UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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HEARING

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FRIDAY
SEPTEMBER 23, 2016

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The Panel met in the Bobby Junker Executive Conference Center, One Liberty Center, 875 N. Randolph Street, Arlington, Virginia, 22203, at 9:06 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT
Hon. Elizabeth Holtzman
Victor Stone
Tom Taylor
VADM(R) Patricia Tracey

PRESENTERS
Judge James Baker, Former Chief Judge, US Court of Appeals for the Armed Forces
Rear Admiral Christian Reismeier (Ret), Former Chief Judge, U.S. Navy-Marine Corps Court of Criminal Appeals
Colonel William Orr Jr. (Ret), Former Chief Judge, U.S. Air Force Court of Criminal Appeals
Colonel Denise Lind (Ret), Former Senior Judge, U.S. Army Court of Criminal Appeals
Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital and Complex Litigation Branch

Mr. Brian Mizer, U.S. Air Force, Appellate Defense Division, Senior Appellate Defense Counsel
Major Lauren Shure, U.S. Air Force, Appellate Defense Counsel
Captain Andrew House, U.S. Navy, Director, Navy-Marine Corps Appellate Defense Division
Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division
Major Anne Hsieh, U.S. Army, Senior Appellate Attorney and Branch Chief
Mr. Roger Bruce, U.S. Air Force, Associate Division Chief, Senior Appellate Government Counsel (by phone)
Major Meredith Steer, U.S. Air Force, Appellate Government Counsel
Mr. Brian Keller, U.S. Navy-Marine Corps, Appellate Government Division, Supervisory Appellate Counsel
Lieutenant Robert Miller, U.S. Navy, Appellate Government Counsel
Lieutenant Tereza Ohley, U.S. Coast Guard, Appellate Government Counsel

STAFF:

Captain Tammy Tideswell, U.S. Navy - Staff Director
Mr. Dale L. Trexler, Chief of Staff
Lieutenant Colonel Glen Hines, U.S. Marine Corps, Judge Advocate
Ms. Julie Carson, Legislative Liaison and Staff Attorney
Ms. Nalini Gupta, Staff Attorney
Ms. Stayce Rozell, Senior Paralegal and Meeting Recorder

OTHER PARTICIPATES:

Ms. Maria Fried, Designated Federal Officer (DFO)

C-O-N-T-E-N-T-S

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

(9:07 a.m.)

MS. FRIED: Good morning and welcome to the Judicial Proceedings Panel Public Meeting. My name is Maria Fried and I am the Designated Federal Official to the JPP.

The JPP is a congressionally mandated federal advisory committee. Publicly available information provided through the JPP is posted on the JPP website and that website is jpp.whs.mil.

Reports issued by the JPP are also posted on the website as are other materials, to include transcripts of past public meetings.

The Department has appointed the following distinguished members to the Panel, The Honorable Elizabeth Holtzman who serves as a Chair to the JPP, The Honorable Barbara Jones, Vice Admiral Retired Patricia Tracey, Professor Tom Taylor, and Mr. Victor Stone. The members' biographies are also available on the JPP website.

Before we get started I would like

take this opportunity to welcome and introduce Captain Tammy Tideswell who is the new Staff Director to the JPP.

Captain Tideswell brings a wealth of experience to her position. Before joining the Staff of the JPP, Captain Tideswell was the Acting Assistant Judge Advocate General of the Navy for Operations Management, the Chief of Staff of Region Legal Services Offices, and the Chief Prosecutor of the Navy.

We also have a new Deputy Director, Lieutenant Colonel Patricia Lewis from the Department of Army. Welcome. Madam Chair?

CHAIR HOLTZMAN: Thank you. Thank you very much, Ms. Fried, and good morning everyone. Before we begin I would like to welcome personally the new Staff Director for the JPP, Navy Captain Tammy Tideswell, and the new Deputy Staff Director, Army Lieutenant Colonel Patricia Lewis. We are very pleased to have the benefit of your expertise and wisdom.

I would also like to welcome the

participants and everyone in attendance today to the 22nd meeting of the Judicial Proceedings Panel. Is that all we've had? It seems like a lot more.

Four of the five Panel members are present here today, Judge Barbara Jones could not attend the meeting, unfortunately. Today's meeting is being transcribed and the transcript will be posted on the JPP website.

The Judicial Proceedings Panel was created by the National Defense Authorization Act in Fiscal Year of 2013, as amended by the National Defense Authorization Acts for Fiscal Years 2014 and '15.

Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendments to Article 120 of the Uniform Code of Military Justice in 2012.

Today's session will address victims'

appellate rights under the UCMJ. This is the first of two meetings on this issue. The second meeting will occur on October 14, 2016.

At the April 2016 Public Meeting the Panel heard from the Special Victims' Counsel and Victims' Legal Counsel Program Managers from each of the Services.

During that meeting the program managers raised concerns about victims' appellate rights. Their specific concerns include a victim's lack of notice of appellate proceedings and lack of standing on direct appeal.

Additionally, the program managers expressed concerns that victim privacy rights are violated when appellate counsel reviews sealed mental health records.

To begin today the Panel is pleased to hear from former appellate judges, four of them, The Honorable James Baker, Former Chief Judge of the Court of Appeals for the Armed Forces, Retired Rear Admiral Chris, I hope I am pronouncing this correctly, Reismeier, is that

correct?

RADM REISMEIER: Yes, ma'am.

CHAIR HOLTZMAN: Thank you. Former Chief Judge of the Navy, Retired Colonel William Orr, Former Chief Judge of the Air Force Court of Criminal Appeals, and Retired Colonel Denise Lind, Former Senior Judge of the Army Court of Criminal Appeals.

The remainder of the meeting will include two Panels of appellate practitioners from the Services' Defense and Government Appellate Divisions.

Thank you for joining us today and we look forward to hearing from and speaking with each of you.

Each public meeting of the Judicial Proceedings Panel includes comments to receive input from the public. We have received no requests for public comment at today's meeting.

Since our meeting in April 2016, we have received a total of six public submissions in the form of letters on victims' appellate

rights.

All written materials received by Panel members for today's meeting and previous meetings are available on the JPP's website at jpp.whs.mil.

Thank you very much for joining us today. We are ready to begin the meeting. Our first presenter is The Honorable James Baker. Mr. Baker?

JUDGE BAKER: Okay. Thank you very much, Madam Chair. I thank you for the opportunity to appear. Like a good lawyer and judge I will start with my disclaimers.

I am retired. I do not speak for the U.S. Court of Appeals for the Armed Forces. I am not even an army of one because I have no authority other than the authority of persuasion, but I bring that to the table I hope.

CHAIR HOLTZMAN: Well, very impressive.

JUDGE BAKER: Thank you. As you know I served for 15 years on the U.S. Court of

Appeals for the Armed Forces, 11 as an Associate Judge, four as Chief Judge.

I was formerly an Infantry Officer in the Marine Corps and I am also currently the Chair of the ABA Standing Committee on Law and National Security.

During my time on the court I reviewed approximately 1000 petitions per year. The court does not track this statistic but I would estimate with great confidence that a majority of the petitions I reviewed involved sexual assault or child pornography.

Keeping in mind that we were a court of discretionary review, and thus we are not seeing the whole playing field, my guess is that much more than 50 percent of our petitions involved either sexual assault or child pornography. That means I have reviewed thousands of petitions involving sexual assault.

