UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

MEETING

FRIDAY,
NOVEMBER 6, 2015

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

CHAIR HOLTZMAN: Good morning, sir.

Thank you very much. Good morning to everyone. I'd like to welcome everyone to the October meeting of the Judicial Proceedings Panel. All five Panel Members are here today. Today's meeting is being transcribed and also video recorded by Army Television. The meeting transcript and link to the video recording will be posted on JPP's website.

The Judicial Proceedings Panel was created by the National Defense Authorization Act, FY 2013, as amended by the National Defense Authorization Acts for FY 2014 and 2015. Our mandate is to conduct an independent review and
assessment of judicial proceedings conducted
under the Uniform Code of Military Justice
involving adult sexual assault and related
offenses since the most recent amendments to
Article 120 of the UCMJ in 2012.

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

This morning, we will spend a brief
time discussing the recently concluded work of
the Military Justice Review Group. That group's
director, former Chief Judge of the Court of
Appeals for the Armed Forces, Andrew Effron,
recently spoke at a meeting of the JPP
Subcommittee to explain the MJRG's work. Its
report and recommendations are not available yet
to the JPP or to the public, but all Panel Members received copies of Judge Effron's briefing slides and the transcript from the Subcommittee session. Once the MJRG report is available, we plan to hear from Judge Effron about his recommendations for changes to the Uniform Code of Military Justice to the extent they affect or impinge upon Article 120 and the issue of adult sexual assault in the military.

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

Following our deliberations, we will continue our review of tasks assigned to the Panel regarding trends and statistics of the military's judicial response to sexual assault crimes. We will first hear from Dr. Nathan Galbreath, the Senior Executive Advisor for the
Department of Defense Sexual Assault Prevention
and Response Office. Dr. Galbreath has prepared
statistical information for us and will brief the
Panel on SAPRO's reporting of case outcomes for
sexual assault cases in FY 2012 through 2014.

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

We then planned time this afternoon
for the Panel to discuss the military justice
process and data we would like Dr. Spohn and the
staff to compile and research for our
examination. Finally, each public meeting of the JPP includes time to receive comments and input from the public. The Panel received four written submissions and two requests from the public for today's meeting.

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

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

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

COL GREEN: Ma'am, if I can just orient the Members to what you have. As the Chair
noted, the JPP Subcommittee heard from Judge Effron at their last session on October 22. Judge Effron provided about a one hour discussion, an overview of how the MJRG was formed, how it was authorized, how it organized its work, its mission and its approach to the task, and then briefed the JPP Subcommittee, not on the specifics of its proposals, but on the nature of its proposals and the process that's now underway for Executive Branch Review of those proposals in anticipation of soliciting a DoD proposal to Congress regarding alterations to the UCMJ.

Judge Effron, because their proposals are still in the interagency process and not available for public release at this point under OMB policy, Judge Effron was not able to provide and cannot provide the full Panel at this point specifics regarding their recommendations. But we did want to at least make sure that the Panel was aware of the MJRG's work and its time line and tables so that the Panel can be aware of it.
In its own analysis of Article 120.

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

Again, Judge Effron's expectation, he's working the review of the MJRG proposal through the Executive Branch process. He can't, obviously, provide a finite time line for when that review will be complete, but he does believe that it should be complete within the near future and he would be more than willing, once that
review is complete and the document has been
released and is available to the public, he'd be
more than willing to come and talk to the Panel
and answer any questions or provide any
information that the Panel might wish to receive
on the MJRG's process.

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

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

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

COL GREEN: Yes, ma'am. One of the
things that Judge Effron noted for the
Subcommittee was that, obviously the MJRG's
review of the entire UCMJ encompassed an enormous
breadth of material to analyze and so their
ability in the short time frame they were
provided to complete their review, his
explanation was that they simply did not cover
the issues at the depth that the JPP is looking at. And so the depth that the JPP and the JPP Subcommittee are looking at Article 120 is not similar to what the MJRG's review is and so, I think his explanation of it was, recognizing the JPP's depth of analysis, that the JPP is positioned to provide a deeper analysis than the MJRG might provide.

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

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

CHAIR HOLTZMAN: Colonel McGovern, thank you.

LTC McGOVERN: -- to the four documents
that you should have in a blue folder named Retaliation. The first document is a proposed outline of the report we would like to start drafting. These are the topics, which you have received information on, in an order which is, we believe, somewhat chronological to the process. And we can talk through that outline this morning. The second document is entitled Proposed Issues for Today's Deliberations. And that's a two page document. These are topics which you have received information on, but going through the transcripts, we do not have your opinions, conclusions, or recommendations, so we would like to get your thoughts on those issues.

The third document is what you've seen in the previous meetings, which is stating the issues, the background information that you have received on that, along with your comments as possible recommendations, analysis, or conclusions, as a reference sheet for you. And then finally, the last document are a set of Requests for Information, which we sent to the
Services today, to ask additional questions on retaliation based on your questions from the last two meetings.

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

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

CHAIR HOLTZMAN: -- would you recommend?

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

CHAIR HOLTZMAN: Sure.

LTC McGOVERN: -- then jump to the issues. With all of our reports, we start with a general introduction and executive summary. Those are possible issues which we would throw into that executive summary. But the heart of the report would start with the overview of retaliation, briefly touching on the definitions of retaliation and the vocabulary you all will be
using throughout the report, as well as the
effects that you heard about retaliation having
on the victims, unit reporting, and giving the
background information on the protections and
prohibitions against retaliation in the Services
to educate everyone on what you've learned.

Then, the next item would be trying to
state what the scope of retaliation actually is,
that there is no data to give you actual numbers,
so we're relying on surveys and anecdotal
information, knowing there is a problem out
there, but it's not measurable at this time.
Then we start with the chronology of the process,
with how victims are reporting retaliation, who
responds to retaliation and the testimony that
they provided to you on their experiences, and
how Case Management Groups are monitoring those
responses and the support for those experiencing
retaliation.

Then we get into something which we've
discussed in great detail, which is investigating
retaliation and we would like to pick up today in
the outline getting to the resolution of retaliation complaints. How does the military respond to the victim? What remedies are available? And how are offenders being held accountable? Also then Section 8 of the outline is preventing further retaliation. You all have heard a lot of information on the initiatives, which the Services are trying to do to educate and increase awareness about the issues surrounding retaliation, get your thoughts on that. And then proposed and pending legislation, make sure you're aware of that and get your thoughts on those proposals.

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

CHAIR HOLTZMAN: Okay, wait, Lieutenant Colonel --

LTC McGOVERN: Yes, ma'am?

CHAIR HOLTZMAN: -- McGovern. Before we go to the proposed issues, may I ask whether anybody on the Panel has a question, a comment, a
thought, an observation on the draft outline?

Yes, Mr. Stone?

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

LTC McGOVERN: Yes --

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

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

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

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

LTC McGOVERN: Yes, ma'am.
CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: Great.

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

CHAIR HOLTZMAN: Excuse me, Colonel McGovern. I'm just a little confused. Are we
still in Box 1?

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

CHAIR HOLTZMAN: Okay.

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

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

If it involves two or three people who are those who are bringing this kind of pressure to bear or if it involves some misunderstanding
of the sort of not in my squad approach.
Whenever you have these kinds of allegations of retaliation, once the victim's taken care of, then it seems to me a command response ought to include addressing the problem that caused the retaliation in the first place.

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

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

CHAIR HOLTZMAN: Yes, Mr. Stone?

MR. STONE: I was going to say, I realize this is difficult because, again, we're not isolating a particular person, we're not disciplining them, and it's not going to happen and be over, it's sort of an ongoing course of conduct. And I don't know how the other Members of the Panel feel, but it reminds me a little bit about when you have people who are either engaged in a large organization with sloppy security
practices or discriminatory practices that don't reach a level to be disciplined, but seem to be there.

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

So it seems to me one of those responses is that there -- as soon as whoever it is makes the response to the victim, that the organizations says, okay, you guys are going to undergo training. And that emphasizes to everybody without pointing the finger that we have a problem. And usually the training gives other examples, not the one that just occurred,
but also gives you a couple of solutions of how -
- you get people to make a good training video
typically or I think something like that, or
sometimes it's on the computer or sometimes it's
a speaker, but that reinforces among everybody,
including the people who may not have recognized
that they were part of the problem, that just
giving somebody the silent treatment, if
everybody is doing it, that person, you think,
okay, I'm not going to get involved in
retaliating, but in fact everybody giving the
person the silent treatment isolates them.

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

CHAIR HOLTZMAN: Yes. Let --

VADM TRACEY: If I could --

CHAIR HOLTZMAN: I'm sorry, go ahead.

VADM TRACEY: If I could just echo
that. But the engagement needs to not be about
the victim, it needs to be about the signal that
is being sent about the cohesion of the unit. If
the unit is tolerating that kind of treatment of
any member of the unit, it suggests that the unit
has a likely readiness problem in front of it.

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

LTC McGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: -- and preparing and
preventing a repetition. And I don't know
whether that -- and that also, maybe that goes
later, but that also means collecting statistics.
I don't know if -- question about how the
statistics are kept about the incidents of retaliation and what's been done about them. Who's looking at that? And then, who's observing to see what's happened and so forth?

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

LTC McGOVERN: Yes, ma'am.

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

LTC McGOVERN: Yes, ma'am. To answer the first part of your question, we will be getting to on the second page the prevention and training efforts that need to go into the response to retaliation and what needs to be done to collect statistics. This was specifically on
-- this question was designed for supporting the victim. Although I do think the victim seeing that training is going on can be incorporated here as part of the overall response.

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

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

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

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

    CHAIR HOLTZMAN: Thank you.

    LTC McGOVERN: Are there any other
issues, particularly responding to the victim?
Do you have any thoughts on what you heard about
the use of expedited transfers, for instance? Do
you believe that's a valuable tool? Are there
any concerns with Facebook or other social media
following the victim that you would like to
CHAIR HOLTZMAN: Does anyone have any question about that? Because I have a point I would like to make. Do we have any statistics on that? And how many expedited transfers were requested? How many expedited transfers were granted? Did the expedited transfer solve the problem? Why were they rejected if they were rejected? Was that justified? Who's reviewing this? I mean, do we have --

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

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

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

COL GREEN: Right.

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

CHAIR HOLTZMAN: Judge Jones?

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

LTC McGOVERN: And --

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

LTC McGOVERN: Yes, ma'am. The other
point which we could research for you would be, at what stage in the process, possibly, they're asking for an expedited transfer? Is it at the time, in the beginning phase when they start to perceive some sort of retaliation? Or is it after an acquittal, when they may face other retaliation or concerns?

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

LTC McGOVERN: Yes, ma'am.

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

HON. JONES: Well, that simplifies that then.

COL GREEN: Right.
CHAIR HOLTZMAN: But why should that be the case? Isn't that person a victim? Doesn't the support person who speaks up and then suffers retaliation, doesn't that become a, I mean, not a victim of sexual assault, but a victim nonetheless of misconduct?

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

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

MR. STONE: Yes. It's worth a footnote in whatever you're drafting that, a question that arises is whether in specific circumstances where the person assisting them then comes in for the same behavior, they should be considered for a possible expedited transfer. And just to clarify the point I was making before, because I wasn't sure I was putting it in the right place, I guess when I was looking at the A2 stopping the retaliation, it always strikes me as I'm not sure exactly how you stop it.
So a training right then for that
group is a shot across the bow that sort of says,
there's a problem with this group. This is not
the annual training, this is not annual material,
this is a training for this group. They see it
as a shot across the bow that they need to change
their group behavior a little bit or there's
going to be further steps. And so that's why I
sort of thought it sort of slipped in there.

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

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

So those are tools for the commanders to use and the testimony we heard just brought that out. But first and foremost, the biggest concern isn't what's happening to the offender, they just want the conduct to stop. And there are ways to do that by sitting down and
MR. TAYLOR: I just have a couple of points I'd like to add. One is to piggyback on what Mr. Stone said, and that is that as teachers, we always look for teachable moments. And I think that one way of thinking about this in terms of a unit's life and command climate is as a teachable moment because, as Mr. Stone said, everybody knows something's going on, they don't know what.

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

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

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

CHAIR HOLTZMAN: Yes, I think so.

LTC McGOVERN: Again, this is also focusing on the victim. You received testimony from a victim that they would like more transparency in the outbrief of what has happened at the conclusion of the investigation. Based on
the research from the regulations, we've found
generally the guidance is provide as much
information as permitted, to the extent permitted
by law. And that leaves room for interpretation
of what exactly the Privacy Act would allow.

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

CHAIR HOLTZMAN: Any comments?

MR. STONE: Yes. I think that at the
minimum, they have to know if the complaint is
still an open one or a closed one. And I think
they also can be told whether or not, if it was
considered to be founded or unfounded, even if
the disciplinary consequences aren't explicitly
told, which can be explained to them, they may
not be able to know the discipline, but if they
hear that it's no longer open, it was closed, but
the conclusion was it was founded, I mean, they
have an understanding that some action had to be
taken. And if it was unfounded, they want to
know that too. I mean, leaving them in limbo
doesn't help. And so, I think you're right, they
need to know what the limits are that they can be
told and they need to be told that much, unless
somebody thinks that they need to be told even
more.

CHAIR HOLTZMAN: Judge Jones?

HON. JONES: This is interesting. I
sort of assumed that almost everything is
knowable and reportable to a victim. Maybe I
need to know what the limits are. I mean, if you
have a Special Victims' Counsel, I would have
expected that he would know when an event
occurred and there was a decision made on a case
by the command structure.
LTC McGOVERN: Yes, ma'am. The regulations do require they receive a monthly consultation from the SARC before each command meeting group and then at the conclusion of an investigation. The concerns the victims expressed to you was, what exactly they hear or are told at that final outbrief is that they find out whether it's substantiated or unsubstantiated --

HON. JONES: Right.

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

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

LTC McGOVERN: It has been --

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

LTC McGOVERN: Or an Article 15, Letter
of Reprimand.

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

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

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

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

HON. JONES: On a substantiated --
LTC McGOVERN: Yes, ma'am.

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

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

LTC McGOVERN: Mr. Taylor, we briefly
looked at the issue and after reading the testimony of the victims, it became clear that it's not necessarily what the law says right now, it's how DoD and the Services are interpreting that law and applying the law. So it really is, I think, on them at this point to clarify for you all or for the field their interpretations so that victims and lawyers and commanders are clear what they can and cannot do.

CHAIR HOLTZMAN: Admiral Tracey, did you have something?

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

LTC McGOVERN: Yes, ma'am.

VADM TRACEY: So there probably would be some benefit in being transparent as to the DoD interpretation of what is allowable with an inclination towards needing to give the victim some satisfaction that appropriate action was taken.
CHAIR HOLTZMAN: I guess my concern here is how is there oversight, appropriate oversight over this? In other words, let's just say -- I mean, we know it's going to happen when there's a court-martial, because that's all public. But in the cases where it's commander discretion, do we have any handle on this and how do we do that? Are there any statistics on the number of cases that were founded where the commanders imposed no punishment?

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

LTC McGOVERN: Yes, ma'am. Throughout the transcripts, I think the Staff would agree that one of the most common themes that you heard
was there has not been tracking of retaliation cases and, therefore, we don't have the information at this time to really assess the scope of the problem. We have a great quote from Judge Jones a few months ago that stated that without this data and knowing the real problem, it's hard to define a solution. In --

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

(Laughter.)

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

The responses from the Services -- because we asked for that data -- was that they
could not provide reliable data because that had not been tracked in the past. If you could just give me a moment -- those are the data points that DoD SAPRO asked the Services to provide.

And in response to your RFIs, the Navy was the only Service who was able to provide us some of that information, but they qualified it that this was not verifiable or complete because it wasn't tracked. It was their attempt in order to be responsive to the JPP.

