

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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MEETING

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FRIDAY
MARCH 11, 2016

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The Panel met in the Holiday Inn
Arlington at Ballston, Ballston Room, 4610 North
Fairfax Drive, Arlington, Virginia, at 9:49 a.m.,
Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman
Hon. Barbara Jones *
Victor Stone
Tom Taylor

WITNESS

Dr. Cassia Spohn

STAFF:

Colonel Kyle W. Green, U.S. Air Force - Staff
Director
Dale L. Trexler - Chief of Staff
Kirt Marsh - Attorney Advisor
Meghan Peters - Attorney Advisor
Terri Saunders - Attorney Advisor
Sharon H. Zahn - Senior Paralegal

Dwight Sullivan - Designated Federal Official

*Participating by telephone

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Adjourn

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2 9:49 a.m.

3 CHAIR HOLTZMAN: Good morning,
4 everybody. Morning, everybody.

5 MR. SULLIVAN: Good morning. This
6 meeting is now open. This is the public meeting
7 of the Judicial Proceedings Since Fiscal Year
8 2012 Amendments Panel, also known as the Judicial
9 Proceedings Panel.

10 I am Dwight Sullivan. I am an
11 attorney with the Department of Defense Office of
12 General Counsel, which serves as the sponsor of
13 the Judicial Proceedings Panel.

14 Today, I am the Designated Federal
15 Officer for this meeting because Ms. Maria Fried
16 is TDY.

17 The JPP is congressionally mandated to
18 conduct an independent review and assessment of
19 judicial proceedings conducted under the Uniform
20 Code of Military Justice involving sexual assault
21 and related offenses since amendments were made
22 to the Uniform Code of Military Justice regarding

1 these offenses by Section 541 of the National
2 Defense Authorization Act for Fiscal Year 2012.

3 The distinguished Members of the Panel
4 are as follows: the Chair, the Honorable
5 Elizabeth Holtzman; the Honorable Barbara S.
6 Jones; Vice Admiral (Retired) Patricia A. Tracey;
7 Professor Thomas W. Taylor; Mr. Victor Stone.

8 Additional information on the
9 establishment of the Panel, Panel membership, and
10 its charter is available on the JPP website.

11 Madam Chair, we are ready to begin.

12 CHAIR HOLTZMAN: Thank you very much,
13 Mr. Sullivan, and good morning, everybody, Panel
14 Members, members of the public, and Staff.

15 I'd like to welcome everyone to this
16 meeting of the Judicial Proceedings Panel. Three
17 of the five Panel Members are here in person.
18 Judge Jones will join us by phone as her schedule
19 permits today. Admiral Tracey could not attend
20 today's meeting.

21 Today's meeting is being transcribed,
22 and the meeting transcript will be posted on the

1 JPP's website.

2 The Judicial Proceedings Panel was
3 created by the National Defense Authorization Act
4 for Fiscal Year 2013 as amended by the National
5 Defense Authorization Act for FY 2014 and 2015.

6 Excuse me. Let me also apologize for
7 my voice. I have been recovering from a really
8 bad bout of bronchitis.

9 Our mandate is to conduct an
10 independent review and assessment of judicial
11 proceedings conducted under the Uniform Code of
12 Military Justice involving adult sexual assault
13 and related offenses since the most recent
14 amendment to Article 120 of the UCMJ in 2012.

15 Today's meeting is devoted to
16 deliberation on our upcoming report to Congress
17 and the Secretary of Defense on the military's
18 adjudication of sexual assault crimes. To
19 prepare for today, our Staff developed an initial
20 draft report that summarizes information received
21 by the Panel. We will review this draft and
22 discuss what findings, conclusions, and

1 recommendations we will include in our report.

2 The significant work required for the
3 Panel to obtain and evaluate data regarding the
4 military's adjudication of sexual assault cases
5 has been ongoing since the fall of 2014, and the
6 Panel could not have conducted this review
7 without the assistance of others. We were very
8 fortunate to be supported by a tremendous team of
9 technical experts, including Justin Coughlin and
10 Jeff Myers from the Application Engineering
11 Branch of the Washington Headquarters Service,
12 who designed and constructed from scratch a
13 database that allows the Panel to accumulate and
14 then analyze case information. We are indebted
15 to them for their commitment and their tireless
16 support of the JPP's work.

17 Similarly, we very much appreciate the
18 analysis and insight provided to us by Dr. Cassia
19 Spohn. Dr. Spohn is a nationally recognized
20 expert in --

21 HON. JONES: Barbara Jones.

22 CHAIR HOLTZMAN: Welcome Barbara,

1 Judge Jones --

2 HON. JONES: Thank you.

3 CHAIR HOLTZMAN: -- sorry.

4 HON. JONES: Thank you. I am sorry I
5 was delayed.

6 CHAIR HOLTZMAN: I am just reading my
7 introductory remarks.

8 HON. JONES: Oh --

9 CHAIR HOLTZMAN: Dr. Spohn is a --

10 HON. JONES: -- I'm doubly sorry.

11 CHAIR HOLTZMAN: No problem.

12 Dr. Spohn is a nationally recognized
13 expert in criminology, and her assessment of the
14 case data obtained by the JPP and her guidance to
15 the JPP and our Staff has contributed immensely
16 to our review. We look forward to continuing our
17 collaboration with Dr. Spohn in future -- future
18 Panel assessments.

19 I gather, by the way, that Dr. Spohn
20 will be on the phone?

21 Col GREEN: She is with us now.

22 CHAIR HOLTZMAN: She is with us now.

1 Good morning, Dr. Spohn, and welcome.

2 DR. SPOHN: Good morning.

3 CHAIR HOLTZMAN: Finally, each public
4 meeting of the Judicial Proceedings Panel
5 includes time to receive input from the public.
6 We received no public submissions or requests for
7 today's meetings -- meeting. All written
8 materials received by the Panel Members for
9 today's meeting and previous meetings are
10 available at the JPP's website, which is
11 jpp.whs.mil.

12 Thanks very much for joining us today.
13 We're ready to begin with our deliberations.

14 Colonel Green, do you want to guide us
15 through this process?

16 Col GREEN: Yes ma'am, good morning,
17 good morning Panel Members.

18 I just -- to begin today, I would
19 first just recap and then turn it over to our --
20 our -- the Staff experts on this.

21 Today is -- as you mentioned, today is
22 intended to deliberate on your discussion of

1 court-martial data and trends in the military's
2 adjudication of sexual assault defenses. Late
3 last week, I sent the Panel Members the Staff's
4 initial draft report, without Panel analysis, of
5 course, but the Staff's initial draft report on
6 military adjudication and also a deliberation
7 guide to help you go through the issues that we
8 believe, the Staff believes, were raised by what
9 you've received and what's -- what's documented
10 in the report.

11 The only thing I would note is, as
12 always, is this is the Staff's attempt to
13 consolidate this information and bring you what
14 we -- we think you may want to discuss, but of
15 course, this is open-ended, and so any other
16 issues, you know, the Staff will adjust any and
17 all materials according to what you want to
18 discuss today.

19 So with that, I will turn it over to
20 Meghan to go over the deliberation guide.

21 CHAIR HOLTZMAN: Okay. So everyone
22 has a copy of the deliberation guide in front of

1 him or her? Okay.

2 MS. PETERS: Yes ma'am, and thank you,
3 sir, and good morning, Members of the Panel.

4 I will orient you to what you have in
5 your folders in front of you and what will be on
6 the screen behind me. There is a slide
7 presentation behind me that's just going to
8 contain sort of the top-line issues that are
9 highlighted in blue in each of the -- in each of
10 your deliberation outlines, and that is literally
11 just a guide so we can all stay on the same page
12 as far as the issues in the deliberation outline.

13 So you may have a copy of the slides
14 in front of you. In addition to that, I think on
15 the right side of your folders is a more detailed
16 issue-by-issue guide, yes, that parallels the
17 flow of the draft report.

18 CHAIR HOLTZMAN: It's entitled JPP
19 Deliberation Guide for Court-Martial Data and
20 Trends, 3/11/16.

21 MR. STONE: Yes, we got that sent to
22 us.

1 CHAIR HOLTZMAN: Okay.

2 MS. PETERS: Good, all right. So
3 that's the primary guide for the Staff's input
4 into your discussion today of the court-martial
5 trends data. What we did with the deliberation
6 guide was again the Staff has suggested five
7 issues that the Panel consider, and again, they
8 mirrored the major sections of the draft report.

9 These are -- Staff again proposed
10 issues. We have proposed issues to you in the
11 past, and I think that's been an evolving process
12 as well, especially as we pulled all the
13 information together, all the background
14 information for the report. So these questions
15 don't exactly mirror what you've seen before, but
16 it's all along the same lines.

17 And we wanted to take them in order,
18 again, to match the flow of the report. Some of
19 this is intended so that the Staff can resource
20 and highlight the data that you have already
21 received. Dr. Spohn is available as well for
22 comment on specific issues, of course her report

1 and her expertise in the use of data analysis
2 informing policy and making system assessments
3 and whatnot in her field, in criminology.

4 So we want to bring her expertise, and
5 Terri and I will bring our background and the
6 information we gathered to help walk through the
7 deliberation outline.

8 Again, the issues that we have
9 identified here stem from the statutory tasks,
10 with one glaring exception, and that is Issue 1
11 that we have for you on page 1, is about data
12 collection and analysis. That is not spelled out
13 in your statutory tasks. However, the Staff's
14 process of identifying information that the Panel
15 would need highlighted issues with regard to the
16 military's data collection and analysis.

17 So the first issue we wanted to
18 propose to you is whether the Panel felt it --
19 that they should comment or discuss DoD's
20 comprehensive data collection in the annual SAPRO
21 reports as well as the various military-specific
22 systems or Service-specific systems that we

1 found, in not one instance, could answer all of
2 the questions that were posed to the Panel, for
3 example, how many sexual assault cases are going
4 on in your Service right now? It is a very
5 difficult question to answer.

6 And so a lot of the notes in this
7 deliberation outline and a lot of the questions
8 we then break down below Issue 1 are meant to
9 highlight those concerns that the Staff had.

10 Services each collect data for
11 different purposes and in different ways. It is
12 mostly a localized process. They just want to
13 know how many cases are going on in their
14 jurisdiction, and it is not offense-specific for
15 the most part.

16 And when we went to DoD and looked at
17 SAPRO reports to see well this is the
18 Department's comprehensive sexual assault
19 information gathering and reporting effort, and
20 they're addressing the concerns of Congress, we
21 found, one, that it was inadequate to address the
22 questions in the statutory tasks which focused on

1 details, case outcomes, the adjudication process
2 for sexual assault, and then specific punishment
3 data. None of that was available in the
4 Service's or the DoD's systems.

5 Now whether that is a shortcoming of
6 the DoD's system is, you know, a separate
7 question, but we also found that it was very
8 difficult to follow DoD's data collection
9 methodology as it relates to adjudication data.

10 So we found that when you looked at
11 court-martial results or the reported results of
12 disciplinary matters, we as a Staff had
13 difficulty answering statutory tasks and finding
14 consistency in the reporting from year to year
15 and from Service to Service, and sort of
16 difficulty following DoD's methodology for
17 reporting this information, so we did not feel
18 that -- we found the fact that SAPRO's data was
19 not something that the Panel could purely rely on
20 was an issue that might warrant discussion and
21 thought.

22 So the first question is: does the

1 Panel wish to comment on any of this? DoD
2 developed an incident database, an electronic
3 database, to collect all this data, and it is
4 supplemental to and separate from all of the
5 military's Service-specific JAG Corps systems for
6 tracking cases. They don't talk to one another,
7 and in some places, they're duplicative or just
8 entirely different in their focus.

9 So there is a lot of effort I think
10 that's put into DoD's data collection. And the
11 other thing is they validates their data one time
12 annually. At the close of the fiscal year, they
13 look back and say how many sexual assault cases,
14 you know, do we have? And -- and that's again to
15 answer the congressional mandates that they've
16 been given and answer these questions, but is
17 that something that's -- that's adequate? If
18 we're interested in using data to assess the
19 military justice system, is that going to answer
20 the right questions? Is it focusing on the right
21 things?

22 I mean, this database is supposed to

1 also help victim services personnel in the field
2 manage their cases and collect information about
3 the incidence of crime, about what is being done
4 with victims. Are they being informed? Are they
5 being cared for? Are they being referred to the
6 right places? This database is also supposed to
7 track that on a local level. But the Staff's
8 concern is -- is the reporting and collection of
9 adjudication data -- if it -- something that, you
10 know, really we found -- we found problems with
11 it as far as accuracy and consistency over the
12 years.

13 And adjudication data is very
14 specific. The legal system is complex. Trying
15 to aggregate the results of a complex legal
16 system across all of these Services across all of
17 these years is a difficult task. It was even for
18 the Staff. But as far as DoD's collection of it,
19 again, it wasn't up to the statutory tasks, and
20 we found some issues with the reliability of the
21 data.

22 CHAIR HOLTZMAN: Judge Jones, do you

1 want to comment about whether you think we should
2 address these shortcomings that we found?

3 HON. JONES: Well, let me begin by
4 saying, as you will remember, was the RSP
5 identified one problem with one of their
6 overarching tasks, which was to compare the
7 military justice system criminal process outcomes
8 with the civilian system. And we not only had
9 problems trying to figure out what the numbers
10 were in the civilian world, we also pointed out
11 that because all the Services used different
12 systems and also labeled parts of the process
13 differently, that it was impossible in many ways,
14 not just difficult for data gathering, but very
15 hard to analyze exactly what was going on.

16 And I remember that when the -- the
17 RSP went to brief the House Armed Services
18 Subcommittee, one of the first questions asked by
19 the Chair was how are we going to track whether
20 we're making any progress? And I remember saying
21 it's really hard.

22 So do I think we have to do something?

1 Yes. I have to confess that data gathering and
2 statistics is not my forte. I can't even imagine
3 how difficult this all was for the Staff, and I
4 understand that basically the Staff ended up
5 getting case files and -- and looking through
6 very, you know, basic data as opposed to being
7 able to -- to get the answers they needed from
8 any system.

9 I guess the only thought I have about
10 this is I'd love to see a system that provided
11 the information we need. I don't know whether --
12 well, I will say that I think, if I'm right on my
13 numbers, the number of sexual assault cases in
14 terms of the caseload is at least 40, over 40
15 percent. Maybe someone can help me there. Maybe
16 it's 50 or over 50 percent. But it's a
17 significant number of all the cases now.

18 Pardon me?

19 MS. PETERS: I think that was some
20 feedback.

21 HON. JONES: Hello?

22 MS. PETERS: I think that was some

1 feedback, ma'am. This is Meghan Peters on the
2 staff. I think that's just side noise. Nobody
3 here was -- was speaking up, so please --

4 HON. JONES: Oh, okay.

5 MS. PETERS: -- continue.

6 HON. JONES: Meghan, maybe you know
7 what the percentage of sexual assault cases is
8 compared to the -- the full caseload. It's got
9 to be over 40 percent, I would think. I think
10 that's the number I heard.

11 Anyway, the point of it is it's a
12 substantial number of cases, so maybe the
13 military should have a system for all cases, and
14 you should be able to get uniform information.

15 I think that is a huge job. I can't
16 imagine -- I don't know what the time would be to
17 do it or the cost. And as I said, I am not -- I
18 am not really somebody who is very expert in this
19 area.

20 CHAIR HOLTZMAN: Any other comments?

21 MR. TAYLOR: I would just like to add
22 that even though I don't consider myself an

1 expert either, the Staff's work indicated that
2 there were Service conflicts in interpreting the
3 DoD guidance about how to report and input data
4 into the database, so that's clearly a problem.
5 The database is only going to be as good as the
6 interpretations are consistent among the Services
7 as to what goes into it, so that's one thing the
8 Staff identified.

9 Another was that particularly when it
10 came to the Family Advocacy Program cases,
11 intimate partner cases, there was a mix of those
12 that ended up in the database that also made it
13 difficult to really compare apples to apples, and
14 then there was a whole list of shortcomings that
15 the Staff identified regarding the kind of data
16 that did not end up in SAPRO reports, and some of
17 that data would have been really important to
18 know if you're doing a serious examination and
19 analysis and comparison of our system with any
20 other system, or even the systems among the
21 Services.

22 So drawing on the list of shortcomings

1 that the Staff has already identified, it seems
2 to me that we definitely should be taking a stand
3 on getting a better handle on all of these data.

4 CHAIR HOLTZMAN: Mr. Stone, you have
5 a comment?

6 MR. STONE: Yes. I took your
7 presentation really to -- and all of these sub-
8 questions here, (a) through (e), to really be
9 asking two questions as the Staff looks forward
10 to doing whatever it's drafting next.

11 And the first question is, should we
12 be going into this information, these questions,
13 at all? And then what should we do about it?

14 And my view is there is no question that we have
15 to document and identify in the report what the
16 problems are that you encountered looking at
17 that, and I definitely think we need you to draft
18 that up for us.

19 I also think that you need to, at that
20 point, distinguish between problems that were
21 really significant that don't seem to be
22 addressable by the current systems, and the other

1 -- some of the other issues, which are
2 addressable and correctable, like you found they
3 made a mistake, they mixed cases in, they double
4 counted a few cases.

5 I think that's a different category,
6 and I think that we should recognize that every
7 system will have some problems, and we've noted a
8 few, and we think they can address those even
9 with what they have, but I think you separate out
10 those issues that can't really be corrected given
11 what we have.

12 Now the second and separate question
13 is -- after having explained that, which we have
14 to because we're reporting, the second question
15 is, should we be making any kind of
16 recommendations for future change, even if those
17 recommendations are that the military should
18 survey what states are doing in reporting sexual
19 assaults to see if there's a better system?

20 Should they survey, look at each
21 other's systems and see if there's one they could
22 all agree to do with certain modifications that

1 would take care -- in other words, what next
2 step, should they take a next step, and maybe
3 some suggestions on what those might be.

4 I don't think we have enough expertise
5 here to tell them exactly what we want them to
6 change or even know what their budget is, but --
7 and it seems to me what I'd like to see is a
8 draft of that so we will know whether we're
9 comfortable getting into a recommendation that
10 goes beyond just documenting that there's a
11 problem with this which my implication says
12 something has to be done and a few
13 recommendations that at least take advantage of
14 what we've seen to point them in some directions
15 that would be helpful.

16 And I guess I'd like to see some draft
17 language on both of those, and then later, we'll
18 be in a better position to know if that goes
19 beyond what we think, you know, we have the
20 expertise and the mandate to recommend or not.
21 But -- but the first part of that I think we
22 absolutely have to do that just to answer our --

1 answer or not completely answer the questions and
2 the issues we were told to address.

3 CHAIR HOLTZMAN: Well I agree. I
4 think that it's imperative for us to comment in
5 response to the question about how DoD and the
6 Military Services collect and analyze the court-
7 martial data.

8 My question to the Staff is the people
9 that we employed to develop our database system,
10 does that database system -- is that one that
11 could be expanded by DoD to resolve the problems
12 of data collection, or do they have to start from
13 scratch just as we did?

14 Col GREEN: No, that's -- ma'am, that
15 SharePoint site that -- and that SharePoint
16 system that was developed could be adapted, I
17 mean, whether the Services would use it as is or
18 would make modifications for different purposes,
19 obviously.

20 But in terms of a case analysis
21 system, that system was designed to track every
22 --

1 CHAIR HOLTZMAN: Right, so basically,
2 the military took that system now, DoD took that
3 system and started to input information. They
4 would get the information that Congress has asked
5 us to pull out easily. Is that correct?

6 Col GREEN: I think that is right.

7 CHAIR HOLTZMAN: So can we make a
8 recommendation, and would it make sense to make a
9 -- to at least advise the military that we
10 developed this system and that it's useable for
11 this purpose and that we would recommend that
12 they examine it to determine whether they feel it
13 does meet their purposes, but basically, if
14 Congress wants this information, there's a system
15 ready to go right now? Shouldn't that be
16 something we want to say? Or am I misstating the
17 --

18 Col GREEN: No, I think --

19 MS. PETERS: I think just to inform
20 that, based on the Staff's experience, the DoD
21 has developed this Defense Sex Assault Incident
22 Database. It's a victim-reporting-based

1 database, so if a SAPR person receives a report
2 of sexual assault, that incident is tracked from
3 report to its final legal resolution.

4 The -- to the extent that that system
5 is already deployed to all of the Services and
6 used by SARC personnel to manage their cases,
7 that exists, and the Staff didn't examine that
8 aspect of it, and that part might be fine, but
9 it's the issue of when they separately dive into
10 adjudication data using a DoD administrative
11 office that's not connected to the Service JAG
12 Corps, to the unique structure of the JAG Corps,
13 and is not connected to any command, they then --
14 and I don't know that they're advised by any
15 legal personnel about how they collect data --
16 they then take raw information from the Services.

17 They certainly have a database that
18 collects raw information. It doesn't collect
19 documents, it doesn't store documents. And DoD
20 determines the queries that they're going to run.
21 And that is where I think -- and how -- and they
22 also tell the Services how to categorize their

1 data, and that is why there is confusion and
2 disputes over the correct way to capture these
3 legal dispositions.

4 So it's -- it's really -- they've
5 developed a database. Congress mandated that
6 they use the database to respond to congressional
7 inquiries, so part of this issue is is Congress
8 asking the right questions, and is DoD answering
9 it in a way that informs Congress and also helps
10 the Services? Because the Services have to have
11 their own systems, and they have very limited
12 resources, and then double up and feed all this
13 information to a separate DoD database that
14 doesn't speak to them.