With that background I would also note that you are the first Panel, official Panel, and/or the first officials to ever ask me if

there is anything I learned during the 15 years I spent reviewing sexual assault cases, so I would like to thank you for that opportunity.

I also haven't been asked if there is anything I have learned about prevention of sexual assault, so I would like to thank you for that opportunity as well.

And I also would like to ask your forgiveness for taking just a moment to step back from Article 6b and tell you a couple things I am sure you already know, but I think it would be odd for someone like me who has seen as much as I have seen in 15 years not to report on what I have seen and I will do so very briefly.

I have just four points here. One, sexual assault is a, if not the, defining event in a victim's life. Judges understand that. It raises important questions of long-term health and well-being as well as justice.

Sexual assault in the military is also a national security issue and a leadership challenge. It is a national security issue

because it impacts recruiting, undermines unit cohesion, kills unit morale, and prevents mission accomplishment. That's a national security issue.

It is a leadership challenge because if the goal is to prevent sexual assault and not just to prosecute it, this is a task for Commanders and it is a task for small unit leaders. It is also a task for friends and roommates.

That is because of the petitions I reviewed, and, again, to be clear, we did not keep statistics, a vast majority of them, in the high 90s, involved excessive alcohol use in some manner, which means there is ample space and opportunity for a leader or a friend to prevent something from happening.

I often found myself asking where were the Sergeants, where were the Lieutenants? There is also the role of power differentials that occurs in the military which also makes it a leadership challenge and opportunity.

And so with that brief introduction I want to conclude on that and say I sure hope as much effort is being spent on the leadership challenge as on amending, reforming, and discussing the law, not by you, but by the system as a whole.

With respect to the amendments to the Code and in particular Article 6b, after *Martinez*, which is the recent decision by my former court which determined that the 6b mandamus provision is a remedy that is exclusively one for the CCAs.

I would be a little bit -- I'm not sure what the right word, but I think I would be presumptuous to be here today telling you I have everything to say about Article 6b.

So I thought what might be most helpful is to make a few observations in three areas, the due process concerns that might arise at the appellate level in light of the proposed text, the legal policy concerns the text might present, and the nature of military appellate

practice at the United States Court of Appeals for the Armed Forces, which might inform how the JPP looks at 6b.

But please note that I am spotting issues here not presenting outcomes and for the purpose of brevity my focus is on macro issues rather than micro issues of drafting.

I will also not repeat matters that have already been addressed in the letters you have received, so my silence neither should be assumed as endorsing or disagreeing with anything that is in the letters.

So of the three sections, the first is due process concerns. Not everyone will agree on the precise contours of criminal due process but most lawyers and judges do agree that due process requires a fair adversarial process that protects the rights of the accused and minimizes the risk of erroneous conviction.

Excepting that as a start point I imagine that specific due process concerns might arise in the following areas. One, as recognized

in ***LMR***, a case that I authored, due process applies to other actors at trial, including, of course, victims, as well as holders of privileges and/or protection such as those recognized by MRE 513 and 412.

A question that ***LMR*** did not answer is what other matters at trial or on appeal also give rise to a due process right to be heard.

A second due process concern, of course, is the impact on the rights of the accused in at least four areas, the right to put on a defense, the right to call witnesses, cross examine, and impeach, the right to a speedy trial as well as a, not speedy, but appropriate appellate process, and then a fourth more amorphous sense of due process which is one of general fairness and the perception of fairness.

One premise of the adversarial system is that the State and the defendant will have an equal opportunity to make their case. With additional argument from victims, there may be a sense, correctly or not, that the Government is

getting two bites at the trial or appellate apple, more time to argue and the strategic value of having additional counsel to identify and shape arguments.

For this reason some judges may take the view that *amicus* briefs should be disfavored. There are ways to address this concern, for example, by providing extra time to the accused or the appellant and then, of course, the real safeguard, and I am looking at my colleagues here, the real safeguard is having judges who are not persuaded by the number of arguments but by the strength of argument. I will return to that theme at the end.

This fairness concern may also arise in the perception, correct or not, that there is so much pressure to address sexual assault in the military today that it may unfairly affect decisions to prosecute and seep into the fairness of trials in a way that falls short of UCI.

Hereto, the safeguard is military judges with the integrity to call it as they see

it. As you well know, not every person charged with an offense is guilty, not every charge can be proven beyond a reasonable doubt, and not every charge or conviction reflects the legally or factually correct degree of culpability, hence the doctrine of LIOs.

A law's purpose cannot be to convict but to have a fair, adjudicative process that protects the interest and rights of both the accused and the victims, as well as state and society.

On the policy questions that might be addressed here are three that I have spotted. First, there is a tension in the law as presently drafted and as contemplated.

It appears to apply to all victims and yet the clear intention and focus is on victims of sexual assault. The question is which victims should be covered and whether there should be victim parity.

To the extent it is intended to apply just to sexual assault victims, the question

arises why some victims and not others, why not the victims of child pornography, the survivors of people who have been murdered, victims of hate crimes, for example, might also come to mind.

To the extent the law is intended to just apply to sexual assault victims, it is drafted in a way that would seem to apply to all and one would ask then the question, why aren't there also SVC for these other victims?

Regardless of who the victims are that are covered, the DoD letter does identify some scope issues and identification issues and there are also questions of how you would go about notifying appropriate victims, and that has been a problem at our court and I suspect at some of the other courts as well after people have gotten out of the military and so on.

A second policy consideration is uniformity. *LMR* identified this as an important reason for the CAAF to have written its decision and with a process that has mandamus going just to the CCAs you run the risk that you are going

to have a different standard and process or outcome in different Services losing the uniform nature of whatever it is that is occurring.

And related to uniformity I would note, in my view, that without CAAF review a civilian court, the federal civilian court designated to hear military justice appeals, you not only lose the benefit of uniform case application but you also lose the important element of civilian participation.

And I think in an area where the credibility of the military is at stake and the concerns about sexual assault are so well founded in civilian society I think it would be important to consider the role of the civilian court in the military justice system.

My third and last segment has to do with appellate practice at the United States Court of Appeals for the Armed Forces, and here, to be perfectly honest, I have bullets.

So my first bullet is the Peter and Paul problem. Whenever you give priority to one

type of case at an appellate court you necessarily are pushing somebody else's case, hopefully just to the side rather than back, but it is important to know that there is concern, I would have concern that if everybody has priority then someone is going to end up getting pushed to the back.

And as the *Moreno* case indicated a while ago appellate due process delay has been a problem in the military, so I would be cognizant of that in anything I was drafting.

I would also note, and you may have read most our court's case law, but in the off chance you haven't there is a tendency in recent years to read jurisdictional grants quite literally.

And this is neither here nor there, I have my own views, but the court does read the law very literally and, therefore, if you want jurisdiction to rest with a court, in this court, the law must be quite expressed in that regard.

If you are asking the question, could

this get appealed to the Court of Appeals for the Armed Forces, that probably answers the question. It's not expressed enough if that's the intent.

My goal here is not to comment on how one should interpret the law just to encourage people that if you have an intent, make it expressed so that it can be followed through and addressed.

My next comment has to do with the importance of catching your appellate breath, your legal breath.