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

HON. JONES: Can I just ask a couple of questions?
LTC McGOVERN: Yes, ma'am.

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

LTC McGOVERN: Yes, ma'am.

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

LTC McGOVERN: If a sexual assault is disposed of in some way other than a court-martial --

HON. JONES: Right.

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

HON. JONES: Okay. So what we're talking about then really is a Privacy Act
problem with just the retaliation cases?

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

HON. JONES: Right.

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

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

MS. CARSON: There is --

HON. JONES: -- if something happens --

MS. CARSON: Something happens and so
there's no tracking of it for --

    HON. JONES: Okay.

    MS. CARSON: -- this reason, there's no

notification of the victim of what happened, and

you're also losing any potential deterrent effect

that people knowing what happens to people in

these cases --

    CHAIR HOLTZMAN: Can I just follow up

because I'm not following, I'm not understanding.

    MS. CARSON: Okay.

    CHAIR HOLTZMAN: Are you talking now

about retaliation or sexual assault?

    MS. CARSON: I'm talking about --

    CHAIR HOLTZMAN: That's what I'm trying

--

    MS. CARSON: -- anything.

    CHAIR HOLTZMAN: So in a sexual --

because I saw from what Colonel McGovern said

that in a sexual assault case, if there was not a

court-martial, but there was punishment short of

a court-martial, that the victim was apprised.

    MS. CARSON: Not of the punishment.
CHAIR HOLTZMAN: Not of the punishment?

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

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

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

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

MS. CARSON: Correct.

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

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

HON. JONES: But at least we track what
happens in sexual assaults and the kinds of punishments, right?

MS. CARSON: Not if it's --

HON. JONES: Because I thought I --

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

HON. JONES: -- just read that so many

-- well, I just looked at a bunch of the

statistics you gave us and I thought for

substantiated crimes it goes through and it tells

you, this guy got 20 days of hard labor, somebody

ever got whatever. Isn't that tracking of

something less than a court-martial?

MS. CARSON: In the SAPRO report, I

think they do have some data on non-judicial

punishment. But I'm -- that's true. So they do

have some -- they are tracking that on sexual

assault cases.

HON. JONES: Right.

MS. CARSON: But they're not doing it

at the level of letting a specific victim know.

HON. JONES: Okay.

MS. CARSON: So you're right. You're
right. In retaliations, since they're not tracking --

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

MS. CARSON: -- retaliation at all --

HON. JONES: Right, okay.

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

But there --

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

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

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

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

HON. JONES: Yes.

MS. CARSON: -- because there are a lot of questions about, well, if it was a sexual assault report that never turned out to be charged as a sexual assault, it goes away. So it's only if it was charged as a sexual assault and gets kicked back, it doesn't go to court-
martial, but gets a non-judicial punishment, you
may get a statistic on that. But it is not a
very clear path that we're getting all of the
data on it. And it's for sure that the victim is
not. We even heard from Special Victims' Counsel
and from anecdotal victims that try as they
might, they can't find out what's done to the
perpetrator and what punishment, if any, is meted
out. It may be substantiated, but they still
don't know if anything is done.

HON. JONES: I see. Thank you.

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

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

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

MS. CARSON: Well, the Privacy Act, I'm
not a scholar on the Privacy Act, but it
disallows any personal information from being
disclosed, except what is typical in routine
business use or routine practice or within the
agency, et cetera. There is no litigation --
because there have been no cases where they're
actually telling people things and then you would
turn around and sue because your Privacy Act was
violated since it's litigation risk that prevents
it from being done in the first place. So is
there a public policy that says, yes, the victim
should be apprised of what happens to the
perpetrator, then you would put that policy in
place and then people challenge it down the road
in court and you say, that is a violation of the
Privacy Act to let victims know, but we've never
gotten to that point.

HON. JONES: Is there a --

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

HON. JONES: Is there some interest,
let's leave aside the law for a minute, within
the military justice system itself, starting with
commanders through public court-martials, that
adds to the desire to keep this private? I mean, is there any discussion about that? Is this supposed to be different from the civilian system for some reason?

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

HON. JONES: Right.

MS. CARSON: There is no other --

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

MS. CARSON: You do have minor --

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

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

HON. JONES: So this is not military
related? That's what I'm asking, whether there's some reason why --

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

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

MR. TAYLOR: Right. If I could just add to that, my experience is that most of these issues have arisen in the past when you have a
Freedom of Information Act request for what happened to a specific person. And then, if you're the lawyer providing advice on whether to release that information or not, you look at whether it's protected under the exemption for privacy under the Privacy Act.

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

CHAIR HOLTZMAN: If I may just interject a question here, because I'm not an expert on this, but you could also make the argument that the failure to disclose with regard
to lower level violators may suggest that people
don't understand that these people have been
punished and, therefore, where is the deterrent
effect?

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

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

HON. JONES: Okay.

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

HON. JONES: But then it would never --
VADM TRACEY: -- event occurred and
this --

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

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

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

LTC McGOVERN: Well, and to --

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

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

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

CHAIR HOLTZMAN: Yes. And also what
Judge Jones raised about the concern of the victim here --

LTC McGOVERN: Yes, ma'am.

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

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

Or you can identify something from a public policy perspective that DoD is going to actually say, if you're a victim of a sexual assault related crime, in those cases, we're going to make it easy on everybody across the
board and we're going to make it consistent by saying, we're going to allow you to know what happened to the offender in that case or enumerate whatever cases in which it's important enough to let you know or the rank is high enough and that may already even be policy. At this certain rank, you're high enough that it should be known.

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

That's another public policy question.

That isn't currently following people who are disciplined at a low level for something that may
be sexual harassment or sexual assault related, but it does go away because of the philosophy that these things shouldn't follow you. Maybe sexual assaults should as policy.

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

MS. CARSON: I think that distills the question down for you, whether you want to make a recommendation one way or the other, those are the competing interests with respect to the
Privacy Act and with respect to the public policy and how DoD is going to handle sexual assaults and outcomes of sexual assault cases and retaliation cases. That's two separate issues.

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

VADM TRACEY: I think that the Staff's suggestion that we're not going to get smart enough about that to do that recommendation in the Panel and perhaps asking DoD to do some deliberate work around what policies would address being sure that victims of retaliation subsequent to a sexual assault case get some view that gives them some satisfaction that their issues have been addressed appropriately, maybe some questions about whether sexual assault related privacy decisions may be different from the routine sets of questions about how to manage people's records, a view of the policy that makes
sure that the reporting and the management
decisions are victim-centered and accused-
centered kinds of views.

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

So you talked about the fact that the
SAPRO gets the data around the sexual assault
case and you ought to be able to track
retaliation as one of the opportunities, if you
will, bad choice of words, but one of the next
states that could happen is a victim gets
retaliated against. That ought to be a part of
the tracking as that answers either yes or no.
That information should be in the SAPRO record on
that case. The file ought to track whether any
retaliation happened against the victim. So I think there are three things to communicate to DoD about work we can't as a Panel do, but we think probably needs to be done.

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

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

I don't think that they -- I think that, that's more important than them necessarily finding out what the level of punishment was.
They know that, that's going to be in the commander's discretion. But they want to know that if it happened two or three times, that somewhere there's a record that it was founded three times and at that point, their choices are either to try and take it further up the line or know that they have to do something to change their career because it's going on. As opposed to, nobody believes me, they all think I'm a liar, I'm going crazy here.

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

And it sort of reminds me of every time I go into the doctor, they have to give me a form that tells me about the privacy of my data.

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

That's what the victims want to know.

That this isn't just a silly remedy, that it has some meaningfulness, even though they're not going to be the one who decides the punishment.

So it's just -- yes, they need more transparency, I'm not sure it has to go into the transparency includes what the outcome was from the personnel records of the person who was disciplined, but that's separate and apart from the victim feeling they didn't just go into an office, say something, and then they never hear again what happens. Even though somebody may be tracking it and something happens, if they don't get that
feedback, they're going to say this whole system
is worthless, I don't have any satisfaction to
know anything happened at all, even though
something may have happened.

CHAIR HOLTZMAN: Judge Jones?

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

LTC McGOVERN: Yes, ma'am.

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

LTC McGOVERN: Yes, ma'am.

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

MS. CARSON: Yes, ma'am.
HON. JONES: Okay. Just wanted to clarify.

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

LTC McGOVERN: Yes, sir.

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

CHAIR HOLTZMAN: Excuse me, Mr. Taylor?

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

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

And the second part is, I have a concern, aside from the victim here, which is how do we assess how seriously commanders are taking the problem of retaliation? I mean, obviously we need statistics to do that, but I think one of the problems that was found with regard to sexual assault, or at least was believed with regard to
sexual assault, is that the military wasn't
taking this seriously. And I think that, that
was true for a substantial period of time, I
don't believe that, that's true any longer. It
may be true in isolated cases or cases here and
there.

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

LTC McGOVERN: Yes, ma'am. I believe
since the POTUS report, you've received briefings
from SAPRO and from the Services of the initiatives, the regulation changes, the command management, the CMGs now having to ask about retaliation, they are coming out with strategies.
So there's a lot in flux right now, but that moves us down to actually your fourth box, about holding offenders accountable and back to the sheet that I just gave you, which is, again, a recurring theme throughout everything you've heard about retaliation is if they can't provide that information to you in the past, would you like to recommend that this information be gathered for your future review or for DoD to be giving it the same attention as sexual assault?

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

LTC McGOVERN: Yes, ma'am. And if --

CHAIR HOLTZMAN: -- seems pretty
obvious to me, but --

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

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

HON. JONES: No, I think we --

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

HON. JONES: I think we need to ask DoD SAPRO to track retaliation the same way they do sexual assault.
LTC McGOVERN: Would you recommend it be published in an annual report along with their regular SAPRO report or a separate report?

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

LTC McGOVERN: Okay.

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

VADM TRACEY: I agree.

MR. STONE: I agree too.

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

CHAIR HOLTZMAN: Unanimous.

(Laughter.)

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

LTC McGOVERN: She's on a roll.

(Laughter.)

LTC McGOVERN: If we could revert back --

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

(Laughter.)
LTC McGOVERN: I think that --

VADM TRACEY: But I think we are not recommending another one of these data calls.

We're doing it as part of the SAPRO --

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

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

HON. JONES: How many years are we --

LTC McGOVERN: -- provide it.

HON. JONES: -- going to be here?

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

LTC McGOVERN: Starting for the next FY?

HON. JONES: Right, yes.

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

LTC McGOVERN: Yes.

CHAIR HOLTZMAN: Okay. So we have this information and it turns out that some commanders have done nothing even though it is a serious --
a founded complaint and a serious allegation of retaliation. What happens to that commander? Who is reviewing these reports and deciding whether something needs to be done?

LTC McGOVERN: I'll let Julie handle that question.

CHAIR HOLTZMAN: Is this real sensitive or --

LTC McGOVERN: No. No, she's just read the regulations very closely.

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

CHAIR HOLTZMAN: Well, maybe something needs to be recommended in terms of reviewing the data to determine whether appropriate action has to be taken vis a vis commanders, either sensitivity training or other kinds of action.
Because the data may scream out for some kind of response.

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

So there is nothing like that, obviously, in cases like this. And, again, I think it's important to remember here, we're talking about cases that may run as simple as somebody who's just feeling left out of their
organization up to a level of professional reprisal. But there are analogies in the sexual assault realm.

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

LTC McGOVERN: Corresponding policies apply.

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

LTC McGOVERN: Right.

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

MS. CARSON: Well, they essentially are kicking it up to the installation level commander
because they're requiring the Case Management
Groups, which is the monthly installation level
commander meeting, to assess --

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

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

    CHAIR HOLTZMAN: Okay. You want me to
--

    HON. JONES: What are we adding?

    CHAIR HOLTZMAN: What we're adding is
— what Kyle talked about was that right now in sexual assault, there are — the action of the commander is proscribed in some cases because there's a concern either of conflict of interest or there's a concern of appearance, so that in some cases, the — I mean, you have, for example, very high level — what is it —

HON. JONES: Well, the authority is removed —

CHAIR HOLTZMAN: Right.

HON. JONES: -- to a higher level.

CHAIR HOLTZMAN: To a higher level.

HON. JONES: Right.

CHAIR HOLTZMAN: None of that exists with regard to retaliation. My view is that we don't know enough to make similar suggestions, but the suggestion is that the DoD look at, once they've collected the data, to look and see whether some of the things they've done under sexual assault with regard to the role of the commander would be appropriate in these retaliation cases. That's all.
VADM TRACEY: Maybe said another way though.

CHAIR HOLTZMAN: Okay.

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

CHAIR HOLTZMAN: That's fine.

HON. JONES: Sounds good.

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

LTC McGOVERN: One last --

CHAIR HOLTZMAN: Mr. Stone --

LTC McGOVERN: Oh, I'm sorry.

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

MR. STONE: Well, is that related to the third question which we just --
LTC McGOVERN: No, sir. It's related

CHAIR HOLTZMAN: No, we jumped to 7.

MR. STONE: Oh, we jumped to --

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

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

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

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

LTC McGOVERN: But there seems to be a consensus.

CHAIR HOLTZMAN: Right. We've agreed on data collection and in using that with regard to the
reports on sexual assault. And the only question is should we add the way in which Admiral Tracey has formulated the concern that I had?

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

CHAIR HOLTZMAN: Oh yes.

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

CHAIR HOLTZMAN: Right.

LTC McGOVERN: Yes, ma'am.

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

LTC McGOVERN: I think the --

CHAIR HOLTZMAN: So let's go --

LTC McGOVERN: The preceding --

CHAIR HOLTZMAN: So where do we go now?

LTC McGOVERN: The preceding issue was addressed briefly in an earlier meeting with an exchange between Mr. Taylor and Mr. Galbreath.

In FY 2013, there was a requirement in the FY 2013 NDAA that anyone who reported a sexual
assault and was then involuntarily discharged 12
months later, a general officer would review that
discharge to ensure that it wasn't for
retaliation, that there was real good reason for
there to be an involuntary discharge.

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

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

    LTC McGOVERN: Yes, sir.

    MR. TAYLOR: -- like the Republican
debate, I guess.
(Laughter.)

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

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

CHAIR HOLTZMAN: I agree.

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

VADM TRACEY: -- how you actually

connect this dot?

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

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

LTC McGOVERN: Yes.

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

MS. CARSON: What they're doing --

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

LTC McGOVERN: To connect those things.

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

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

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

3 CHAIR HOLTZMAN: Can I ask --

4 LTC McGOVERN: -- or something separate?

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

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

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

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

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

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

CHAIR HOLTZMAN: So it's in advance.
COL GREEN: -- separation. So this is pre-separation. So under the framework of the law, the requirement would actually be, and in the case that a senior official were to determine that it was inappropriate, they would essentially be able to turn off that separation at that point.

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

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

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

COL GREEN: Okay.

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

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

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

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

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

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

CHAIR HOLTZMAN: I understand that, but that's not my point. My point is, I don't want to have to go back and say, oh, they didn't look at it, so now they should look at it. Do I have the right, right then and there without going through five other procedural steps, to get this
remedied? And could the -- what's it called, the BC --

LTC McGOVERN: BCMR, yes, ma'am.

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

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

CHAIR HOLTZMAN: I thought that was --

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

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

LTC McGOVERN: No, ma'am.

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

CHAIR HOLTZMAN: Okay.

COL GREEN: The 2016 NDAA is a
different requirement that allows the BCMRs to
review classes of cases without an individual
application.

CHAIR HOLTZMAN: Okay.

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

COL GREEN: Yes, ma'am.

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

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

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

COL GREEN: I think that would create
--

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

MS. CARSON: This is just looking at
the discharge. This IG report is just going to
look at the discharges and whether or not they
were proper. It is not connected to the requirement in the NDAA that they be looked at before the discharge happens.