15 They can't run the same reports that
16 DoD can. The Services aren't getting the benefit
17 of that direct feedback that DoD could provide,
18 but theoretically, a database could provide to
19 them, so DoD runs a report for example in '14
20 saying these are all your sex assault cases, the
21 Services can't duplicate that report with
22 specific case names and look at jurisdictions or

1 figure out which one of their cases are even in
2 that report.

3 We're hoping that that issue -- that's
4 a systematic issue that's hopefully going to be
5 resolved next year, but every time we looked at
6 an issue, we came back to is, it just problematic
7 that DoD SAPRO was collecting and analyzing
8 adjudication data? Could that be handled
9 elsewhere, or could they be doing it differently?
10 Could they be doing it better? Or should
11 somebody else -- should that be tasked down to
12 the Services where the legal personnel are?

13 Because the way they categorize and
14 present adjudication data in waterfall charts,
15 and they exclude FAP cases because they're
16 controlled by this policy about, you only
17 categorize cases based on who provides victim
18 services, but adjudication data is controlled, we
19 know by a subject in a court case, then they do
20 some kind of algorithm to filter all of that out,
21 and again, it's entirely disconnected from, you
22 know, the folks who are much closer to the legal

1 case, to the legal officers --

2 CHAIR HOLTZMAN: Well maybe my --

3 MS. PETERS: -- who are supervising
4 the case --

5 CHAIR HOLTZMAN: -- question is not
6 the right question.

7 MS. PETERS: Yes.

8 CHAIR HOLTZMAN: Maybe my question is
9 the following: does DoD at this time have a
10 computer system that could collect this data and
11 then spew it out to give us the answers that we
12 had to build a whole new system for?

13 MS. PETERS: They have a database, and
14 --

15 CHAIR HOLTZMAN: Okay.

16 MS. PETERS: -- they can create --

17 Col GREEN: No.

18 MS. PETERS: -- a way to answer those
19 --

20 CHAIR HOLTZMAN: No no --

21 MS. PETERS: -- queries.

22 CHAIR HOLTZMAN: -- that's not my

1 question.

2 Col GREEN: No.

3 CHAIR HOLTZMAN: My question is can
4 they modify -- I mean, their database, is that
5 one that could be used unless it -- to provide
6 this information?

7 Col GREEN: The --

8 CHAIR HOLTZMAN: Or --

9 Col GREEN: The issue that you have,
10 and this is where the disconnect I think lies in
11 terms of what the JPP did versus what DSAID and
12 the DoD systems have been developed to do, as
13 Meghan mentioned, DSAID is a victim-based system
14 to track victim resourcing, victim support,
15 victim processing through -- through the military
16 --

17 CHAIR HOLTZMAN: Right.

18 Col GREEN: -- system.

19 CHAIR HOLTZMAN: So that's good.

20 Col GREEN: But an adjudication system
21 which is based on an offender --

22 CHAIR HOLTZMAN: Right.

1 Col GREEN: -- or a case, there's a
2 disconnect there that, you know, at that point,
3 you track through DSAID what's happening with the
4 victim, but necessarily, you're not gathering the
5 level of detail or information about --

6 CHAIR HOLTZMAN: Right.

7 Col GREEN: -- the adjudication of a
8 particular case and those don't --

9 CHAIR HOLTZMAN: Right.

10 Col GREEN: -- necessarily match.

11 CHAIR HOLTZMAN: Okay. I got that.

12 Now my next question is what do they have to do
13 to their present system to catch that
14 information? Can they -- is it simple for them
15 to just do that, or can they for example use our
16 system and somehow integrate it with the existing
17 victim-based system?

18 Col GREEN: I --

19 CHAIR HOLTZMAN: What has to happen?

20 Col GREEN: I don't know that we know
21 enough about DSAID to know the technology of
22 integrating those, but I will say that the

1 system-based -- the system developed by the JPP
2 is a case-document-based system where we pull
3 particular case documents from a court case or
4 from an adjudication, we stored those, we took
5 information from those and developed information
6 from that.

7 So those could very easily be linked
8 to information contained in DSAID. If -- if a
9 case --

10 CHAIR HOLTZMAN: Right.

11 Col GREEN: -- in DSAID is -- is
12 tracked with a number, that number could be
13 integrated into the -- into the --

14 CHAIR HOLTZMAN: Right, so in other
15 words, if they -- if they just had their victim
16 identification data collection system, if it were
17 -- if you added a case number to it, then you
18 could pull up all the information that we had
19 through our system, it could be linked.

20 Col GREEN: I --

21 CHAIR HOLTZMAN: You think?

22 Col GREEN: I think so. I mean,

1 again, I, you know --

2 CHAIR HOLTZMAN: That would be an easy
3 way, it could be, theoretically, it could be
4 done.

5 Col GREEN: Right. I -- when you talk
6 to IT --

7 CHAIR HOLTZMAN: Well maybe we want --

8 Col GREEN: -- folks, they will --
9 they will tell you why things don't work quite
10 that easily, but --

11 MR. STONE: Right, this is the
12 interoperability issue, that you have different
13 systems, and they were developed at different
14 times, and sometimes the capacity of a system
15 can't be scaled up to handle the other thing you
16 want.

17 CHAIR HOLTZMAN: Right. But we don't
18 know -- I mean, I guess the point is that the
19 military doesn't know that its system -- doesn't
20 know whether its system -- well, it doesn't know
21 that its system isn't collecting this data right
22 now.

1 MS. PETERS: Right.

2 CHAIR HOLTZMAN: Okay, so that's
3 number one, you need to know that. And number
4 two, they need to find out, it seems to me that
5 this is the point, they need to find out whether
6 their existing system can be easily corrected to
7 include this information so it can be produced
8 for Congress's review and review within the
9 military.

10 And if it can't, we have this system
11 out here, hello, that might be integrated, and
12 they should look at that as to whether or not
13 that's a possible resource.

14 MS. PETERS: Okay. So --

15 CHAIR HOLTZMAN: Am I -- is this
16 making --

17 MS. PETERS: -- what --

18 CHAIR HOLTZMAN: -- sense --

19 MS. PETERS: -- you're suggesting
20 right is --

21 CHAIR HOLTZMAN: -- at least
22 analytically? I don't know whether in practice

1 it works.

2 MR. TAYLOR: Well I mean I think it
3 does because I think what we have done in effect
4 is run a pilot program.

5 CHAIR HOLTZMAN: Right.

6 MS. PETERS: Yes.

7 MR. TAYLOR: And they should think of
8 our program -- our program, your program that
9 your staff developed, as a pilot program that --

10 CHAIR HOLTZMAN: Correct.

11 MR. TAYLOR: -- might work for them.

12 CHAIR HOLTZMAN: Correct. Right.

13 MS. PETERS: Right.

14 CHAIR HOLTZMAN: And they need to know
15 that their present program, however, won't give
16 them this information.

17 MR. TAYLOR: Right.

18 MS. PETERS: Right. And they -- the
19 types of queries, the offense-specific queries,
20 the queries based on a reading of court
21 documents, is not possible in their current
22 system because they just asked for numbers from

1 all of the general court-martial convening
2 authorities in the DoD, basically.

3 CHAIR HOLTZMAN: Okay. So I -- do we
4 all agree that that's what -- I mean, maybe Mr.
5 Taylor summed it up best, what Mr. Taylor said, I
6 mean that that should be what the report should
7 say?

8 MS. PETERS: That they certainly do --
9 yes, that there is a -- a need to revisit the way
10 they collect adjudication data and report it in
11 this database. It --

12 CHAIR HOLTZMAN: Well, I think the
13 points though were, number one, they don't now --

14 MS. PETERS: Right.

15 CHAIR HOLTZMAN: -- have a way of
16 reporting this.

17 MS. PETERS: Right.

18 CHAIR HOLTZMAN: They don't collect
19 this information --

20 MS. PETERS: Right.

21 CHAIR HOLTZMAN: -- also. They don't
22 collect it and they can't report it. Three, we

1 did a pilot program to show them how they could
2 report it. They should look at that, or they
3 should develop their own system, but they need to
4 -- they need to address this lack, this failure
5 on their part in the data collection process.

6 MS. PETERS: Right, okay.

7 CHAIR HOLTZMAN: All right. Any
8 disagreement with that? I guess we're up to
9 point -- is there anything else that -- that, in
10 the questions you've raised in Issue 1, that we
11 have ignored in our --

12 MS. PETERS: As I review this, ma'am,
13 I think we're -- we're really talking about DoD's
14 reporting. I am not sure -- I want to make sure
15 I understand if the Panel is -- is interested in
16 talking about the interoperability with Military
17 Services, different case management systems, or
18 are we really leaving the military-specific
19 systems as something to -- to note, but we're
20 really talking about recommendations with regard
21 to DoD's approach --

22 CHAIR HOLTZMAN: Right --

1 MS. PETERS: -- to that whole issue.

2 CHAIR HOLTZMAN: -- let's then --
3 okay, so that's a good question.

4 What's the story with the Services?
5 Can the Services produce these -- this
6 information?

7 MS. PETERS: Some Services can, and
8 some can tell you a lot about courts-martial, but
9 not everything from the moment a report is made.
10 The Air Force can track everything --

11 CHAIR HOLTZMAN: Okay, so --

12 MS. PETERS: -- that's going on with
13 every case.

14 CHAIR HOLTZMAN: So I think the point
15 -- the same point goes for the Military Services.

16 MS. PETERS: Okay.

17 CHAIR HOLTZMAN: DoD can't do it, some
18 of the Services may be able to do some of it --

19 MS. PETERS: Right.

20 CHAIR HOLTZMAN: -- nobody does the
21 whole thing --

22 MS. PETERS: Right.

1 CHAIR HOLTZMAN: -- right? Isn't that
2 the point?

3 MS. PETERS: Yes ma'am.

4 CHAIR HOLTZMAN: Okay. We have a
5 pilot program that shows how you can do the whole
6 thing?

7 MR. STONE: And if the constituent
8 Services don't align with DoD, then the problem
9 is DoD is not really able to monitor what
10 individual Services are doing, and the individual
11 Services aren't able to get the benefit of their
12 own analysis in a consistent way and figure out
13 when they get some output that oh, it shows that
14 we don't have enough, you know, victim
15 coordinators, we need one or two more, we see
16 them all coming from one particular place, there
17 must be a lack there, or -- you know, or there's
18 the area that is fine, we don't have enough
19 investigators over here, or maybe even defense
20 counsel.

21 But -- but they'll be able to look at
22 their own data and -- and tease information out

1 of it that's useful, not just report numbers. I
2 mean, just, you know, counting heads is not so
3 helpful if it doesn't also give you the -- the
4 feedback to in each cycle try and fine tune your
5 system, and that's why the Services need to be
6 able to do that, and if -- if their systems are
7 designed to feed into the big DoD system, then
8 everybody is talking both ways.

9 DoD can talk to them if it issues a
10 new overarching reg, and they can talk to DoD
11 when they have experimented with something that
12 works a little bit better, you know, maybe having
13 traveling defense and prosecution counsel or
14 something to remote locations or not, and they
15 can feed it up, they can show them how it has
16 changed their data vis-a-vis another Service that
17 didn't do that.

18 So this gets back to, that's right,
19 that, you know, integration means that they're
20 going to have interoperability, and if they
21 design them from the get-go without talking to
22 each other and DoD, then it's almost inevitable

1 they're going to have problems because they're
2 not going to even -- they may have the same
3 system, but it's on different equipment, and this
4 equipment doesn't talk to that equipment, so yes,
5 they need to have that.

6 Col GREEN: I think an important point
7 on that, though, Mr. Stone, is that there is no
8 DoD military justice system, and DoD does not
9 operate a military justice system or program.
10 DoD provides policy oversight broadly regarding
11 how the military justice systems are operated by
12 the Services, but it's the five Services who
13 operate their own military justice systems.

14 They are responsible for their --
15 their case management. They are responsible for
16 the administration of justice within each of the
17 Services, so that -- that interoperability, or
18 that connection at the DoD level, to drive or
19 recommend a DoD solution is difficult because
20 what you really have are five systems or five
21 independent jurisdictions operating under the
22 umbrella of DoD, but there really aren't the

1 resources or the oversight at the DoD level that
2 there -- that we might --

3 CHAIR HOLTZMAN: Yes, but Congress --

4 MR. STONE: Yes --

5 CHAIR HOLTZMAN: -- would -- I am
6 sorry.

7 MR. STONE: Yes, go -- exactly, I was
8 going to get to that point.

9 Congress did not ask us to have each
10 of the different Military Services get us there.
11 They asked us to have DoD respond, and we're a
12 DoD Panel. And while I understand that some of
13 this is getting into the weeds, as they say,
14 beyond where DoD wants to specify, DoD still has
15 to be able to ask the right questions, so even
16 when it comes up with a budget, it knows that
17 this Service definitely needs a little bit more
18 budget in this area than that Service, you know,
19 regardless of what traditionally maybe they ask
20 for, they want to push a little bit more
21 resources over there.

22 So you know, I agree with you that --

1 that at the operational level, it's not what DoD
2 usually does, but that isn't where Congress is
3 coming from.

4 CHAIR HOLTZMAN: Yes. I think that
5 the point is that Congress -- I mean, what we're
6 saying in our report here is we don't know
7 frankly if you want this information. Maybe you
8 don't. Maybe Congress really doesn't care, and
9 maybe DoD, you don't really want to know this
10 information.

11 But if you do happen to want it, this
12 is what you need to be looking at. So I get it,
13 that, you know, it's not necessarily a
14 responsibility of DoD, but you know, if Congress
15 wants this information, or DoD wants this
16 information, or the Military Services really want
17 to be in a position to analyze it, then these are
18 things that they need to be looking at, or we
19 suggest that they -- with due respect, suggest
20 that they look at.

21 Okay. I think we're up to Issue 2.

22 MS. SAUNDERS: Can I just raise one

1 point quickly --

2 CHAIR HOLTZMAN: Yes.

3 MS. SAUNDERS: -- and it has been
4 touched on already, is that there is, by DoD
5 policy, there's a whole category of cases that
6 are not being reported as sexual assaults, those
7 involving spouses and intimate partners --

8 CHAIR HOLTZMAN: Right.

9 MS. SAUNDERS: -- which are handled by
10 the Family Advocacy Program, and you've heard
11 testimony about that, and the RSP also --

12 CHAIR HOLTZMAN: Right.

13 MS. SAUNDERS: -- looked at this issue
14 too. Do you want to have any recommendations
15 regarding this, any thoughts that -- or findings
16 that we want to make on that? Because right now,
17 all of these -- there's this whole category of
18 cases that are just not being reported to
19 Congress.

20 CHAIR HOLTZMAN: So we don't know the
21 -- Congress has no idea of the, you know, of the
22 conviction rates --

1 MS. SAUNDERS: Right.

2 CHAIR HOLTZMAN: -- dismissal rate,
3 whatever other issues would arise.

4 Col GREEN: Nor could the JPP assess
5 that because there's no information --

6 CHAIR HOLTZMAN: So we couldn't get --

7 Col GREEN: -- centralized, no ma'am
8 --

9 CHAIR HOLTZMAN: -- so our system --

10 Col GREEN: -- we were unable to.

11 CHAIR HOLTZMAN: -- didn't -- our
12 system wasn't able to get at this category of
13 cases either.

14 Col GREEN: The problem is there's no
15 way to identify those cases.

16 CHAIR HOLTZMAN: What happens to them?
17 What category do they go into?

18 MS. PETERS: Well they are
19 investigated and adjudicated like any other case,
20 and each Service JAG Corps is tracking them in
21 their own -- as part of their own prosecution
22 caseload. It's just that when you ask DoD SAPRO

1 to aggregate cases, they, by their own policy,
2 just won't count those, as in legal officers,
3 legal folks at the Service level, say I have this
4 whole list of -- this whole spreadsheet of cases.
5 Well that's a Family Advocacy one, I won't report
6 that to DoD.

7 So the Services then at a local
8 installation. They're counting all of those
9 legal cases together because they count by
10 subject and by court, not by victim service -- by
11 victim -- the type of victim services received by
12 FAP or SAPRO.

13 But when you ask at the high level,
14 the DoD level, for this information, you're
15 constrained by this -- this policy that makes it
16 very difficult, and if you ask the Services for
17 all of their cases, they would have to go back
18 and do some sort of hand-counting to tell you
19 every single -- what the entire universe of
20 sexual assault cases is.

21 But they already have such a huge
22 amount of effort devoted to reporting cases to

1 SAPRO that when we asked, where are all of your
2 cases? They said our cases are with SAPRO. We
3 report all our cases to SAPRO. Go get the
4 information from SAPRO.

5 So that became the answer because
6 they're constrained in many ways by DoD's policy
7 and the way DoD tells them to report sex assault
8 cases. So this FAP distinction is a problem all
9 the way up the chain, from the installation to
10 the DoD --

11 MR. STONE: So then, does that mean
12 that you think, and maybe you do or don't, and
13 you want to suggest that somewhere we need a
14 little regulatory change, a little regulation
15 that says, you know, they have to report this, or
16 so-and-so, you know, must include this, because
17 maybe they're simply waiting for a regulation to
18 cover them going into an area they haven't
19 traditionally been in, and if that's the case, I
20 hope you'll highlight that and propose what
21 little, it might just be a small regulation, that
22 fixes that.

1 You know, sometimes everybody says
2 that's the other guy's job and they don't want to
3 be stepping on toes, and maybe we've just got to
4 clarify whose job that's going to be.

5 CHAIR HOLTZMAN: Right. I don't know.
6 My view about this, and maybe this is tainted by
7 my own experience, but when I was a prosecutor,
8 sexual assault, interspousal sexual assault, was
9 not a crime. And so maybe this goes way back to
10 the view that this isn't really serious, we don't
11 really have to count it, and we really don't have
12 to know about it, and we don't have to really
13 analyze it.

14 I could be completely wrong, so I am
15 just hypothesizing or speculating that maybe this
16 is an outgrowth of that kind of view that these
17 kinds of -- that marital rape isn't very serious
18 in the end.

19 So Barbara --

20 HON. JONES: I have a quick question

21 --

22 CHAIR HOLTZMAN: I am sorry, Judge

1 Jones?

2 HON. JONES: -- on this.

3 It was a long time ago, but am I right
4 that some of the issues relate to
5 confidentiality, or at least that family, a
6 bureau wants things kept confidential in some
7 instances, or many instances?

8 MS. PETERS: Yes --

9 HON. JONES: Does --

10 MS. PETERS: -- ma'am.

11 HON. JONES: -- that play a part in
12 this?

13 MS. PETERS: Yes ma'am. The testimony
14 we received I think it was in September from the
15 Family Advocacy Program manager at the DoD level
16 was they are focused on family services, not the
17 adjudication piece, but they don't necessarily
18 want to report and publicize the legal outcome of
19 one spouse's side of the case for those concerns
20 because they want to unite people behind closed
21 doors and work on problem-solving with -- or
22 bring people behind closed doors and work on

1 those family-related issues and provide social
2 work services.

3 And it's an outgrowth of that, so it's
4 that victims in an intimate partner situation can
5 avail themselves of FAP services. FAP just by
6 their own policy will, out of confidentiality
7 concerns, broadly not report an adjudication
8 outcome for that victim's case, and that doesn't
9 get transferred to SAPRO, so it doesn't transfer
10 to Congress.

11 Col GREEN: But I -- I think it's
12 important to note that this -- that that -- the
13 issue there is the reporting of it.

14 MS. PETERS: Yes.

15 Col GREEN: It doesn't mean that the
16 investigators are not pursuing an investigation
17 in a case involving an intimate partner or
18 spouse, and it doesn't mean that those cases are
19 not being prosecuted --

20 MS. PETERS: Right.

21 Col GREEN: -- in the same way that
22 any other cases are being prosecuted. It is

1 merely the aggregation of information about those
2 cases is not included in the SAPRO data and is
3 excluded because they are considered a different
4 type of case.

5 CHAIR HOLTZMAN: To me it doesn't make
6 any sense to consider them a different type of
7 case, and they should be included in the figures.

8 I mean, if you wanted to put an
9 asterisk and say, you know, there were 25 marital
10 rapes, then that's fine. I have no problem with
11 that. But this should be included in all the
12 information about rapes in the -- and sexual
13 assaults in the military. It seems to me it's --

14 MR. STONE: And --

15 CHAIR HOLTZMAN: If this is -- I don't
16 think that there's necessarily a confidentiality
17 issue in the sense that this is just like, you
18 know, the -- the failure -- the restricted
19 reporting. If they don't want to -- if they just
20 want counseling, health care, the victims, you
21 know, that's up to them. The military says it's
22 up to any victim whether you want to report it,

1 whether you're married or not, whether you're an
2 intimate partner or not, so I don't see that --
3 why this should be treated differently from --
4 from any other kind of restricted reporting.

5 They should keep track of these
6 numbers in the general -- in the general scheme
7 of things, so I think this needs to be raised as
8 an issue. I would prefer we recommend that the
9 numbers be included. If they want to indicate
10 the -- you know, break it out in some way, that's
11 fine with me, I have no objection to that.