We found, and I don't -- You may be able to comment on this since you sometimes were the recipients of this, but we found that when we, there are often times when the field, the counsel in the field and the lower courts just could not catch up with the case law and there was benefit to letting the field and the law develop through the common law system rather than us release a bunch of opinions on August 31st and then wonder why appellate counsel and the CCAs weren't correctly applying the law on September

2nd.

And I think that there are certain aspects of this, on the SVC side of things, that development of the law would be helpful. For example, in the case of ***LMR*** I think it was very helpful for everybody to finally see a case and pivot off that case rather than operate without binding case law. So there is something to be said for catching your appellate breath.

Timelines, I mentioned the importance of speedy trial as well as appellate due process, delay, and speed. Justice, there is the phrase "Justice delayed is justice denied." That is true for the victims, as well as the accused.

Careful of the law of unintended consequences, where there is opportunity to appeal there is also opportunity to delay, especially in a system of adversarial representation and zealous representation.

One remedy to avoid delay is to be clear that the process of review is abbreviated in some form. Mandamus is a very high standard

to overcome.

If these cases, if folks wants these cases to be heard in an interlocutory manner, perhaps the answer is to limit page numbers and limit times to file and times to decide, but I would be conscious of that.

In conclusion and in light of this background what would I recommend? First, and I know this is your -- Well, I don't want to put words in your mouth, but I haven't met anybody who does not take this view, my focus would be always first on prevention and then prosecution, right, because if you prevent something from happening then there is no need for prosecution.

I don't want the victim -- As for the law I think the most important thing that the military can do, the UCMJ can do, that Congress can do, is to provide for tenured judges in the military.

These, as the ***Ducksworth*** case indicated, and I saw it time and time again, it takes time, and I have yet to meet a judge who

does not say that it took them at least three years to learn to become a judge.

And it turns out that's about the tenure of a military judge, trial judge, or a CCA judge, and in my view -- I have two rules of inversion.

One rule of inversion is that it's much harder to be a trial judge than an appellate judge and it's much harder to be a CCA judge dealing with direct appeal than it is a CAAF judge.

As a CAAF judge I had more time, I had the smartest people I could find called clerks who could help me address the issues. Trial judges do not have the luxury.

My other rule of inversion is likely that the less prestigious a court is perceived it may be more important, and I can't imagine a more important trial court than a court-martial and a trial judge in the military in light of the types of cases they are dealing with and the fact that they are dealing with so many sexual assault

cases, which as I indicated at the outset were matters of justice, matters of well-being, and matters of national security.

So to emphasize, if it were up to me I would do what other military justice systems have done around the world, provide for real tenure for military judges, not because I don't think they are independent and impartial without it, but because I don't think it provides for the amount of time to learn the skills and judgment and experience that it takes to be a master trial judge in the first instance.

That takes time and that's what I would like to give the military. Thank you very much, Madam Chairman.

CHAIR HOLTZMAN: Thank you very much, sir. Rear Admiral Reismeier?

RADM REISMEIER: Yes, ma'am. Thank you, I appreciate the opportunity to address the Panel today.

I also take some great joy of being able to speak after Judge Baker because while I

was on active duty he, of course, would have been reviewing my work and always got the chance to speak after me, so now it's finally my chance to be able to say I agree with everything he has said or thought in his entire life.

I should give the same disclaimer. I am now retired, so I am not even sure that I have the power of persuasion. I speak only for myself in any of these matters.

I would like to start out with a slightly different global observation with regard to not necessarily sexual assault in particular, but what I would say are the persistent attempts to alter the UCMJ in order to achieve whatever the goals are that whoever it is who is working on the project is trying to reach.

You know, the UCMJ was designed to be, you know, portable. Try a case anywhere, anytime, do it rapidly, and move on.

For years we have operated in something of a garrison sort of mentality with the understanding that we've got reachback, we

can move people anywhere in the world, we can get there on a dime, we've got instant communications.

I think that it's worth it for anyone who is thinking about altering either the rules for courts-martial or the statute to consider what the world might look like at some point in the future and whether what we are creating is something that would be wholly unsustainable and inoperable in a global war.

Now it's easy to say, you know, we're never going to fight the kind of war that we fought during World War II, but that's what they would have said after World War I.

And to the extent that we now have the political reality of people talking about having women have to sign up for a potential draft in the future as well, now let's face it the political structure is attempting to create a system where we have got a fallback position should the worst happen.

Okay, we can start drafting again and

we can say all day long that's never going to happen, but for whatever reason in the wisdom of Congress we maintain the infrastructure for a draft yet we do not maintain the infrastructure for a UCMJ that could respond to the sorts of tensions that we saw during World War II.

You know, if you are in the field some place and you don't even have enough gasoline to move your tanks, the idea that you are going to be able to move a lawyer in the middle of that battle space and/or provide victim counsel and your statute has absolutely no contingency for a national emergency seems a little shortsighted to me.

So I would say as we look at any of these amendments, as we look at things that we think would be better, somebody needs to contemplate whether that "better" is going to work in all places at all times.

That's my sort of global observation about the changes that we have seen in recent years.

Focusing in a little on the issue of, okay, what's happening at the CCAs right now. By way of background, and I hope that I don't make this seem like your 62nd meeting instead of your 22nd, but I'd like to take a brief detour and talk about how we got here.

You know, in 1998 Congress altered MRE 412 to include provisions that required protected privacy information, if that's the right term for it, to be sealed.

And then in 1999 MRE 513 was added to provide protection for the psychotherapist-patient record. The inclusion of the records sealed by law required some action to address who could access those records after trial since the trial courts are not standing courts in the military.

The extent to which trial courts orders protect and sealed exhibits post-trial, the duration of the trial courts orders sealing those exhibits, and the mechanics of getting access lawfully post-trial all created

uncertainty in handling records of trial with sealed exhibits. So the President promulgated RCM 1103A to address those sealed exhibits.

Now taking another brief detour here, I can recall that when I served as an appellate government counsel in 1996 through 1998 before there were legal requirements to seal exhibits, trial judges were sealing exhibits.

The language used varied greatly. Some simply sealed the record by order of the court, some sealed it to all but some named exceptions, including the convening authority, the staff judge advocate, appellate courts, those sorts of things.

Some sealed the records noting that they would remain sealed absent further order of a competent court. So on appeal no one knew what to expect until you actually opened the record and saw what the sealing order said.

Sometimes as appellate counsel you literally could just go into the file room and gain access to the exhibits. Sometimes you

needed to request access from the clerk of court and sometimes you had to request the access from the panel judge, sometimes you had to file a motion.

So in 1998 when sealing became statutorily required the default appeared to be that counsel would require a court order to open the seals.

So the amendments to the MCM clarified all of that with one rule that defined what the access would be and as the comments to the MCM note the President's rule relies on the professionalism of the judges, judge advocates, and civilian attorneys who may require access to sealed records post-trial in carrying out their duties.

It was thought that a careful balance was created that would protect a victim's privacy rights afforded at trial by allowing a very limited degree of access to the records post-trial so the reviewing courts could assess if the trial court erred in matters surrounding the

sealed exhibits.

So RCM 1103A provides that reviewing authorities will have access to sealed exhibits and then the rule defines reviewing authorities to include appellate counsel as well as appellate courts.

The President prescribed that access. What that means is that military courts are not generally authorized to limit the access that Congress or the President have prescribed.

So NMCCA promulgated a rule longer ago than any of us are able to remember. It's likely that the rule was drafted shortly after RCM 1103A became operable. I know that it's been in effect for at least ten years, but our best guess is that it's been operable for longer than that.