VADM TRACEY: I'm sorry, is --

MS. CARSON: This is going backwards.

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

MS. CARSON: From 2009 to 2015.

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

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

VADM TRACEY: So they are not
evaluating whether that was a retaliation, they are evaluating whether it was properly reviewed?

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

    VADM TRACEY: So this is a baselining --

    MS. CARSON: Essentially, it's looking --

    VADM TRACEY: -- exercise.

    MS. CARSON: -- backwards.

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


those, how many are --

MS. CARSON: Right.

VADM TRACEY: -- being discharged and

the basis is these --

MS. CARSON: Right.

VADM TRACEY: -- medical --

MS. CARSON: Right.

VADM TRACEY: -- determinations? Okay.

LTC McGOVERN: So that is separate and

apart from --

CHAIR HOLTZMAN: Can I just understand

that? What does this mean the basis is the

medical factors?

LTC McGOVERN: Rep. Holtzman, many of

the victims believe their involuntary separations

are improperly classified as an adjustment

disorder or other pre-existing personality

disorders, which are not compensable by the VA.

So in the past, and that was part of the

Invisible War and everything else, they said,

they're just getting us out on these medical

discharges so we don't have any benefits. So I
think the IG effort is going back, making sure
that that is not occurring. The other allegation
is, they are just giving us these involuntary
discharges as retaliation --

CHAIR HOLTZMAN: Right.

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

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

MS. CARSON: Correct.
LTC McGOVERN: No, ma'am.

CHAIR HOLTZMAN: -- 2013 NDAA?

MS. CARSON: Correct.

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

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

LTC McGOVERN: In this instance, it isn't the medical condition, and that's why the PTSD cases have to go to the Surgeon General, who is qualified. These are looking at the entire case record to see if there's any evidence of retaliation in the case as a basis for the involuntary separation. Because as with, we'll get into, maybe not today, but with the Military Whistleblower Act and other allegations, victims going through a sexual assault have
counterintuitive behavior, may engage in things, you all have heard, that aren't expected of a normal person because they're going through this trauma. They also show up late, they may have a declined performance.

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

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

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

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

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

LTC McGOVERN: Right.

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

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

LTC McGOVERN: No, this is --

CHAIR HOLTZMAN: -- in terms of performance, just bear with me for one second. We know the person's showing up late or not doing the job properly, I got that. But the underlying
cause of that may be a medical or mental health cause. That goes back to my original question, why is a general flag officer deciding this as opposed to somebody with medical training, such as the Surgeon General? But was this ever -- so that's just my question. I'm sorry, maybe that's a --

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

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

COL GREEN: A discharge that's based on personality disorder, adjustment disorder, or other mental health conditions, within the Services, that medical assessment of the individual is made by a medical doctor. And so all of those packages, the underlying cause or reason for that separation is based on a medical review that says this person has this condition and I deem them to be unsuitable for service. And so, that becomes then the basis for the discharge. And then that goes back to the command to determine upon that medical judgment
whether to make the separation or not.

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

HON. JONES: So do I have this right? Our recommendation would be, if we wanted to make one, that, yes, we should be tracking the involuntary separations of service men and women who alleged they were sexually assaulted?
LTC McGOVERN: Who were involuntarily separated within 12 months.

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

LTC McGOVERN: Yes, ma'am.

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

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

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

VADM TRACEY: -- occurring within a year --

HON. JONES: -- to know.

VADM TRACEY: -- of a sexual assault --

HON. JONES: Okay.

VADM TRACEY: -- filing. Are they
being reviewed and what are the results of those reviews?

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

LTC McGOVERN: The commander takes the complete picture with all the evidence before them to see if they are suitable to continue to serve in the military. For instance, if someone began to have a drug problem, so that is clearly a violation of the UCMJ. But there's a doctor's note saying they are struggling, their drug use started after the sexual assault, there's a causal connection, they may look and say, instead of this being an involuntary separation, it
should be a medical discharge and reassessed.

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

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

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

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

HON. JONES: Yes.

MS. CARSON: It's already a requirement
that the flag, that's already in the NDAA that
the flag officer -- it's actually in the NDAA
that it has to be requested by the victim, but
DoD made the policy that all involuntary
separations within 12 months of making a sexual
assault report have to be reviewed for the
adequacy of what's happening by a flag or a
general officer.

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

VADM TRACEY: It's a new requirement --

HON. JONES: I think this is semantics

here.

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

HON. JONES: I see.

MS. CARSON: So there's three
questions. The first question is how many are
actually being discharged?
HON. JONES: Right.

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

VADM TRACEY: And the third question is --

MS. CARSON: The third question is why?

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

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

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

That's my --

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

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

MS. CARSON: -- we want to collect the data first --
CHAIR HOLTZMAN: -- that's part of it

MS. CARSON: -- to see what --

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

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

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

CHAIR HOLTZMAN: Correct.

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

CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: Okay.

VADM TRACEY: -- document by people who are charged with making that kind of review. And
at the end, it is a line officer's role to be able to take the whole picture and evaluate whether the decision making makes sense. And you have to do that across things over which you are not an expert. And you find ways in which you get expert advice. So I think that this is the - - there isn't any other recourse than this kind of a structure inside DoD.

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

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

HON. JONES: Okay.

MS. CARSON: Correct.

HON. JONES: Got it.

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

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

CHAIR HOLTZMAN: Okay. Did you
formulate a recommendation, Staff?

LTC McGOVERN: Yes.

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

LTC McGOVERN: Thank you.

CHAIR HOLTZMAN: Thank you.

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

CHAIR HOLTZMAN: All right. Dr. Galbreath --

DR. GALBREATH: Good morning.

CHAIR HOLTZMAN: -- happy to welcome you back.

DR. GALBREATH: Thank you.

CHAIR HOLTZMAN: You are really a glutton for punishment.

(Laughter.)

CHAIR HOLTZMAN: We very much appreciate that.

DR. GALBREATH: Happy to help.
CHAIR HOLTZMAN: Thank you. Yes, okay.
So I guess without further ado, we're ready to
hear your testimony --

DR. GALBREATH: Very good.

CHAIR HOLTZMAN: -- presentation.

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

But this has been an iterative process
for me because this is something, as the Panel
heard last time, that really doesn't exist
anywhere else. That this ability to kind of
track through cases that come into a jurisdiction
and follow them all the way through final
disposition. And so it required -- what you see in front of you and the waterfall charts that I'm going to talk about were designed in 2008 by a conglomeration of criminal investigators, attorneys, and representatives from the Sexual Assault Prevention and Response Office.

These were done in response to a greater interest in understanding how cases flow through the criminal justice system, to also comply with Congressional reporting requirements that asked us to tell them about all of the case dispositions associated with sexual assault. That was in the reporting law and it still remains. In order to be able to understand what happens in the criminal justice system and track it all the way through, we had to kind of flowchart this and once we did, I also had to figure out the criminal investigator part of this as well.

And that's what you see in front of you, that's on this first slide right here, is just my ability to track through what comes in
the door as far as reports of sexual assault.
What you see in front of you is FY 2014 data,
this is the most recent data that the Department
has. We are currently assembling our 2015 report
right now for Congress, which is due in April.
But, as you all know, our data reflects a
snapshot in time. And so it's good for the last
day of the fiscal year every year. And that's
what you see in front of you. Because if we snap
the chalk line the next day, the numbers will
shift and move a little bit because this is a
live system.

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

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

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

As you know, not every case that is
referred for investigation during the fiscal year
will be completed at the end of the fiscal year.
And in addition to that, cases from prior fiscal
years will be completed in FY 2014 that we
weren't able to account for in the prior year.
So bottom line is you have a number of cases
here, or at least subjects from cases, that may
have been from investigations opened in a number
of previous years, not just FY 2014 that sits in
front of you.

CHAIR HOLTZMAN: But these are only
closed cases?

DR. GALBREATH: Only closed cases, yes,
ma'am. So, we have our top number on Point J,
you see our top number of subjects is about, and
now I have to start using glasses because I'm
old, 3,648 subjects for FY 2014. Those are all
of the subjects that we could identify in closed
cases where we had a disposition available to
report. Keep in mind that, once again, there's a
time lag between the closure of a criminal
investigation and when a disposition is reported.
And this reflects the criminal justice process,
the Article 15 process, administrative actions,
things like that.
So as you can see, not everybody is under the jurisdiction of the Department in our criminal investigations. In other words, the Military Criminal Investigators investigate cases where people may be outside the military justice jurisdiction. This is not a differentiation that is regularly recognized in the press or elsewhere. I think a lot of people mistakenly believe that we have legal authority over everybody in our unrestricted reports and, of course, we don't. So we had to have a way to kind of factor out all the folks that we can't take action on because we don't have an ability to do so under the law.

In addition, there are a number of cases that come in every year that there is either -- that the allegation that was reported was either false or baseless. False meaning that evidence existed for the MCIO to demonstrate that the crime did not occur or the individual accused did not commit the crime. Or baseless, meaning that the allegation reported did not meet either
one article or one element of proof for a sexual assault offense under the UCMJ.

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

The other boxes at Point L, M, and N are all people that are also outside our jurisdiction because either the offender is unknown, even after a full investigation into the matter, the subject might have been a civilian or a foreign national who is not under the authority of the Department, the legal authority of the UCMJ, or subjects may have died or deserted prior to action being taken against them. The vast majority of folks in that box deserted.
Under Section 0, as you know, a civilian or foreign authority can exercise jurisdiction over our military people. And that takes them out of our jurisdiction. In most cases, even though I understand and this is a fine point of law that either you all can correct or one of the Judge Advocates can, even though I understand that we can take action when a civilian authority prosecutes an individual, there has been a policy decision to not follow-up and take action for the same crime.

And so, as a result, unless there's some other compelling evidence, most of the active duty folks that are prosecuted by a civilian or foreign national under Point 0, the Department will either discharge them or will just let the foreign host take over. Some of our folks that are in foreign prisons are still technically on active duty and then they're discharged upon release. At least that's how it's been explained to me.

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

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

And so as we have grown our process, so has the requirements for reporting from Congress. So as we add a new category or as we begin to resolve and answer many of our questions, they have become required parts of our report to Congress. One of the real challenges has been is that as you know, we have four
Services and four traditions associated with how
to count the numbers and how to dispose of cases.
So one of the first big challenges was to lay
this map out and get everyone to agree to call
everything in one of these boxes pretty much the
same thing.

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

So if you look at the Point P of the
2,625 subjects, our first decision point
underneath that is, was there sufficient evidence
to substantiate misconduct? And you might be scratching your head as to why do we use the term substantiate there? That was one of the first points that for many years I could not get an agreement on across the Services as to what substantiated meant. Why is that important? Because Congress has required in their reporting law for us to report only those cases in which a sexual assault was substantiated. In other words, case disposition information associated with a substantiated case.

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

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

As you see at Point Q, you can see
that evidence supported commander action in about
76 percent of cases in 2014. Command action was
precluded in about 22 percent of cases in 2014,
that's at Point U. And at Point V, you can see
only about two percent of our cases were
unfounded, at least under this analysis here.
All total, I would say that our unfounded rate is
about, given Army's numbers, about I think it's
16 percent last year.
Unfounded, remember, does not necessarily mean false, it could also mean baseless. And most of our unfounded cases from Army are baseless. And so our false reporting rate is anywhere between about five and six percent, which is in line with published estimates in the best research that we have in the civilian community.

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

When we started out -- and so in other words, what percentage of cases in subjects that are underneath the authority of the Department, what percentage of cases could we do something
in? Whether that is a court-martial, whether
that is non-judicial punishment, administrative
actions, or discharges. What percentage? And so
this last year was the highest percentage on
record at 76 percent. When we first started
tracking through this analysis, my first
percentage was about 57 percent.

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

Underneath Point Q, you'll see sexual
assault charge substantiated 1,550 subjects.
This means that on the charge sheet or at least -
- well, let me put it this way, that the Services
reported to us that action was taken for the
sexual assault offense. It might not have been the offense alleged during the investigation, but it was the offense for which there was sufficient evidence at the closure of the investigation. So, for example, if someone is alleging a penetrative offense at the outset of an investigation, but there was only sufficient evidence to indicate that a contact type of crime occurred, then that's the logical progression that I'm talking about here.

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

And so I'll track you through the outcomes of those cases in just a minute, but I'll cover the rest of these. For the non-judicial punishments, the administrative
discharges, and other adverse administrative actions, we rely on the legal officers from each of the offices of the Judge Advocate General to ascribe the appropriate disposition associated with these actions. So the Judge Advocates tell us about the non-judicial punishments. They also look to see if there was an administrative discharge associated with it or others.

We only count one subject one time and we've kind of made an arbitrary level of severity associated with these cases. So, clearly, with court-martial being the most severe action taken, or the most serious action taken. With non-judicial punishment being the next severe action taken and then administrative discharges and then other administrative actions. Just to let you know, I don't have real good agreement between the JAG Offices as some believe that administrative discharge is a more serious action than a non-judicial punishment. And in some cases, that's probably true. But because some non-judicial punishments may not result in --
well, none of them usually result in any kind of jail time or confinement time. And usually those are fines and reductions in rank and things like that that occur.

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

MS. MANSFIELD: I'll keep quiet.

DR. GALBREATH: Okay, thank you.

(Laughter.)

DR. GALBREATH: That being the case, in addition to sexual assault allegations, the
darker green boxes under Point S and T that you see, these are cases where a crime was investigated based on a sexual assault allegation, but at the conclusion of the case, a sexual assault allegation could not be substantiated or could not be identified, but there was evidence to indicate that some other crime occurred. These crimes are, some examples, adultery, false official statement, burglary, theft, other kinds of things that might have occurred alongside of a sexual assault allegation. So these cases, once again, are in the same order or at least the same severity as indicated for our sexual assault matters as well.

On the other side, on the U side in the light blue boxes, these are cases where all command action is precluded regardless of what was investigated or whatever we have as far as the crime that was alleged. So for 248 subjects, the victim involved in their case declined to participate in continuing justice action. Every year, about nine percent or so of our cases, we
can't take action on because the victim declines
to participate.

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

Next box down, for 323 subjects, there
was insufficient evidence of any offense to
prosecute at the conclusion of that
investigation. So there may have been one or two
elements of the crime that were proven, but in
the opinion of the legal officer or the trial
counsel, there was not sufficient evidence to go
forward and I believe this is a decision based on
the idea of a trial counsel's ethical duty to be
able to put forward only those cases where they
believe that they have sufficient evidence to
prosecute the crime.

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

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

MR. STONE: What is that Capital V?
What does that mean?
DR. GALBREATH: That is also unfounded cases that could be false or baseless. But this was a -- why I have -- you'll notice at Point K and Point V, I have two unfounded boxes. This was a disagreement between the Services about how to count unfounded cases and at what point a decision is made about a case being unfounded. This was a recommendation from the RSP to align our process and we have.

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

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

DR. GALBREATH: Good question. I don't know, largely because no one in the civilian community has been willing to participate with us
in looking at their cases. In 2010, I reached 
out to a number of jurisdictions that had about 
1.5 million people in them. Seattle, San Diego, 
Philly, San Antonio are some of the places that I 
reached out to. I talked to people in the 
district attorney's offices, I talked to people 
in the police departments and I asked if they 
would be interested in helping us kind of have a 
comparative system.

I could not get anybody to participate 
with this, largely because as I talked to at 
least a couple different jurisdictions, they 
didn't have the ability to do this. The closest 
thing that I've ever seen is Dr. Spohn's work 
that the Panel is tracking out of L.A. County 
with the Sheriff's Department and the LAPD. 
That's the closest and even then, she had I 
believe a really challenging time trying to track 
cases from A to Z in the justice system. 
So what I will tell you is, how these 
cases break out I think ended up being 
educational for a lot of people in the nation in
what percentage of cases actually go forward. I know, having worked in law enforcement for the greater part of my career and working with civilian law enforcement, that a lot of this data's not tracked this way. In addition to that, the district attorney's office don't necessarily keep track of the cases in this way either. And so, that bridge from the law enforcement side then over to the district attorney's side, there's often very little connection in how cases flow through a system.