12 MS. PETERS: Okay.

13 MR. STONE: And -- and in the material
14 --

15 HON. JONES: I was just going to say
16 I agree, I think this should be included, but I
17 do think they should also be identified for --
18 for I don't know what you want to call them,
19 domestic violence, whatever, because that adds --
20 that adds to the picture.

21 MR. STONE: And that doesn't mean that
22 they can't decide as a programmatic matter that

1 even though they're using actual case numbers, in
2 every case where they report something with a
3 name, they don't consistently use John Doe and
4 Jane Doe as a signal to everybody that it's a
5 family matter without actually using a true name,
6 but that at least the researchers would have a
7 case number if there's a need to go back and do
8 further analysis, just have lots of John and Jane
9 Doe cases.

10 CHAIR HOLTZMAN: Okay. Are we up to
11 Issue 2?

12 MS. PETERS: Yes ma'am.

13 And Issue 2 is -- and again, we have
14 a reference to the section of the draft report
15 where we addressed this, and we have talked about
16 whether -- a little bit in some of our past
17 meetings, what are the limitations and also the
18 uses of adjudication data in assessing the
19 criminal justice system or in assessing how
20 sexual assault cases are being prosecuted?

21 So the way -- the information that we
22 have received is first, how is a similar type of

1 information being collected in the civilian realm
2 by the Sentencing Commission and by the Bureau of
3 Justice Statistics, and you know, does the Panel
4 want to comment on that as a -- either a model or
5 as something instructive as far as where you can
6 get value out of studying adjudication data?

7 Secondly, the other issue is when you
8 look at military-specific actions in the realm of
9 sexual assault, the -- when you look at the
10 military's response to sexual assault, their
11 options include other things like courts-martial
12 and lower-level disciplinary actions. What is
13 the value -- or appellate records -- what is the
14 value of looking at that in the military system?

15 So we have an example maybe in the
16 civilian realm because we've had some comments
17 from the Sentencing Commission and some
18 practitioners about the value of civilian data
19 collection efforts, but again, I think a central
20 concern in addressing the statutory tasks, and
21 the Staff just poses this to the Panel for
22 consideration, it might be valuable -- would it

1 be valuable to comment on theoretically the value
2 and limitations of statistical analysis in
3 performing this sort of work and in making policy
4 recommendations?

5 So I have on this page sort of
6 summarized the highlights of what the Panel has
7 heard from Sentencing Commission and other -- and
8 other witnesses, and Dr. Spohn, and Dr. Spohn can
9 comment in a, maybe, more detailed fashion if the
10 Panel has more specific questions about the
11 people who do this research, how is it used and
12 what is its value? Again, as a foundational
13 matter to addressing whether we can make
14 assessments about -- whether you could make
15 assessments about the military justice system.
16 How -- what is the value of this data?

17 What the Panel heard is that at the
18 state -- at the national level, it's very
19 difficult to aggregate this information and get
20 something that's nationally representative. The
21 Sentencing --

22 CHAIR HOLTZMAN: You mean in terms of

1 states?

2 MS. PETERS: In terms of states --

3 CHAIR HOLTZMAN: In terms of state
4 information --

5 MS. PETERS: Right.

6 CHAIR HOLTZMAN: -- right.

7 MS. PETERS: Right. The aggregate
8 federal information in the realm of at least
9 sentencing data is -- is very complete and very
10 detailed, and the witnesses who came to the Panel
11 talked about, well this is what we -- because our
12 information is so detailed, and because we want
13 to inform sentencing policy, we can use the data
14 -- we collect the adjudication data from
15 conviction and sentence -- to inform sentencing
16 policy, to tell Congress what the impact of their
17 criminal justice legislation reforms are. And
18 those are some of the uses and the value that the
19 Sentencing Commission commented on.

20 The Panel also received information on
21 the other side of that debate, and that is in the
22 realm of sexual assault, a lot of these cases are

1 carried out in the states, and we don't have that
2 depth of data and information available about
3 sexual assaults in the states, and we don't have
4 that nationwide.

5 Likewise, we also don't have
6 nationally representative data or really very
7 much data beyond specific jurisdictions about
8 what happens from charging or sometime earlier in
9 the process before sentencing.

10 And the other issue is what -- you
11 know, how can researchers study this information
12 once they do get it? And Dr. Spohn did comment
13 in previous meetings about trying to identify,
14 okay, now that we have this data, let's try to
15 figure out what's driving these outcomes, and how
16 do we go about doing that? What types of
17 analysis get us there? Is that valuable for
18 policy?

19 So I guess this issue is trying to get
20 at what are the value and uses of data, and if
21 there is a value and a use to it that the Panel
22 would like to comment on, what types of data do

1 you need? Where are the important things? Is it
2 a complete set of data? Is it a representative
3 sample? Is it system wide, or is it just
4 specific to one aspect of the system?

5 And those are the kinds of questions
6 we've posed to the Panel to talk about, the
7 theoretical uses of this data, and again, if we
8 have any specific questions here as well about
9 criminology and their research, Dr. Spohn is
10 available to answer that, those things.

11 MR. TAYLOR: Well I was curious about
12 which of our congressionally mandated tasks does
13 this relate to?

14 MS. PETERS: The nature of the tasks
15 was the first one said talk about the consistency
16 and appropriateness or review and evaluate trends
17 in the decisions and the punishments in courts-
18 martial and non-judicial punishment and
19 administrative actions, and then they asked you
20 to specifically assess the consistency and
21 appropriateness of those outcomes, or of those
22 results.

1 And what is behind that? I think it
2 -- what we heard from earlier discussions is
3 that's a difficult sort of task, and to put that
4 sort of label on something, if that's difficult,
5 first of all, what type of data would partially
6 get you there? And then two, if you're looking
7 at this data anyways, is there something else
8 relevant to draw from it?

9 I mean, it goes to the precursor --
10 it's sort of a precursor question to, can we even
11 assess consistency and appropriateness? This is
12 intended to sort of build towards whether the
13 Panel can specifically address that task, and if
14 it can't address that task but there's something
15 else relevant and valuable about the data and the
16 Panel wanted to comment on it, first exploring,
17 what are the uses of this data generally, can
18 help answer that question.

19 CHAIR HOLTZMAN: Did they ask us, did
20 Congress ask us to assess -- to compare sentences
21 in the military justice system with the civilian
22 system?

1 MS. PETERS: Yes ma'am.

2 CHAIR HOLTZMAN: So that is a specific
3 question that has been asked of us, and I think -
4 - and don't we have to respond to that?

5 MS. PETERS: Yes ma'am, that's -- yes.

6 CHAIR HOLTZMAN: And isn't our answer
7 that that's impossible?

8 MS. PETERS: That is what we have
9 discussed, yes ma'am.

10 CHAIR HOLTZMAN: Am I wrong?

11 MR. TAYLOR: Well, the only question
12 -- not -- not to disagree with the Chair, but it
13 seemed to me that we were asked to comment on the
14 value of data, of using data to assess
15 adjudication. That's not exactly the same thing
16 as saying if data are available, we can use it to
17 compare. It seems to me a different question
18 that social scientists would be more interested
19 in perhaps than Congress on this particular
20 question.

21 It seems to me that it takes it a
22 little far off field of where our major focus has

1 been. I understand that with Issue 1 because we
2 couldn't really respond to congressional requests
3 unless we first understood how to get the data,
4 so I understood why in that case we needed to
5 make this separate inquiry.

6 It's not quite so clear to me in this
7 case why it is, beyond getting the information
8 from the U.S. Sentencing Commission which they
9 provided about what they do, and then our general
10 understanding that there's no similar database to
11 enable us to make a comparison to states
12 similarly situated, it seems to me like that's
13 sort of the end of the inquiry instead of going
14 into a discussion about the value of statistical
15 analysis and data as it pertains in general to
16 the problem.

17 MS. PETERS: The --

18 MR. TAYLOR: But I could be wrong.

19 This is just the way I read it --

20 Col GREEN: Well --

21 MR. TAYLOR: -- when I saw that.

22 Col GREEN: I think Meghan pointed out

1 some of the areas that the Staff thought the
2 policy question comes up. The other thing is a
3 bit of a caveat in terms of -- we were asked to
4 provide this data, and whether the Panel wants to
5 proactively make notes.

6 I mean, I guess the issue is any time
7 you put a statistic or -- or data out there, it
8 can very quickly drive policy, and, you know, if
9 the Panel wants to comment on the appropriateness
10 or inappropriateness of this based on its own
11 review of how that data is used elsewhere in its
12 -- in its own study, you know, educated by
13 criminologists in terms of what this means, is --
14 is -- are there any, you know, warnings, caveats,
15 or -- or information points that the Panel wishes
16 to make regarding the use of its own data that
17 it's providing?

18 MR. STONE: I'd take a shot at that
19 and say absolutely.

20 I think -- I think the point that we
21 need to make is that when looking at these non-
22 military databases which start with non-military

1 situations, when they analyze the elements of the
2 offense, and especially the characteristics of
3 the offender, they are looking at a different
4 universe, and there isn't an easy match to the
5 military.

6 So they're not going to be looking at,
7 typically, a universe of first offenders because
8 if in the military you were previously convicted
9 of rape, you're probably not still there. They
10 are not going to be looking at a universe of
11 people who by virtue of their job or in close
12 proximity many hours of every single day, and who
13 don't have an easy freedom to say I didn't like
14 that boss, I'm leaving this job and avoid the
15 situation, so that's -- that military, you know,
16 being posted to places is -- is not a factor in
17 the Sentencing Commission data.

18 They are not going to be as an
19 aggravating factor probably looking at someone
20 higher in the chain of command who has some at
21 least implicit control over your entire career
22 and therefore creates pressure.

1 So there are a different set of
2 factors, and we should identify just the ones we
3 can easily see so that we can say we've looked at
4 the other data and the -- the overall compression
5 -- impression is this caveat that they don't
6 match up exactly, so we really, you know, we can
7 say that we've seen this, and maybe we should say
8 this or that in the civilian data, but -- but the
9 most glaring fact is it doesn't match up and that
10 is another reason why we need to be able to pull
11 more out of the reporting of the military data so
12 that when we do construct, if we do, a sentencing
13 scheme, we see some of the elements we want to
14 look at each time.

15 Another one may be, did it occur
16 during training? I mean, that's an issue. Did
17 it -- how long have these people been in the
18 Service? I mean, things like that, as well as
19 are they or have they been intimate partners for
20 some period of time?

21 But I just think that -- you know,
22 another one may be, has either one ever applied

1 for a transfer that was denied? But all I'm
2 saying is I think that this gives us a good place
3 and opportunity to explain why they don't match
4 up and areas where it would be useful to focus in
5 the future.

6 MS. PETERS: And -- and to your point,
7 Mr. Stone, I think the Staff's perspective on
8 this issue was that Congress asked the Panel to
9 collect a lot of data and to look at it. Does
10 the Panel just want to say this is what we think
11 generally data can be used for if you're going to
12 assess a criminal justice system?

13 CHAIR HOLTZMAN: I --

14 MS. PETERS: I mean, does it help you
15 understand what's happening in these cases? Is
16 there intrinsic value to that?

17 MR. STONE: Well it tells you you've
18 got to look at elements of offense and elements
19 of the characteristics of the offender, having
20 looked at the other data --

21 MS. PETERS: Right.

22 MR. STONE: -- and so what we see

1 looking at it, what we can report is we don't see
2 a very good match. We realize there's elements
3 missing before one could draw conclusions with --
4 with a high degree of confidence, and I think
5 that's what Dr. Spohn said, that the multivariate
6 research, you know, leaves something -- there's
7 more that needs to be done. I think that's what
8 she was saying.

9 CHAIR HOLTZMAN: Well I'm not sure
10 that I -- I think I come out where Mr. Taylor has
11 come out, which is I'm not sure I'm ready to make
12 -- give an opinion on the value of statistical
13 analysis here because I don't -- I don't really
14 know enough about that.

15 What I do know from what we've -- from
16 what we've had presented to us is that the --
17 that there is no basic system in the states for
18 pulling out information on sentencing, and the --
19 while there is a, you know, a very detailed
20 system on the federal level, the number of cases
21 is very small, so, you know, you have a
22 statistically questionable pool from which to

1 draw conclusions.

2 And for these reasons, I would say
3 that we have to be very careful about making any
4 comparisons because it's statistically invalid.
5 Is that correct, Dr. Spohn?

6 MR. STONE: I don't think that's
7 correct.

8 CHAIR HOLTZMAN: I think it's --

9 MR. STONE: I'd like to hear --

10 CHAIR HOLTZMAN: -- statistically --

11 MR. STONE: -- Dr. Spohn, but --

12 CHAIR HOLTZMAN: -- invalid --

13 MR. STONE: -- but if there are --

14 CHAIR HOLTZMAN: -- to say --

15 MR. STONE: -- hundreds of cases,
16 that's a big enough sample. It doesn't have to
17 be thousands of cases.

18 CHAIR HOLTZMAN: It's statistically
19 invalid to compare the military system to the
20 state system because you don't have enough -- you
21 don't have state system information. That's the
22 problem. You don't have comprehensive systems

1 from all the states, so you can't make it say,
2 well all the states have a conviction rate of 84
3 percent, and in the military, it's 22.

4 You can't do that because we simply
5 don't have that information about the states. I
6 mean, we do have some of that information --

7 DR. SPOHN: I -- yes, I think that's
8 right.

9 I do think that it's misleading to try
10 to compare outcomes in the military to those in
11 the civilian justice system for all the reasons
12 that you've just mentioned, and I also think that
13 it's -- it's very difficult even to compare
14 outcomes across jurisdictions in the civilian
15 system because they vary so much on -- on many,
16 many dimensions.

17 And so I -- I do think that -- that
18 one has to be cautious and careful, and that
19 doing so can really produce some misleading
20 results.

21 CHAIR HOLTZMAN: All right. So that's
22 as far as --

1 HON. JONES: Dr. Spohn --

2 CHAIR HOLTZMAN: Yes.

3 HON. JONES: -- can we even begin to
4 compare results between the Services? So like
5 when you see, you know, the Air Force is, you
6 know, doing something at 87 percent, and the
7 Marine Corps is at 65 percent. Leave aside the
8 category. Do we know enough about all of the --
9 the variables there to -- to try --

10 DR. SPOHN: Well --

11 HON. JONES: -- to draw --

12 DR. SPOHN: -- I think --

13 HON. JONES: -- any kind of
14 conclusion?

15 DR. SPOHN: I think that is a problem
16 in the sense that the variables that we don't
17 have, focusing particularly on the victim and
18 some -- and the relationship between the victim
19 and the suspect, if those things vary
20 systematically across the Services, and if they
21 in fact predict how cases are handled, then again
22 you would -- you would be reaching misleading

1 conclusions.

2 Now, if you can assume that those
3 variables that are missing from the data file are
4 kind of randomly distributed among the Services,
5 then you could have more confidence, but I don't
6 know that you can make -- that you can make that
7 -- that claim, or reach that conclusion.

8 HON. JONES: And I don't know whether
9 this became an issue in this particular study,
10 but do we have any confidence that we know at
11 what point in time sexual assault incidents
12 actually become cases and become the beginning of
13 the statistics, as between the Services?

14 We talked about this a lot a while
15 ago. Well, you talked about it in terms of
16 civilian jurisdictions because police officers
17 can just --

18 DR. SPOHN: Yes.

19 HON. JONES: -- you know, never report
20 it to the DA, et cetera. I am not talking about
21 that per se, but I -- but I thought that was also
22 a problem between the Military Services in terms

1 of, you know, what the -- what the various
2 criminal investigation divisions do with respect
3 to each Service in terms of where the case goes
4 next, and then even at a certain level, what
5 happens to it, and I think it's different.
6 That's my recollection anyway.

7 DR. SPOHN: Meghan, I think you would
8 be better able to answer that question than I
9 would because you were involved in that whole
10 data collection process.

11 MS. PETERS: Right. While the JPP's
12 data collection started with the preferral or
13 filing of charges, and the RSP had looked at what
14 happens once a report is actually made to
15 somebody with responsibility to do something
16 about that, the -- what has evolved over time is
17 the responsibility of a criminal investigator to
18 inform a JAG attorney, particularly one who is
19 involved in the sex assault prosecutions, and
20 then to have -- this information is also
21 forwarded to a commander, a senior commander,
22 usually at the flag officer level within eight

1 days, to inform them of the -- the pendency of
2 this case, this report, and this investigation.

3 And from there, a variety of groups
4 and stakeholders will have involvement. And for
5 reporting purposes, a case is a case, these days
6 in the sex assault realm, once an unrestricted
7 report is made, and even a restricted report has
8 its own tracking mechanism.

9 While our focus was narrower, what DoD
10 has done is reporting everything from the moment
11 of a report is discovered, that yes, in -- in
12 years -- in recent years, different investigative
13 organizations will call a case substantiated, and
14 that means one thing, and another Service might
15 not use that particular term, or they might make
16 the --

17 HON. JONES: That's exactly --

18 MS. PETERS: -- substantiation -

19 HON. JONES: -- what I was
20 remembering.

21 MS. PETERS: Right.

22 HON. JONES: I am sorry, yes, go --

1 MS. PETERS: And --

2 HON. JONES: -- ahead.

3 MS. PETERS: -- that may happen later,
4 much later in the process, for a different
5 Service.

6 And so when Dr. Galbreath came here in
7 previous times before the Panel, he might have
8 had two boxes in one of his waterfall charts that
9 said a case is substantiated here; this is Box K
10 and this is Box O, look at these two boxes, it
11 depends on the Service. Some refuse to call it
12 substantiated very early in the investigation.
13 Some are going to use that term later in the
14 process. Some might not even use that term, and
15 we had to get everyone on the same page to say
16 just use -- just feed cases that fit DoD's
17 definition please, and that was a work in
18 progress. That was years in the making.

19 So those, yes. Those are still
20 reporting issues that are, I think endemic to
21 aggregating sex assault data from the moment of a
22 report. There have been solutions in progress,

1 and people are always working to get on the same
2 page. We didn't hear any more detail about the
3 fidelity of the reporting or aggregation of that
4 information and all of those changes in detail.
5 What we then focused on ma'am was what happens
6 from preferral.

7 And you still have terminology
8 differences and just practice differences in the
9 Services driven in part by their different
10 organizational structures and just the fact that
11 they're administered differently. So some of
12 those problems with the reporting and
13 investigation phase terminology do apply in the
14 legal adjudication realm as well.

15 HON. JONES: Right, because they
16 changed the numbers of cases that you should
17 actually be looking at, which would change the
18 percentage.

19 MS. PETERS: Right.

20 HON. JONES: I assume.

21 MS. PETERS: Right.

22 Col GREEN: Right, but --

1 HON. JONES: So I mean I just point
2 that out as -- as an issue that's been around,
3 well, for our limited life, at least, that we've
4 identified a while ago.

5 And I -- I am glad to hear they're
6 trying to get that reconciled because it's going
7 to be very difficult to use these statistics, you
8 know, to say well gee, I wonder why this is
9 working in this Service, but this -- this other
10 issue is not, or the thing isn't working in the
11 other.

12 So it is very -- I mean, I just worry
13 about --

14 (Telephonic interference.)

15 MS. PETERS: Judge Jones? Madam
16 Chair, I think we lost her. We can --

17 Col GREEN: She'll call back in.

18 MS. PETERS: Okay, okay.

19 (Pause.)

20 CHAIR HOLTZMAN: Well, I guess what
21 Barbara -- I don't mean to -- while we're waiting
22 for her to join us, I guess what she is basically

1 saying is that she is concerned about the issue
2 of drawing comparisons from the statistics, and -
3 - and if that's the case, then my recommendation
4 is --

5 HON. JONES: Barbara Jones.

6 CHAIR HOLTZMAN: Okay, Barbara, you're
7 taking the words out of my mouth, so go ahead.
8 We're waiting for you.

9 HON. JONES: Sorry, I disconnected
10 myself.

11 (Laughter.)

12 CHAIR HOLTZMAN: Okay. Well, we'd
13 love to hear what you -- you -- the finish of
14 your comments.

15 HON. JONES: Well I think I was
16 finished, actually. I don't know what to do
17 about this except to try to keep working on
18 making sure that we're -- we're comparing apples
19 and apples and -- and that we don't have one
20 Service that has a different policy so that there
21 can be a report, and maybe -- but there's not a
22 case that gets -- that actually makes it to the

1 adjudication system.

2 And I -- I think maybe that's not a
3 problem of looking at adjudications per se, but
4 we're really looking at the big picture, which is
5 what happens when there's a sexual assault
6 report? Maybe most of these cases shouldn't get
7 into the system, but we don't know which Services
8 are putting more in or less in or whatever, at
9 least I don't.

10 And this is really just a problem I
11 recall from -- from the RSP.

12 CHAIR HOLTZMAN: Well, I was just --

13 HON. JONES: So --

14 CHAIR HOLTZMAN: -- I was --

15 HON. JONES: Go ahead.

16 CHAIR HOLTZMAN: I was basically
17 taking your remarks to a conclusion and
18 suggesting that perhaps what we want to say here
19 is that we can produce whatever information we're
20 required to produce for the Congress, but simply
21 say that, you know, all of this stuff has to be
22 looked at with, you know, with a lot of -- well,

1 with a lot of boxes of salt, not just grains of
2 salt, because we -- we were unable to draw
3 comparisons because of the problems with the
4 numbers and the problems in identifying what
5 assumptions are made with regard to each item
6 that's included in these statistics.