So the rule of court provides that a request by appellate counsel to examine unclassified, original records of trial and other official documents that are unprotected by judicial privilege shall be made to the responsible panel secretary.

So, in other words, the appellate counsel walks into the court, goes to the secretary of the panel and says, "May I see the exhibit?"

The rule states that examination shall be done in the reception area or in a space that is designated by the court staff. Removal of records of trial from the court's chambers is discouraged.

If counsel wants to remove the sealed exhibit for some reason the approval of the senior judge of the panel to which the case is assigned or his or her designee is required.

Records of trial should be logged out for no more than one work day. So the court tries to maintain positive control of all of these.

If counsel wanted to make copies of any of these documents it requires a motion and then the court may issue an order limiting what they can do with the material.

When counsel are permitted to make

copies they are ordered to destroy the copies upon completion of appellate review and the counsel are directed to certify via affidavit that the records were destroyed.

Now, in recent years the clerk of the court has taken a rather active role in monitoring the destruction of the orders following up with counsel on completion of appellate review and if they haven't already filed an affidavit directing them to file the affidavit with the court indicating that destruction has actually occurred.

I am told the compliance has actually been very good, that the attorneys, if they haven't already filed the affidavit with the court, follow-up in short order complying, you know, indicating that the items have been destroyed.

That's the sum total of the process at NMCCA to date. I will say that at least, you know, anecdotally I know of at least one case during my tenure when I was on the court where we

wanted to limit the access because of the material that was there.

We found ourselves somewhat constrained because of the President's rule and when there is tension between what CCA wants to do in terms of limiting access and the broader access that the President has granted, the President wins.

So that's where we are, well that's where they are, I should say, now at NMCCA. Thank you for the chance to participate today. I look forward to further discussions.

CHAIR HOLTZMAN: Thank you. Colonel Orr?

COL ORR: Thank you.

CHAIR HOLTZMAN: You're welcome.

COL ORR: Good morning. To The Honorable Elizabeth Holtzman and members of the Panel, thank you for the opportunity to speak to you today.

Although I currently serve as a Policy Advisor to the Air Force Leadership on Military

Justice Matters, this morning I am here to provide one retired military appellate judge's perspective regarding sexual assault victims' appellate rights.

Now let me begin by addressing both the positive changes called for in the proposed legislation as well as some of the challenges implementation will bring.

Since 2007 the Uniform Code of Military Justice and the Manual for Courts-Martial have seen great change, both through congressional and executive action.

Many of these changes have brought improvements in the way we prosecute cases and protect the rights of those who have come in contact with the military justice process.

However, as many of these changes over the past decade have been incremental in nature, they have left residual effects on the UCMJ which have required many subsequent modifications to rectify.

One such positive change is the

addition of Article 6b to the UCMJ. The intended purpose of Article 6b was the incorporation of victims' rights found in the Crime Victims' Rights Act into the UCMJ.

Since the National Defense Authorization Act of 2014 courts and military justice practitioners have come to a consensus as to the definition of a victim in Article 6b and acceptance of the special victims' counsel who may appear on their behalf in the court.

Nevertheless, UCMJ Article 6 is written coupled with two key decisions rendered by the Court of Appeals for the Armed Forces has left appellate rights of an alleged uncertain.

Article 6b provides access to courts of criminal appeals by submitting a writ of mandamus on rulings related to victims' rights, ordered appearance at preliminary hearings or to submit a deposition, Military Rule of Evidence 412 relating to the admission of evidence regarding a victim's sexual background, Military Rule of Evidence 513 relating to the

psychotherapist/patient privilege, Military Rule of Evidence 514 relating the victim advocate privilege, and Military Rule of Evidence 615 relating to the exclusion of witnesses.

In LRM v. *Kastenberg* the CAAF held that a victim's position as a non-party to the court-martial does not preclude standing. There is a longstanding precedent that a holder of a privilege has a right to contest and protect that privilege.

Therefore, *LMR* has limited standing to be heard on issues relating to MRE 413, 412, and 513. In a second case, *EV v. Martinez* in 2016, CAAF ruled that they lacked jurisdiction to entertain a petition from a victim appealing a decision of a court of criminal appeals under Article 6b(e)(1).

Given the uncertainty of appellate jurisdiction on 8 April 2016, the special victims' counsel from the Services provided your Panel with suggested changes to Article 6b regarding victim appellate rights.

They also proposed language requiring the Judge Advocate General of each Service to detail at least one commissioned officer as appellate victims' counsel.

Additionally, they provided legislation requiring appellate counsel and courts to recognize victims as a party in interest for the purposes of appellate litigation relating to the protections afforded by Military Rules of Evidence 412, 513, and 514, and I will address these issues in turn.

In my opinion, victims should have the ability to enforce their limited rights in an appellate court. However, as long as victims are provided access to appellate courts consistent with the Victim Crimes Right, status as a real party in interest is neither appropriate nor necessary.

First, as previously stated, CAAF has recognized that the holder of a privilege has a right to contest and protect that privilege because representation of a victim in the

military justice process is limited by status, in other words, you must be eligible for legal assistance under 10 USC 1044(e), with some minor exceptions, and subject matter, which is 412, 513, 514, the majority of a victim's concerns are already addressed at the trial level, or interlocutory appeal.

Conversely, the issues that normally arise post-conviction after they are docketed with the CCA are normally aligned with one of the parties thereby eliminating the need for granting new statuses or real party in interest.

In Air Force appellate practice a victim or witness of an offense in a case before a court may request to appear before a court-martial through counsel by seeking leave to file as an *amicus*.

If the court grants that motion the parties would require, that motion would be required to be served upon all victims.

A real party in interest is normally defined as a person or entity whose rights are

involved and stands to gain from a lawsuit or petition even though the plaintiff who filed the lawsuit is someone else, also called a nominal plaintiff.

Now although the Air Force Court of Criminal Appeals has not defined a real party in interest in their rulings, the government and defense generally agree that the victim is not a party to the pleadings.

The current practice is to follow CAAF's guidance in *LMR* which ruled that a victim is not a party.

Consistent with the current Air Force Rules of Practice and Procedures the parties would be required to serve any and all pleadings in the case without regard to whether the victim had an interest in the pleading if they were given a real party in interest status.

Air Force appellate practitioners have systems in place to address the notice of appellate matters. First, a victims' counsel serves notice of representation upon the parties

and petitions the court to examine unclassified original records of trial and other official documents that are not protected by judicial privilege.

For sealed portions of the record, counsel must include in their petition the specific legal authority that authorizes their access to that portion of the record of trial.

Even though such requests are routinely granted victims' counsel has expressed concern about the lack of protection of sealed materials on appellate review.

Specifically, a victim's right to absolute privacy is in direct conflict with RCM 1103A. Consistent with the Crimes Victims' Rights' Act, government counsel has a duty to provide notice of assignments of errors to appellate victims' counsel upon notice of representation.

Many victims expressed concern about appellate counsel reviewing sealed portions of the record containing private matters that the

military judge did not provide to the litigants during the trail.

However, 1103A states reviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to the proper fulfillment of the responsibilities under the UCMJ, the Manual for Courts-Martial, governing directives, instructors, regulations, applicable rules of practice and procedure, or governing directors.