I know members of Congress when we briefed this information were quite concerned when they saw how this broke out, as were many people in the Department, because this work had never been done before. So, as a criminal investigator, I knew that the problems or crime, there's a lot more crime that goes on than ever gets reported. What does get reported, some of those don't get investigated. Some crimes get investigated and then a percentage of those get prosecuted.
In any criminal justice textbook, you'll see this kind of funnel approach to the justice system. This is our system of justice. Beyond a reasonable doubt is a very high bar to be able to prosecute a case and not all of those cases meet that requirement. And just to be very clear, this is true not just for the military justice system, this is true in the civilian justice system as well.

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

This is why the prevention approach of the Department, it does include deterrents and having a credible criminal justice system, but also a lot of work in with our system so that we
give people the proper skills and abilities so
when they see a situation at risk for sexual
assault, they do something, they say something.
We are empowering our folks to get to those
crimes before they occur. And also having our
commanders be kind of our lynchpin in our
prevention work.

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

And so, one of the first things I do
when I treat victims of sexual assault is have
them focus on something other than the outcome of
t heir case in the criminal justice system because it's so given to many other things as far as
whether or not it will reach the inside of a courtroom. That being said, the Department's
also experimented, as you know, with the Victims Legal Counsel and Special Victims Counsel, to see
can we increase participation rates by victims if we give them an attorney and we put everybody
into the balance in the courtroom. And so that's something that we're looking at as well.

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

VADM TRACEY: Just two --

DR. GALBREATH: Yes, ma'am.
VADM TRACEY: If I understood the hierarchy here correctly, the 111 administrative discharges in R, those are individuals who had no other action, no NJP, they went to administrative discharge direct?

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

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

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

VADM TRACEY: Okay. So there may be
some anomalies over time --

DR. GALBREATH: There may be.

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

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

VADM TRACEY: Okay.

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

VADM TRACEY: Okay.

MR. STONE: If I may ask --

DR. GALBREATH: Yes, sir?

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

DR. GALBREATH: These would be Letters of Reprimand, general officer Letters of Reprimand, Letters of Admonishment, Letters of Counseling, associated with misconduct if that was the only way that we could take action in the case.
MR. STONE: And that wouldn't be as the result of an Article 15?

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

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

DR. GALBREATH: Actually, when we walk through this, because of the differential levels of proof associated with or the available
evidence in these cases, commanders may not have been able to take the case to court. But we also knew that they were taking action on the sexual assault allegation or the other misconduct that was turned up during the investigation. When we broke out these four boxes, we realized that there were going to be mutually exclusive actions taken in these cases that could fit in these buckets. And so, we tried to at least track that and illustrate that the best that we could. Does that answer your question?

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

DR. GALBREATH: So under non-judicial punishment, what we're looking at is actions taken under Article 15. But the admin discharges and the other adverse actions may not have been Article 15 actions. Those were standalone actions under either an administrative discharge regulation or some kind of administrative
corrective action with the delivery of a Letter of Reprimand or Counseling or Admonishment. Most of those in there are Letters of Reprimand.

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

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

And also, don't forget too that when we talk about sexual assault, not everything that we're talking about is a penetrating crime like
rape or sexual assault, the named offense under Article 120. Sometimes it's abusive sexual contact, very low level things, for example, groping and stuff like that, which might not be appropriate for an Article 15 or a crime in the eyes of that commander and that attorney who's advising him on what appropriate action is in that case.

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

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

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

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

DR. GALBREATH: Under our policy, they are to be informed of all case outcomes and dispositions. That's why we keep their case open in the Case Management Groups that happen at each installation until that disposition decision has been made. If they're represented by a Special Victims Counselor or Victims' Legal Counsel, they
are to be informed of the outcome. If they're not, then the SARC or their Victim Advocate is informed of the outcome and is supposed to tell the victim. If that does not happen, that's not in compliance with Department policy.

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

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

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

Again, it is hard to -- when people have an idea about what sexual assault is in
their head, and typically we all imagine the worst, there is other misconduct under Article 120 that we have to address as well. And some of that is, for lack of a better term, buffoonery and bad, it's misconduct, it has to be addressed, and it's bad stuff. It's illegal, but at the same time, based on the amount of evidence that we have to address it, it limits what we can do.

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

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

DR. GALBREATH: Sure.

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

DR. GALBREATH: So I've looked to case clearance rates in the UCR process, in the Uniform Crime Reporting process that the FBI tracks every year and I have a really hard time
trying to align how cases fall out. And then
that bridge between the police department and how
they might clear a case under UCR and how a
district attorney might pick it up. And also
with the idea that a district attorney not only
has multiple jurisdictions that they might be
prosecuting.

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

And so to get that -- to kind of
follow, to get the agreement of one law
enforcement department and then how their
specific cases are tracked through either the
district attorney or the city attorney's office
and follow those all the way through and then
what those outcomes are, that's a big challenge.
I've never seen a system that had that kind of
integration to be able to follow this all the way
through.

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

Because sometimes then the federal
jurisdiction might come up, not often in sexual
assault, but if a sexual assault occurs under
special territorial jurisdictional issue in the
federal government, which is usually a prison or
an Indian Reservation or something like that,
then the federal government might exercise its
control. So the answer is, it's very
complicated, ma'am.

(Laughter.)

CHAIR HOLTZMAN: Thank you.

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

CHAIR HOLTZMAN: That would be good.

DR. GALBREATH: So of the -- and of
course this comes from Point R, our court-martial
preferrals that 998 subjects from the previous
page comes across over here to our court-martial
charges preferred. So once again, if you follow
the line down, you'll see that I have three
categories on the far left side of the slide.
That first one is case dispositions completed in FY 2014. So even though I had subjects with charges preferred in 2014, not everybody had their case go through and get a full disposition in that year. And so, you'll see I have 137 subjects in FY 2014 that I'll be probably reporting on about 98 percent of them or so in 2015. It takes about two years many times for cases to make it all the way through our case attrition charts. And this year it was great, because of DSAID, I didn't have any cases where I didn't have any information, so this was a good thing.

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

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

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

However, my attorney friends tell me
that if a discharge in lieu of court-martial is
granted, oftentimes it's given that UOTHC
discharge, the under other than honorable conditions. Rarely, very rarely is there a general or an honorable discharge granted in that process. As a matter of fact, I'm aware of no honorables given, only other generals, at least in my data that I can recall off the top of my head. So that decision -- yes, sir?

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

DR. GALBREATH: You are correct. And that is one of the things that we're trying to get after in our Military Investigative and Justice Experience Survey with victims, the MIJES that we're doing. It's new this year, we're asking -- we've had about 272 victims of sexual
assault respond to us and I'll let you know what
they say.

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

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

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

So moving right along, down underneath
here, you'll see where we have cases, 176
subjects, where the court-martial charges are
dismissed. It turns out that based on evidence
that was obtained during the Article 32, even
though court-martial charges may have been
dismissed, there was sufficient evidence for the
commander in that case to circle back around and
administer non-judicial punishment under Article
15 based on the facts in evidence. And so that's what you see in the blue boxes underneath this box here.

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

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

HON. JONES: Can I just ask you --

DR. GALBREATH: Yes, ma'am?

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

DR. GALBREATH: Or at least started, yes.

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

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

HON. JONES: Okay.

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

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

DR. GALBREATH: That is correct.

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

DR. GALBREATH: I would have to send you to the Judge Advocates from each of the
Services to have them explain why no further additional action was taken. My assumption is, is that for every time you administer non-judicial punishment, you have to be ready to go to court in case the person turns it down and I would guess that in those cases where no NJP could be taken, the Judge Advocate or the trial counsel felt that they didn't have enough evidence to make anything else stand up at court. That would be my guess.

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

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

HON. JONES: Thanks.

DR. GALBREATH: Any other questions about that point? Okay. Then moving along, if
you go back to the top box again that says
proceeded to trial in that second column from the
left, you have at least one sexual assault
offense charged and then, of course, you all know
that there could be many different charges on
that charge sheet that go forward. And so the
individual could be convicted for none, one, or
any combination of what is admitted at trial.

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

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

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

     MR. TAYLOR: Right.

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

     When you follow the box across to
that, one, two, three, fourth column from the
left, you can see all the punishments associated
with the convictions. Confinement, reductions in
rank, fines and forfeitures, and a punitive
discharge or dismissal are the top four punishments awarded at court-martial usually. The punitive discharge, keep in mind that, that's a bad conduct discharge or a dishonorable discharge.

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

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

DR. GALBREATH: Yes.

MR. TAYLOR: Or at what point?

DR. GALBREATH: That's when it's closed for us. We have a number of points, but to
capture this information, it's when that
convening authority says, there you go, and
awards the sentence, I believe. For more secure
information, please contact the JAGs, but that is
usually the point at which we're snapping the
chalk line.

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

DR. GALBREATH: It's separate. That's

--

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

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

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

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

MR. STONE: Okay.

DR. GALBREATH: Any other questions on
this page? Okay. You'll also notice that, let's
see -- okay. So on the next page that you see that's labeled 4, these are the non-judicial punishments under Article 15 and how these fell out. So, once again, there were 318 subjects. Not everyone who has non-judicial punishment initiated for them has it go all the way through. Sometimes commanders decide to not take action. Also, again, we had non-judicial punishment pending for some cases as well, as you can see as you go through. But out of those 318, I had 271 subjects have their punishment administered and, of course, once again, you can see the range of punishments associated with that. Any questions about NJPs? Okay.

The next page, Page Number 5, are the non-sexual assault offenses that you'll see and this largely tracks through the same way that I walked you through the sexual assault offenses. So these are cases where at the conclusion of a criminal investigation, the Judge Advocate or the trial counsel didn't believe that there was sufficient evidence to charge a sexual assault
case, but there was other misconduct that could
be addressed and that's how these cases break
out. And they're very similar data reported
here. Many of these cases, whereas most of the
cases that had a sexual assault charge associated
with them receive a court-martial charge, the
vast majority of these received non-judicial
punishment, just because of the less form of the
crime associated.

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

But one of the things that the Joint Chiefs wanted to know was if you're being
prosecuted for a rape or a sexual assault under Article 120, what are the outcomes of those cases
as compared to the abusive and aggravated sexual
contact cases that are charged and is there a
difference? And so that tracks you through that.
And there is a little bit of a difference. As a
matter of fact, what we find is, is that you'll
note at the bottom, because of the lesser
included offenses that are involved, if a
penetrating offense is convicted, we'll have some
sexual -- if a penetrating offense is charged,
about half of those cases end up with a
penetrating offense convicted, 11 percent end up
in a sexual contact offense convicted, and 35
percent end up in some other offense convicted.

That was the analysis that I told you
that we could do to show you what the differences
is between what happens at trial, whether or not
someone gets convicted of a sexual assault charge
or something else. And then on the right side of
that chart is also the information as well for
those just contact crimes. So in those cases,
it's about 50/50 every year, this year is a
little bit lower than 50/50. So if you were
charged with a sexual contact offense, about 43
percent were convicted of a contact offense and 57 percent were convicted of some other offense at trial.

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

(Laughter.)

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

And, of course, again, this is wave tops information. Every single case -- the lawyers remind me all the time, as a psychologist, I'm looking for ways to
characterize data in a summary statistic. How can I give you the best kind of idea about what happens in an average case? Attorneys are always telling me, there is no average case, because every case is adjudicated based on its merits. So what we end up with is just wave tops information about what happens.

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

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

DR. GALBREATH: Yes, sir?

MR. STONE: -- that I don't know where to look on these charts. I mean, as I look at all your numbers now, it looks to me that like out of the 4,660 reports they start with, only 330 people were committed to jail custody total, either for sexual assault or another related one, which was the kind of numbers that I don't think is going to motivate anybody to plead guilty. And then I said to myself, well, where is pleas
of guilty? And is that under this convicted of
any charge at trial? So we can't tell how many?
I mean, maybe all of those are guilty pleas and
virtually none are court-martial convictions by
the panel. Is that somewhere?

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

MR. STONE: Not everything is what?

DR. GALBREATH: Not everything is a
guilty plea.

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

DR. GALBREATH: I do not.
MR. STONE: Thanks.

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

(Laughter.)

DR. GALBREATH: Thank you, ma'am.

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

(Whereupon, the above-entitled matter went off the record at 12:08 p.m. and resumed at 1:05 p.m.)
A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:05 p.m.)

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

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

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

The first two slides in this deck, and I'm going by the trends and statistics slides that were in your folders, outline first of all, and I think it's very important and one of the things the staff has done consistently, is go back to the tasks Congress assigned to this
panel. Which are three.

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

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

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

And we quickly determined that the level of information that was contemplated in the tasks from Congress, was not available in any
easy to find or available resources that the
services or DoD were currently producing.

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

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

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

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

And then other information such as
lack of information about the sentence or the court-martial type, and why type of court was involved, sometimes that was -- that's in the reports from SAPRO, and sometimes it's not.

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

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

And so we looked for to those forms where we could find the most information that was necessary to understand the case. There are some limits on this. Records of trial in the
military, if a case doesn't reach a certain
threshold, it's summarized and it's not a
verbatim transcript and a verbatim record of
trial.

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

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

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

So, with those parameters, we -- as we
told you before, we went out and sought the
court-martial data. And we requested -- our
requests from the staff were based on the annual reports produced by DoD, SAPRO for fiscal years '12 through '14.

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

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

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

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

And then also, the ability of the services to reach back in the SAPRO reports and
identify which cases are involved based on our request, is somewhat limited. It was limited prior to the implementation of DSAID by simply whether they had the records and could reach back and identify what case was being requested, as it had been listed in the SAPRO report.

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

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

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

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

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

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

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

They're just maintained more centrally. And there's more record keeping requirements. So we went to those first. And
again, they relate to all of the tasks.

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

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

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

And again, the process we went
through, when you see it under each year here,
the number requested and identified, requested
again was that staff process of saying, based on
the SAPRO reports -- and again, the SAPRO report
is starting out with a list of every
substantiated or every sexual assault allegation,
and anything that could have touched disciplinary
or legal process, not just a court-martial.

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

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

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

    And that just gets down to when you're
actually looking at actual documents or case
disposition, was that case actually completed in
the fiscal year? Do you have enough records to
say that this was the disposition? Was it really
a sex offense versus a lesser 120 offense or an
indecent acts offense that's really consensual
conduct and not the sex offenses that the JPP is
tasked with looking at?

So, when we reconciled with each
service sort of this process of what list of
cases by subject name, if possible, what list of
cases exists out there that would be responsive?

We then started working with them beginning in
May of this year, we started actually receiving
the documents from each of the Services.

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

And then we went about trying to
again, obtain those records. And again, you'll
see our record collection rate there is then in blue for each fiscal year.

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

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

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

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

That's why I think that explains some
of the drop off in cases received. But, this has been a months long process ongoing, receiving cases that were completed.

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

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

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

But so, because of the existing case keeping regulations, cases are in a variety of places. The Services double backed to go to all these installations and all these commands to
find things that hadn't yet made it up to let's say, the appellate process. Or hadn't yet been retired.

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

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

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

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

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

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

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

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

And then, you know, we again have been
requesting these cases since at least May of this
year. FY 12 and 13, and eventually 14. And I
think we've had probably some of the issues that were -- that presented the most difficulty probably for FY 14.

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

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

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

And I think it highlights some issues with data tracking when you look at documents by reporting up through the chain of command all the
way to DoD SAPRO, you're going to see some differences in our numbers from what's reported in the number of cases that SAPRO has versus what we might have on hand with a complete set of documents in our database.