7 So --

8 MS. PETERS: Okay.

9 CHAIR HOLTZMAN: -- I mean I have no
10 problem -- I think that's -- I don't know that we
11 can say anything more than that.

12 MR. TAYLOR: I agree.

13 HON. JONES: Right.

14 MS. PETERS: And ma'am, I think that
15 also what the discussion of the Panel likewise
16 relates to, Issue 5 in the deliberation outline,
17 and so we've -- we have definitely --

18 CHAIR HOLTZMAN: Where is Issue --

19 MS. PETERS: -- I think --

20 CHAIR HOLTZMAN: -- 5?

21 MS. PETERS: -- addressed -- Issue 5
22 is on page 12, the last page of the deliberation

1 outline.

2 And we had really presented here
3 information that you've heard along the lines of
4 what the Panel has already discussed,
5 supplemented by some specific data points, really
6 to promote the discussion that we -- we just had
7 about whether it's comparable.

8 And I would -- the Staff had wanted to
9 bring the Panel's attention to the last bullet
10 there, which might be some additional
11 considerations in the comparability realm.
12 Getting to comparable decision points means
13 looking at the procedural distinctions between
14 the two systems as well.

15 CHAIR HOLTZMAN: I think that we need
16 to point out all of the, or as many as we know,
17 the fallibilities in the -- you know, in trying
18 to make the comparison.

19 MS. PETERS: And ma'am, the one note
20 before we depart from -- it looks like Issue 2
21 does sort of lead into that final Issue, Issue 5,
22 that the Panel identified, or that the Staff

1 identified, about comparability.

2 One remaining facet of Issue 2 is is
3 there -- if you were just -- instead of comparing
4 systems, if you were just looking at one system
5 in and of itself and you just wanted to look at
6 the prosecution of sexual assault, does
7 aggregating this adjudication data tell you
8 anything? Is it valuable?

9 And the Staff is asking the Panel
10 whether they want to comment on that approach;
11 using data to assess the military justice system.
12 Is there -- does the Panel wish to make a
13 statement about whether that's important to do?

14 CHAIR HOLTZMAN: Why don't you give an
15 example of what you're talking about?

16 MS. PETERS: Well, does looking at the
17 types of charges being brought and whether a rape
18 charge is going to a general court-martial or
19 not, and then what the sentence is for that case,
20 does looking at, again, what is encompassed in
21 adjudication data, which is everything from the
22 legal forum to the outcome to the punishment,

1 does looking at those numbers tell you something
2 about the system, or do we want to -- does it
3 help you understand the system better?

4 A lot of us might go on anecdotal
5 evidence or our -- our perceptions that we had
6 before viewing the system, and then is there
7 value though in looking at the data in and of
8 itself in that it might help you understand
9 patterns and trends in -- in how these cases are
10 resolved.

11 MS. SAUNDERS: And perhaps it would be
12 helpful to actually look at some of the data --

13 MS. PETERS: Right.

14 MS. SAUNDERS: -- too before we maybe
15 get to that big overarching question, because
16 that's kind of a big philosophical question, is,
17 you know, the data that has been gathered by the
18 JPP regarding -- relating to disposition of
19 cases, relating to outcomes, and relating to
20 punishment, perhaps it would be more useful to
21 look at those specific aspects and the data
22 gathered in those areas first and then maybe

1 perhaps be able to draw some larger philosophical
2 overarching conclusions, if you're -- if that's
3 where you want to go.

4 CHAIR HOLTZMAN: I think that we just
5 answered that question, didn't we? I thought
6 that what Mr. Taylor was saying was that we're
7 not going to make --

8 MS. SAUNDERS: In terms of this --

9 CHAIR HOLTZMAN: -- larger conclusions
10 --

11 MS. SAUNDERS: -- in terms of our
12 specific data, the data that has been gathered by
13 the JPP.

14 So perhaps if we wanted to look at
15 Issue 3 for example in answering our first
16 congressional task, which is on page 6 of your
17 deliberation guide, this is really where we get
18 into the data that has specifically been gathered
19 for the purposes of answering the congressional
20 tasks in front of us.

21 Do you want to start on this now,
22 ma'am, or do you want to --

1 Col GREEN: Do you want to take a
2 break?

3 MS. SAUNDERS: -- take a break?

4 CHAIR HOLTZMAN: Yes, I'd like to take
5 a break, but I'd just like to know, are we
6 finished with 2, or are we not --

7 MS. SAUNDERS: Okay.

8 CHAIR HOLTZMAN: -- finished with 2?

9 MS. SAUNDERS: I think we were trying
10 to transition maybe from 2 into 3.

11 CHAIR HOLTZMAN: All right. Well I
12 think if we're finished with 2, I'd like to be
13 finished with 2 if we could --

14 MS. PETERS: Okay.

15 CHAIR HOLTZMAN: -- possibly be
16 finished with 2. Yes, okay, great. So now we're
17 up to 3, and I think we'll take a ten-minute
18 break.

19 (Whereupon, the above-entitled matter
20 went off the record at 11:03 a.m. and resumed at
21 11:20 a.m.)

22 CHAIR HOLTZMAN: Okay. I think we're

1 ready to start.

2 Okay. So I guess we're up to Issue 3,
3 which is in essence, does the Panel wish to
4 comment on the decisions and punishments in
5 sexual assault cases and whether these are
6 appropriate and consistent based on the
7 information available?

8 Meghan, do you want to --

9 MS. SAUNDERS: I think --

10 CHAIR HOLTZMAN: Will you help guide
11 us through this issue --

12 MS. SAUNDERS: Yes, and --

13 CHAIR HOLTZMAN: -- please.

14 MS. SAUNDERS: -- Terri Saunders is
15 going to lead this part --

16 CHAIR HOLTZMAN: Oh, okay.

17 MS. SAUNDERS: -- of the discussion --

18 CHAIR HOLTZMAN: Okay --

19 MS. SAUNDERS: -- at least for the
20 beginning of -- of this.

21 So as you can see from your
22 deliberation guide, on page -- beginning on page

1 6, Issue 3 is going to specifically deal with the
2 data that's been gathered by the JPP in three
3 separate areas; which is disposition data,
4 adjudication outcomes, and punishment data, which
5 are sub-sections 3(a), 3(b), and 3(c), and we'll
6 talk about each of those in turn.

7 And all of these of course relate to
8 one of the congressional tasks which is listed at
9 the very top of that page, dealing with the
10 appropriateness and consistency of -- of the
11 data, of courts-martial proceedings, non-judicial
12 punishment, and administrative actions, including
13 the number of punishments by type and the
14 consistency and appropriateness of those actions.

15 So I'd like to begin with Section --
16 with Issue 3(a) disposition data --

17 CHAIR HOLTZMAN: Okay.

18 MS. SAUNDERS: -- and the sub-question
19 that belongs under that is, do the data indicate
20 whether disposition decisions of convening
21 authorities are consistent or appropriate?

22 And for this of course we looked at

1 data gathered from Fiscal Years 2012 to 2014.

2 The court-martial data, as you've heard, is from
3 this -- the information gathered that was input
4 into our database, and of course Dr. Spohn took
5 that information and performed some analysis, and
6 you have her report on that.

7 In regards to non-judicial punishment
8 and administrative actions to include
9 administrative discharges, we did not have that
10 same level of -- the same documentary evidence,
11 so what we did instead is we went to the SAPRO
12 report. And in terms of the data obtained from
13 the SAPRO report and from DSAID, for non-judicial
14 punishment, each of the Services in their
15 separate reports into the SAPRO report has a case
16 synopsis listing of every sexual assault case
17 that was disposed of in some way, and they
18 provide certain information.

19 As -- as has been discussed, this
20 information was not detailed enough in the court-
21 martial process and adjudication process, which
22 is why this separate database was developed.

1 In terms of non-judicial punishment,
2 it -- barring, you know, of course input errors
3 and information like that that's going to happen,
4 the -- the information was deemed adequate to be
5 able to answer for example how many, you know,
6 how many reports of sexual assault ultimately end
7 in non-judicial punishment and the types of
8 offenses that go there.

9 In terms of -- of administrative
10 discharges, the information was very spotty from
11 those reports, very difficult to -- to analyze.
12 But some of the information that we were able to
13 gather based on the database for -- for all
14 courts-martial, for NJP and for administrative
15 discharges, some takeaway points: it looks like
16 penetrative offenses, rapes, sexual assault, were
17 primarily resolved through referral to general
18 court-martial.

19 In fact, in the FY14 NDAA, Congress
20 has already kind of spoken to what they think is
21 the appropriate outcome for that in that they
22 have now mandated that all penetrative offenses

1 be referred to general court-martial for all
2 cases going forward.

3 There were no non-judicial punishment
4 outcomes for penetrative offenses, so if the
5 question arose, are rape cases going to non-
6 judicial punishment, the answer to that is no.
7 The -- the types of offenses that are going to
8 non-judicial punishment are -- are contact
9 offenses.

10 So penetrative -- so a takeaway point,
11 penetrative offenses are primarily being referred
12 to -- to general courts-martial. Contact
13 offenses run the gamut. You have some that are
14 referred to the various types of courts-martial,
15 and then you also have many going to non-judicial
16 punishment.

17 Some numbers here: let's see, for
18 Fiscal Years 2012 through 2014, there were 486
19 cases where a contact charge was preferred toward
20 a court-martial and 363 of those cases actually
21 were referred to a court-martial, compared with
22 680 cases that were resolved through non-judicial

1 punishment. This is all the Services for all
2 three years.

3 CHAIR HOLTZMAN: You mean that weren't
4 referred to a court-martial?

5 MS. SAUNDERS: That weren't referred
6 to a court-martial.

7 CHAIR HOLTZMAN: 600 cases were not
8 referred to a court-martial --

9 MS. SAUNDERS: That went to non-
10 judicial punishment.

11 CHAIR HOLTZMAN: -- that went to --
12 and 400 that went to court-martial --

13 MS. SAUNDERS: That were -- at least
14 had a charge preferred --

15 CHAIR HOLTZMAN: Right.

16 MS. SAUNDERS: -- with a view toward
17 court-martial.

18 Of course, we know when we are talking
19 about contact offenses that there is a broad
20 range in the types of misconduct that are
21 encompassed in there. When we're talking about
22 contact offenses, we're talking about wrongful

1 sexual contact, abusive sexual contact, and
2 aggravated sexual contact.

3 Wrongful sexual contact was in the
4 2007 Statute, so while we see a lot of those
5 types of cases in non-judicial punishment in the
6 2012 numbers, they of course begin to -- to go
7 away as the 2012 Statute kicked in and those
8 cases were then of course rolled into the -- into
9 the abusive sexual contact.

10 So that is one takeaway, contact
11 offenses are being resolved in a variety of ways.
12 We don't have the facts of those cases, largely,
13 so to be able to say only this type of case is
14 going to non-judicial punishment or to general
15 court-martial, it would be difficult to say based
16 on the information that we have.

17 We don't know the strength of the
18 evidence. We don't know whether the victim was
19 willing to testify in some of those cases or any
20 of the other case-specific variables. We just
21 don't have that information.

22 So this is the type -- so the

1 takeaways are fairly simple. For penetrative
2 offenses, they are largely going to general
3 court-martial, which has now been legislated.
4 Contact offenses are going to a variety of
5 different forums.

6 So do you wish -- does -- do you wish
7 to comment on the appropriateness or consistency
8 of the outcomes that -- or of the data we've been
9 able to share with you? Is there -- do you have
10 any questions that I might be able to answer
11 based on that?

12 CHAIR HOLTZMAN: Anybody have any
13 comments?

14 HON. JONES: Can I just ask one quick
15 question, Terri?

16 MS. SAUNDERS: Certainly.

17 HON. JONES: Between 2012 and 2014,
18 the numbers of prosecutions went up, correct, for
19 penetrative conduct?

20 MS. PETERS: That is correct. Yes, it
21 went up year-to-year, ma'am.

22 HON. JONES: That's correct?

1 MS. SAUNDERS: Yes. That is correct.

2 HON. JONES: But the number of
3 acquittals also went up, is that right?

4 MS. SAUNDERS: One second. We're
5 finding --

6 HON. JONES: I am sorry.

7 MS. SAUNDERS: No, no, not at all.

8 MS. PETERS: No, we want to be
9 precise.

10 (Pause.)

11 MS. SAUNDERS: Okay. So that is
12 correct. The acquittal rate did appear to go up
13 for penetrative offenses by year. It -- it
14 appears that it held somewhat consistent when
15 dealing with contact offenses.

16 HON. JONES: So the -- yes, the --
17 that was consistent. The number went up in both,
18 in other words, the numbers brought as well as
19 the conviction number?

20 MS. SAUNDERS: That's correct.

21 HON. JONES: Okay. I was just -- yes,
22 okay.

1 So I'm sorry, I -- I thought that was
2 interesting. I don't know what it means. And
3 I'm not sure what the question is on the table
4 right now, Terri, so if you --

5 MS. SAUNDERS: Well the question --

6 HON. JONES: -- would get me back and
7 oriented, I would appreciate it.

8 MS. SAUNDERS: Oh, absolutely. The
9 question when we're dealing with just the
10 disposition, where do these cases go when they
11 are brought to the initial -- to the disposition
12 authority, to the senior commander? Do they go
13 to court, do they go to non-judicial punishment
14 or some other forum?

15 The -- the question is does the -- do
16 the data indicate whether the disposition
17 decisions of convening authorities are
18 consistent, and do the data indicate whether
19 those same disposition decisions are appropriate?

20 So does the Panel wish to comment on
21 the appropriateness or the consistency of where
22 -- how those cases are disposed? Based on --

1 HON. JONES: I think I'd be afraid to
2 comment on it. My personal opinion is right now
3 -- although one thought that occurred to me was
4 that we need more years to see what actually
5 happens with the numbers we have; at least
6 another year or two of data.

7 MS. SAUNDERS: And in a moment, we're
8 going to talk about the adjudication outcomes,
9 the conviction versus acquittal rate, and also
10 the punishment data, but for now, does anyone
11 want to, for example, comment on the fact that
12 penetrative offenses are largely going to general
13 court-martial, the consistent -- whether that's
14 consistent or appropriate?

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

17 MS. SAUNDERS: Certainly.

18 MR. TAYLOR: What I sort of expected
19 to see here was a number for 2012, a number for
20 2013, and a number for 2014. So if -- if you --
21 that data may be somewhere, but it's not on this
22 guide that you gave us. So I mean, if you

1 showed, for example, an increase in a certain
2 category from 2012 to 2013 to 2014, then you can
3 say, well, you may or may not call it a trend.

4 I talked to some statisticians at Duke
5 about how many years does it take to make a
6 trend, and as you can imagine, there are all
7 kinds of answers to that. And of course we had
8 Dr. Spohn's observation about that and Judge
9 Jones -- basically with whom I agree -- but so
10 what does that show? Does it show a difference
11 in each of those years? Okay.

12 MS. SAUNDERS: Okay. We do have that.
13 I don't -- I don't know whether it's in their
14 packets, the Cassia -- or Dr. Spohn's statistical
15 report.

16 CHAIR HOLTZMAN: Yes.

17 MR. STONE: Yes, yes we do. Which
18 table should we look at?

19 MS. SAUNDERS: We're looking on page
20 7, Table 3. And it -- by year, it does talk
21 about the -- is it 6? I am sorry, do they have a
22 different --

1 MS. PETERS: Okay. There was one
2 update to the report.

3 MS. SAUNDERS: Oh, okay.

4 MS. PETERS: Yes, sorry.

5 MS. SAUNDERS: Okay. So you do see
6 based on by penetrative offense and by contact
7 offense general court-martial, that's the overall
8 statistics at the top. And then right below
9 that, you do see by year, 2012, the number that
10 went to general court-martial at 280 --

11 CHAIR HOLTZMAN: Wait a minute, 280?

12 MR. STONE: It's page 6, page 6.

13 CHAIR HOLTZMAN: Oh.

14 MS. SAUNDERS: I'm sorry, I think I
15 had --

16 MR. STONE: Table 3.

17 MS. SAUNDERS: -- a different version
18 of the report than you. I apologize.

19 CHAIR HOLTZMAN: Okay. Just wait a
20 minute then, please. Okay. You're on page --

21 MS. SAUNDERS: Table --

22 CHAIR HOLTZMAN: -- 6?

1 MR. STONE: Yes.

2 MS. SAUNDERS: It's -- the Table is
3 entitled --

4 CHAIR HOLTZMAN: Right.

5 MS. SAUNDERS: -- Disposition of
6 Sexual Offenses.

7 CHAIR HOLTZMAN: Right.

8 MS. SAUNDERS: So if you see that, the
9 table right in the middle there has 2012, 2013,
10 and 2014. You can see by number and by
11 percentage the numbers of cases that went to
12 general, special, and summary courts-martial.

13 (Pause.)

14 MS. SAUNDERS: So you can see the --
15 for example, in general court-martial, it went up
16 in 2013 and down slightly in 2014.

17 HON. JONES: Right.

18 MS. SAUNDERS: Whereas the others have
19 gone consistently upward. I don't know, does
20 this answer your question --

21 MR. TAYLOR: Yes --

22 MS. SAUNDERS: -- Mr. Taylor?

1 MR. TAYLOR: -- thank you.

2 MS. SAUNDERS: Okay.

3 MR. TAYLOR: Thank you. So I guess
4 the point is you're taking all three years and
5 treating them -- you're addressing them
6 collectively when you describe what you just did
7 in terms --

8 MS. SAUNDERS: Correct.

9 MR. TAYLOR: -- of --

10 MS. SAUNDERS: And of course, in the
11 report, we do break it out a little bit more, and
12 we do have this data here that can break it out a
13 little bit more, but just, you know, one thing
14 that was consistent in all the years was the
15 penetrative offenses for example are being
16 largely handled at general court-martial, which
17 now Congress has legislated. So from this point
18 forward, all penetrative offenses should be
19 handled at general court-martial.

20 But the -- also consistent is that
21 contact sexual offenses have been handled in a
22 variety of different ways, through referral to

1 general court-martial to non-judicial punishment.
2 So they -- for whatever consistency that tells
3 you, it's consistent in its inconsistency,
4 perhaps.

5 CHAIR HOLTZMAN: Well, I don't know
6 that we can reach any conclusion. At least I
7 don't feel comfortable reaching any conclusion
8 about appropriateness because we don't have any
9 of the facts --

10 MS. SAUNDERS: We don't have the facts
11 --

12 CHAIR HOLTZMAN: -- of any of the
13 cases, and --

14 MS. SAUNDERS: Right.

15 CHAIR HOLTZMAN: -- I don't know what
16 you can say about consistency because what are we
17 measuring, just that the number is going up, or
18 do we need to know something more in detail about
19 it? So I would just present the numbers without
20 reaching a conclusion.

21 MS. SAUNDERS: So it would be enough
22 to say that what I just said, which is that

1 penetrative offenses largely handled by --

2 CHAIR HOLTZMAN: Right.

3 MS. SAUNDERS: -- general court-
4 martial?

5 CHAIR HOLTZMAN: Describe the facts,
6 that's it.

7 MS. SAUNDERS: Okay.

8 MR. TAYLOR: I agree.

9 MS. SAUNDERS: That's helpful.

10 CHAIR HOLTZMAN: How do you feel, Mr.
11 Stone?

12 MR. STONE: I agree, and then we're
13 going to get to these acquittal numbers, we're
14 going to have to have that in there too.

15 In other words, if something is
16 increasing and largely going up, we -- as was
17 pointed out, we've got to show as Judge Jones
18 said that the number of acquittals are going up
19 too, the percentages.

20 CHAIR HOLTZMAN: Okay, so then we're
21 up to number 2 on this chart, right?

22 MS. SAUNDERS: Issue 3(b), which is

1 adjudication outcomes.

2 CHAIR HOLTZMAN: No, on number 2, do
3 the data indicate whether -- oh, I see, right, we
4 did -- we did 3(a), so we're up to 3(b), okay.

5 MS. SAUNDERS: Right.

6 Col GREEN: So just to summarize
7 though ma'am, that the appropriateness question
8 is, without case facts, there's not an ability
9 for the Panel to provide that analysis --

10 CHAIR HOLTZMAN: Right.

11 Col GREEN: -- and the consistency is
12 somewhat related to that, but also I mean I guess
13 Mr. Taylor's concern about the -- and it has been
14 expressed by others, that, I mean, we have three
15 years' worth of data and whether there's
16 consistency across years is difficult to
17 determine by this data set, is that, to
18 summarize?

19 CHAIR HOLTZMAN: Well, also because
20 it's fact-specific, so how do you know --

21 Col GREEN: Yes ma'am.

22 CHAIR HOLTZMAN: -- whether it's

1 consistent or not? Okay. Where are the numbers
2 related to 3(b)?

3 MS. PETERS: Okay. 3(b), there are
4 some statistics on page 9 of your deliberation
5 outline, and I can reference Dr. Spohn's
6 statistical report for additional information,
7 but this is information you received in January
8 that we looked at the case outcomes.

9 Again, the tasks don't say you need to
10 report the conviction rate specifically. We --
11 the Staff felt it was implied, if you were going
12 to look at decisions and punishments, the stop in
13 between is the case outcome, and then you know
14 how many punishments you have to -- to look at,
15 so it was naturally part of our research and
16 analysis.

17 We looked at whether somebody who was
18 charged with a penetrative offense or contact
19 offense was convicted, and a conviction rate --
20 our lesson is it's all about definition. What do
21 you define as the group out of which you
22 calculate the conviction rate?