As a general rule, the Air Force Court of Criminal Appeals provides access to sealed materials to appellate counsel upon request. However, such access is limited to portions of the record concerning the offenses of which their client was found guilty.

Many of the changes intended to provide victims' meaningful rights, such as a voice and notice, were a much needed improvement to the military justice process.

I sincerely appreciate your invitation to hear from appellate practitioners as you

conduct your thoughtful review before submitting additional legislative proposals.

As we examine our system for improvement it is important that we critically look at every change to ensure that we are bringing about meaningful change that will preserve the rights of the accused, the rights of the victims, and the needs of commanders.

I wholeheartedly believe that after this process we will have a military justice system that is more efficient and robust than ever.

Thank you for the opportunity to appear before you today and I look forward to answering your questions.

CHAIR HOLTZMAN: Thank you, Colonel. I appreciate your contribution. We will next hear from Colonel Denise Lind. Colonel, welcome.

COL LIND: I see you saved the best for last. I am joking. Madam Chair Holtzman, Members of the Judicial Proceedings Panel, thank you for inviting me to speak today.

By way of background I spent just shy of 30 years in the Army Judge Advocate General's Corps and retired in 2015. Six of those years were as a military trial judge and two of those years I was a senior judge on one of the panels on the Army Court of Criminal Appeals.

I would like to focus my remarks by advising you of current practices at the U.S. Army Court of Criminal Appeals, which I am going to refer to as the Army Court, regarding victim notice of appellate matters, victim privacy interests during appellate counsel review of records at trial, and victim participation in appellate proceedings. I have copies for you of all of the documents that I will be talking about.

With respect to victim notice of appellate matters, at the trial level the Department of Defense uses DD Form 2703 entitled Post-Trial Information for Victims and Witnesses of Crimes, that form is dated March of 2016 to advise victims.

With respect to appellate review this form advises victims, "All court-martial convictions are either reviewed by judge advocate or subject to some form of appellate review. An appeal is when a higher court reviews the decisions made by lower courts to determine if a legal error was made. The post-trial appeal process can take a long time. Depending on the offense an accused can choose to waive appellate review. A victim has the right to be notified in advance of the date and time of any appellate courtroom hearings and to be notified of the final decision of any appellate court or judge advocate review."

The pre-2016 version of the DD Form 2703 did not contain any advisement of the appellate review process.

If an accused is sentenced to confinement the victim and witnesses, if applicable, are requested to fill out DD Form 2704, that form is dated March of 2013, entitled Victim Witness Certification and Election

Concerning Prisoner Status.

The trial counsel or designee notifies victims and witnesses of information regarding their post-trial rights and any changes in the accused's confinement status.

The form requests victims and witnesses to place their name, address, and telephone number on the form to be notified of changes with the prisoner.

The form has a yes/no election for the victim or witness to elect whether they want to be notified of changes in status of the prisoner. The form puts the notice on the victim or witness to notify the Military Central Repository with an accurate address and telephone number to continue receiving notifications.

At the appellate level approximately seven years ago the Army created an appellate/victim liaison position within the Clerk of Courts Office. I am going to refer to this position as the AVL.

The AVL carries an average of 500

active cases with one or more victims. This includes all individual victims of crimes, not just victims of sexual assault.

When a record of trial arrives at the court records, with one or more individual victims, it is referred to the AVL. The AVL obtains victim information from the DD Form 2704 if the accused was sentenced to confinement.

If the accused was not sentenced to confinement the AVL looks through the record of trial to find information where the victim can be located.

The AVL contacts the victim directly, unless the DD Form 2704 or other information indicates the victim is represented by special victims' counsel or other counsel. In such cases the AVL contacts the counsel.

The AVL has standard form letters she tailors to each individual case regarding appellate procedures relevant to the victim that occur at both the Army Court and the Court of Appeals for the Armed Forces, the CAAF.

Each of these letters I am about to describe has the AVL's phone number and email address with an invitation for the victim to contact the AVL with follow-up questions.

When the case is initially submitted to the Army Court the AVL sends a letter to one or more of the victims telling them the case has arrived at the court and explains the appellate process at the Court of Criminal Appeals level.

The letter asks the victim if he or she wishes to continue receiving notifications in the case. The AVL sends letters to the victims advising when an oral argument on the case is scheduled and when the Army Court has completed appellate review.

The letters are tailored to explain what the Army Court did with the case. For example, affirming the findings of guilt and sentence, modifying the conviction with or without granting sentence relief, or modifying the sentence, et cetera.

The opinion of the court is attached

to the letter. Each of the letters goes on to describe what happens next in the process, for example, if the appellant petitioned the CAAF and the petition was granted or denied, the AVL notifies the victim of scheduled oral arguments on the case before the CAAF and the final decision of that court.

Some victims have varying levels of interest in the case at the appellate stage. Some are very interested and have repeated telephone calls or emails with the AVL, others have moved on with their lives and don't want to be notified at all.

Funding and resourcing to link databases used by the Army Court with confinement facility databases and creation of databases enabling appellate courts to upload documents and allow victims potentially to log in to obtain court filings involving their cases would facilitate the victim/witness liaison at the appellate level.

Before I turn to current procedures at

the Army Court regarding victim privacy interests during appellate counsel review of records of trial I would like to address some nuance between victim privacy interest with respect to Military Rule of Evidence 412 as distinguished from Military Rule of Evidence 513 and 514.

Military Rule of Evidence 412 is not a privilege of the victim. The privacy interest of the victim in Military Rule of Evidence 412 is not to prevent disclosure of records being produced for *in camera* review or disclosed to the defense.

The defense counsel is usually the one raising the motion to admit other sexual conduct of the victim. Trial counsel, defense counsel, and the accused know what the evidence is and all participated in the closed hearing.

The information is sealed to protect the other sexual conduct of the victim the judge has ruled inadmissible or was not admitted at trial from the public.

In contrast, Military Rule of Evidence

513 and 514 are privileges. The privacy interest of the victim under these rules is to prevent the production or disclosure of information privileged under these rules basically to anyone.

Prior to June 2015, Military Rule of Evidence 513 authorized military judges to conduct an *in camera* review, if the review was necessary to rule on a motion for production or admission of records privileged under that rule.

Necessarily, records have to be produced for a judge to do an in camera review. Case law at the time encouraged such in camera reviews by military judges, and I am referring to the *United States v. Briggs*, 48 MJ 143, Court of Appeals for the Armed Forces (1998), and I do note that was one year before Military Rule of Evidence 513 was enacted.

The June 2015 change to Military Rule of Evidence 513 removing the constitutionally required exception and requiring the military judge to make specific findings prior to ordering the production of records for in camera review

will likely result in reduced orders to produce privileged records, and accordingly a reduction of privileged records under Military Rule of Evidence 513 or 514 in records of trial going on appeal.

Addressing privacy interests of the victim at the Army Court, as we discussed earlier Rule for Court-Martial 1103A governs the sealing process and appellate reviewing authority access to sealed material.

The rule authorizes appellate government and defense counsel to review but not disclose sealed information. Military Rules of Evidence 412, 513, and 514 each require "the motion, related papers, and the record of the hearing to remain under seal."

There may be other sealed materials in the record of trial as well, for example, images of child pornography or classified information.

When the military judge orders records produced for in camera review under Military Rule of Evidence 513 or 514 those records are normally

appended to the record of trial.