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

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

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

And so, we've kind of kept those in our -- on our database that has a secure access point basically. That's for housing the electronic form of the records.
COL GREEN: You just hit on that specifically. Because that's been the point of issue for the staff.

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

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

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

And so the Panel has access to all the information that we've obtained from those cases.
But the actual case records themselves remain under service control.

Next slide.

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

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

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

And again, I'll highlight that. When you actually look at the case documents, while it was listed as involving a 120 offense where the charges preferred, and a disposition was completed in the FY. When we looked at the
documents, we have a notion one that it was a complete set, so you can track the procedural outcome of the case.

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

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

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

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

Even though Article 120 now today, as you'll see in the reference chart and your reading materials, has subsections for indecent
conduct, again, that's under the heading of 120.

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

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

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

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

MS. PETERS: Yes.

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

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

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

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

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

And sometimes some of those documents were missing. Or if there's an Article 32 investigation, which is only required if you're
going to go to a general court-martial. And it
can be waived by the accused. But there should
be a form indicating what happened with that
proceeding.

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

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

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

And again, so the further a case went
along, the more documents we had. A case that
reached -- somebody was administratively
discharged after prefferal for whatever reason,
that case's record would be kept at the
installation for two, maximum three years.

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

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

MR. TAYLOR: Thank you.

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

Or did you do a completely independent
of? Because none of the numbers exactly match
up. Sometimes you're higher, sometimes you're
So, I wasn't sure how you could be higher. So, that's why I wondered if you had an eye on those Fiscal Year '14 -- that fiscal year 14 data that we just heard about?

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

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

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

And again, there's so many nuances to the legal process, we just felt that that
Sentencing Commission methodology of collecting documents was going to be better than looking at raw numbers. But certainly some scrutiny of the statistics in that report, I think is part of the analysis and informs what we need to be looking at.

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

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

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

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

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

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

We can at least tell the Services we know that case is out there or we think it is.

Please go get it. As opposed to saying, give us
everything that's out there. We have nothing to compare it against.

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

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

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

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

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

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

So they're on somebody's track sheet somewhere, right? And so, we use what's reported to SAPRO as a good, I guess, azimuth, or a good
bead on exactly -- on roughly how many cases
might be out there for the JPP use.

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

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

Now, because you've been asked to
compare punishments in the military with like
punishments in the civilian sector, we've gone
into the Sentencing Commission in the Bureau of
Justice Statistics, and said please give us some
analysis for like cases in the military. And we
we're pending some analysis from the Sentencing
Commission that's specific to the JPP.
And what we did was requested like
offenders and like offenses in that grouping.
So, that's where you see that we looked at first
time offenders.

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

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

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

So, trying to keep some of those
metrics equal, we asked for first time offenders.
And again, those adult victim cases in the most recent years available.

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

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

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

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

So, it will be interesting to unpack all of that. But we have requested civilian data for you to do that.
CHAIR HOLTZMAN: Can I ask one quick question?

MS. PETERS: Um-hum.

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

MS. PETERS: Yes.

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

MS. PETERS: No.

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

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

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

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

CHAIR HOLTZMAN: One hundred?

MS. PETERS: In one year's data. And
that's a guestimate. I really don't know how it's going to break down if we look at adult victims only.

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

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

MS. PETERS: Right.

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

MS. PETERS: Right.

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

CHAIR HOLTZMAN: Yes.

COL GREEN: And I think the number for
FY 14 and the Sentencing Commission report was in
the neighborhood of 400. And so that's the top
number.

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

CHAIR HOLTZMAN: Great. Thanks.

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

So, that's not just courts-martial.

That could mean, did a case never receive a
prefferal? It was never considered for that.

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

So, to the extent that the task might
lend itself to looking at records of non-judicial
punishment or adverse administrative action, we
had to look at again, what kind of information is available out there. And the bottom line answer is not much.

As far as even statistical data, and when you get down to are there actual records there, there's even more challenges. Because we're talking about personnel records for the most part.

And the records collection regulations differ by service. And it's usually, you know, about two years maybe sitting at the unit. And then it's in the individual's personnel file.

So, it not being a public document and the nature of those documents, you may want to -- it would be, I think, certainly a plausible option then to go say, where's the numerical data out there? The tabulations on these actions?

Again, the first stop would be to review the DoD SAPRO reports to see what they have in there. So what you see in front of you is our look at the SAPRO reports' tabulations of cases that involved a non-judicial punishment or
adverse administrative action.

And this is from our read of the service enclosures. The charts basically, they have a chart listing line by line, every case that falls into the -- fell into the SAPRO database of some sort.

So, and not by name, but just sort of by allegation. And then by end result. So, we looked at those numbers. And again, we will see what sort of level of analysis could be performed just with that collection, that sampling of administrative action.

What level of detail could we scrutinize that with? I think maybe something along the lines of what sorts of offenses are being disposed of through non-judicial punishment?

And then is it possible to see what sorts of conduct are captured in administrative actions? Because again, they are administrative.

And there -- it might be a false premise to presume that a sexual assault
allegation that has adverse administrative action connected to it, actually involved a sex offense. Did that letter of reprimand describe, you know, a rape? Or some sort of bad behavior that the military condemns?

And so it went into that person's personnel file. And maybe that particular sex offense didn't warrant action. Didn't go anywhere. Something else happened to it.

So, we will have to kind of look at what is being reported in these annual SAPRO reports. Kind of scrutinize these numbers.

And also make sure, and see where the adverse action or non-judicial punishment are, I guess, assigned to the same soldier twice. Basically a person can certainly receive both actions.

They can be punished non-judicially and then receive a separation from service. And in fact that may happen in a lot of instances. So, we can try to look at that from these lists. And so there's a lot of, I think, a
lot to unpack from just these raw numbers. Not so much in the level of detail of the action, but maybe what's happening around it.

How did the case start? Did any of these actions happen in conjunction with another disciplinary action? Is the person separated or not?

But again, it will be important to look at really whether they were involved in what we would call a sex offense versus collateral misconduct. Versus really just some sort of bad behavior.

All of those could be encompassed in these numbers that you're looking at. So, --

MR. TAYLOR: I have one clarifying question if I may?

MS. PETERS: Um-hum.

MR. TAYLOR: When you say that the NJP and admin action info are not uniformly reported in the SAPRO annual report case reports, I didn't get that impression from talking -- from listening this morning to the briefing on the
waterfall charts.

So, could you give me an example of how they are not uniform?

COL GREEN: This data was taken from the synopsis sections, the enclosures that were reported in each of the cases. And so in a particular case, the synopsis, the narrative, may indicate that that case resulted in NJP and nothing further.

Another narrative may indicate that this resulted in NJP and then the soldier was administratively separated. So, the combination of those, I mean, both are indicated.

But, obviously, if there's NJP for some type of a sex offense, it may have ultimately resulted in administrative action. It's just not captured in the narrative.

And so the ability to really get that total fidelity about the outcome in the case, I mean, we're somewhat limited by what the Services reported in their enclosures.

MS. PETERS: Right. Yes, there's a
whole host of issues there. And about when these actions are complete. When is the separation action complete could be one interpreted issue.

But, absolutely, it's when the Sapro attempts to kind of give a hierarchy, assign a hierarchy. And then ask what's the most serious level of discipline taken?

Services may interpret that as, I'm only going to report one action taken. And some may report, well, I think this is also relevant. So I'm just going to tag on the fact that he was administratively separated.

We don't believe that we can -- that we have uniform and consistent types of reporting to analyze again, the exact punishment or the exact types of actions taken.

I think what you can start to get a sense of when you step back and look at these in the aggregate is, what types of conduct are the subject of these disciplinary actions? You know, is it an aggravated sexual assault? Or a wrongful sexual contact?
Or something even that turns out to be something less? And again, that bad behavior category.

MR. STONE: I guess one of the things I'm hoping you're going to see when you're done analyzing this, telling us, is what percentage of the cases actually resulted in a formal finding of guilt versus those that did not.

And the reason I say that is, you know, when you look and try to compare with any other system, they'll tell you which -- either what percentage pled or were found guilty, versus those that were not guilty.

They don't start telling you about all the cases where there was deferred prosecution. Whether there was an agreement with the prosecutor or the case was dropped because the guy did this or he did that or the other thing.

And to some extent, I feel like I myself, I'm totally distracted by all of these other things that are done. But nonetheless do not result in a formal acknowledgment on the
record that shows that there was guilt or no

And I think to some extent, that may

be reflective of how difficult it is to use an

Article 120. That it is very difficult.

Prosecutors are throwing up their hands and

accepting all kinds of other things.

Okay, we'll process them out. In

other words, they're making deals that

nonetheless do not reflect that there was an

acknowledgment, a formal acknowledgment of guilt.

And so I hope that you'll be able in

doing this to be able to tell -- you know, I am

frankly very unimpressed with the non-judicial

punishment and adverse administrative action if

it doesn't result also in an on the record

admission of guilt.

Because that doesn't help the victims

as a class. It may help an individual victim

that the person is out. But as a class, it tells

us that there's something wrong, I think, with

Article 120. That's it too difficult to use.
Which is some of the testimony we got at the very beginning. That the prosecutors are making all kinds of deals to avoid having to go to trial on the language of that Statute.

So, I hope you're going to be able to give us some actual numbers. Just like I think the same thing is true with the number of people who are actually incarcerated for these offenses. Spend time in jail for the offense.

Because I think that if you're having to deal away these sexual assault offenses on a regular basis, it means, you know, that your chance of getting the person to spend any time in jail is slim. And alternate dispositions are very nice, but that's not -- that just tells me that the system is broken.

HON. JONES: You know, the converse to that though could be that in the military, NJPs and adverse administrative actions are actually a broader set of remedies. Even though they're not a formal conviction.

And look, it's very difficult. We
know it from the RSP to figure out what the actual statistics are in terms of convictions for all of the many sexual assaults that occur in the civilian population.

But, I think the one thing that everybody recognized in the Panel, was how difficult it is to get from an allegation of a sexual assault to a final conviction in a courtroom in the civilian system. And I think just anecdotally, it's pretty clear that an awful lot of these cases that the ones that even make it to the District Attorney's offices, you know, many, many of them never get to the courtroom.

So, I don't think we can make quite the conclusions you're suggesting from the fact that there are NJP and adverse administrative actions, because these are extraordinarily difficult cases.

And I'm just suggesting these are things that a prosecutor in the civilian world wouldn't even have the opportunity, you know, to impose.
MR. STONE: Well, I think in a civilian world, prosecutors always have the possibility of deferred prosecution or declining a case. But, I guess what makes me unsatisfied will be if in those circumstances, there is no finding.

I agree with you. It's nice to have a range of punishments. And I have no problem with that range of punishments if they follow somewhere in the system a determination that the sexual assault occurred.

If there's no such determination, then the person can go on and continue in the service and do it again. Or, the victim's going to feel like, you know, this whole thing -- she was not believed or he was not believed, and no sexual assault occurred. And our numbers aren't going to be right.

So, it seems to me there's an acknowledgment of guilt that has to come along with these other lesser punishments. And I guess from some of the earlier data, I couldn't tell
which ones did and didn't have it.

And I think that that's a crucial component for us to know where we're going. I just don't think we can compare anything if we don't know whether these are ways to avoid a sexual assault.

Or whether these are ways after you have an acknowledgment of guilt to ameliorate the penalty. And I think the second one is -- I have no problem with. But the first one, is maybe I think what got us here.

COL GREEN: One of the important things to remember Mr. Stone, is the range of conduct that's encompassed within Article 120 ranges from rape to abusive sexual contact. And by statute, Congress has recently set a limit that the only forum for resolution of a penetrative sexual offense is a general court-martial.

And so, I think some of what you're talking about, and what I think I hope -- we hope that our data will be able to provide, is of the
varying severity levels of conduct that's encompassed within Article 120, what is the forum in which that particular type of allegation is resolved?

And I think what I expect to see is that obviously on the more severe end, the rape, the sexual assault, the penetrative offenses, I highly doubt you'll see those type of conduct in these numbers. But again, that's -- we'll look at the statistics to determine whether any of those types of offenses are involved in these alternate dispositions.

MR. STONE: And I think maybe what you're telling me, which I agree with, is that when we finally get to a revised suggestion for Article 120, there should be a 120(a), (b), (c), (d), et cetera. So that in the future if somebody wants to track, if they're tracking Article 120(a) offenses, they know they're dealing with that most serious category.

COL GREEN: Right.

MR. STONE: And when they deal with
the (b) or the (c), they're dealing with much less serious offenses. And so then they can understand the outcomes.

COL GREEN: And we've recorded the information in our database by each one of those specified offenses. So, we'll be able to -- and we can continue in the next discussion to talk about how we'll be able to break that down for you to see those.

MR. STONE: Great.

MS. PETERS: Right. The documents we've captured will record a finding and a disposition by charge for the most part. That's why we chose the prefferal stage to really start focusing on the documents.

And we will have numbers for you. And beyond that, that's maybe another level of analysis.

And again, I would -- the earlier slides did talk about some of the documents that we have to capture those procedural steps.

Again, some of those, and I should say
this before we move on, we'll -- be able to tell us whether there was a guilty plea involved in the case because we've looked at pretrial agreement. And the results of trial typically record the plea by charge.

So, we will have access to that information and see what types of analysis we can do. If we could go to the next slide.

There is one more issue here in the level of judicial process encompassed by the tasks. And that would be appellate case results.

And I believe it's your second or third task that says look at the appeal of convictions or whether any sex offense conviction is reduced or set aside on appeal. Aside from sort of the issues maybe with the wording of the task, it certainly encompasses let's look at the appellate life of a case.

Now, the first issue I'll note is yes, we collected appellate decision for FY 12, 13 and 14. And I have to first just make the disclaimer that these appellate decisions don't necessarily
tie to the cases tried in that year.

Naturally appellate process timing is
going to occur a year, maybe two, after the case
is tried in some cases. So, we're not looking
longitudinally at all of the courts-martial in
our data base with these appellate cases.

It's just appellate decisions decided
in the last three years. Some of these cases --
some of the FY12 courts-martial might have been --
- might have reached an appellate review in FY 13
or 14.

Our goal wasn't again, to try to tie
those together, but really just to start to get a
grouping of those cases. Maybe going forward
with more years of data, you could tie previous
years' cases to current appellate results.

So, if I can just talk about how the
staff went about collecting appellate data for
you, in order to address the task. I want to
make one or two notes here.

And that is, again, we just looked at
decisions reached by fiscal year. And note that
there are different avenues for appellate review.

While the tasking may have said, when somebody appealed their conviction, well, the appellate process is largely governed by Article 66. So, there's two avenues -- there's at least two avenues to appeal.

And that is, there's an automatic review by the appellate courts if a sentence reaches a certain level. And there's a whole appellate counsel service, not necessarily on the individual accused.

This is something that's happening as a matter of right. There's an appellate structure, you know, built into each JAG corps to litigate the appellate issues of these cases.

So, when you have a trigger like a year or more of confinement or a punitive discharge, it goes up to the appellate court for review. As well, the service TJAGs have a role in getting a case to review by an appellate court.

And that's regardless of whether it
was the result of a guilty plea or a contested matter. In fact the appellate courts do routinely review guilty pleas and the inquiry that the judge does, the very searching inquiry that a judge does with an accused.

So, we've just looked for cases that had an Article 120 issue. Was it an Article 120 offense at issue?

And then you tried to unpack what sort of issue was that? Was that an issue that was germane to all cases, like suppression of a statement?

Or was it something germane to the statute or a related sex offense issue like a 412 or a 513 issue? Or one of the unique aspects of the military appellate courts, and that is factual and legal sufficiency.

Basically they take a review of the record. And they have the -- they can question the findings of the panel or the judge and choose to set aside a verdict.