1 So we presented to you multiple
2 conviction rates because we think it sort of has
3 this cascading effect of giving you a sense of
4 where these charges fall out in the process.

5 We had 1275 cases in which a
6 penetrative offense was charged. We then -- Dr.
7 Spohn looked at the percentage of those cases
8 that ultimately resulted in a conviction for that
9 main offense or for some lesser sex offense so
10 that you could see whether -- that where a
11 penetrative offense was charged, roughly 41
12 percent of the time the individual was convicted
13 of a sex offense. It may have been a rape or
14 sexual assault, it may have been a contact
15 offense.

16 Then we also looked at where one of
17 these cases were brought that involved a
18 penetrative offense originally on the charging
19 document, if they weren't convicted of a sex
20 offense, were they convicted of a non-sex
21 offense? We don't have all the facts. They may
22 be related to the sex offense charges, they may

1 be unrelated. But that was an additional 10
2 percent of cases that were only convicted of a
3 non-sex offense.

4 And by looking at all of those
5 numbers, then Dr. Spohn was able to break out the
6 overall conviction rate of 51 percent where the
7 main offense was -- the most serious offense was
8 a rape or sexual assault.

9 And we looked at contact offenses
10 separately because they can involve a broader
11 spectrum of severity. They can be minor. They
12 could be a more serious aggravated contact. But
13 on the whole, they tend to be more minor
14 offenses, and we looked at how the conviction
15 rate shook out from preferral again. And
16 preferral is the very earliest stage of a
17 prosecution, and a lot -- there is no court
18 involved at preferral. So the lesson here in
19 looking at these conviction rates is that the
20 military justice system is unique, and preferral
21 in the military does not necessarily mean the
22 same thing as filing charges with a court in

1 civilian court.

2 So we also looked at cases that were
3 referred by a convening authority to a court-
4 martial and found it was very important to look
5 at the conviction rate from that point in the
6 legal process, and you still see that if it -- if
7 there are charges of a penetrative offense, the
8 likelihood of conviction was roughly 1/3, 33.6
9 percent.

10 CHAIR HOLTZMAN: Where are you reading
11 now, please? I'm sorry.

12 MS. PETERS: All on page 9 of the
13 deliberation guide.

14 CHAIR HOLTZMAN: Are you down in the
15 fourth bullet?

16 MS. PETERS: One, two, three --

17 CHAIR HOLTZMAN: One, two, three,
18 four, five.

19 MS. PETERS: -- fifth bullet, yes.

20 CHAIR HOLTZMAN: Okay. And what year
21 does this refer to, the 2,000 --

22 MS. PETERS: Collectively, all --

1 CHAIR HOLTZMAN: -- one thousand, two
2 hundred --- oh this is a three year -- this is
3 the number for three years?

4 MS. PETERS: Right.

5 CHAIR HOLTZMAN: Okay. Can we make
6 that clear somewhere?

7 MS. PETERS: Okay. Yes, absolutely.

8 So all of these statistics that we
9 have referred to involve an assessment of all
10 three years' worth of data across all of the
11 Services.

12 CHAIR HOLTZMAN: You have it broken
13 out by year? No.

14 MS. PETERS: The -- and that, I think
15 there is some more detail by year and by Service
16 in the statistical report. And when you get down
17 to that level, you have -- depending on the size
18 of the Service, you may be only talking about a
19 few cases, and we don't have it by year and
20 Service at the same time. It's either breaking
21 it down by year or breaking it down by Service,
22 and by the classification of offense as a

1 penetrative offense or a contact offense.

2 So -- and I just want to make sure I
3 answer, we can provide more -- we can refer to
4 the statistical report for that information.
5 Yes, I think it's Table 4 in the statistical
6 report, right, which should be page 7 of Dr.
7 Spohn's statistical report, has a breakdown by
8 year and then by Service on the following page in
9 Table 5.

10 What we see that -- as you break down
11 the conviction rate from preferral for
12 penetrative offenses, the conviction rate dropped
13 year to year -- I'm sorry, well, slightly from
14 2012 to 2013, you were at about 27 percent, and
15 in 2014, the conviction rate for penetrative
16 offense was -- the preferral conviction rate was
17 about 20 percent.

18 Likewise, for contact offenses, it
19 looks like the same -- you see the same sort of
20 trend or pattern in that. In 2012, conviction of
21 a contact offense was -- had a 36 percent chance,
22 and in 2014, was down to 25.7 percent chance of

1 conviction from preferral.

2 There are additionally I think -- it's
3 also possible, if I were to direct the Panel's
4 attention to Table 2 in the statistical report,
5 there's just a lot of information right there,
6 but what you have is the ability to compare, as
7 we tried to do in this deliberation outline but
8 maybe it's a little bit more detailed, in Table
9 2, you have the penetrative offense or contact
10 offense conviction rate from preferral followed
11 by where the charges fall out after referral to
12 trial.

13 And everything in Table 2 again is
14 top-line statistics that look at all of the cases
15 in the database spanning all years.

16 MR. STONE: And what do you think that
17 tells us?

18 MS. PETERS: Well, the -- I think it
19 tells you, I mean, it tells you where these
20 charges are going, from preferral and referral,
21 two very important points in the justice system.
22 And I think it just actually gives you a picture

1 of the fact that there are options for how these
2 cases are resolved.

3 They can be dismissed and they could
4 -- or they could also reach an alternative
5 disposition. And if we're worried about why
6 cases are being dismissed, you know, this Table 2
7 and this type of data can tell you, well, it was
8 dismissed at a certain point in the legal process
9 where an Article 32 hearing was held in most of
10 those cases, in about at least 80 percent of
11 those cases I think -- or I'm sorry, roughly 60,
12 I think, percent of the cases, and it looks like
13 respectively 82 percent of the cases. So our
14 point in bringing preferral conviction rate and
15 referral conviction rate along with the other
16 resolutions of the case is just to say this is --
17 these are how the charges are washing out.

18 Does it look like the conviction rate
19 is relatively low for penetrative offenses?

20 Certainly. But without the facts of the cases
21 Members have already echoed, I don't think the
22 Staff was able to draw -- to suggest any further

1 meaning behind that, it was just these are -- the
2 rates are what they are.

3 If they challenge our assumptions
4 about the way cases were being handled, maybe
5 there is some value in that, or maybe it
6 challenges our expectations of what we think
7 should happen with felony charges brought in the
8 military. But that is putting a greater meaning
9 behind the numbers. We just thought that this
10 was a good depiction of where cases fall out in
11 the system from preferral or referral of charges.

12 MR. STONE: Do we have comparable
13 penetrative numbers of convictions and acquittals
14 in any of that state data that we have?

15 MS. PETERS: We have a conviction rate
16 for rape cases in the Bureau of Justice
17 Statistics survey, and so it was only rape
18 whereas --

19 MR. STONE: And it --

20 MS. PETERS: -- ours is rape and
21 sexual assault.

22 MR. STONE: Okay, and it was about

1 what?

2 MS. PETERS: Sixty eight percent in
3 2009. It was a survey of 40 jurisdictions in May
4 of 2009, and the overall conviction rate was 68
5 percent, and that should have applied to just the
6 rape conviction. So that was the closest
7 available civilian data comparable to this.

8 What the Staff thought, some of us
9 anyway, thought maybe was interesting is just
10 that it -- the military brings a sexual assault
11 charge, and there is at most a 1/3 chance that a
12 rape or sexual assault charge will result in
13 conviction.

14 It was numbers like that that we saw
15 value in presenting these statistics, and each
16 statistic we looked at, we said we'd like to know
17 more. If it's dismissed, did an Article 32
18 happen? Well our database was able to tell us
19 that with some fidelity, and we thought that that
20 was important because that's the military's --
21 one of the mechanisms by which we vet charges
22 before referral in an adversarial preliminary

1 hearing environment.

2 So a discussion of the conviction
3 rates and the case outcomes is a discussion of
4 military justice procedure, essentially. The two
5 are really closely wed.

6 HON. JONES: And can I ask one
7 question? When is it that the new Article 32
8 procedure took effect?

9 MS. PETERS: For offenses on or after
10 26 June 2014, so the new procedures -- that
11 effect is not measured in these statistics. If
12 anything --

13 HON. JONES: Oh it's not in there.
14 These are all pre-that, these are the old Article
15 32 procedure.

16 MS. PETERS: Yes ma'am.

17 HON. JONES: Is that right?

18 MS. PETERS: Yes ma'am.

19 HON. JONES: Okay. Fair enough.

20 Col GREEN: And actually, the
21 proceedings, the Article 32 proceedings were
22 changed in December of 2014. The law was changed

1 in June, and then they became effective for cases

2 --

3 MS. PETERS: Oh, that's right.

4 HON. JONES: Right.

5 Col GREEN: -- that went to an Article
6 32 after December of '14. So, no, none of this
7 data reflects any of that, ma'am, and this may
8 just establish something that in the future,
9 those comparisons give you something to compare
10 with future years of data to see how the pre-
11 trial processing of these cases changes as we see
12 more of those cases post-change start to go
13 through the system.

14 HON. JONES: I think you're absolutely
15 right, Kyle. I think that will be a big change
16 with the new procedures in terms of the number of
17 cases, and that actually move on after an Article
18 32.

19 DR. SPOHN: And if I could just say
20 something about how data like this can inform
21 policy recommendations, I think you've just hit
22 on something important in that longitudinal data

1 can reveal patterns of outcomes and can pinpoint
2 when those patterns change.

3 So this can then be examined in
4 relationship to changes in laws, policies, and
5 practices. So if Congress does in fact change
6 the definition of the crime or mandate new
7 policies or procedures, this can really tell us
8 whether these changes had the instrumental
9 effects that were anticipated.

10 So in that sense, collecting this data
11 over time can really demonstrate the impact of
12 legal changes and impact or no impact, so to
13 speak.

14 CHAIR HOLTZMAN: Do we have any sense
15 of what the conviction rate is in non-sex-offense
16 cases? Homicide or --

17 MS. PETERS: I don't have that --

18 CHAIR HOLTZMAN: -- anything like
19 that? We don't have that?

20 MS. PETERS: -- data at hand, no.

21 CHAIR HOLTZMAN: Because actually, I
22 mean, you know, as a former prosecutor, the 32

1 whatever it is convicted of -- the 28 -- where
2 are we? The 33 and a third percent conviction
3 rate sounds, you know, pretty low. I don't want
4 to say alarming.

5 HON. JONES: And I just want to be
6 sure I've got this. That's if they bring -- this
7 is after court-martial, these are court-martial
8 results, right?

9 MS. PETERS: Yes ma'am.

10 HON. JONES: Out of 100 cases, only 33
11 are convicted? Okay.

12 MS. PETERS: Right.

13 HON. JONES: And as we increase the
14 number of courts-martial, the conviction rates
15 are going -- for penetrative offenses, the
16 conviction rates are going down? Is that right?

17 CHAIR HOLTZMAN: How do you get to the
18 number of 100, Barbara? I am seeing a number of
19 928. Is that not correct?

20 HON. JONES: Oh, I was just using 100
21 as a percentage, 33 convicted out of 100.

22 CHAIR HOLTZMAN: Oh, okay but --

1 HON. JONES: I mean you said 33
2 percent was the conviction rate.

3 CHAIR HOLTZMAN: Right. I think the
4 number is 928, is that correct, referred to trial
5 for penetrative offenses, in this Table 2?

6 MS. PETERS: Yes ma'am, that's
7 correct, that's the referred -- number of
8 referred penetrative offenses.

9 CHAIR HOLTZMAN: In three years?

10 MS. PETERS: For three years.

11 And yes ma'am, Judge Jones, on the
12 point about --

13 HON. JONES: Yes.

14 MS. PETERS: -- one table does show
15 you the number of courts overall are increasing.
16 Meanwhile the conviction rates are maybe
17 decreasing slightly or holding constant. They're
18 not necessarily increasing with the number of
19 courts-martial.

20 HON. JONES: And then you're saying
21 they're holding constant, they're not decreasing
22 either?

1 MS. PETERS: Well --

2 HON. JONES: Or it's not statistically
3 significant?

4 MS. PETERS: As far as its
5 significance, I would -- in that realm, I would
6 defer to Dr. Spohn, but it appears that in 2012
7 and 2013, the difference was 0.2 percent in the
8 conviction rate for penetrative offenses. It
9 then dropped seven percentage points by 2014.

10 So there would be a drop, and I guess
11 that's where I'm saying I saw some year changes
12 where it was constant, and in some where it
13 dropped.

14 Likewise, for contact offenses --

15 HON. JONES: Oh, I see.

16 MS. PETERS: -- '13 and '14, right
17 below penetrative offenses, you go from 27.9
18 percent down to 25.7 percent. And that variance
19 may not be significant in any regard, but it is a
20 slight decrease.

21 HON. JONES: I've got you. Thank you.

22 Col GREEN: Dr. Spohn, is there --

1 HON. JONES: Then again I guess we'll
2 see if the -- now that there will be more courts-
3 martial, because it's now mandatory with the
4 charge, general courts-martial, we'll have
5 another year's data, I suppose.

6 Although I guess, when does it take
7 effect? You know, the problem is we won't really
8 know anything for about two years, right?
9 Because people have to get charged and then
10 tried.

11 MS. PETERS: Right.

12 Col GREEN: Right, but --

13 MS. PETERS: That's correct.

14 Col GREEN: -- but the Article 32
15 process for every case heard after December of
16 2014 was changed, and so the results --

17 HON. JONES: Yes, no, I think -- yes,
18 I think with Article 32, we have a chance of
19 seeing --

20 Col GREEN: Right.

21 HON. JONES: -- something interesting,
22 let me put it that way.

1 Col GREEN: Yes.

2 HON. JONES: I guess the fact that now
3 many -- I don't know how many more, but a certain
4 number more cases will end up in general courts-
5 martial than before with this latest
6 congressional change. That may be something we
7 just won't be able to see the -- you know, any
8 impact in terms of conviction rates.

9 CHAIR HOLTZMAN: Can I just also ask
10 about conviction rates? And I know the numbers
11 are really tiny, like 9, 11, but what's the
12 conviction rate in the federal system for sexual
13 assault crimes?

14 MS. PETERS: The information we have
15 is that just broadly, it's in the upper 90s for
16 all offenses, and I don't believe we asked for a
17 specific conviction rate for sexual assault. We
18 asked the Sentencing Commission only for their
19 punishment data. And that's the extent of
20 Staff's familiarity, and I'm not sure if Dr.
21 Spohn has any more information in that regard.

22 DR. SPOHN: I do not, no.

1 Col GREEN: My understanding from the
2 Sentencing Commission is because the trigger for
3 the Sentencing Commission is where there's a
4 conviction and a punishment, and so their data is
5 collected based on only convictions, and so their
6 understanding of cases that do not result in a
7 conviction, I don't know that they have any
8 federal data on that other than what's maintained
9 as part of BJS's statistics.

10 MR. STONE: Yes, there is other data,
11 right. It wouldn't be Sentencing Commission
12 data, but --

13 CHAIR HOLTZMAN: Okay, well whatever.

14 MR. STONE: -- there's other DOJ data.

15 CHAIR HOLTZMAN: Well what does the
16 DOJ data show?

17 MS. PETERS: We don't have anything --
18 I don't think we have a sex assault-specific --

19 CHAIR HOLTZMAN: Conviction rate.

20 MS. PETERS: -- conviction rate. But
21 if it's any indication that overall you're at 97
22 percent mostly through guilty pleas in the

1 federal system, sex assault is going to have more
2 variation than other offenses. That's the extent
3 of the information available.

4 MR. STONE: And you have that other 68
5 percent rate that you spoke of a few minutes ago.

6 MS. PETERS: Right, from the 2009 data
7 from BJS, yes. And that's -- right, and that's
8 overall, right, and that is just for rape, not
9 the other offenses.

10 MR. STONE: That's just for rape,
11 okay.

12 HON. JONES: That's the federal
13 number? I'm sorry. Is that right?

14 MS. PETERS: 68 percent is the
15 statewide, nationwide --

16 HON. JONES: Oh okay, got you.

17 MS. PETERS: -- sampling figure.

18 HON. JONES: Okay.

19 CHAIR HOLTZMAN: In 2009?

20 MS. PETERS: Yes.

21 Col GREEN: Dr. Spohn, in terms of the
22 year to year comparison of data, your Table 4 in

1 your report notes that the -- for the year
2 changes for the case outcomes for penetrative
3 offenses, you noted that differences in -- by
4 year were statistically significant, but were not
5 statistically significant for contact offenses.

6 Are there particular -- because we're
7 talking about convictions for the penetrative
8 offenses, contact offenses, acquittals, are there
9 particular aspects of that that were
10 statistically significant, or how might the Panel
11 look at those numbers in terms of breaking that
12 out?

13 DR. SPOHN: So the statistic is a
14 reflection of overall changes, and if we wanted
15 to look at each individual category, that is,
16 conviction for a penetrative offense or
17 acquittal, we could do that, but that statistic
18 just shows that overall the changes are
19 statistically significant.

20 And so, I mean I guess you could
21 eyeball them and say well, what's happening is
22 that acquittals are going up, and that the other

1 -- some of the other data is pretty consistent
2 from year to year.

3 MR. STONE: I was sort of interested
4 in the text below Table 4, the sentence that
5 said, the odds of being convicted of a
6 penetrative offense were highest in the Army, 28
7 percent, and lowest for the Marine Corps, 16.9
8 percent.

9 It seems to me that's a pretty
10 significant difference, and says certainly
11 something either about the resources that are
12 available or the difficulty of moving the
13 procedures along for pragmatic Service reasons or
14 something, but that's a difference that looks
15 like it's -- you know, that's a huge difference
16 in outcome.

17 HON. JONES: Can you tell me -- give
18 me a page?

19 CHAIR HOLTZMAN: Seven.

20 MR. STONE: Page seven of Dr. Spohn's
21 report, about --

22 HON. JONES: Oh, thank you.

1 MR. STONE: -- four lines up from the
2 last line, and I wonder if Dr. Spohn has any
3 thoughts or anybody else does about how -- that
4 great, tremendous disparity.

5 DR. SPOHN: I think what you have to
6 keep in mind is those are simple bivariate
7 results, and they don't take into account that
8 there might be differences in the kinds of cases
9 or, you know, some of the factors that were
10 predictive of the kind of outcomes. And so if
11 you look at the multivariate analysis, I think
12 that's a better picture of whether there are in
13 fact real differences across the Services or by
14 year and so on. And those results are presented
15 further back in the report.

16 CHAIR HOLTZMAN: Where are they
17 presented?

18 MS. PETERS: I believe it begins on
19 page 16, ma'am.

20 MR. STONE: I thought that was page 8,
21 Table 5. Isn't that it?

22 MS. PETERS: I think some of the

1 multivariate analyses are presented in narrative
2 form because it's just analyzing predictive
3 factors rather than being presented as numbers in
4 a table, so --

5 MR. STONE: I mean but even there you
6 have in the last column on the first table, the
7 first chart in Table 5, you've got the Army only
8 dismissing without any further action 9 percent
9 of the cases, and every one of the other Services
10 has got twice as much as that that they're
11 dismissing without anything further. That's
12 pretty big too.

13 You've got also the same kind of a
14 disparity pretty much in contact offenses.
15 Again, the Army doing something with 96 percent
16 of the cases, and only the Air Force comes close.
17 Everybody else is, you know, in the teens, you
18 know. That's kind of -- wow.

19 MS. PETERS: Well Dr. Spohn, if the
20 proper -- if the context that you're talking
21 about considering, I think in the multivariate
22 analysis, about halfway down page 16 of the

1 report, is that sort of the sum total of what
2 happens when you hold Service and type of case
3 constant?

4 I believe there's -- if I can read
5 this, and you tell me where this fits within our
6 discussion, but the results of the analysis on
7 two indicators of the likelihood of conviction,
8 whether the accused was charged with and
9 convicted of a penetrative offense, I guess Table
10 15 shows those results, sorry.

11 I'm sorry, below that, the
12 statistically significant predictors of
13 conviction for at least one charge are the fiscal
14 year, actually some victim characteristics, and
15 the number of charges, and also whether the
16 accused was charged with a penetrative offense.

17 And there is no mention of the
18 Service. When you looked at -- when you did the
19 multivariate analysis, was the Military Service
20 of the accused predictive of conviction or
21 acquittal? I think not as much as these other
22 factors.

1 DR. SPOHN: That's right, that's
2 exactly right. So once you hold constant the
3 seriousness of the offense, the number of
4 victims, and the other factors that are in those
5 tables, any differences between the Services are
6 --- they're not statistically significant, which
7 means that the need to -- or they wash out when
8 you control for those other factors.

9 CHAIR HOLTZMAN: I think what's also
10 quite interesting, alarming, is that on the
11 bottom of page 16, it's the gender of the victim
12 is also statistically significant in the sense
13 that, there's less likely to be a conviction when
14 the victim is a female.

15 DR. SPOHN: That's correct, keeping in
16 mind that most victims are in fact female and --

17 CHAIR HOLTZMAN: Is that --

18 DR. SPOHN: -- keeping in mind who
19 victims are is kind of skewing that result.

20 CHAIR HOLTZMAN: I'm sorry, I missed
21 what you said. What's --

22 DR. SPOHN: I thought it was

1 interesting --

2 CHAIR HOLTZMAN: What's skewing the
3 result? So even though it's statistically
4 significant, it's not meaningful? Would you
5 explain that in some way? I'm not following.

