendulum
15 could swing too far if we try to make too many
16 changes in this area too quickly.

17 So we were happy to hear that they are
18 eager to continue discussions with us, and again,
19 in the October 9 letter, we have reiterated our
20 general recommendations from the previous letter
21 that we supplied to the Judicial Proceedings
22 Panel to help prevent situations like what

1 occurred in the Lamar Owens case, which was also
2 attached in your letter that was presented today,
3 things such as the undue influence, over-referral
4 of sexual assault cases, and presumption of
5 guilt.

6 So those are the issues we are hoping
7 to -- to tackle, and we do plan to work with the
8 staffers and create recommendations for the NDAA
9 2017 to maintain due process and fundamental
10 fairness. As such, we also look forward to the
11 recommendations of your Panel as well and hope
12 that you keep these considerations in mind when
13 you do make your recommendations.

14 So with that, I thank you for your
15 time, and again, I appreciate all of the hard
16 work and effort that you're putting into this
17 issue. We greatly appreciate it.

18 CHAIR HOLTZMAN: Thank you very much,
19 Mr. Perry. Any members of the Panel have any
20 questions, comments?

21 I just want to say --

22 HON. JONES: Nice to see you again.

1 CHAIR HOLTZMAN: -- thank you again --

2 MR. PERRY: Very nice to see you as
3 well, Judge, thank you very much.

4 CHAIR HOLTZMAN: I just want to make
5 a point that we are supposed to be an independent
6 Panel, so the views of the members of Congress
7 really should not influence our deliberations.

8 MR. PERRY: Understood.

9 CHAIR HOLTZMAN: That's a point for
10 the future.

11 Thank you very much.

12 Mr. Cooley, please come forward.

13 Thank you, Mr. Cooley. Welcome to the Panel.

14 MR. COOLEY: Thank you.

15 CHAIR HOLTZMAN: I guess the ground
16 rules have been explained to you.

17 MR. COOLEY: They have.

18 CHAIR HOLTZMAN: Thank you.

19 MR. COOLEY: Are we ready?

20 CHAIR HOLTZMAN: Yes.

21 MR. COOLEY: Madam Chair and members
22 of the Panel, it's an honor to appear before you

1 and on behalf of the Law Firm of Jordan Guydon, I
2 would like to present some comments about Boards
3 for Correction of Military Records.

4 I am Howard Cooley, a retired Army
5 Colonel, and my colleague sitting in the back
6 there is Daryle Jordan, a veteran of the Gulf
7 War. And that is the perspective that we're
8 using.

9 In 1946, an angry public confronted
10 Congress regarding the military's abusive
11 treatment of Servicemembers during World War II.
12 Congress and President Truman understood the
13 problem and shaped the law to be responsive.
14 Through an enactment of one of the last major
15 structures of the New Deal, Congress and
16 President Truman created the Service Boards for
17 Correction of Military Records, which have
18 unparalleled administrative power exceeding those
19 of federal courts in numerous respects.

20 Then, in the 1980s and the 1990s,
21 after Congress discovered mismanagement by all
22 service BCMRs, Boards for Correction of Military

1 Records, it resculpted the law to include a ten-
2 month adjudication time clock.

3 Today, some 20 years later, the sexual
4 assault pandemic in our military has presented
5 yet another defining moment. The question is
6 whether BCMR's substantive and procedural
7 processes are rigid or evolutionary.

8 We believe the sexual assault
9 challenges once again calls for the reshaping of
10 the law, policies, and the flow of equity with
11 vision, imagination, and foresight, and as you
12 know, your task in that process is vital.

13 Under the practice of BCMRs today, a
14 young female private woman who enters the service
15 in part to escape the trauma of sexual and
16 physical assault in her hometown would probably
17 need to call Olivia Pope from Shonda Rhimes' hit
18 show "Scandal" to escape sexual assault from her
19 enlisted and officer supervisors, a trauma that
20 might cause her to think about suicide.

21 She would not trust her chain of
22 command, with its repressive record of a 62

1 percent retaliation rate against women who raise
2 sexual assaults. The private would also be
3 worried that equal opportunity officers and other
4 individuals in the installation have been
5 compromised by the command.

6 Despite their enormous power,
7 particularly in equity, and the extraordinary --
8 the extraordinary sacrifices of the service
9 members, BCMRs have refused to open the channels
10 for expedited or extraordinary relief for alleged
11 victims of sexual assault, gender discrimination,
12 or discrimination based on sexual orientation, or
13 for anyone else, for that matter.