They can choose to maybe reassess a
sentence. They’re the last arbiters of whether a
sentence was fair. They’re sort of supposed to
help calibrate sentences. And they can make an
assessment there, too.

So, we looked at was there an issue
with the offense? Or the offense of conviction
or the finding? Was there action on the finding
or sentence?

And was relief granted? And what sort
of relief? And we also have those appellate
decisions obviously for your reference.

So, this is looking at the numbers
here that, you know, it's a pretty small
percentage of our overall case load. Well,
compared to the number of courts tried in a year,
this how many appellate decisions on 120.

You're going to see that's sort of our
ballpark. And we have to maybe parse out from
there, make sure again, that it's aggravated
sexual assault or rape and not a 120(c) offense
that's capturing, those indecent conduct
offenses.
But that's largely what our data pool is going to look like. And the staff will be giving you some analysis there. See what kinds of relief and the basis for the relief that's being granted at the appellate level.

And that's subject to your questions is just some of how we unpacked the tasks, the information we brought to you to examine. And there's a variety of ways to do it.

So we hope today we can get your thoughts on some areas we would like to focus on in response to those tasks. It's pretty broad, but I think where we have concentrated is on that court-martial process.

Not just the outcome, but what got us to that outcome. And again, by charge and by final outcome.

CHAIR HOLTZMAN: Dr. Spohn, are we up to you? Thank you. Thank you very much, Ms. Peters.

DR. SPOHN: So, let me just say by way of introduction that I've been provided with the
data that the staff has collected. And this is
the identified data on the 1,800 cases --
approximately 1,800 cases in which some sex
offense charge was preferred.

And they've asked me to look at the
data. To analyze the data in terms of outcomes
and also in terms of predictors of those
outcomes.

So, in terms of outcomes, there's
obviously a number of different ways that one
could conceptualize the outcome of a case. I
think that in conversations with Colonel Green
and with Meghan Peters, it's clear that one of
the things the Panel is interested in, and you've
just referenced this Mr. Stone, is what
percentage of cases resulted in a conviction that
is a finding of guilty versus dismissal of all
charges, acquittal on all charges, or some sort
of alternative disposition on all charges?

And we can conceptualize the
conviction in different ways. The SAPRO report
looked at penetrative offenses versus contact
offenses.

I parsed it out here in terms of Article 120 sex offenses and non-Article 120 sex offenses. We can really do this any way that suits your purposes.

And then many of the offenders for which sex offense charges were preferred are actually convicted of non-sex offenses. So, focusing on the outcome in the case, conviction versus other kinds of outcomes.

And then for offenders who are convicted, we obviously want to look at both the type and the length of sentence. So, -- and again, we can do that for those who are convicted of the Article 120 offenses, other sex offenses, non-sex offenses, or we can do it for rape, sexual assault, forcible sodomy versus everything else.

I mean, there are a number of ways that we can look at the type of the sentence. Although this is complicated in the military system.
And then for offenders who are given

some sort of confinement, what was the length of

the sentence?

CHAIR HOLTZMAN: Excuse me, may I just

interrupt for a question.

DR. SPOHN: Um-hum.

CHAIR HOLTZMAN: What is the
difference between an adjudged sentence and an

approved sentence?

MS. PETERS: Yes, ma'am. The adjudged

sentence is what happens at trial from the judge

or the panel. And that result from trial,

whatever the judge or the panel adjudges goes to

the convening authority, the general officer that
dictated a court-martial will take place.

And he takes final action on that

sentence via approval in part, or not at all.

And that issue has been addressed in recent

legislation kind of curtailed somewhat convening

authority action on sentences in sexual assault,

rape and sexual assault.

But again, that's really when the case
is considered done, is when it is received by the convening authority. In previous years we might see more options to the convening authority to approve or not as far as the sentence goes.

These days there's less discretion that the convening authority can exercise. But again, approval is what we considered a final outcome of the case.

CHAIR HOLTZMAN: I'm still a little confused. Adjudged is what happens --

MS. PETERS: At trial.

CHAIR HOLTZMAN: At trial.

MS. PETERS: Right.

CHAIR HOLTZMAN: And approved is what the convening authority does.

MS. PETERS: Yes. You can look at the findings --

COL GREEN: After.

CHAIR HOLTZMAN: After trial.

MS. PETER: Right. It comes with the whole record and the result comes to him for approval.
CHAIR HOLTZMAN: All right. Okay.

COL GREEN: And that encompass, ma'am, the clemency process that you studied during the Response Systems Panel, which has been, as Meghan alluded to, Article 60, which has been significantly altered in recent years, to limit the ability of convening authorities to make adjustments to findings and to sentences in cases.

And particularly limited in sexual assault cases.

CHAIR HOLTZMAN: Now, where do plea agreed upon sentences come into this picture? Or does that matter?

MS. PETERS: We have -- so we have some data on plea agreements. And typically, the restrictions under Article 60 are scaled back a little bit in the realm of plea agreements.

So where a prosecutor and the convening authority and then the accused enter into an agreement, some of those -- it doesn't curtail the ability of the convening authority to
say, cap a sentence or disapprove a dishonorable discharge.

So, they can still have a pretrial agreement that ahead of trial issues a cap on rape and sex assault offenses. And then a trial happens and it's -- again, that agreement's walled off from the judge because the agreement's between the accused, it's made on the recommendation of a prosecutor and the convening authority and the accused sign it.

And then either a guilty plea or a contested trial happens before a judge or a jury. And they come up with an adjudged sentence at trial.

And what is in that agreement between the convening authority, when he receives that adjudged sentence, he says well, I'm going to go back to that pretrial agreement, and if I said I would cap sentence at so many months or so many years, I'm only going to approve the sentence up to the cap that I approved earlier in my agreement with the accused.
So, that's why we found it important to look at adjudged and approved. There could be some real difference there in the realm of plea agreements if we see a lot of guilty plea cases, sure the adjudged and the approved sentence might be very different.

CHAIR HOLTZMAN: But what about if the approved sentence is based on a plea agreement versus not being based on a plea agreement? Is that a difference that's important to catch?

MS. PETERS: Yes. And I think we can capture that where we have received valuable pretrial agreement data that we actually have in a lot of cases the actual pretrial agreement.

So we can see what that deal was. And then we can actually see that final action and see him -- see the convening authority following through with the agreement and saying okay, the adjudged sentence was five years. I agreed to cap it at three. I'm only approving three years confinement in this case.

And so we will be able to get a sense
of when that's happening. And if you want to
look at particular groupings of cases because we
could look at that.

    CHAIR HOLTZMAN: Okay. Thank you.

    DR. SPOHN: So, I've just begun to
work with the database. But I've already
discovered that there are a number of
complicating factors.

    And the first is that in the data that
we have, there accused is often charged with
multiple counts. The range of the number of
counts in the data, it ranges from one to 30.

    And the mean is about five and a half
charges per case. This includes non-sex offenses
and well as sex offenses. And the counts that
are included are often disposed in different
ways.

    So you might have a rape charge that's
discussed. A sexual assault charge that is a
guilty verdict at a general court-martial. And
then other charges that are disposed of in
different ways.
The charge might be withdrawn, it might be dismissed. Or the defendant might be found not guilty.

In some cases the dispositions are all consistent so that all charges are dismissed. All are given an alternate disposition. Or the defendant is found guilty or not guilty of all of the charges.

But in many cases, the outcomes vary depending upon the charge. And so the question then becomes how best to characterize the overall outcome of that case?

And I think our thoughts are that we'll look at those charges for which the defendant or the subject was found guilty. And how those differ from the charges that were preferred. And we can track that.

The other complicating factor is that offenders often receive multiple punishments. So, unlike a civilian justice system where when we think about the type of sentence, we're really talking probation or some sort of other
alternative to incarceration. But probation, jail and prison.

In the military system, there are many more options. And offenders can receive multiple kinds of punishments. And so again, how to characterize that is going to be more complicated then it is in research on the civilian justice system.

That said, we can and they have obtained data on the length of confinement. Which would be consistent with the civilian justice system where we look only at the likelihood of incarceration.

But then also for those offenders who are given either jail or prison, the length of the sentence. So we can have some consistency there.

The other -- go to the next. So, in terms of some of the questions that we've been talking about, how to identify the ways in which outcomes vary, depending upon the year in which the case was disposed, the service.
We can look at it for each service by year. We can compare the forum where the case was disposed. That is whether it was a general court-martial or a special court-martial.

And then we can look at whether the sentence was imposed by a military judge or by a panel. And there are various ways that we can, I guess, tease out how these cases arrive at the dispositions or the outcomes and sentences that they do.

But, in looking at predictors, there are complicating factors in that -- the database does contain a number of factors that research on the civilian justice system has identified as being predictive of how the case is disposed, and what the sentence is.

And that would be such things as the most serious charge, the number of counts, the number of victims, victim gender, victim status, the accused's rank, the type of disposition, the type of forum, the service and the year. So, those are all variables or factors that we can
take into consideration in trying to decide how
cases are -- in trying to explain that is, the
outcomes of these cases.

CHAIR HOLTZMAN: May I ask a question
at this point?

DR. SPOHN: Yes.

CHAIR HOLTZMAN: I see that Service is
an issue here. Are you suggesting that there is
a difference in the outcome depending on what
Service the military member --

DR. SPOHN: I think that's an
empirical question.

CHAIR HOLTZMAN: We don't know the
answer -- so you're not suggesting that there is
such a difference --

DR. SPOHN: No, no, no, no --

CHAIR HOLTZMAN: That's --

DR. SPOHN: -- I am just suggesting
that that's --

CHAIR HOLTZMAN: -- something you're
looking at.

DR. SPOHN: -- a possibility --
CHAIR HOLTZMAN: Okay.

DR. SPOHN: -- that that is a factor that we assume that you would be interested in knowing, if there is a difference based on the Service.

But the complicating factor is that many of the variables that research on the civilian justice system, specifically on sexual assault cases, has identified as being predictive of outcomes are not included in the database, and this is particularly true with respect to the characteristics of the victim.

We know the number of victims. We know the victim's status and the victim's gender, and in cases where there are multiple victims, we know the status and the gender of each victim so that we can characterize it as a male or a female, or all males, all females, or a combination of the two.

CHAIR HOLTZMAN: And what do you mean by "status"? Excuse me.

DR. SPOHN: Military versus civilian.
CHAIR HOLTZMAN: I see.

VADM TRACEY: But you don't know the rank if it's military?

COL GREEN: For the victims?

VADM TRACEY: Yes.

COL GREEN: No ma'am, and this is an issue with looking at the records of trial. The requirements for specificity about the victim are limited, and so one of the things in terms of even the status of victims, the consistency of that is something we're not sure about because we found records where in -- in the start of a case, the charge sheet might list a victim as PFC KM, and then during the Article 32 hearing, it's referred to as Ms., and so it may be that it is simply refer differently to maybe a person that's separated from service. There are a lot of factors that go into that, so this is an area where the specificity about the victim is somewhat limited.

DR. SPOHN: So in terms of the variables that are not included, there's no
information about the relationship between the victim and the accused, whether the victim was engaging in any kind of risk-taking behavior, especially drinking or using illegal drugs, the credibility of the victim, the degree of injury to the victim, whether the victim was willing to cooperate into the investigation and prosecution of the case, whether there was delay in reporting or whether the crime or the incident was immediately reported, whether the victim had any kind of motive to lie about the incident.

And then there is no indication of presence of physical evidence or witnesses, so those are variables or factors that we will not be able to take into consideration in trying to understand or to explain why cases were decided in one way rather than another.

So those are kind of caveats to what we can and cannot do and the questions that we can and cannot answer.

MS. PETERS: And if I could talk about the -- the court-martial records, one of the
reasons that some of this information that may be very important is not at our fingertips is again we looked for information that was uniform, complete, and accurate, and you find that something like the relationship between the victim and the accused, albeit certainly of interest, is not uniformly kept necessarily in a record of trial.

Certainly where there was an acquittal and you have a summarized record, summarized means there's a mark that there was evidence introduced in an argument and court closed, essentially. It's very, very cursory.

So it's difficult. If we couldn't consistently discern the relationship, we took that off of the -- the list of possible things to track with enough fidelity that it would give you something meaningful.

So we would like to have that, and could we open up every record of trial? Maybe should the Panel be interested in things like this that might be available in full records?
What we thought was if the database gives you numbers that you wanted to scope out for further inquiry, there is a way to shape the staff's research for you by reaching back to pull case records potentially.

But maybe rather than doing that for all 2360 cases, we'd look at case outcomes driving and disposition driving the tasks, so we started there to give you numbers to deal with first.

CHAIR HOLTZMAN: Any members have any questions?

MR. STONE: Well I don't know if this is a question, but it's an observation that I'd kind of like you to keep in mind, particularly Dr. Spohn, as you're going through this.

You know, criminal prosecutions not in the military came under tremendous criticism in the 1980s because of the amount of variables of the type you were describing, and they resulted in two changes that were crucial, and I think maybe you can -- you can keep these in mind when
you're thinking about the numbers you're going through.

The first change was a requirement which the Attorney General promulgated in his Principles of Prosecution that the most serious charge that can be -- the most serious provable charge must be pursued, that you can't deal away a case in the interests of ease of getting through the caseload.

And then the second corollary to that was that the sentencing guidelines were required because they found at a quick look that 20 percent of all the people convicted in federal court were not getting any jail time, and between the flexibility to charge anything you felt like and make a deal that didn't include going to jail, the public didn't feel like it was getting what it thought it was getting.

And I have some of the same concerns now that I heard about all these alternate dispositions here today in huge numbers, and I'm even more concerned about it now because I see a
huge number of discharges that occur from the
service, which sounds to me like a disservice to
the various states, because if people have
committed a rape, they need to be convicted, not
just discharged so they then walk around the
various 50 states with no accountability
whatever. The military is happy they got them
out, but they've passed the problem along to the
states that the person is going to be in.

And so I think if the military is
going to go through this process, it sounds to me
like there's going to need to be some
accountability both for going forward on the most
serious provable charge and for seeing that
there's accountability at the end of it.

So that's why all these alternate
dispositions to move the caseload along, it makes
me even wonder why the convening authority should
continue to have a lot of discretion and power in
the cases where the person agrees to leave the
military, because then the problem is no longer
-- I can understand the convening authority
wanting to have discretion if the person is going
to stay in the military, but if they're not going
to stay in the military, it seems to me that's a
whole different kettle of fish, and that's
something which the people of the United States
and their elected representatives are going to
want to know: are you just passing this problem
along to us?

And so I ask you to keep one eye on
that as you go through the data, and I'm glad
you're looking at the most serious offenses
individually and what some of that accountability
is, because I -- it's -- looking at those numbers
today, it sounds to me like discharge from the
military is the overwhelming penalty, not guilty
plea and time in jail.

DR. SPOHN: So one of the advantages
of this data set that they've compiled is that it
does list every charge that is preferred and the
disposition and -- of every charge, and so I mean
that I think is a real advantage of the data that
they have collected.
MS. PETERS: Right, and Mr. Stone, your point is well taken, and I will just highlight an example because you asked if we revisited the DoD SAPRO report.

One of the SAPRO statistics is what percentage of Servicemember subjects charged and tried for a sex assault offense were convicted in FY 12, and what kind of punishment did they receive?

The statistic there is going to have a punishment, but that doesn't tell you whether that punishment is really associated with the most serious sex offense charge or a sex offense at all, maybe a lesser sex offense. We hope to be able to look at the life of each charge on the charge sheet and get a better picture of that number and of that trend and differentiate it again from the existing reports out there.

COL GREEN: One caveat to that, again, in the military, with unitary sentencing, multiple charges that result in conviction, there's no way to differentiate obviously the
ultimate sentence associated with that conviction relative to the different charges that were involved.