6 DR. SPOHN: Oh no, no, it is a
7 statistically significant difference, and it
8 could be that there are factors that aren't
9 controlled for in the model because there are
10 very few -- I mean, in terms of the victim
11 characteristics. We don't know, for example, if
12 let's say females were less likely, less willing
13 to cooperate in the adjudication process than
14 male victims.

15 And so the difference could be due to
16 underlying factors, data that we don't have that
17 are -- that would explain those differences.

18 And again, I think that's part of the
19 difficulty of drawing definitive conclusions is
20 that some of the variables that research at the
21 state level has identified as being predictive of
22 outcomes, that data is not contained in the

1 database.

2 CHAIR HOLTZMAN: Can we make that
3 point somewhere in the materials that we're
4 presenting here, that we don't --

5 MS. PETERS: That we don't have the
6 same kinds of data?

7 CHAIR HOLTZMAN: Yes.

8 MS. PETERS: Yes ma'am.

9 MR. STONE: This sort of cuts -- this
10 cuts against, doesn't it, us being able to say
11 that maybe everybody should use our database and
12 process, because even our database doesn't
13 provide enough variables to -- for Dr. Spohn to
14 draw those conclusions?

15 DR. SPOHN: Right. I mean, I think
16 that the United States Sentencing Commission has
17 a database or data collection protocol that could
18 serve as a model for the military in the sense
19 that the U.S. Sentencing Commission requires each
20 of the district courts to provide a certain
21 specified set of documents, and all courts
22 provide the same documents.

1 Then there is a research arm in the
2 Sentencing Commission that is tasked with
3 entering the data, analyzing it, and reporting
4 the results, and you know, something like that at
5 the Department of Defense might be, you know, it
6 might be the way to go.

7 It would involve creating an agency
8 that would be tasked with doing that, but the
9 consistency that the Sentencing Commission data
10 provides is I think pretty remarkable, and
11 researchers use that data, de-identified data,
12 and as a result, we have a very robust and
13 methodologically sophisticated body of research
14 on federal sentencing, that really, there is no
15 rival on any other issue.

16 MR. STONE: Do you think that the U.S.
17 Sentencing Commission folks, because they're
18 looking at federal data and ultimately military
19 prosecutions are federal, that one solution might
20 be to press Congress to make the Sentencing
21 Commission have a little side job, you know, that
22 obtains this?

1 And since they're already -- they've
2 already got computer systems and data systems and
3 analysts doing it for one set of data, that they
4 should pick up the relatively small numbers of
5 military cases and do this too?

6 DR. SPOHN: That would be, I guess up
7 to Congress and the Sentencing Commission, but
8 yes, that would be the appropriate solution I
9 think.

10 CHAIR HOLTZMAN: But that would only
11 give us sentencing information, it wouldn't give
12 us the underlying information related to
13 convictions and so forth, which is, you know, a
14 big issue as well.

15 DR. SPOHN: Well --

16 CHAIR HOLTZMAN: Am I right?

17 DR. SPOHN: They could collect the
18 data from earlier stages. The Sentencing
19 Commission chooses to not collect data on
20 charging and plea bargaining and that kind of
21 thing, but certainly one could collect that kind
22 of data if those documents were available.

1 It would require some modifications,
2 obviously, of the data that the Sentencing
3 Commission collects, but I mean the data would
4 not be comparable anyway since the data that the
5 Sentencing Commission collects is based on the
6 Federal Sentencing Guidelines, obviously.

7 CHAIR HOLTZMAN: Can I ask again about
8 the conviction rate? Does this take into account
9 plea bargains, or is this just conviction after
10 trial?

11 MS. PETERS: No, it takes into
12 consideration plea bargaining.

13 CHAIR HOLTZMAN: So we don't have
14 broken out what the conviction -- what the trial
15 conviction rate is?

16 MS. PETERS: Correct, we don't have
17 that.

18 HON. JONES: Are we talking about our
19 numbers or the Sentencing Commission?

20 CHAIR HOLTZMAN: No, no, our numbers.

21 MS. PETERS: No, we --

22 HON. JONES: Oh okay, I thought we had

1 the numbers based -- the conviction rate was
2 based on actual courts-martial, general courts-
3 martial. I apologize then. Okay.

4 MS. PETERS: No, but we --

5 HON. JONES: Obviously, we could get
6 that number, I assume.

7 MS. PETERS: Right. We do have the
8 ability to look at our data set and really look
9 at how many of those cases involved a guilty plea
10 to a sexual offense. It's just a matter of sort
11 of time and how you frame the issue, but that
12 information can be available, and we could look
13 at that.

14 HON. JONES: Great, thank you.

15 CHAIR HOLTZMAN: So in other words we
16 don't have a trial conviction rate, but we could
17 get one.

18 MS. PETERS: Right.

19 CHAIR HOLTZMAN: From our numbers?

20 MS. PETERS: Right.

21 As we do that, the number of cases
22 you're examining is obviously going to continue

1 to decrease, and so the Staff felt comfortable
2 sticking with the more -- the broader statistics
3 that involved as many cases as possible to get
4 that broader picture because in the end, this is
5 -- you might be looking at 100 cases over three
6 years, and you start thinking, well, over five
7 Services in three years, how many times is this
8 one particular fact or event happening in the
9 Service, so then what is the value of that
10 statistic?

11 And so we stuck with the broader
12 statistics generally, but those inquiries we
13 could specifically make.

14 MR. STONE: Would it be a lot of
15 trouble to find that number for us?

16 MS. PETERS: No.

17 MR. STONE: Okay.

18 Col GREEN: The Staff did look at the
19 number of cases that went to pre-trial
20 agreements, so the number of cases that went to
21 the plea bargaining process, and of the -- across
22 the three years, the 1289 cases that were

1 referred to courts-martial, 387 of those cases,
2 or 30 percent, involved a pre-trial agreement.

3 And the --

4 MS. PETERS: Right, this is -- and
5 this is where the issue with pre-trial agreements
6 I think comes into play, is exactly you -- it is
7 -- it just takes time to know exactly what you're
8 looking at. You want to make sure it's a plea to
9 a penetrative offense, if that's the main offense
10 charged, or is it a plea just to the contact
11 offenses on the charge sheet, but you're looking
12 at a category of cases where a penetrative
13 offense was charged, and that drops off, and he's
14 only pleading to a contact offense.

15 And so there are so many different
16 permutations of results when you look at plea
17 agreements, it really became complicated, and we
18 really weren't sure, the further down we dug, how
19 much we were going to be able to tell you --

20 MR. STONE: I think we were --

21 MS. PETERS: -- because it always
22 required more clarification.

1 MR. STONE: I think we were asking
2 about the opposite.

3 MS. PETERS: Okay.

4 MR. STONE: In other words, we were
5 more interested in the number -- the numbers in
6 the categories you have here that did not involve
7 a pre-trial agreement.

8 MS. PETERS: Okay.

9 MR. STONE: Leaving aside that the
10 pre-trial agreement could -- every agreement
11 could be different, we were curious to see
12 acquittals and convictions on the ones that went
13 to a court-martial.

14 MS. PETERS: Okay. And we could do
15 that, and there's always fringe sort of
16 circumstances where a pre-trial agreement, you
17 know, just really refers -- well, there -- we
18 could do that. And we can explain that.

19 Col GREEN: And I think the top-line
20 number Mr. Stone is --

21 MS. PETERS: Yes.

22 Col GREEN: -- I mean, looking at what

1 we figured out, 70 percent of the cases are going
2 to litigation versus pre-trial agreement, and the
3 breakouts of then what of those cases result in
4 conviction versus what of those cases result in
5 acquittal would -- we would have to, you know, go
6 back to the information and pull those numbers
7 out again.

8 MR. STONE: Yes, because I wondered
9 whether the 20 percent that we were looking at
10 that resulted in conviction of penetrative
11 offenses would go down to half of that or less.

12 MS. PETERS: Right, and you have
13 scenarios --

14 CHAIR HOLTZMAN: And that, of course,
15 excuse me, would raise questions about the
16 capacity of the prosecution effort, I think. So I
17 think it is a number worth knowing.

18 MS. PETERS: And one of the other
19 complicating factors we noted was that sometimes
20 pre-trial agreements resolve a sexual assault
21 charge as a lesser included offense or a lower
22 offense, say an assault, an aggravated assault,

1 and they take away the sex offense component and
2 it changes it from an Article 120 offense to an
3 assault, and the individual is pleading to --
4 agrees to plead to an assault.

5 And this doesn't happen in every case,
6 but we just noticed this is a particular type of
7 aberration you would want to keep in mind because
8 the sex assault charge stays on the charge sheet
9 until findings, until they actually have the plea
10 agreement hearing. So it looks like the case is
11 going to trial and that he's pleading.

12 If you only look at this a certain
13 way, it looks like he's pleading to a sex
14 offense. When you actually get down to the way
15 we had to specifically code the data, he's -- he
16 or she is pleading to a non-sex offense, and the
17 sex assault charge drops off.

18 And so that -- you have to be very
19 careful in coding that you're not capturing those
20 cases where he's not pleading to a sex offense,
21 but it looks like sex offense charges referred,
22 it doesn't drop until the plea is accepted. So

1 sometimes, certain things are going to survive on
2 the charge sheet, and it might skew the data
3 somewhat one way or another, and that's just --

4 Col GREEN: But I think --

5 MS. PETERS: -- complication.

6 Col GREEN: -- the opposite, and I
7 think this was Mr. Stone's point, is that the
8 opposite, we could analyze in those 70 percent of
9 the cases that involved no pre-trial agreement --
10 -

11 MS. PETERS: Right.

12 Col GREEN: -- I mean, agreed, the
13 dispositions of the sexual assault offenses and -
14 - or the punishments, all that, when there is a
15 pre-trial agreement, those can go a lot of
16 different directions.

17 But when a case is quote unquote clean
18 and does not involve any type of an agreement,
19 looking at the case outcome is a little bit more
20 simplified because then you're really looking at
21 acquittal, conviction --

22 MS. PETERS: Okay, the contested case

1 --

2 Col GREEN: Right, exactly --

3 MS. PETERS: -- outcomes.

4 Col GREEN: -- the contested cases.

5 MS. PETERS: Okay.

6 Col GREEN: So --

7 CHAIR HOLTZMAN: But you're still not
8 getting the whole picture because the pre-trial
9 agreement really results -- really affects the
10 sentence, it doesn't affect what's going to
11 happen at the trial. Because you can be
12 acquitted at the trial, and nothing -- then, you
13 know, the pre-trial agreement goes out the
14 window, isn't that right?

15 Col GREEN: No ma'am, the pre-trial
16 agreements in the military involve a case where
17 there's an agreement to -- as to the plea to the
18 charges or charge, whether that's a guilty plea,
19 dismissal of charges, that then results in some
20 type of modification of the sentence or the
21 result and the punishment --

22 CHAIR HOLTZMAN: But you --

1 Col GREEN: -- of the case.

2 CHAIR HOLTZMAN: -- can still have a
3 plea agreement with regard to sentence and go to
4 trial, am I wrong?

5 Col GREEN: No, not in the military
6 system.

7 MR. STONE: In other words they don't
8 have sentence bargains.

9 Col GREEN: Right.

10 MR. STONE: They only have plea
11 bargains.

12 MR. TAYLOR: So what you'd end up
13 doing is just pleading guilty without any kind of
14 agreement to some offense that you're willing to
15 plead guilty to, and then you take your chances
16 on what happens in the larger -- the trial of the
17 rest of the charges.

18 CHAIR HOLTZMAN: I see.

19 Col GREEN: Right.

20 CHAIR HOLTZMAN: But you --

21 HON. JONES: But why not --- I think
22 I was under the same impression Liz was, that you

1 could end up with a sentence from the panel or
2 the military judge, but it might not be the
3 sentence agreement you had with the convening
4 authority, and you could end up with -- you get
5 the lower of the two. Am I missing something?

6 Col GREEN: No Judge Jones, that's
7 correct, but that's in exchange for a plea to the
8 charges. There are no agreements on sentencing
9 that are made --

10 HON. JONES: Right, okay.

11 Col GREEN: -- absent an agreement as
12 to the plea to the charges.

13 CHAIR HOLTZMAN: So they have to plead
14 guilty to everything?

15 Col GREEN: Well, plead guilty to
16 everything, I mean, they can -- there are
17 agreements there. They can plead guilty to one
18 offense --

19 CHAIR HOLTZMAN: I see.

20 Col GREEN: -- a lesser offense --

21 CHAIR HOLTZMAN: I got it.

22 Col GREEN: -- and dismissal of

1 charges, so -- but there's an agreement between
2 the convening authority and the accused to
3 resolve the findings portion of the case, and
4 then that allows the terms of the pre-trial
5 agreement to be considered at the punishment
6 phase.

7 CHAIR HOLTZMAN: Okay.

8 MR. STONE: Which explains why your
9 first comment is very important, that it would be
10 nice to see the conviction rate in the non-plea
11 cases.

12 CHAIR HOLTZMAN: Right.

13 MR. STONE: That would tell us a lot.

14 CHAIR HOLTZMAN: Right.

15 HON. JONES: And if we're --

16 MR. STONE: We'll probably tell
17 Congress --

18 HON. JONES: -- going to try to look
19 at punishments, we have to look at the -- it
20 would be interesting to see, and I don't know
21 what the answer is, whether they're getting
22 lesser sentences when they have an understanding

1 with the convening authority.

2 MS. PETERS: Yes ma'am, because if the
3 sentence adjudged at trial happens to be lower
4 than the plea agreement cap, the plea agreement
5 is not modifying the term of confinement because
6 it falls within the range -- falls within the cap
7 that was agreed to.

8 So, right, just because there's a plea
9 agreement does not mean that there's going to be
10 a modification of the sentence if the trial court
11 or panel adjudged a lower sentence.

12 HON. JONES: Well, so if the panel
13 gives him a lower sentence, what does he get?

14 MS. PETERS: He gets the lower
15 sentence.

16 HON. JONES: The lower or the higher?

17 MS. PETERS: He gets the lower
18 sentence. It's just that in terms of whether the
19 plea -- he gets the lower sentence in every case
20 --

21 HON. JONES: Right.

22 MS. PETERS: -- but when you're

1 looking at the impact of --

2 HON. JONES: I'm just saying --

3 MS. PETERS: Yes.

4 HON. JONES: -- oh, I'm sorry, go
5 ahead.

6 MS. PETERS: No, I'm saying that if
7 you're just looking at the effect of a plea
8 agreement on the system, that plea agreement is
9 executed. It's just that that plea agreement --
10 in that case, he's getting a lower sentence, and
11 the plea agreement isn't capping the sentence
12 because it's already lower.

13 And so that's just an interesting
14 twist in looking at cases with the plea --

15 HON. JONES: Oh, okay, I was only
16 thinking that if we're going to try to do the
17 statistics on confinement, it would be
18 interesting to see whether, you know, a
19 significant percentage of people got a shorter
20 term of confinement when they had an agreement --

21 MS. PETERS: Okay.

22 HON. JONES: -- with the convening

1 authority. That's all. It's a small point.

2 MS. PETERS: And Dr. Spohn, did we --
3 I think we looked at that in some detail after
4 the -- after the January meeting, is that
5 correct? Is that what we discussed via email?

6 DR. SPOHN: We did, and I compared the
7 -- well, I compared the approved -- the adjudged
8 and the approved sentences, and there were only
9 as I recall Meghan five cases in which the
10 offender -- in which case the adjudged sentence
11 was confinement and the approved sentence did not
12 involve confinement.

13 MS. PETERS: Right, and I'm looking --

14 DR. SPOHN: We also --

15 MS. PETERS: Okay.

16 DR. SPOHN: We also looked at the
17 difference in the mean sentences, and I don't
18 have that data in front of me.

19 MS. PETERS: The -- what I have from
20 looking at the impact, to Judge Jones's question
21 that I think we had discussed and I just happen
22 to have pulled it for the meeting, but that when

1 you have a plea agreement, where did it impact
2 the sentence? Because the difference between the
3 adjudged and approved sentence will show whether
4 the -- a plea agreement should show in most
5 cases, whether it was a plea agreement or whether
6 the convening authority's action pursuant to a
7 plea agreement or clemency reduced the sentence.

8 And in 76 percent --

9 DR. SPOHN: Right.

10 MS. PETERS: -- of the cases, there
11 was no difference between the adjudged and
12 approved sentence. In 88 percent of the cases
13 then the difference was six months or less. And
14 in 92 percent of the cases where we had a
15 sentence to look at, the convening authority's
16 action via plea agreement or whatever mechanism
17 modified the sentence by a year or less.

18 So out of 92 percent of our cases, the
19 net change was a year or less --

20 HON. JONES: Okay.

21 MS. PETERS: -- based on convening
22 authority action on the trial.

1 HON. JONES: Right.

2 MS. PETERS: And this was something I
3 think --

4 HON. JONES: Thank you.

5 MS. PETERS: -- was requested from the
6 January meeting, so -- .

7 HON. JONES: Thank you.

8 MS. PETERS: Mm-hm.

9 CHAIR HOLTZMAN: So going to issue
10 3(b), point 1, how are we going to comment on
11 this? Are case outcomes an effective indicator
12 of the justice system?

13 HON. JONES: Are we at 3(b) or (d)?
14 I'm sorry.

15 CHAIR HOLTZMAN: (b), as in boy.

16 HON. JONES: (b). Okay.

17 CHAIR HOLTZMAN: I don't know what it
18 means an effective indicator of the justice
19 system. Is it effective -- is it an indicator of
20 what about the justice system? Is that a -- is
21 that what -- what Congress asked us to give them?
22 No.

1 MS. PETERS: No ma'am, it's not part
2 of the taskings. It is information available to
3 the Panel, and the -- so we presented it to you
4 and asked what can we do with it? And this is
5 also based on comments the Panel had received in
6 previous meetings about well, can you judge a
7 system, the success of a prosecution, by the
8 conviction rate, or by the sentence? Are those
9 indicators of success?

10 And I think the comment from one of
11 the prosecutors who appeared in October was, "I
12 don't judge success by how big the sentence is."
13 Meg Garvin from the NCVLI was asked if I was
14 assessing the impact of programs like the SVC
15 program, are there indicators in the justice
16 system that would help me? Well, conviction rate
17 is not one of them. Don't look at conviction
18 rate as a certain indicator of whether things are
19 going in the right direction or the wrong
20 direction, necessarily, I think more broadly.

21 So because we had some Panel input on
22 that issue, it's -- and we just have the data, is

1 it data to report? I guess is the question, and
2 beyond reporting, are there any observations that
3 we think are worth noting? And it sounds like
4 the Panel is hesitant to really make any broader
5 conclusions from a conviction rate.

6 CHAIR HOLTZMAN: Well I mean, I don't
7 know. Panel Members, what are your views?
8 Barbara, do you have a thought about that?

9 HON. JONES: Whether we can make any
10 broader conclusions?

11 CHAIR HOLTZMAN: Yes, I guess what
12 comments would the Panel -- the question number
13 two, skipping number one, is what comments would
14 the Panel like to make about the military's
15 conviction and acquittal rates in sexual assault
16 cases, if any?

17 HON. JONES: Yes, I don't -- well, I
18 have only really got one other question, and I
19 don't know the -- I don't know about any -- I'd
20 have to think some more about anything I might
21 like to actually comment on as a Panel.

22 You also had another indicator in

1 there that -- which I thought was interesting,
2 was that civilian victims, their trials more
3 likely ended in a conviction than military
4 victims? Did I read that right?

5 MS. PETERS: Yes. I think that was
6 one of the -- the victim characteristics in the
7 bivariate analysis in the early part of Dr.
8 Spohn's --

9 HON. JONES: Right.

10 MS. PETERS: -- report appeared to
11 indicate, you know, predictive value for
12 conviction, and I think that's also addressed in
13 the multivariate analysis, where it seems that
14 that factor drops off in terms of significance
15 for determining whether there's going to be a
16 conviction or acquittal, meaning when you hold
17 those factors constant, maybe something else is
18 driving that difference for civilian victims
19 versus military victims.

20 HON. JONES: Okay, so I guess my only
21 comment would be that perhaps I think what I
22 would say at the end of all this is that the

1 statistics, while we -- certainly there is never
2 any certainty in statistics, some of them present
3 an interesting question that we could ask, just
4 to see if, you know, even in our site visits.

5 Like why do you think civilian
6 victims' cases result in conviction more
7 frequently than when the victim is a military
8 person? I mean, I just throw that out as an
9 example.

10 I think they -- it could be useful to
11 get us thinking about questions to ask. I think
12 we might want to ask the question of whether we
13 think, you know, with more cases getting thrown
14 in than were thrown in before to courts-martial
15 and the conviction rates maybe are going down, do
16 people think there is overcharging?

17 I mean, I just -- I guess my point is
18 simply I think there is food for thought here. I
19 don't think we can reach any definitive
20 conclusions. Some of the statistics are more
21 reliable than others, obviously, for different
22 purposes, but I think one purpose is that they

1 may give us some questions to talk about and
2 think about.

3 CHAIR HOLTZMAN: Well, I'd just like
4 to add to that. Mr. Stone or Mr. Taylor, do you
5 have any comments you'd like to -- Mr. Stone?