14 That, however, is not the only example
15 of the BCMRs' adherence to prudential
16 considerations at the expense of due process and
17 fairness for service members. In fact, the Navy
18 has -- has a record of refusing to hold a hearing
19 for 20 consecutive years. The Coast Guard has
20 refused to hold a hearing for 10 consecutive
21 years, that is, as of the end of 2013. And the
22 Army has attempted to emulate the Navy and the

1 Coast Guard in terms of not having hearings.

2 As a result, it is a Herculean task
3 for most service members to successfully
4 challenge the credibility of the chain of command
5 before the Navy and the Army BCMRs in particular,
6 and that strikes at the heart of sexual assault
7 credibility challenges.

8 Further, the Army --

9 CHAIR HOLTZMAN: Mr. Cooley, I think
10 they are holding up a one-minute sign, just for
11 your --

12 MR. COOLEY: Oh, really? I timed it
13 at 4:30. I guess I am going slower today, so let
14 me move along.

15 All right. Here is the bottom line.
16 What we're saying is that it is time to have a
17 private -- a separate DoD Board for Correction of
18 Military Records system for sexual assault, a DoD
19 level which was in existence in 1946. Have that,
20 give that organization extraordinary relief power
21 so that when people who are trapped in an island
22 somewhere, a young lady is trapped in an island

1 somewhere, can call the Board, and the Board can
2 immediately, through the extraordinary relief
3 powers, move her, transfer her, help her, or
4 assist her immediately.

5 This is what is needed, combat power
6 on the ground with an entity that has the
7 authority to make it happen.

8 Secondly, let BCMRs be a -- let the
9 Air Force, the Navy, and the -- and the Army
10 BCMRs, have them all -- my time is up.

11 CHAIR HOLTZMAN: Another 30 seconds,
12 sir.

13 MR. COOLEY: Have them appeal all
14 cases regarding sexual assault, gender
15 discrimination, and sexual orientation
16 discrimination. Allow those cases to be appealed
17 to the Boards for Correction, the DoD Board for
18 Correction of Military Records.

19 Why? Because the Navy does not have
20 hearings. The Army does not have hearings. I
21 read that testimony when they came here. They do
22 not have hearings.

1 And so as a result, credibility
2 determinations cannot be made, and women cannot
3 be made whole, and neither can other victims, and
4 so therefore, we are proposing a DoD-level Boards
5 for Correction of Military Records that deals
6 with sexual assault and related matters only, not
7 relief for cause of murder or anything else.

8 But that is because this is such a
9 pernicious problem. You've got a high suicide
10 rate that, as a result of sexual assault for
11 women, \$4.5 billion is expended every year to
12 take care of these individuals, the women who
13 have been affected by this.

14 So this is -- we have to stop this,
15 and this is the way to do it.

16 Somebody -- and lastly Madam Chair, if
17 I may, the supervisors don't work because they
18 are the ones that engage in sexual assault. The
19 commanders, the commands don't work because they
20 are the ones that are engaged in retaliation.
21 The Boards for Correction of Military Records
22 don't work. Okay, the Air Force does, but -- and

1 the Coast Guard has lawyers, but the Army and the
2 Navy, they're not effective in the area of
3 challenges to a command -- to the decisions by
4 members of the chain of command.

5 You have to even this out, and the way
6 to do that is to have a higher board, a DoD
7 board, for sexual assault matters. This board
8 was created, a general DoD board was created in
9 1946. Eisenhower appointed the board when he was
10 Chief of Staff. And that way, it equalizes it so
11 that women can have relief.

12 And finally --

13 CHAIR HOLTZMAN: Thank you, Mr.
14 Cooley.

15 MR. COOLEY: I beg your pardon?

16 CHAIR HOLTZMAN: I think the time has
17 expired.

18 MR. COOLEY: Thank you.

19 CHAIR HOLTZMAN: So I appreciate your
20 --

21 MR. COOLEY: Thank you.

22 CHAIR HOLTZMAN: -- your coming before

1 us, your thoughtful testimony, and your
2 willingness to help educate us on this problem.
3 We very much appreciate it.

4 MR. COOLEY: Thank you, Madam Chair,
5 and --

6 CHAIR HOLTZMAN: Thank you.

7 MR. COOLEY: -- and the Panel.

8 HON. JONES: Thank you.

9 CHAIR HOLTZMAN: Mr. Sprance?

10 MR. SPRANCE: The meeting is now
11 closed.

12 CHAIR HOLTZMAN: Thank you.

13 (Whereupon, the meeting in the above-
14 entitled matter went off the record at 3:18 p.m.)
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In the matter of: Judicial Proceedings Panel

Before: US DoD/DOHA

Date: 11-06-15

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