So we will hit a limit in terms of our ability to understand the nature of charges where there are multiple convictions or -- and that could include multiple sex assault convictions as well as sex assault and non-sex-assault charges involved in the same case.

MR. STONE: Yes, I understand that. I mean, in the civilian system, plenty of charges -- there may be more than one charge in a single case, and there may be sentences that are run concurrent to each other because the judge is giving what in effect is a unitary sentence, and in some states, they actually have provisions for calculating the sentences, and they call them unitary so the prison officials know what to do with the sentences.

But nonetheless, if there is a conviction on one of these most serious sexual assault cases, then I don't -- I am less
concerned with the less serious offenses. I want
to see what that overall penalty is when there is
a conviction on one of the very most serious
offenses.

COL GREEN: And again, going back, I
think one of the things we'll be able to do is
look at the alternative dispositions, those cases
that involve administrative discharges or non-
judicial punishment, and identify for you which
of the Article 120 offenses may be associated
with that ultimate outcome in the case, to -- to
go to what you're saying in terms of the types of
offenses that are involved in those.

CHAIR HOLTZMAN: Any other questions?

VADM TRACEY: I do have one. So it
seems that we ought to be able to tease out maybe
some signals about consistencies or
inconsistencies in some of these things. I'm not
sure how we address the taskings about
appropriateness based on the facts of the case.

We know what people were charged with,
we don't really know anything about how solid the
evidence was or anything of that sort, right?

COL GREEN: We've talked a lot about that ma'am, and you're right, and I will tell you that in conversations with the Services since the first time we started to look at this tasking and trying to get records, they have the same concern, and I think, you know, like Dr. Spohn's limits identify, this will tell you a lot about what happened, but the why is not so clear from case documents or case records.

The staff's -- my -- our thoughts are appropriateness could also be in the forum selection of where the case is resolved. Appropriateness of the outcome might not be something that we can determine, but there may be something that you can opine on as to whether or not it was dealt with appropriately, and so I guess my recommendation to the Panel is really focused on the procedural appropriateness rather than the subjective outcome appropriateness of a case, because I agree with you, ma'am, it's difficult.
VADM TRACEY: But we are asked to speak to appropriateness of decisions, punishments, and administrative actions, so we're only going to be able to answer a question that's not actually on that list, right? Appropriateness of the venue, we'll be able to perhaps comment on that, right?

COL GREEN: And I guess that -- maybe I'm parsing words, but I think the procedural decisions, the -- you can almost again just limit that in terms of what you feel comfortable reviewing.

MS. PETERS: And I could give an example of something that might be available. Again, we would have to go back and see how prevalent are the detailed records on proceedings. Let's say, what is the convening authority considering when he makes the decision to send something to a general court-martial or to deal a case or to dismiss all charges?

If the dismissal is coming on the recommendation of the Article 32 investigating
officer and the staff judge advocate, those are procedural decisions, and that context that might go to the issue of appropriateness, and again, we would owe you more analysis on how in depth we could go there. That might be an example of something that would assist with that part of the task.

MS. ROZELL: I'd like to comment.

That -- having analyzed these cases and input them into the database, I've seen trends over the different cases, and I have seen situations where prosecutors actually charged multiple charges for the actual -- the single incident, so they may charge a specification of rape, and they may also charge a specification of sexual assault for the same incident.

So there are -- I have seen multiple charges for the actual -- the same offense.

MR. STONE: You know, that's a common practice typically in criminal cases because a prosecutor does not know whether he is going to be able in the eyes of the fact finder to prove
every single one of the elements that he needs
for the greater offense, so it is very common
that he will charge lesser offenses in the same
indictment and later, after he has got his
conviction, he'll dismiss those other counts,
which he wouldn't be able to go forward on anyway
under the double jeopardy clause.

But the idea is you're not sure what
your evidence is going to be and how it is going
to prove out until you put it on the stand.

There is precedent federally that you
can convict on a lesser included charge even
without charging it, but in many other
jurisdictions, you have to charge the lesser
offenses as well, although you are only going to
get a conviction on one, so yeah, it's --

MS. ROZELL: I understand that, sir.

I have also started to notice, now
that we have the SVCs available to the victims,
going forward, I think we've made some
recommendations to gather additional documents
that capture that information, and whenever it
comes to say a discharge in lieu of court-martial, I have seen more times where there is actual documentation in the record where the victim has been -- their recommendation as far as the disposition of the case, they get the victim's preference as to whether they agree to it or not.

So that is something that I think that is valuable to capture in the future, as well as incidences where there have been lack of victim participation. I have been able to capture that where I can, and I hope that we can gather that information as we go forward to find out maybe what is the -- you know, what is a factor in why the case is not being, you know, completed at trial.

VADM TRACEY: Those two data elements are available in the data for the cases that you --

MS. ROZELL: In the cases in which I found it. I think going forward with gathering information for the upcoming fiscal years, I
would like to get that information in all the cases. That's something that we may be able to capture in the future.

VADM TRACEY: Where it's available, you have captured it --

MS. ROZELL: Yes ma'am.

VADM TRACEY: -- in this data set?

Okay.

CHAIR HOLTZMAN: But normally, it's not? I mean, it seems to me in one of the -- one of the data elements you should be looking for then is the role of the -- one, is there an SVC, and also whether the victim has had some opportunity to be heard with regard to sentence or with regard to -- particularly with regard to sentence.

So that might be another actual explicit factor that you --

MS. PETERS: Yes ma'am.

CHAIR HOLTZMAN: -- ought to be considering.

MS. PETERS: -- that would be easier
to track as the congressional updates, the '14
and '15 NDAAs, are implemented as far as when
victim input is required to be considered at
referral, when pre-trial agreements are decided,
and one of our issues we ran into is we carved
out a spot in the database to look for this and
to look for this in records, so you really have
to have a complete record.

CHAIR HOLTZMAN: I see.

MS. PETERS: And you have to have --

CHAIR HOLTZMAN: So you -- in other
words, you're trying to find it, but it's not
there?

MS. PETERS: It's not always there,
right, yeah.

CHAIR HOLTZMAN: Okay.

COL GREEN: Because a Special Victims'
Counsel is not necessarily making an appearance
in the case, it may not be --

MS. PETERS: Yeah.

COL GREEN: -- or it may not be known
from the full record, and in particular, it may
not be known from the records we have whether an
SVC was involved.

CHAIR HOLTZMAN: Well, is one of the
outcomes of our consideration of this material a
suggestion as to additional data elements to be
captured in whoever is keeping the basic records
here, for example, noting whether there is a
Special Victims' Counsel, for example noting
whether the victim spoke?

I mean, if they are not capturing that
information now, that may be a recommendation
that we want to make to DoD about the future.

COL GREEN: Right. Ma'am, I think
this whole concept of the records that -- or the
data that we've been able to obtain is novel --

CHAIR HOLTZMAN: Okay.

COL GREEN: -- and so I think parts of
that, in addition, the Panel's recommendations of
important things that were not available that you
would like to see tracked obviously would seem to
be a good idea to think about.

MS. ROZELL: One of the areas that
I've also noticed in the case records is that
even though there may be a DoD form for the
Services to use, earlier in the FY13 -- or '12
and '13 and even in the '14 cases, that the
Services actually use their own forms, and so
therefore, they are not capturing the same
information on those forms.

MR. STONE: And I might add in
explanation of why it's going to be difficult to
find, until LRM, I don't think victims' counsel
were granted standing, which would have appeared
in the records, in any of these cases. They
could be there, but they were not allowed to --
they were not -- their appearance was not on the
record, they didn't have standing, and they still
don't expect in those 412 and 513 hearings. That
is one of the ongoing issues, whether they can
say anything, so many of those military judges
take the position that, correctly, they are not a
party, and so you don't find in the records, even
though they may have been present, so I can see
why it's difficult for them to find it.
CHAIR HOLTZMAN: Right, but they could
do it in the future if we suggested that.

VADM TRACEY: And importantly for this
report, you could capture the number of instances
in which you found evidence of those occurrences
and what those -- were there any patterns in
those outcomes.

CHAIR HOLTZMAN: Exactly.

MS. ROZELL: I think the biggest area
that I saw that wasn't captured on specifically
the charge sheet was what forum, whether it was a
panel, and this was in the early like FY12 and
some of the early FY13s as well, is that some
Services were using their own form that didn't
capture what forum was used. Some did.

As of January of '14, there is an
updated form for the Article 32 that actually
specifies whether or not an SVC is used or is
involved, so that hopefully, if those forms are
being used and that information is captured, then
we'll be able to, you know, highlight that
information as well.
That is the only -- that is the only form that I have seen change to actually check whether or not there is SVC involvement.

CHAIR HOLTZMAN: If there are no other questions, then we are finished with this. Do we have any other -- do you have any further comments you'd like to make to us? Dr. Spohn, have you finished your --

DR. SPOHN: Yes.

CHAIR HOLTZMAN: -- remarks? Well, I --

COL GREEN: And the only thing we have left is --

CHAIR HOLTZMAN: Colonel Green?

COL GREEN: -- we presented, again, just to -- just to get an idea of the Panel's desired area for focus --

CHAIR HOLTZMAN: Well, we have another whole -- is this -- is this this presentation or the next presentation?

COL GREEN: Well, we sort of blended them all ma'am, so --
CHAIR HOLTZMAN: Well, we should take a break.

COL GREEN: If you want to take a break.

CHAIR HOLTZMAN: I am trying to figure out about a break, so let's just take a break now, okay? And if we're finished with this Panel, I just want to say thank you to all of you for this excellent presentation and your staff work, excellent staff work.

(Whereupon, the meeting went off the record at 2:30 p.m. and resumed at 2:47 p.m.)

CHAIR HOLTZMAN: We are nearing the end of this hearing, so -- meeting.

So our next presentation is a staff presentation on identifying focus areas for further examination regarding military sexual assault adjudications, and Colonel Green, you're going to guide us again, as always, in your very competent manner. Thank you.

COL GREEN: Thanks, ma'am.

And I will turn this over to the
staff. Our process in this, and obviously again, going back to my initial discussion, was how broad the scope of what could be looked at through the data really is, but then getting back to your key issues and what Congress has asked you to do.

And so one of the things the staff has done is try to look at each one of those questions and brainstorm along with Dr. Spohn what the key areas are and what the key focus points might be for analysis that might provide information to you, and more importantly, might represent the system health of the military justice system in terms of how it's processing Article 120 cases.

CHAIR HOLTZMAN: So are we looking at this pink sheet?

COL GREEN: Yes ma'am, and so --

CHAIR HOLTZMAN: Okay.

COL GREEN: -- I'll just pass it over to Meghan and Terri to talk more specifically about the ideas they've come up with.
CHAIR HOLTZMAN: Thank you.

MS. PETERS: Yes sir. And rather than
go through every single question, I'll just
begin, highlight some of those key areas.

And in picking apart each task, you
have three of them in this sheet, there is some
overlap here, so we tried not to duplicate
questions or get caught up in which question fit
best with each task. I think you can kind of get
a sense of the purpose behind the tasks
generally.

So we tried to look at the first task
as looking at decisions as to disposition,
disposition being court-martial or some type of
alternative disciplinary action.

And the questions tend to focus on
what happens by offense: how are offenses treated
in the judicial process? And they -- this
hearkens back to Dr. Spohn's brief and ours
about, you know, this is informed by what we
already have largely and what we think we can
deliver, informed by what is important.
But we know that we can break things down by -- you can look at service, by service trends, for how offenses like rape and sex assault are tried or disposed of. We can look at at least a trend over three years, and I think I would defer to our expert as to whether three years makes a trend, but it is -- it is a start, and we know that this issue will continue in the Panel's review in the future.

And then to the extent that decisions -- asking to look at decisions means look at what happens before the outcome, right, what happens at the 32, Article 32 hearing, and what happens at that referral decision, and it might also encompass again what is the percentages of results, like conviction or acquittal or full dismissal?

So we tried to take a lot of those factors that we said were prevalent in those records of trial document and unpack them into these questions. The first one is again going to focus on the procedure. I think in number 2, you
are looking at trends in punishments by level of court-martial, so we went and collected records on general, special, and summary court-martials.

And then we also I think touched on the fact that we have comparative data, to the extent it's available, anyway, and we will see how that bears out in the federal and state level.

So we suggested that the Panel look at how do our convictions and sentences compare, and that might ask the Panel to make a qualitative judgment on the value of those punishment options in the military, like a punitive discharge, which is often issued in conjunction with a term of confinement.

The third task, and again, every single one of these mentions courts-martial, but I think they focus on a different aspect of the process and try to come at it by --

CHAIR HOLTZMAN: You say third, you're talking about number 3 on page --

MS. PETERS: Yes ma'am, number --
CHAIR HOLTZMAN: Okay.

MS. PETERS: -- 3 here, and I'm trying
to give an overview of what we tried to capture
generally, again, rather than walking through
each specific question, because I think the
questions -- we would defer to, you know, some of
the Panel's sense of where to go with this.

But task number 3, review and evaluate
courts-martial for sex assault, and you're
covered by --

CHAIR HOLTZMAN: I don't know what you
are reading. I am sorry.

MS. PETERS: I will direct you. So --

CHAIR HOLTZMAN: Where are you?

MS. PETERS: I am on page two. So on
the first page that you're looking at, you have
the first task --

CHAIR HOLTZMAN: Oh, you mean number
3? This, with the number sign?

MS. PETERS: Right.

CHAIR HOLTZMAN: Oh, I thought --

MS. PETERS: Yes ma'am.
CHAIR HOLTZMAN: -- you were talking about -- okay. So this is the second page?

MS. PETERS: So the --

CHAIR HOLTZMAN: If you number the pages.

MS. PETERS: -- document, and I'll just go back to how we structured this, we listed the task, statutory task, on the left, and it's in italics. We designated it 1, 2, and 3, though in the JPP's charter, it might have an a, b, or c designation.

So -- but in the order in which the tasks appeared in the statute, that is the order they are listed in this worksheet, in this three-page worksheet.

So the first task is -- is listed in italics there for you to revisit, decisions, consistency, and appropriateness of decisions, punishments, and actions based on the facts of individual cases.

Then on the right, we associated a number of potential research questions that could
give you information to inform your review in task 1.

The other part of the staff's undertaking is to say maybe before you get to individual questions, is it valuable to go through an exercise of saying well what is really behind a task? Are there sub-questions, categories of issues, before you get to the specific questions?

So just to use the first page as an example, you have task number 1 in italics, and then what you have is the staff's suggestion as to a foundational issue directly underneath it, and we just highlighted it as a foundational issue. That is just a staff note. That is not in the charter, that is just, again, our suggestions for a direction, as are the questions on the right, are purely a staff product of ways we can look at the data to inform the task.

MS. SAUNDERS: And as Meghan had pointed out, you will see a lot of overlap. For example, in question 1, they talk about
appropriateness of punishments, and they do the
same thing in the second question as well, so
rather than just keep repeating questions over
and over again, we just tried to consolidate
them, and when it comes time to ultimately put
all of this together into a report, it is really,
you know, it is really not going to matter. We
will deal with them all as one big group.

MS. PETERS: And our thought was if
there is -- if the Panel has some time to absorb
the association the staff has made here between a
task and a related question, are there questions
that you think from this list are pertinent? Are
there some you would add or take away in the
general sense?

MR. TAYLOR: So if I could just ask
this question again, it goes back to the
fundamental task, and that is identifying trends,
and it may be, Dr. Spohn, that you are the right
person to answer this, or at least to address my
question.

How -- do you think at this point you
have enough data in enough different categories
so that you can statistically say for any of
these areas you can identify a trend as opposed
to reporting what it is percentage-wise or some
sort of breakdown?

DR. SPOHN: Well I don't think that
you can say that based on three years of data
that there is a trend. I think you would need
longitudinal data over let's say a decade to be
able to say that there are trends in how these
cases are disposed.