6 MR. STONE: Well, I think maybe when
7 we get the answer to the question that the Chair
8 asked, we'll have a better answer to whether the
9 outcomes are an effective indicator of the
10 justice system. If only one out of ten sexual
11 assault defendants actually going to trial
12 results in a conviction, that outcome is an
13 indicator that maybe Congress was correct in
14 deciding to try and fine-tune what goes in in
15 Article 32s and other components to -- because
16 that shows a tremendous waste of effort and
17 resources when you get -- you know, most systems
18 don't continue to just plod ahead when they're
19 getting one out of ten convictions.

20 CHAIR HOLTZMAN: Mr. Taylor?

21 MR. TAYLOR: Yes, I agree with what
22 Judge Jones had to say, but I would also add that

1 once we get beyond describing the data as it is,
2 trying to attribute any kind of causation to
3 anything I think is a mistake because even if we
4 can say there is a correlation that doesn't mean
5 there's causation.

6 So once we get beyond simply
7 describing the data and what they say, I think
8 we're on thin ice.

9 CHAIR HOLTZMAN: Yes, I am not
10 disagreeing with that.

11 I just would somehow want to suggest
12 that a 33 percent conviction rate, and the
13 numbers may even be more dramatic when we look at
14 the conviction rate after trial, does raise --
15 should raise some questions about the
16 effectiveness of prosecutorial training. It may
17 not have -- there may not be any causal
18 relationship, but it does raise questions about
19 how good the prosecution system is, is it -- and
20 why this is happening.

21 I mean, we can't tell whether this is,
22 you know, just the way the cookie crumbles, but

1 the quality of the evidence, the --

2 MR. STONE: Or even the notion that
3 the military with its lawyers is rotating them
4 more than a civilian --

5 CHAIR HOLTZMAN: Correct.

6 MR. STONE: -- system does.

7 CHAIR HOLTZMAN: Right, right, we
8 don't --

9 MR. STONE: The most --

10 MR. TAYLOR: Or --

11 MR. STONE: -- experienced people get
12 rotated.

13 MR. TAYLOR: -- whether there's a
14 general sense on the part of commanders that
15 they're going to refer more cases to trial.

16 MR. STONE: Maybe that, too.

17 CHAIR HOLTZMAN: Right, right, over
18 the --

19 MR. TAYLOR: We don't know.

20 CHAIR HOLTZMAN: -- right, so we don't
21 -- right, so we don't really know what's
22 happening, but this is something that should

1 trigger some further analysis.

2 And I think Judge Jones makes an
3 excellent point, which is one of the analyses
4 could be our own, which is when we go and do some
5 of these site visits, to ask also about why is
6 this, you know, what do you think the reasons are
7 for this conviction rate? Is this the best we
8 can do? Is it that rotation or not enough
9 investigative support --

10 HON. JONES: I mean or --

11 CHAIR HOLTZMAN: -- or --

12 HON. JONES: -- or --

13 CHAIR HOLTZMAN: -- the victim is not
14 willing --

15 HON. JONES: -- or is it the --

16 MR. STONE: Or the training, like you
17 said --

18 HON. JONES: And this is something we
19 did learn, that, you know, prosecutors', civilian
20 prosecutors' offices very carefully pick and
21 choose the cases they're going to bring to trial,
22 and I think we've heard enough to at least I

1 think assume that most of the time, they do not
2 take to trial the typical case that's charged in
3 the military.

4 CHAIR HOLTZMAN: Right, exactly. And
5 I don't know whether we want to even raise these
6 points as we raise the question, you know. It
7 may be unfair simply just to throw out, well,
8 look at this as a 33 percent conviction rate, we
9 need -- maybe need to raise some of these other
10 points as well, which is some of the reasons for
11 it could be whatever, but it's still worth --
12 it's still maybe worth examining.

13 What about the first issue, which is
14 are case outcomes effective indicators of the
15 justice system?

16 I mean, I think the answer in a way is
17 it could be or it couldn't be --

18 MR. TAYLOR: Yes --

19 CHAIR HOLTZMAN: -- depends --

20 MR. TAYLOR: -- I mean I don't --

21 CHAIR HOLTZMAN: -- on how much
22 information you have.

1 MR. TAYLOR: I mean, it -- the way I
2 think about it is it's a relevant factor, but
3 whether it's an indicator, if you have, for
4 example, a totalitarian society that has a 99
5 percent conviction rate, then you could say
6 whatever you would say.

7 CHAIR HOLTZMAN: Right.

8 MR. TAYLOR: So it's one factor, not
9 the only factor.

10 MR. STONE: Well and I think another
11 question, but again, it's something that's
12 probably beyond the data that we have available,
13 would -- and this comes from having heard some of
14 the victims speak to us -- is whether or not
15 military victims in cases where there is a
16 conviction -- what percent of those cases do
17 those people continue to stay at the military in
18 their next opportunity to either sign up again or
19 leave?

20 And that seems to me, that sort of
21 says something about the justice system if they
22 feel vindicated and they can go on, or they

1 don't. But I don't think we have data on that.
2 That might be one of these anecdotal things.

3 CHAIR HOLTZMAN: So should we try to
4 take a break for lunch? It's 12:30. Or --

5 Col GREEN: Yes ma'am, and Judge
6 Jones, am I right in that you won't be able to
7 join us right after lunch?

8 HON. JONES: I probably cannot get
9 back on until 3. If I can get out of this other
10 thing any earlier, I will.

11 Col GREEN: Okay.

12 HON. JONES: So I'll call in.

13 CHAIR HOLTZMAN: Great, thank you very
14 much. So we'll adjourn --

15 HON. JONES: Thank you --

16 CHAIR HOLTZMAN: -- for lunch.

17 HON. JONES: -- goodbye.

18 (Whereupon, the above-entitled matter
19 went off the record at 12:30 p.m. and resumed at
20 1:29 p.m.)

21 CHAIR HOLTZMAN: And I guess we're up
22 to Issue 3c, which is, does the Panel wish to

1 comment on whether court-martial sentences are
2 appropriate and consistent based on the data
3 available? And anybody have a comment on points
4 1 and 2, which is pretty much an issue that we
5 addressed already? Mr. Taylor, what about
6 helping us with your brilliance?

7 MR. TAYLOR: No. In fact, it seemed
8 to me that the discussions we've had to this
9 point about what these data mean pretty much
10 apply to 3c as they did to 3a and b. I think we
11 can be descriptive and say what our research to
12 date has discovered and what it says, but in
13 terms of drawing any conclusions about what it
14 really means I think it's probably a little
15 difficult for us to do that.

16 CHAIR HOLTZMAN: Show your brilliance.

17 MR. STONE: Yes. I'd like to see at
18 least a comment how the sentences without plea --
19 the convictions without plea bargains for
20 penetrative offenses and the convictions for
21 contact offenses without any agreement compared
22 to whatever data the Sentencing Commission or the

1 states might have.

2 I know they are not exactly the same,
3 but at that point at least you've got convictions
4 for rape and convictions for penetrative
5 offenses. And I think it's enlightening, even if
6 it's not -- even if you're not sure what the --
7 you know, all the consequences that flow from it.
8 I think it's -- we should be showing that we've
9 looked at that, it seems to me.

10 CHAIR HOLTZMAN: Well, I have no
11 objection to doing that, but I do think, just as
12 we noted earlier, that the -- that if we are
13 going to bring up these other sentences, we also
14 ought to suggest factors that could account for
15 the disparities, because otherwise it could
16 become explosive and misleading. And I think it's
17 really important to indicate what some of the
18 factors could be, which is one of the reasons
19 that we aren't drawing conclusions.

20 MS. PETERS: Right. And ma'am, you're
21 referring to some of the evidentiary issues and
22 just fact-specific issues that Dr. Spohn had

1 listed as a limitation to this study, and that we
2 don't have all of that type of information behind
3 the sentences. We have type of offense --

4 CHAIR HOLTZMAN: Right. Exactly.

5 MS. PETERS: And, again, because the
6 military is unitary sentencing --

7 CHAIR HOLTZMAN: Exactly. Right.

8 Right. There are a lot of issues that complicate
9 it and make it very difficult to draw
10 comparisons, and I think those ought to be
11 suggested is my only point.

12 Okay. So I think we finished Issue
13 Number 3.

14 Col GREEN: Was there anything
15 noteworthy that you all wanted to just make sure
16 that we --

17 MS. PETERS: The data that we analyzed
18 included a couple other points around it, such as
19 whether punishment involved a punitive discharge,
20 because that is an authorized type of punishment.
21 But, again, that is something that Congress has
22 spoken to recently with a mandatory minimum for

1 penetrative offenses.

2 If there's a conviction on a
3 penetrative offense, a dishonorable discharge
4 will be mandatory. And that came into effect
5 after Congress issued this tasking to look at the
6 consistency of punishment data. But I think that
7 congressional -- that that reform is relevant
8 here because it's going to make a lot of
9 punishments consistent, at least as far as
10 whether punitive discharge is issued.

11 I think there's -- that was one
12 aspect. And the aspect that we already covered
13 was whether there is -- as you had asked, Madam
14 Chair, whether there is anything to discern
15 between the adjudged sentences and the approved
16 sentences, and we've kind of given you the
17 aggregate statistics about how most of those are
18 not changing very much at approval.

19 CHAIR HOLTZMAN: Okay. So --

20 MS. PETERS: I think that --

21 CHAIR HOLTZMAN: Right. I think we've
22 finished with 3. Am I wrong?

1 MS. PETERS: No. As long as -- I
2 mean, I think we have summarized the aggregate
3 statistics and ultimately whether they can
4 address what Congress has asked. So I think, I
5 mean, that is the bottom line. I think as long
6 as the Panel is satisfied that the punishment
7 data the staff has provided to you is relevant to
8 present, then I think the staff understands where
9 the Panel -- what the Panel's answer to the
10 ultimate task is.

11 MR. STONE: Is the obligation of an
12 offender who's been convicted of a contact
13 offense to register in a sexual offender registry
14 determined by the state he goes back in, or by
15 the federal system?

16 MS. PETERS: I think by the state to
17 which he returns once he is released. That's I
18 think ultimately where the ultimate decision is
19 made on sex offender registry. But, generally
20 speaking, all Article 120 offenses are
21 registrable offenses as a general matter.

22 MR. STONE: So all the penetrative and

1 all the contact offenses, sexual contact, are
2 going to be register offenses?

3 MS. PETERS: Right.

4 Col GREEN: Mr. Stone, the DoD
5 maintains a list of its offenses that DoD
6 requires notification -- or establishes that
7 members must notify if they have been convicted
8 of those offenses, the sex offender registration
9 notice. So they maintain a list that they
10 update, and so those -- the current list of
11 registerable offenses includes all Article 120
12 offenses, as well as previous iterations of 120
13 and 134 and those types of thing. But the
14 current offenses are all -- everything under
15 Article 120 from rape down to abusive sexual
16 contact.

17 And so obviously, then, that goes to
18 the state for the state's determination as to
19 registration specifics.

20 MR. STONE: I guess what occurs to me
21 from that is whether or not we should make some
22 observation that in cases where a defendant has

1 been convicted of an offense that's going to
2 cause him to register it may well be that the
3 level of discharge he gets is going to have less
4 effect on life than in other cases.

5 Whether he gets dishonorable or
6 general or whatever it is, you know, if he's now
7 a felon who's got to register as a sex offender,
8 it seems to me the level of discharge is going to
9 play -- may play less of a role. I think we
10 could just observe that as an observation that
11 the level of discharge may have a much greater
12 impact on offenses that don't require a sexual
13 offender, you know, felony sexual --

14 CHAIR HOLTZMAN: Well, I'm not sure I
15 agree with that, because the level of discharge
16 could very well affect your job opportunities,
17 which is pretty serious, whether or not you have
18 to register or how you have to deal with the sex
19 offender business. So I don't want to minimize
20 that in any way or suggest that that's not
21 serious. It could be very serious.

22 MR. TAYLOR: But didn't Congress just

1 change the law to require mandatory minimum of a
2 dishonorable discharge or dismissal?

3 CHAIR HOLTZMAN: Yes, right.

4 MR. TAYLOR: So it's automatically
5 going to be the most serious form of discharge if
6 you're convicted of the --

7 CHAIR HOLTZMAN: Right.

8 MR. TAYLOR: -- offense anyway.

9 CHAIR HOLTZMAN: Right. But I'm just
10 saying, even though you have to register as a sex
11 offender, there is no -- just saying dishonorable
12 discharge isn't going to be so important anymore,
13 of course it still could be very, very important
14 in a person's life. So I don't want to minimize
15 the impact of a dishonorable discharge, even
16 though you're going to be a sex offender.

17 Col GREEN: And determining --

18 CHAIR HOLTZMAN: That's my only
19 disagreement.

20 MR. TAYLOR: And I guess the point I
21 was trying to make was it's not a conceivable
22 scenario that you would be convicted of an

1 Article 120 offense and get a general discharge.

2 CHAIR HOLTZMAN: Right.

3 MR. TAYLOR: Because you're going to
4 get a dishonorable discharge now as a mandatory
5 minimum.

6 Col GREEN: For penetrative --

7 MR. TAYLOR: For a penetrative offense
8 to your point.

9 MR. STONE: Yes. And I still think
10 that having a felony conviction is going to be
11 certainly a significant issue when you go to get
12 a new job, particularly if it's one that you have
13 to register for. That's going to be -- both of
14 those are going to disqualify you for an awful
15 lot of jobs.

16 And so I guess I'm not saying it's of
17 no consequence. I'm just saying that issue is of
18 more consequence in those other offenses that
19 they sometimes plead to. I just think it's a
20 little lower on the scale of distinguishing these
21 from others, both because of what Congress has
22 done if it's a penetrative offense and because of

1 the other -- and what Congress has done for the
2 registration, the various states that you have to
3 go register.

4 I mean, I think in the old days it
5 would have been a more significant consequence,
6 but now they've attached other consequences that
7 are automatically flowing.

8 MS. PETERS: Absolutely. And the
9 dishonorable discharge operates to affect not
10 only employment but veteran's benefits and things
11 of that nature that might be separate, have
12 consequences separate from sex offender
13 registration and -- but I understand the nuances
14 there between sort of the -- how do we assess or
15 comment on the collateral effects of these
16 punishments and other things attendant to a sex
17 offense conviction?

18 There is one note, sir, I'd like to
19 make. I'm not sure if I should wait for --

20 Col GREEN: Yes. Maybe we'll wait
21 until --

22 MS. PETERS: -- the chair.

1 Col GREEN: The other point I would
2 just make, it's difficult, as a military
3 attorney, to quantify the effect of a punitive
4 discharge from a court-martial, for whether it's
5 for a client or -- or to explain to a commander
6 or to anybody, because of -- I mean, there are a
7 lot of potential consequences that flow.

8 There are some that flow in terms of
9 veterans benefits there -- you know, but the
10 interpretation of what that punitive discharge
11 means and the impact on that, you know, convicted
12 person's life is really, really difficult to
13 predict, other than the automatic veterans
14 consequences and potential things like that.

15 MR. STONE: Well, that's -- what
16 you're telling me is that we need a couple more
17 sentences about it, that maybe it isn't lesser
18 but for the reasons that, which you can sort of
19 itemize. I mean, I think that's good, because I
20 think that -- it explains something which is, you
21 know, certainly an issue, and it might as well
22 get a couple of sentences of explanation.

1 MS. PETERS: About the value or the
2 consequences to a punitive discharge.

3 MR. STONE: Yes. And how those are
4 perhaps different from having to register and
5 having to get a dishonorable automatically. I
6 mean, that may even explain why some individuals
7 will plead down to a sexual contact offense where
8 they were charged with a penetrative offense to
9 avoid some of those consequences. I mean, that
10 -- you know, that's useful for people to see that
11 -- what's involved.

12 MS. PETERS: Okay.

13 MR. TAYLOR: I would just add that
14 even though I think that to some extent at least,
15 I've been in the camp of those who thought we
16 shouldn't say too much about the data that's not
17 descriptive, you did have some really interesting
18 points that I think ended up in the draft that
19 you provided us about what you could say about
20 the data.

21 For example, you made the comment at
22 the bottom of the page, on page 10 where we're

1 talking about the deliberation data, that the
2 average length of the adjudged confinement -- I
3 mean, there are things you can say, it seems to
4 me, that would be helpful to put it in context,
5 even though if you parse your way through the
6 appendix then you'll see some of that.

7 But I think those observations, based
8 on the data, without trying to attribute any
9 meaning to them other than this is what this
10 collectively means, I think that's helpful for
11 the reader, just as a practical matter.

12 MS. PETERS: Okay. All right. Yes,
13 sir. That's why we tried to just bring Dr.
14 Spohn's descriptive statistics about --

15 MR. TAYLOR: Exactly. Exactly. Just
16 put it in words.

17 MS. PETERS: If I may, the one note
18 that may not be reflected in this one-pager here
19 in the deliberation outline, and that is when
20 we're talking about sentencing. Again, this is a
21 collective assessment of all types of
22 courts-martial, and I think we made this note in

1 the background section on this section of the
2 report, is that a general court-martial, a
3 special court-martial, and a summary
4 court-martial are the three different types we're
5 talking about.

6 And so we provided an explanation of
7 the -- each one has a punishment limit to it, so
8 that if someone goes to a special court-martial
9 their maximum punishment is one year. If you go
10 to a -- as far as confinement. If you go to a
11 summary court-martial, and there's only roughly
12 100 in our data set, you're getting a maximum of
13 30 days, and you're likely to maybe come away
14 with no confinement at a summary court-martial
15 they might issue because it's almost
16 non-judicial. It's a weird hybrid creature.

17 And so we just want to inform the
18 discussion. The staff would think it's important
19 to note that we are also talking about three
20 different forums when we are talking about
21 punishment data. So we give these global
22 statistics, but if you were to dig down, in

1 general -- the range of punishment available at a
2 general court-martial might be higher than the
3 overall average that we've presented to you.

4 And the average punishment at a
5 special court-martial is going to not be higher
6 than a year, but we have -- just for your
7 understanding of the statistics, we have combined
8 all types of courts-martial into one overall
9 statistic. And if you think it's important, we
10 provided a brief explanation of that in the
11 background.

12 CHAIR HOLTZMAN: Well, you might need
13 to disaggregate them, because people might want
14 to know what kinds of sentences are being meted
15 out, I mean, by the general courts-martial.

16 MS. PETERS: Okay.

17 MR. STONE: Because those are going to
18 be the ones for penetrative and sexual contact.

19 CHAIR HOLTZMAN: Yes. Those are the
20 most serious offenses.

21 MR. STONE: Those are the ones we
22 really care about. If they plead something all

1 the way down, they must have decided that it
2 wasn't that serious or they just couldn't prove
3 it. So --

4 CHAIR HOLTZMAN: Or they're just
5 giving a very -- I mean, you know, a summary
6 court-martial that can give a maximum 30 days.
7 You know, they give seven days as opposed to 29
8 days. I don't know that anybody is going to
9 really raise an eyebrow, but if we're getting
10 from general courts-martial in these cases, 29
11 day sentences, I think we need to know about it,
12 especially because they could give more than a
13 year.

14 MS. PETERS: And, Dr. Spohn, correct
15 me if I'm wrong, but when we looked at the
16 penetrative offenses only, given that roughly 92
17 percent of those offenses were referred to
18 general courts-martial, when we look at the
19 average punishment, the mean punishment for
20 penetrative offenses, which was 54 months, that
21 is representative of the general court-martial

22 CHAIR HOLTZMAN: Good. Well, we have

1 --

2 MS. PETERS: -- the sentence.

3 CHAIR HOLTZMAN: Good. So we have
4 that information. That'd be important to have.

5 MS. PETERS: Right. Just I think if
6 anyone were to look at it in total -- the more
7 you average, the lower it's generally going to go
8 because we're talking about lower levels of
9 disposition ultimately being averaged in with
10 general court-martial sentences. And I think
11 that's really the clarification I just wanted to
12 make.

13 CHAIR HOLTZMAN: So are we finished
14 with Number 3, Issue Number 3?

15 MS. PETERS: Yes, Madam Chair. I
16 think if you're comfortable with our -- the
17 descriptive statistics we've included here, and
18 the Panel it sounds like has made an agreement on
19 approaching that question about appropriateness
20 and consistency, I think we've concluded Issue 3.

21 CHAIR HOLTZMAN: So now we're up to 4.

22 MS. PETERS: Right. And at this

1 point, ma'am, I would ask that we -- because
2 we're talking about punishment data and that does
3 relate to the comparative data statistics,
4 comparative data is actually scoped out in Issue
5 5. We started talking about it earlier.

6 But just so the staff understands that
7 we have fully addressed the issue, if we could,
8 ma'am, forward to Issue 5, comparative military
9 federal and state punishment data and look at
10 that, and then save appellate data for the last
11 part of it, especially because Dr. Spohn is --
12 was integral in this aspect of, you know, the
13 staff's work as well.

14 CHAIR HOLTZMAN: All right. Let's go
15 ahead.

16 MS. PETERS: Okay.

17 CHAIR HOLTZMAN: Let's not spend more
18 time on deciding which one we're going to go --

19 MS. PETERS: So Issue 5 is -- relates
20 to a separate statutory task, which we've
21 included at the top of the outline. And that is
22 look at punishments in military courts compared

1 to the punishments rendered in federal and state
2 criminal courts. The Panel did discuss earlier
3 what some of the data was -- that the data are or
4 were in regards to those pieces of information
5 available from the federal system and the state
6 system.