This includes records upon which the judge has ordered production, conducted an in camera review, and declined to order disclosed to counsel at all. If the military judge does not order records produced they will not accompany the record of trial.

Sealed material goes into the original record of trial only. The original record of trial is maintained by the Army Court during appellate review at the court.

Rule 30.4 of the Army Court Internal Rules of Practice and Procedure provides "Attorneys of record in appellate cases may access the sealed records of an original record of trial. Attorneys will request permission from the clerk and coordinate review of sealed records with Office of the Clerk of Court. Attorneys of record are responsible for returning the sealed matters completely and without alternation to the Clerk of Court's possession. Photo copies of sealed records are prohibited."

Such permission is routinely granted for all sealed records with the understanding that sealed classified material and child pornography images require additional protocols not relevant to this discussion.

Normally sealed matters as a practical matter are in a sealed envelope in the record of trial. Counsel breaks the seal and reviews the sealed records in the Clerk of Court's Office.

Counsel initials the envelope that they have reviewed and reseals the sealed matter in the envelope prior to returning it to the Clerk of Court personnel.

Documents disclosed to counsel in discovery but not admitted into evidence at trial would not normally be in the record of trial unless they were attachments to motions or appellate exhibits were included within the allied papers that accompany a record of trial.

Turning to victim participation at the appellate stage, direct appeal. The 2013 and 2015 changes to 10 USC 806, or Article 6b(e), now

allow victims at the trial level to file an extraordinary writ of mandamus with the Military Courts of Criminal Appeals when the victim believes that a trial level ruling violates his or her rights under Military Rule of Evidence 412, 513, 514, or 615.

The Manual for Courts-Martial recognizes two parties on appeal, the United States and the accused. There is limited standing for third parties to intervene.

Rule 15.4 of the Army Internal Rules of Practice and Procedure allow *amicus* curiae to file a pleading by invitation of the court or by motion for leave to file granted by the court.

Rule 16.2 allows oral argument by counsel for *amicus* curiae upon motion granted by the court. The victim may also consult with government or defense counsel depending on the interest in the case.

While not of participation as a party on appeal, the victim may participate in appellate proceedings by consulting with

government appellate counsel or defense appellate counsel if the victim is aligned with the accused.

Attending oral argument and requesting appellate filings from the AVL, the AVL sends Army Court notification of relevant actions by the Army Court regarding her case, his or her case, and attaches court decisions on the case.

Thank you for allowing me to converse with you today. I look forward to our discussion.

CHAIR HOLTZMAN: Thank you very much. Thanks to all the members of the Panel for your very thoughtful presentations. Thank you, Colonel, and thank all the members of the Panel for the thoughtful presentations. We will begin with Professor Taylor.

PROFESSOR TAYLOR: Thank you, Madam Chair, and thanks to all the members of the Panel.

I have never been an appellate practitioner so I may have some questions that

seem rather simplistic as I have tried to follow the arguments and the discussions, so bear with me if you will, please.

Chief Judge I would like to start with you, if I may, and ask you to comment as you started talking about the leadership challenge and how that ties in with the kind of culture that the UCMJ can help create, the kind of environment that the very subjects we are talking about here today can help create as you think about not only what you said about working with the leadership and changing the leadership culture.

I think that's part of what you were saying, so it's not just the leaders but everyone right down to the lowest enlisted person who embraces all the changes and tie that together maybe with what the Admiral was saying about the portability of the system so that you are creating a system that is not only flexible but also portable.

JUDGE BAKER: Thank you for the

question and the opportunity to return to prevention, which is the ultimate goal here.

The UCMJ, obviously, serves as a deterrent effect. It reminds Commanders of their responsibility to lead in this area, but it does not absolve, and this is a critical point, it does not absolve members of the military and members of the military community from their responsibility as leaders and requires team members to do all they can do to prevent misconduct.

And if you need the UCMJ to back that up through the Article 134 or perhaps maltreatment provision -- Which is the maltreatment -- Yes, I don't want to --

RADM REISMEIER: Ninety-three.

JUDGE BAKER: Ninety-three, thank you very much. I am out of training. You can do that, but I don't think, I'm not sure how much further I need to -- if you are turning it into a military justice problem you are probably past the point where your leadership could have been

most effective.

And I think back to the times when, you know, my first Sergeant put his arm around me when I was a young and really innocent 22-year-old and I actually thought my Marines were going home on Friday night and studying tactics and training and he kindly explained to me that that was not what they were doing and that I should probably talk to them about excessive alcohol use and driving, and so I did.

And to this day I still find commanders at every level who are not including excessive alcohol use, sexual assault, and child pornography part of their, so-called, platoon leader's brief on Friday nights, Saturday nights, and every other day of the week.

So my hope, and this may or may not respond, Mr. Taylor, to what you were asking, my hope is that your work in the spotlight that Congress's concern has brought to this issue will remind leaders at all levels of what they can do and how they can do it.

I am happy to -- come back at me, because I'm not sure I --

PROFESSOR TAYLOR: Well, yes, thank you. That's a good start, but I would like to follow-up with I guess the context of that question which is from the public policy point of view, unless it's violating some secret judge's handshake that you have on the CAAF, when you sit and deliberate with your colleagues when you did as chief judge and as one of the regular members of the panel, did you take into account as you come up with the decisions that you do on these somewhat technical issues what the impact is from a philosophical sense on the larger issues that you started your conversation with?

So I guess I am asking about judicial philosophies --

JUDGE BAKER: Well, that's interesting, how judges act. I mean I think the book of judging would say that, one, we are bound by the record of trial and I think one of the strengths of an adversarial process, and people

would ask, and let's see if this answers the question in its own special way, people would ask do you need to have military experience to serve on the Court of Appeals for the Armed Forces, and, of course, the legal answer is you don't.

But my further response to that is while it is helpful, judges don't decide cases based on their own experience or whether they served in the Marine Corps or the Air Force.

They decide cases based on the four corners of the record of trial and that's where the CCAs come in because they have fact-finding power, as well as legal review power.

And, secondly, in an adversarial system it is the job and duty of the counsel to tell the judge all that they need to know about military culture or the impact of the decision they are about to take.

So sort of the confines of what we would consider or what we should consider are, one, the facts from the record at trial and the arguments from counsel about the implications of

what we might decide.

But our job ultimately is to say, were the elements of the offense met and was the First Amendment, Fourth Amendment, Fifth Amendment, and Sixth Amendment adhered to, not to say, gee, it would be better.

That's "legal" policy or "policy" policy, it would be better if we did this. That would, I think, be outside a normative judge's views of what their role was.

One of the frustrations of being an appellate judge is you are having a conversation with the field and with society, but the conversation takes place over eight years and it is interrupted by 100 other cases or 450 other cases and you are bound by the issues presented to you rather than the issues you've spotted and would like to address.

And I don't know if you felt that way, I was trying to have a conversation with you, but it was over years.

RADM REISMEIER: No, I think that's

true. I think, you know, everybody recognizes that there is some either overt or understood message in the case law that you are trying to look through and trying to respond to and trying to go hey, I think this is where they are going.

Obviously, there is the holding and then there is all of the dicta in there that you try and sift through and sometimes you get it right as the inferior court and sometimes you don't.

JUDGE BAKER: Are we at least in the ballpark of responding?