That said, we can look at outcomes by
year and see if there are differences in the way
that the cases are handled.

MR. TAYLOR: Well that's what I
thought you would say based on coming from a
public policy school, but -- so I think we just
have to acknowledge up front there is only so
much we can do. We can say what we know, but we
can't obviously say what a trend might be at this
point as to just a starting point, is that
correct?
MS. PETERS: I think that's correct. I think the trends might also exist in sort of a microcosm of how many times we see a certain charge go a certain way, or in the percentages of guilty pleas versus contests and conviction and acquittal rate.

It might have to grow, but if we establish a baseline or a foundation for this year's review that we build upon in next year's review, there might be some value to that.

But that three years, again, is also based on what we could get with reliability, I think, and again, if the trend is also, going back to the microcosm, just if we're not just looking at how things are treated over the years, but again, if we in consultation and in the data analysis process and it informs your view, then you can see how many times a commander -- we have 1800-plus decisions here, are we going to see some patterns for the numbers in where cases go and how many charges end up falling off every outcome, and how many times generally aggravated
sexual assault is going to a general court-martial? Do those numbers start the inquiry or inform what the trends to look for might be?

DR. SPOHN: Patterns is probably --

MS. PETERS: Patterns, okay, pattern, trend, okay. Not in the statistical realm, you, yeah, might cling to a word that you don't know exactly what we mean from the -- I guess in the statistics world, but we think that there are a lot of decisions to look at that, again, we might see a repeat pattern enough to kind of understand how the justice system is handling these cases.

CHAIR HOLTZMAN: I would just like to --

MS. PETERS: And whether that is consistent or appropriate might be discernible.

CHAIR HOLTZMAN: Well, I'd just like to follow up on kind of a point that Mr. Taylor made, which is that if you look at the question in number 2, we have to assess the consistency -- I am reading from the middle of the point -- the consistency of the punishments based on the facts
of each case. Now how are we going to do that?

Can we do that?

MS. PETERS: We don't have the full

records in every case.

CHAIR HOLTZMAN: Correct, so --

MS. PETERS: We don't have the

investigative files ma'am, so no, we can't do

that.

CHAIR HOLTZMAN: Okay. So right, so

just to follow up on his point, I mean, we can't

really answer number 2, and it's going to be very

hard to compare the punishments in federal and

state court because the statutes are not exactly

the same.

MS. PETERS: Yes ma'am, this goes back

to October's meeting.

CHAIR HOLTZMAN: Right, so -- so I

think some humility here is going to be in order,

I think. I don't know. I just raise that as a

kind of philosophical point, and without the

facts, it is very hard to know appropriateness of

the sentence, to follow up on the very wise
comment made by Admiral Tracey.

    MS. PETERS: Agreed, and we don't
believe the records tell you why. They just
might be able to give you some numbers, and --

    MR. STONE: But if you do have the
sub-categories of Article 120, that tells you
factually what was found to have been proven, so
like you were saying at the beginning, you'll be
able to separate penetrative from non-
penetrative, and maybe touchings from assaults,
and sexual contacts, so it seems to me that you
do have some basis there. Even though admittedly
it is defined by the legal terms, nonetheless,
some differences in the facts of the cases.

    And I was even going to add that I
wouldn't mind if on page one, just to make a
note, where you deal with (i), is there a
difference in the types and amounts of
punishments a judge didn't approve in cases where
there's a guilty finding on at least one Article
120 offense, I would hope that would be by the
different categories of 120 offenses so I knew
penetrative from non-penetrative, because you
know, on the most serious categories, that is
where we're the most sort of concerned about is
this being handled in a way that's appropriate?

CHAIR HOLTZMAN: Any other thoughts, comments, observations?

COL GREEN: Ma'am, the other --

CHAIR HOLTZMAN: Colonel?

COL GREEN: -- just one other note relative to trends or patterns or whichever the
case may be, and that goes to the fourth page, the additional areas of focus as determined by the Panel.

This Panel was tasked with assessing recent developments in the area of Article 120 law, and so one of the things that the Panel may be able to do over time or even subsequent reviews following the Judicial Proceedings Panel using this as a starting point for the data is -- are changes in the law that have taken place relative to the Article 32 proceedings, the requirement that penetrative offenses go to
general courts-martial, the changes in Article 32 in December of 2014, I mean, all those establish changes in the system that may be -- may create benchmarks that the Panel can look for treatment of cases prior to that to after the fact.

And again, I -- nothing that is going to be available right now, but our hope is that this data at least is a starting point to be able to make factual judgments on those changes rather than just subjective assessments.

CHAIR HOLTZMAN:  Good.

MR. STONE:  And maybe pose the questions for further review even if we can't answer them.

COL GREEN:  Yes sir.

MR. STONE:  Great.

VADM TRACEY:  You'll be able to categorize cases by which version of Article 120 they were being tried under, right?

MS. PETERS:  Yes.

VADM TRACEY:  Yes, okay.

MS. PETERS:  We have marked that out
in the database, and we'll be able to analyze that.

VADM TRACEY: Great.

CHAIR HOLTZMAN: Well, I guess then that concludes this part of the -- unless you have something else, Colonel?

COL GREEN: Well, just so -- just so that the staff is clear, our intent then is to use these as our research questions and to work with Dr. Spohn and the information we have and to try to bring you information and factual information, and at our next meeting on December the 11th, our goal will be to provide you factual information under these categories for your consideration.

And I guess obviously I know this is a list that we just provided to you, and if -- if there are other areas that individual Panel members recognize or think about over the course of time, please of course let me know, and we'll see.

We're within -- and we're working with
Dr. Spohn in terms of the limits of the data, and obviously it's a huge volume of data, and while we think we've made it as manageable as possible, we are in a limited time, and so with about a month to really try to build this analysis together, we're going to put together as much as we can.

CHAIR HOLTZMAN: Good. Well, thank you very much Dr. Spohn, Colonel Green, everybody on the staff, for the wonderful presentation. I guess we're up to public comment?

COL GREEN: Yes ma'am. If you give us a moment, we'll --

CHAIR HOLTZMAN: Okay, thank you.

(Pause.)

CHAIR HOLTZMAN: Mr. Perry and Mr. Cooley, we are ready to hear from you, please. Are you testifying together, or are you -- no, okay, fine.

Okay. Well then let's do one at a time, yes sir.

Mr. Perry, we have you first. Sorry.
I don't know why that's the case, but anyway, you are here first.

Welcome to the Panel, Mr. Perry. I think you are familiar with the ground rules, so you can commence.

MR. PERRY: Yes, Madam Chair.

CHAIR HOLTZMAN: Thank you.

MR. PERRY: Good afternoon.

CHAIR HOLTZMAN: Good afternoon.

MR. PERRY: Madam Chair, members of the Panel, thank you very much again. I appreciate your time in allowing me here to testify here for you again.

As you recall, I was here at the October 9th meeting representing Center for Prosecutor Integrity and expressing our concerns for the preservation of due process, the presumption of innocence, and not shifting the burden of proof in sexual assault cases onto the accused.

Since that time, we have had an opportunity to meet with several offices
representing the House Armed Services Committee
and the Senate Armed Services Committee.
Specifically in that time, we visited 19 offices,
both Democrat and Republican together, their
perspectives on some of these issues.

And during those meetings we did have
what I would categorize as -- as candid and open
discussions about these issues, and I would say
like us, they do want to ensure that we are
seeking justice here and preserving the integrity
of the system, which is -- is paramount.

So we felt it important to let you
know some of their thoughts and what we were
hearing during these meetings, and as such, we --
I have drafted a letter dated October 9th that
was submitted to the Panel for review, and
hopefully you have received that.

In that letter, we did highlight the
viewpoints of the staffers from the HASC and SASC
Committees, but just to highlight a few general
consensus opinions, these staffers were -- I
believe all but one were either vets or active
duty themselves, so they were very much in tune
with what is going on and what the most recent
developments have been.

And they did acknowledge that there
has been a push for more convictions, and that is
being felt amongst the ranks, and we did hear
several staffers indicate to us that in their
perception, there is a bit of a -- a hostile
environment for the Servicemembers in terms of
fear of allegations against them, and then also
on Capitol Hill as well in terms of political
agendas being pushed in this area.

So they are cognizant of the issues,
and they also share our concern that the pendulum
could swing too far if we try to make too many
changes in this area too quickly.

So we were happy to hear that they are
eager to continue discussions with us, and again,
in the October 9 letter, we have reiterated our
general recommendations from the previous letter
that we supplied to the Judicial Proceedings
Panel to help prevent situations like what
occurred in the Lamar Owens case, which was also
attached in your letter that was presented today,
things such as the undue influence, over-referral
of sexual assault cases, and presumption of
guilt.

So those are the issues we are hoping
to -- to tackle, and we do plan to work with the
staffers and create recommendations for the NDAA
2017 to maintain due process and fundamental
fairness. As such, we also look forward to the
recommendations of your Panel as well and hope
that you keep these considerations in mind when
you do make your recommendations.

So with that, I thank you for your
time, and again, I appreciate all of the hard
work and effort that you're putting into this
issue. We greatly appreciate it.

CHAIR HOLTZMAN: Thank you very much,

Mr. Perry. Any members of the Panel have any
questions, comments?

I just want to say --

HON. JONES: Nice to see you again.
CHAIR HOLTZMAN: -- thank you again --

MR. PERRY: Very nice to see you as well, Judge, thank you very much.

CHAIR HOLTZMAN: I just want to make a point that we are supposed to be an independent Panel, so the views of the members of Congress really should not influence our deliberations.

MR. PERRY: Understood.

CHAIR HOLTZMAN: That's a point for the future.

Thank you very much.

Mr. Cooley, please come forward.

Thank you, Mr. Cooley. Welcome to the Panel.

MR. COOLEY: Thank you.

CHAIR HOLTZMAN: I guess the ground rules have been explained to you.

MR. COOLEY: They have.

CHAIR HOLTZMAN: Thank you.

MR. COOLEY: Are we ready?

CHAIR HOLTZMAN: Yes.

MR. COOLEY: Madam Chair and members of the Panel, it's an honor to appear before you
and on behalf of the Law Firm of Jordan Guydon, I
would like to present some comments about Boards
for Correction of Military Records.

I am Howard Cooley, a retired Army
Colonel, and my colleague sitting in the back
there is Daryle Jordan, a veteran of the Gulf
War. And that is the perspective that we're
using.

In 1946, an angry public confronted
Congress regarding the military's abusive
treatment of Servicemembers during World War II.
Congress and President Truman understood the
problem and shaped the law to be responsive.
Through an enactment of one of the last major
structures of the New Deal, Congress and
President Truman created the Service Boards for
Correction of Military Records, which have
unparalleled administrative power exceeding those
of federal courts in numerous respects.

Then, in the 1980s and the 1990s,
after Congress discovered mismanagement by all
service BCMRs, Boards for Correction of Military
Records, it resculpted the law to include a ten-month adjudication time clock.

Today, some 20 years later, the sexual assault pandemic in our military has presented yet another defining moment. The question is whether BCMR's substantive and procedural processes are rigid or evolutionary.

We believe the sexual assault challenges once again calls for the reshaping of the law, policies, and the flow of equity with vision, imagination, and foresight, and as you know, your task in that process is vital.

Under the practice of BCMRs today, a young female private woman who enters the service in part to escape the trauma of sexual and physical assault in her hometown would probably need to call Olivia Pope from Shonda Rhimes' hit show "Scandal" to escape sexual assault from her enlisted and officer supervisors, a trauma that might cause her to think about suicide.

She would not trust her chain of command, with its repressive record of a 62...
percent retaliation rate against women who raise
sexual assaults. The private would also be
worried that equal opportunity officers and other
individuals in the installation have been
compromised by the command.

Despite their enormous power,
particularly in equity, and the extraordinary --
the extraordinary sacrifices of the service
members, BCMRs have refused to open the channels
for expedited or extraordinary relief for alleged
victims of sexual assault, gender discrimination,
or discrimination based on sexual orientation, or
for anyone else, for that matter.

That, however, is not the only example
of the BCMRs' adherence to prudential
considerations at the expense of due process and
fairness for service members. In fact, the Navy
has -- has a record of refusing to hold a hearing
for 20 consecutive years. The Coast Guard has
refused to hold a hearing for 10 consecutive
years, that is, as of the end of 2013. And the
Army has attempted to emulate the Navy and the
Coast Guard in terms of not having hearings.

As a result, it is a Herculean task for most service members to successfully challenge the credibility of the chain of command before the Navy and the Army BCMRs in particular, and that strikes at the heart of sexual assault credibility challenges.

Further, the Army --

CHAIR HOLTZMAN: Mr. Cooley, I think they are holding up a one-minute sign, just for your --

MR. COOLEY: Oh, really? I timed it at 4:30. I guess I am going slower today, so let me move along.

All right. Here is the bottom line. What we're saying is that it is time to have a private -- a separate DoD Board for Correction of Military Records system for sexual assault, a DoD level which was in existence in 1946. Have that, give that organization extraordinary relief power so that when people who are trapped in an island somewhere, a young lady is trapped in an island
somewhere, can call the Board, and the Board can immediately, through the extraordinary relief powers, move her, transfer her, help her, or assist her immediately.

This is what is needed, combat power on the ground with an entity that has the authority to make it happen.

Secondly, let BCMRs be a -- let the Air Force, the Navy, and the -- and the Army BCMRs, have them all -- my time is up.

CHAIR HOLTZMAN: Another 30 seconds, sir.

MR. COOLEY: Have them appeal all cases regarding sexual assault, gender discrimination, and sexual orientation discrimination. Allow those cases to be appealed to the Boards for Correction, the DoD Board for Correction of Military Records.

Why? Because the Navy does not have hearings. The Army does not have hearings. I read that testimony when they came here. They do not have hearings.
And so as a result, credibility determinations cannot be made, and women cannot be made whole, and neither can other victims, and so therefore, we are proposing a DoD-level Boards for Correction of Military Records that deals with sexual assault and related matters only, not relief for cause of murder or anything else.

But that is because this is such a pernicious problem. You've got a high suicide rate that, as a result of sexual assault for women, $4.5 billion is expended every year to take care of these individuals, the women who have been affected by this.

So this is -- we have to stop this, and this is the way to do it.

Somebody -- and lastly Madam Chair, if I may, the supervisors don't work because they are the ones that engage in sexual assault. The commanders, the commands don't work because they are the ones that are engaged in retaliation. The Boards for Correction of Military Records don't work. Okay, the Air Force does, but -- and
the Coast Guard has lawyers, but the Army and the Navy, they're not effective in the area of challenges to a command -- to the decisions by members of the chain of command.

You have to even this out, and the way to do that is to have a higher board, a DoD board, for sexual assault matters. This board was created, a general DoD board was created in 1946. Eisenhower appointed the board when he was Chief of Staff. And that way, it equalizes it so that women can have relief.

And finally --

CHAIR HOLTZMAN: Thank you, Mr. Cooley.

MR. COOLEY: I beg your pardon?

CHAIR HOLTZMAN: I think the time has expired.

MR. COOLEY: Thank you.

CHAIR HOLTZMAN: So I appreciate your --

MR. COOLEY: Thank you.

CHAIR HOLTZMAN: -- your coming before
us, your thoughtful testimony, and your willingness to help educate us on this problem. We very much appreciate it.

MR. COOLEY: Thank you, Madam Chair, and --

CHAIR HOLTZMAN: Thank you.

MR. COOLEY: -- and the Panel.

HON. JONES: Thank you.

CHAIR HOLTZMAN: Mr. Sprance?

MR. SPRANCE: The meeting is now closed.

CHAIR HOLTZMAN: Thank you.

(Whereupon, the meeting in the above-entitled matter went off the record at 3:18 p.m.)
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