7 The only additional information that
8 the Panel may find useful in the Issue 5, in
9 particular on page 12 of the deliberation
10 outline, is just that there -- it was discussed,
11 what are the federal guidelines for similar types
12 of crimes in the federal system? And that is
13 aggravated sexual abuse and sexual abuse.

14 And ultimately -- so we've provided
15 that along with some of the sentences that we
16 received from the Sentencing Commission's
17 analysis. The purpose in doing so was to see
18 what data was available as far as punishment data
19 and to try to see how much we could understand
20 about what's in these statistics from the federal
21 and state system.

22 I don't know that it changes the

1 in-state conclusion that really there are more
2 differences in the data -- in the types of data
3 included here, the closer you look at it. But we
4 just wanted to provide this level of detail for
5 the Panel's review of this issue, which is, I
6 think the Panel has already said is very
7 difficult if not impossible to do.

8 But looking at some of this data might
9 highlight further challenges in that you can look
10 at a guideline range and realize that there are a
11 number of factors that could even influence where
12 courts ultimately end up on a particular
13 sentence. And that alone might be one facet of
14 the discussion of the challenges in comparing the
15 data.

16 And the same holds true I think for
17 the Bureau of Justice Statistics data, and that
18 we know very little about it, we know very little
19 about what's in these aggregate statistics. It's
20 several years removed from the current statistics
21 we have compiled, and it's not collected as
22 routinely as other data. And so we thought that

1 those were some additional aspects the Panel may
2 want to consider in addressing this particular
3 task.

4 And what the staff did not do here is
5 line up statistics in a way that would presume
6 that you're looking at comparable decision points
7 because of the challenges in comparing things, so
8 we didn't just create a graphic of federal,
9 state, and military data all in one linear
10 fashion.

11 We found it challenging and misleading
12 to do so, so we have separated out, here's the
13 federal data, here's the state data, and here's
14 the issues with drawing a straight line
15 comparison to the military system. And that was
16 the staff's suggested approach here.

17 CHAIR HOLTZMAN: Now, you -- on the
18 federal side, you have -- these are really tiny
19 numbers, 25 offenders, and then 30 offenders. Is
20 this -- for what period of time are we talking
21 about?

22 MS. PETERS: From 2012 to 2014.

1 CHAIR HOLTZMAN: Oh. So it all -- so
2 the same time period is covered with regard to
3 the federal sentencing guidelines issue as for
4 the military justice system.

5 MS. PETERS: Right. Because of our
6 specific request to the Sentencing Commission for
7 those years of data.

8 CHAIR HOLTZMAN: What is the option?
9 I mean, don't we -- we've put forth the
10 information. I don't know that we can compare
11 the outcomes. First of all, a very small sample
12 on the federal side, and it's -- and, secondly,
13 the state courts -- state system is also a
14 relatively small sample, and then we -- there are
15 other infirmities.

16 I think we point out -- I think we
17 just describe the differences, in my opinion, and
18 explain why these can't be compared.

19 MS. PETERS: Yes, ma'am. And that
20 would also cover the last aspect of the tasking,
21 which is based on the facts of each case, which
22 we have in no circumstance basically.

1 CHAIR HOLTZMAN: Right.

2 MR. TAYLOR: I think that's right, and
3 I think the challenges that you listed at the
4 bottom of page 12 of the deliberation guide
5 pretty much says it all. That would be in our
6 report that goes along with this particular
7 issue.

8 MR. STONE: I think that's good, too,
9 so long as we have the actual numbers like you
10 have here, because it seems to me that people
11 asking me wanted to know if we went and got the
12 numbers, we get the numbers, we show them the
13 numbers, but we tell them it's not, again, a
14 one-to-one comparison. There's other issues.

15 They may for themselves feel that
16 they're interested in the number of days in
17 confinement, but, you know, that's up to them if
18 they want to weigh heavily or not weigh at all
19 those factors at the bottom where we say it's not
20 exactly the same. I mean, people often want to
21 know what are the day in confinement averages.
22 So we'll give it to them, but we'll show them

1 what limitations there are.

2 CHAIR HOLTZMAN: Right. And I think
3 also the -- one of the challenges that should be
4 listed is that the -- with regard to the federal
5 sentencing guidelines, if you took comparable
6 defendants here, which is defendants without a
7 prior record, we're only talking about nine
8 offenders in the federal system. I don't know
9 that that's, you know, something you can compare
10 to anything over three years. I mean, it's
11 really so small as to be -- I don't know how
12 relevant it is, but I think that needs to be
13 there and pointed out.

14 MS. PETERS: Okay.

15 CHAIR HOLTZMAN: Okay.

16 MR. STONE: I guess the other thing,
17 once we get into the offenders, is that at least
18 I know when I went to the training down in
19 Charlottesville -- and I'm not sure whether we
20 heard it again here, but I know we reported it
21 back that the trainers were saying that a -- an
22 overwhelming majority of military offenders are

1 serial offenders.

2 And so that's also a factor that may
3 or may not make it easy to compare the one group
4 against another, that often once they finally
5 bring a case there's often a variety of women who
6 want to bring a case but who felt chilled from
7 doing so until somebody finally had the nerve to
8 step forward and say, my career be damned, I'm
9 bringing the case. And then others lined up
10 behind her and -- or him.

11 And so, again, that's -- it shows that
12 the context is different than the straight
13 federal numbers.

14 CHAIR HOLTZMAN: But that's anecdotal.
15 We can't use anecdotal, I think, information with
16 regard to that.

17 MR. STONE: Well, they were presenting
18 it as more than anecdotal.

19 CHAIR HOLTZMAN: No, no. I'm talking
20 about what the people at the JAG school tells you
21 is anecdotal. What they're telling you --

22 MR. STONE: No. The people -- the JAG

1 school are basing it on numbers. I don't know.

2 Well --

3 CHAIR HOLTZMAN: Yes. But you don't
4 know that they're basing it on these numbers.

5 Col GREEN: And all I would say is the
6 numbers from -- look at Dr. Spohn's analysis, is
7 the cases that we obtained of the cases that went
8 to adjudication by court-martial, the average
9 number of victims in those cases was 1.28.

10 So I don't know that that represents
11 an overwhelming majority that have multiple
12 victims. I mean, certainly some of those do
13 involve multiple victims, but I would say that
14 errs more towards the single victim rather than
15 multiples.

16 CHAIR HOLTZMAN: Okay. Serial means
17 separate events, separate instances.

18 Col GREEN: Right.

19 CHAIR HOLTZMAN: I don't know that
20 we're talking about 1.2 victims in one incident
21 or 1.2 victims in several incidents? It's not
22 clear to me what they're talking about here.

1 Col GREEN: And the average number of
2 victims was 1.28. The number of charges and
3 specifications was 5.77. So --

4 MR. STONE: Maybe that's a question to
5 ask if we go down to Charlottesville again.

6 Col GREEN: Yes. And I think our
7 review of the data was -- you know, a lot of
8 times those charges and specifications are
9 written charges in the alternative, so it's not
10 necessarily multiple incidents. It's an incident
11 charged in multiple varieties or multiple ways.

12 So it's difficult from just looking at
13 the case data to determine the nature of the
14 offender to know whether it's -- I mean, without
15 really delving into the specifics of each case,
16 to know whether you're talking about serial
17 offenders or single.

18 CHAIR HOLTZMAN: Well, as I said, to
19 me serial offender means you have committed not
20 several victims at one time or in one incident
21 but over time you have repeated the rape. That's
22 a different story, it seems to me. But I don't

1 know that we have any data to -- with regard to
2 that as opposed to anecdotal information. So I
3 would be very cautious about including anything
4 that's not a statistic.

5 All right. What else about -- can we
6 go to 4?

7 MS. PETERS: The last thing is Dr.
8 Spohn is joining us for her -- to provide her
9 insight, and I think she did talk about the
10 apples-to-oranges comparison -- I think I'm
11 quoting her -- from January.

12 But, Dr. Spohn, I didn't know if you
13 had anything to add based on -- or the discussion
14 at issue, if I've quoted you correctly about the
15 comparability.

16 CHAIR HOLTZMAN: Are we on 5, or are
17 we on 4?

18 MS. PETERS: If we are done with 5,
19 ma'am, I think --

20 CHAIR HOLTZMAN: Well, are you asking
21 her about 5?

22 MS. PETERS: Yes, ma'am.

1 CHAIR HOLTZMAN: Okay. I thought we
2 were going to 4, but okay, we're on 5. Is there
3 a reason we need to ask her --

4 DR. SPOHN. Meghan, I don't have
5 anything else to add, and you did accurately
6 characterize my concerns about comparability.

7 CHAIR HOLTZMAN: Great. Thank you
8 very much, and thank you for your participation
9 and for your help.

10 DR. SPOHN: Not a problem. Bye-bye.

11 CHAIR HOLTZMAN: Bye.

12 MS. SAUNDERS: Are you ready to go to
13 Issue 4, ma'am?

14 CHAIR HOLTZMAN: Yes, ma'am.

15 MS. SAUNDERS: Okay. Issue 4 deals
16 with military appellate data, and it relates to
17 the congressional task that's listed at the top
18 of page 11 of your outline. So we're looking at
19 the number and description of instances when
20 punishments were reduced or set aside upon
21 appeal, and the instances in which the defendant
22 appealed following a plea agreement.

1 So the questions below are asking,
2 does the Panel wish to comment on the appellate
3 consideration and resolution of sexual assault
4 convictions? And then two subquestions under
5 that dealing with how often punishments are
6 reduced or convictions set aside upon appeal, and
7 the frequency of military court setting aside
8 sexual assault convictions where the accused has
9 pled guilty of the offense.

10 An important starting point for the
11 discussion on this is to note that Article 66 of
12 the UCMJ grants automatic appeal to members
13 receiving one year or more of confinement or a
14 punitive discharge at a court-martial. So that's
15 an automatic appeal for those individuals.

16 Based on that looking at statistics
17 from 2012 through 2014, the universe of cases of
18 issued opinions from the Service courts involving
19 adult sexual assault was 380 cases. Of those 380
20 cases, the court set aside convictions or reduced
21 sentences in 46 of them, so about 12.1 percent.
22 Some of the main reasons that were -- for those

1 actions were unreasonable multiplication of
2 charges, where the court determined that the
3 accused had unreasonably been charged in multiple
4 ways for the exact same offense, or factual
5 insufficiency. There are some other reasons
6 listed here as well.

7 And, again, from that same universe of
8 380 opinions from 2012 through 2014, there were
9 eight cases involving appellate relief granted
10 when an accused pled guilty to an adult sexual
11 assault offense. Those eight cases involved
12 technical errors made in the initial charging of
13 the case, such as unreasonable multiplication of
14 charges or errors by the military judge in
15 sentencing.

16 And then, finally, one of the final
17 data points here, the U.S. Court of Appeals for
18 the Armed Forces granted relief to an appellant
19 convicted of an adult sexual assault offense in
20 nine cases over this period of time.

21 Thank you. Meghan just reminded me
22 that the summaries of those nine cases are in

1 your reading materials that are contained in your
2 folder.

3 MR. STONE: That's nine out of how
4 many, do we know, that they have up on appeal?

5 MS. SAUNDERS: I don't think we have
6 that statistic in our folder for how -- for the
7 universe of cases there. We could probably find
8 that for you, though.

9 CHAIR HOLTZMAN: That would be a good
10 idea.

11 MS. SAUNDERS: Or, actually, Mr. Kirt
12 Marsh is the one that actually compiled this --
13 did all the work for getting this stuff together.

14 MR. MARSH: Maybe I can shed a little
15 bit of light on this.

16 MS. SAUNDERS: Yes.

17 MR. MARSH: Sort of the way that the
18 Court of Appeals for the Armed Forces maintains
19 the cases on their website is different from the
20 Service criminal courts of appeal, and it makes
21 it harder going into the past to see nonpublic
22 opinions, cases that are disposed of by like a

1 summary disposition or the other ways that the
2 military appellate courts dispose of cases,
3 aren't compiled the same way.

4 So knowing how many got up to the
5 court is just -- absent going back and doing a
6 different request for information, it wasn't
7 readily available the way it was from the
8 Criminal Courts of Appeal for the Armed
9 Services.

10 MR. STONE: As public data.

11 MR. MARSH: Yes, sir.

12 MR. STONE: Okay. But perhaps just a
13 letter to the clerk, they would be willing to go
14 back and find it for us. Do you think, Kyle?

15 Col GREEN: I don't know. We'd have
16 to determine what we would ask for in terms of
17 the number of appeals that were made versus the
18 number of cases that resulted in published
19 opinions and whether they have the capability to
20 break that out based on sexual assault offenses.

21 I'm not sure -- I mean, Kirt, do you
22 have any -- based on their organization, I don't

1 know that they break out cases according to
2 offense type, and that was one of the
3 difficulties I think Kirt ran into in terms of
4 even looking for these cases was trying to
5 identify which cases involved an adult sexual
6 assault offense. That's not something that they
7 create any type of identifier on or anything in
8 their organization.

9 So, I mean, we could certainly ask.
10 My prediction is that it may be difficult for
11 them to get us information on that.

12 CHAIR HOLTZMAN: Can I just say that
13 the difficulty of getting this information should
14 be in the report, that they don't, so that
15 Congress knows that? I mean, if they want in
16 the future --

17 Col GREEN: Okay.

18 CHAIR HOLTZMAN: -- this kind of
19 information, they are going to have to ask the
20 court to prepare it in a different way so that
21 or to keep track of it in a different way. It's
22 not that it's our fault. It's that --

1 Col GREEN: Right.

2 CHAIR HOLTZMAN: -- you know, this is
3 -- the courts don't keep records -- the appellate
4 courts don't keep records in this fashion, and so
5 we are unable to get the information, if that
6 turns out to be the case. And if Congress wants
7 it, or the Defense Department wants it or anybody
8 wants it, they've got to ask the courts to
9 develop the information or list it in a different
10 way. But otherwise, they'll think it's our fault.

11 MR. TAYLOR: Well, I think that's
12 exactly right. And even the language itself, when
13 it describes it, says at the end, if such
14 information is available. So there's a perfect
15 reason for us to say just what you said, Madam
16 Chair.

17 MR. STONE: Yes. And that's true with
18 the Service courts, too, because you're looking
19 at opinions involving adult sexual assault
20 offenses.

21 CHAIR HOLTZMAN: Right.

22 MR. STONE: Again, we don't know how

1 many they decided without opinion. So, I mean, I
2 think that we need to couch whatever we say about
3 the appeals in terms of there was a limited
4 universe available for the staff to be able to
5 review. Again, nine reversals and we don't know
6 how many there were. Was it nine out of 10, or
7 was it nine out of 900? I mean, that's a pretty
8 big difference.

9 CHAIR HOLTZMAN: So you could even
10 find that information now.

11 MR. SULLIVAN: One point to keep in
12 mind is that CAAF is a court of discretionary
13 jurisdiction. And so in the -- in about 85
14 percent of the cases, CAAF chooses not to
15 exercise discretionary jurisdiction.

16 CHAIR HOLTZMAN: Right. So the
17 numbers are really small, then maybe it's nine
18 out of nine. Just joking. But if --

19 MR. SULLIVAN: An interesting thing is
20 of course the grant or denial of discretionary
21 review is something of a clearing function. In
22 other words, the court is more likely to grant

1 the discretionary review if a case has an issue
2 that appears that it may be likely to result in
3 reversible error. So it's going to be very hard
4 to quantify.

5 CHAIR HOLTZMAN: Is there -- so what
6 point have we finished? Does the Panel wish to
7 comment on any observations regarding how often
8 punishments are reduced or convictions set aside?
9 I think the only comment that we want to have is
10 to note what we have and note the difficulty of
11 getting the information. And that's it.

12 MS. PETERS: Okay.

13 CHAIR HOLTZMAN: And, b, does the
14 Panel wish to comment on any observations
15 regarding the frequency of military courts
16 setting aside sexual assault convictions in cases
17 in which the accused pleaded guilty to the
18 offense? Anybody have the same issue?

19 MR. STONE: I don't know. Did you
20 have better data where they pleaded guilty?

21 Col GREEN: No. This is the 2.3
22 percent of cases, so, again, just a handful.

1 MS. SAUNDERS: Right. This is still
2 at the Service courts.

3 CHAIR HOLTZMAN: Are there any others
4 we want to make?

5 Col GREEN: No. I mean, I think what
6 I'm hearing and what the staff will do, then, is
7 document what we were able to find, note the
8 difficulty in obtaining the information, and then
9 that the Panel really isn't able to or going to
10 draw conclusions from that information as to the
11 broader meaning. Is that fair?

12 MR. TAYLOR: Yes.

13 MR. STONE: I do think we need a
14 little sentence somewhere in here that explains
15 that when we talk about this, I guess we'll call
16 it appellate data consideration, we're not
17 talking about the sentence review before --
18 between the -- that results in the approved
19 sentence, which can in effect be a review, too.

20 But we're not talking about that here;
21 we're talking about a different court, a
22 different level I guess beyond the convening

1 officer level entirely, just because I think that
2 people who are only slightly familiar may think
3 that we're either including that change in the
4 sentence that can happen by the convening
5 authority or that we've overlooked it.

6 So they would have known that that's
7 in the other data, that this is when you get to a
8 completely different forum.

9 CHAIR HOLTZMAN: Okay. Does that
10 conclude our work?

11 Col GREEN: I guess it -- these are
12 the issues that the staff developed. But I
13 always leave open, are there other issues that
14 the Panel wishes to comment on?

15 CHAIR HOLTZMAN: So then we should be
16 considering anything that hasn't been brought to
17 our attention already? Terri?

18 MS. PETERS: No. I think -- well,
19 we've certainly covered all of the broad issues.
20 And, if possible, I think as more of an
21 administrative matter, I want to make sure that
22 there's -- if there's any additional points of

1 information that the Panel needs, that we're
2 providing a bit more detail about certain types
3 of sentences, so I think we've actually -- well,
4 I think we've covered that. I think we've given
5 you what we can get in terms of statistics at
6 this point.

7 So I don't think that there is --
8 subject to the Panel's further questions, upon
9 further review, I think we have given the Panel
10 -- I think the statistics today are not being
11 supplemented in any great -- in any great effort
12 in any way, with our existing data set. Like I
13 think we're done with the statistical analysis
14 for this iteration.

15 CHAIR HOLTZMAN: Well, Mr. Stone has
16 asked for some additional information, if we can
17 ask for it, about the appellate review.

18 MS. PETERS: Appellate review. Okay.

19 CHAIR HOLTZMAN: We've also asked for
20 more information about the conviction rate. So I
21 don't think we've -- and there may be some other
22 information.

1 MS. PETERS: Trial level conviction
2 rate.

3 CHAIR HOLTZMAN: Right.

4 MS. SAUNDERS: We noted all of those
5 things and we're going to be delving into those.

6 MS. PETERS: Right.

7 CHAIR HOLTZMAN: So, Panel Members, do
8 you have any other thoughts or issues that you
9 want to raise? Otherwise --

10 MR. TAYLOR: I would just like to
11 thank both Ms. Saunders and Ms. Peters for their
12 diligence in pulling all of this together.

13 MR. STONE: I have one piece of data
14 related to what I was mentioning before, and I
15 think maybe you'd have to go back to the
16 investigative service to find out, because I
17 distinctly recall when I was in Charlottesville
18 at the special victims counsel training that it
19 was repeatedly emphasized how the fact that the
20 investigators found that they were looking at
21 serial violators in -- and I believe they said
22 more than 90 percent of the cases.

1 Now, that is not going to show up when
2 they prosecute a single case. It might show up
3 in a presentence report. But it's possible that
4 the investigators have a source of data that they
5 can tell you. And if not, even if they're
6 willing to go down on the record in the same way
7 that our subcommittees interviewed people and it
8 resulted in information which we then relied on,
9 they made such a point of that that I'd like to
10 see if they have some data. And if it is a point
11 that's valid, we need to acknowledge it.

12 MS. PETERS: I understand. And we'll
13 see what we can pull up in that regard. Okay.

14 MR. STONE: Thank you.

15 MS. PETERS: Ma'am, I think that's all
16 the staff has for you.

17 CHAIR HOLTZMAN: Okay.

18 Col GREEN: I think with that, ma'am,
19 we will go back, and I know we received some
20 technical edits from Mr. Taylor.

21 CHAIR HOLTZMAN: There are some from
22 me, too.

1 Col GREEN: And so any of you that
2 have technical edits to the report, we will go in
3 and try and incorporate the Panel's analysis
4 based on today's discussion, and circulate a
5 revised draft to you in the -- hopefully as soon
6 as the staff can accomplish that.

7 CHAIR HOLTZMAN: Okay. Well, thank
8 you very much Meghan and Terri and Kirt for your
9 wonderful work. Thank you Sharon for your help.
10 Thanks to the Panel members for being here.
11 Thanks, Colonel Green, Kelly, everybody.

12 MR. STONE: Do we have public comment?
13 Do we have to ask or --

14 CHAIR HOLTZMAN: No. We have no -- we
15 have no comment. We're fine.

16 Okay. The meeting is -- oh --

17 MR. SULLIVAN: For the record, the
18 meeting is closed. Yes, ma'am.

19 CHAIR HOLTZMAN: Thank you.

20 (Whereupon, the above-entitled matter
21 went off the record at 2:10 p.m.)
22

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