PROFESSOR TAYLOR: Well, yes, but I would like to now pull that back to -- I guess the last question I will ask for you on this round, and that is when you said earlier toward the end of your comments on appellate practice that there was a tendency to read jurisdiction literally, if I understood what you said correctly.

JUDGE BAKER: That's correct. I'm sparing you the necessity of reading all our case

law.

PROF. TAYLOR: Right.

JUDGE BAKER: But it's joyful of course, but it is dense. And there are a number of cases that were three-to-two splits that, where the issue was -- and I think first, just a side point, judges speak with their opinions, not with what they say about their opinions elsewhere.

PROF. TAYLOR: Right.

JUDGE BAKER: So I think it's -- there's nothing improper about it, but a judge shouldn't go around supplementing their opinion by saying, this what I really meant and this is what you should have gotten out of it. ***LMR*** is my statement on that. Period.

But the tension you'll see in some of these jurisdictional cases is between a judge who might look to the legislative history and purpose of the law, let's say to provide a uniform standard, to provide civilian oversight in the military, that sort of thing, and a judge who

would look to just the words of Article 66. And it doesn't say review in this case, so therefore there's no jurisdiction.

Those are both proper ways to look at the law. But what I'm signaling is, the majority of my court tends to look at the law, if it doesn't say at 6 o'clock on Tuesdays we have jurisdiction, then we don't have it.

Which is fine. You now know that, if you wish to provide jurisdiction or you think that's the right result or if you're a counsel arguing before the court, you need to be prepared to address that.

So my goal here is not to say, oh you know, the two judges in that case got it right, not the three. Or the three got it right not the two.

Mine is, I don't care who got it right, I want you to do what -- if you intend to do something as a panel or Congress intends to do something as a Congress, be clear, in light of what I'm telling you, so there's no doubt. So

that the victims understand exactly what their rights are or not. The CCAs understand what their law is or not and so on.

It's clarity, is what I'm seeking through that comment.

PROF. TAYLOR: Thank you very much, Judge Baker. And actually, you made the point I was trying to make better than I ever did and that is, there are instances where one's view about what this is all about does impact how they interpret these various statutes.

JUDGE BAKER: Without question. And I'd say, I'll poke fun at myself, and you can, no doubt, find plenty of people in this room to do it as well. That I would fall into the camp that would look to the, first the law itself. If the law is clear, you don't go beyond the law.

But where the law was not clear, and you'd have to say that much in the UCMJ is not and nor was it intended to answer every question, you look to the purpose in legislative history. And that's entirely appropriate. That's part of

what you do.

What you don't do is say, and in my view, because when I did this in the Marine Corps, this was, that's not in the record of trial, is it. And nor did counsel have the opportunity to comment on that.

PROF. TAYLOR: So, assuming that we've sketched out some broad framework here, would each of you like to comment on this in terms of the extent to which you, as senior appellant judges, felt that you had some room to move within the rules in order to do better or worse, if you will, by protecting appellate victims' rights?

If you feel really constrained as you lead your panels and as you worked through these decisions yourself?

RADM REISMEIER: If I may, before answering that, if I could back up and pull in a thread from your original question.

And the question is, okay, paraphrasing a little, is the UCMJ a tool for

commanders, in order to address the things that Judge Baker is talking about, that is, that now sort of messaging the prevention is a far better approach then trying to come at it through prosecution?

The Article 137 of the Code actually requires that every enlisted member, at the time of enlistment, actually be briefed on the contents of the UCMJ. Now, the UCMJ was designed to be a teaching tool.

But the value of that teaching tool and the value of that knowledge really depends on the clarity with which the message is conveyed. The more complex the law gets, and the more lawyers you need in order to come in and explain it, the less value it has to a commander to be able to say, "Look, these are the requirements."

Everybody in uniform understands the simple message of, you smoke dope, you're going home. Try to message Article 120, in simplicity like that, and you can understand how it is that the UCMJ does not do what Article 137 envisions

when you get to this issue of prevention.

So while I would agree with all of the comments that are made, I would say, I think there is opportunity to make the law way more clear, if that's what people want to do. I just have to say that, and it's a comment I made when I testified before this panel, whatever it was, 15 months ago or something, there are now three versions of Article 120 in effect.

Going back in again, so that there are now four versions in effect, depending on the time of the crime, is help the practitioners probably don't need. But if somebody is going to go back in and alter the law further, I would say look at Article 137 and ask yourself, can you message this in a way that an 18-year-old kid is going to go, okay, I understand what the rule is supposed to be.

I would say that most 30 something year old trial practitioner lawyers, who've got way more schooling than those guys have, could simplify Article 120 in a way that would make

sense.

JUDGE BAKER: And just to be clear, we were talking about the criminal articles of, if you're talking about Article 15 as well.

RADM REISMEIER: Right.

JUDGE BAKER: There are commander's tools in there to do all that we're talking about.

RADM REISMEIER: Right.

JUDGE BAKER: But that was not the focus of our presentation.

COL ORR: Yes, you had mentioned, Judge Baker had mentioned the eight-year conversation. Ours is a little shorter.

But going to and from the appellate bench and back to the trial bench, and back and forth over a 12-year period, it was frustrating as an appellate judge to have a case where you have multiple sexual assaults for this event, this is the rule of the case. For this event, this is the rule of the case, and for this event, this is the third rule of the case.

And panels, jury panels, look at you like, "Well, if you have to do all this, how is this kid supposed to figure this out?". As an appellate judge, it's frustrating sometimes to know that you have to go by the law of the case at the time, realizing that if you were in that third iteration, this would be a crime, but you have to let the other two go. And it's all the same type of event.

So those are the things where you know where the policy is going, but you have to stick to the law at the time of the event.

COL LIND: I want to make sure I understood your question correctly.

PROF. TAYLOR: It's changed several times during the course of --

(Laughter.)

COL LIND: I initially thought that you were asking, sort of to the extent that an appellate judge can sort of send a message on leadership and climate.

I think to a certain extent an

appellate judge can, an appellate judge is probably not going to say this is a poor leadership climate in the appeal, but the appellate judge can lay out the fact of what occurred in the record of trial in a certain way that when people read them, they might come to the conclusion that that wasn't the best command climate there. And I think that's possible to do that without coming out with an advisory opinion or something like that.

So that said I will also say, remember, by the time the case gets on appeal, that command is long gone, people have moved. So at least with respect to the command at issue in the trial, that message I don't think is going to get to that group, if you will.

I will say, from my experience as a trial judge, what you did see a lot of times were units who were trying to implement preventative measures, would frequently send a lot of their platoons or companies to the trial. To watch the trial. And see these things play out.

So that's some of the things I saw at the trial level.

JUDGE BAKER: Can I pick up on that? One of the things that Chief Judge Robbie Everett started in 1986 was our outreach program. And that was the process, and is the process, where our court would hear appeals around the country. On military bases and at law schools.

The intention was initially to obviously show a larger audience the nature of and the practice of the *Military justice system, but also to show that it operated under a civilian review.

And one of the opportunities that those programs have now is to also show a larger audience, both in the civilian world and in the military audiences, often volunteer military audience where the commander has brought the entire battalion or regime along to watch. It is a great opportunity.

And that's worth every, you know, 100 of my speeches is equivalent to two minutes of an

outreach case that a command is watching. That is an area where I don't know the answer for you.

You have direct review at the CCA and therefore a compelling motion of cases that doesn't allow you to travel as much. But occasionally people debate whether we should do away with outreach. And I think it's one of the most important things we do as a public, in our public service roles.

COL LIND: I would just add that the Army Court does it as well. When I was on the Army Court we did an outreach at Baylor. And that same, the very next day we did one at Fort Hood, Texas. And we do it like twice a year.

PROF. TAYLOR: Madam Chair, I'll yield at this point. Thank you.

CHAIR HOLTZMAN: Admiral Tracey.

VADM TRACEY: I'm neither a lawyer or a judge so forgive my questions if you'll forgive Mr. Taylor's questions.

Judge Baker, you talked about the fact that the way that the language is framed in the

proposed legislation would apply to all victims and that that seems unwieldy. But to focus on the sexual assault victim would open questions as to whether there are, why only those victims?

Is it inappropriate, given your view that the UCMJ is partly intended as a preventative measure, is it inappropriate for a crime that has the sort of corrosive effect that you've attributed to sexual assault, and the special kind of corrosive effect, would it be inappropriate to single out sexual assault for some special treatment under 6b?

JUDGE BAKER: Well, one answer is it's never appropriate for Congress to legislate as it sees fit. I think, one, my first message is clarity.

And, oh by the way, you need not apologize for not being a lawyer or a judge or whatever --

VADM TRACEY: I only do that in this room.

(Laughter.)

JUDGE BAKER: Okay. Our job is to communicate the law in plain English, if possible, and with clarity, so it reinforces the message.

If we're not doing so, then we have not performed our role successfully. We may have performed our role, but not successfully.

So my first comment is, be clear what is intended, in the entire discussion. And it's inappropriate discussion is all about sexual assault victims.

But the word "all", lawyers, I always caution my students, never say "always" and never say "all." Because there are exceptions to every rule. And "all" means "all". All pleadings. Every filing to extend a deadline to submit a brief. That's all.

So I guess my point is, it's not inappropriate to focus on a particular victim, or a class of victim, particularly where that particular victim or class of victims is so closely tied to one, issues of justice and well-

being, but also national security and the health of the national security mission.

I think all victims though deserve -- if you're a child pornography victim, I would be careful, in my own, if I were a policy maker, I would want to say, what's the line between a child victim of child pornography and a sexual assault victim? And why should one be treated one way versus the other? They both should be treated with great care.

So I'm not sure if that's where I would draw the line. I don't think it's inappropriate to draw the line there. But where does it become complicated?

Hate crimes, for example. What about a hate crime? So I think I would be asking myself, where should the line be and why? And I don't sense that's happening.

And then I think working back from the other direction, a violation of the Espionage Act, who's the victim? You know, in some sense all members of society might be the victim there

because our security, if properly charged, our security is all diminished. We all suffer.

That person is clearly, is probably too diffuse, right? So I would not have those victims come forward.

Is that clear? So this is a line drawing exercise. My point is this, the line in here is not the line people are talking about. They think they've drawn one line in this, in plain English --

VADM TRACEY: Has not.

JUDGE BAKER: -- is a different line. And if I'm a counsel, and I have a child porn victim, I'm thinking, what are my duties now in light of this law. And it's confusing.

So has that been clear in response?

VADM TRACEY: That's good, thank you.

JUDGE BAKER: Yes.

VADM TRACEY: Thank you. Colonel you described an Army victim liaison position and then a set of actions that that position fulfills in the Army's Court cases. Do the other Services

perform those functions, these notifications? And just don't have someone whose identified with the full set of responsibilities or --

COL ORR: In the Air Force, those functions are somewhat being performed but they're not being performed by the court per say. We have a legal service there that performs some of that.

VADM TRACEY: And that is connected to the court in what way?

COL ORR: It actually is not connected to the court. It's a separate division that we have. Services Legal Counsel.

VADM TRACEY: So is the Services Legal Counsel responsibility to track what's happening in the court so they can communicate with the victim or is it the courts responsibility to inform the service liaison --

COL ORR: It's the court's responsibility to notify the victim, the legal counsel. And then --

VADM TRACEY: Okay.

COL ORR: Yes, right.

RADM REISMEIER: Somewhat similar to the Air Force response, that really is a government function, it's not a court function. The court is generally not in the business of, you know, the court takes cases in, the court decides issues based on the record, the court issues opinions.

If somebody has an equity involved in that, that's a government function to actually say, okay, you need to know if this has actually come up. So that's going to be, to the extent that it's done, it's done with within the offices of the established programs for VWAP, victim advocates, those sort of things.

The court does not, that's not the court's job. At least that's the institutional way that the court would look at it.

I mean I get that the issue is, at that point, becomes decentralized. I get the issue you're raising, but, no, that's not the way the Navy approaches it at this point.

VADM TRACEY: And is the process that's somewhat equivalent to the Air Force's, is it the same between the Navy and the Marine Corps or are there two different --

RADM REISMEIER: It's about the same. It's largely driven by the departmental structure. So the Department of the Navy.

VADM TRACEY: Okay. Thank you.

COL LIND: If I might, I would just want to clarify. I said this earlier, but in the Army it's not the court and the judges --

VADM TRACEY: Got it.

COL LIND: -- that notify the victim, it's the court administration --

VADM TRACEY: But you have a person assigned that, who sits --

COL LIND: Yes.

VADM TRACEY: -- in that venue and there's not the air gap. Yes

COL ORR: Right. And the Air Force does not have a person assigned for the court to do that.

VADM TRACEY: Yes.

RADM REISMEIER: Can I, if I may, back up and address this issue of, okay, is the basket of people too big, too small, is it all victims, is it some victims?

One thing that may be worth considering is that to some extent your victim really is not the right identifier. If what you're really trying to talk about is somebody who's the holder of privilege that is 513 material. Whatever the privilege is.

If you're trying to protect that information from being disclosed, whether the person is this type of victim, that type of victim, an essential witness, it almost doesn't matter. If what you're trying to do is protect the information, then you can just simply key in the information and have it say, look, the holder of the privilege.

Now, you're going to have to do some drafting to figure out how exactly you identify who the holder of the privilege is. But to some

extent, the language sweeps too broadly.

That is, that you're sweeping in victims of all sorts. To some extent it sweeps too narrowly because you're not getting the people who may have some information that needs to be protected, but they don't fall under the rubric of the victim. Or they're not a victim in this particular case.

JUDGE BAKER: But to be clear, they would still be in a position, without this legislation, to have standing --

RADM REISMEIER: That's right.

JUDGE BAKER: -- to protect their privilege. So you need not be -- and we are in agreement on this, you need not be listed in 6b in order to protect your 513 privilege. *LMR* makes that clear.

Although *LMR* is addressed specifically to a victim, the language says, "There's longstanding precedent that a holder of a privilege has a right to contest and protect the privilege."

So the legislative question is, if the law is clear on that, and we'll stipulate that the law is clear as four judges can agree it is, what additional, and the Rear Admiral is quite right to raise this, what additional are you trying to capture in those all pleadings, all briefs.

So that's another way to get at it. Which is, is the class of person, privilege holders as you've indicated, is the class of person a victim. And if the class of person is a victim, what kind of victim?

But if it's really about 412, 513, 514, and no more, you can draft a very clear statute. In fact, you don't even really need one in light of the case law.

VADM TRACEY: Can I ask a question? It's your opinion that there's not a requirement for any change in order to make the right to protect the privilege clear. Is the "By what means" clear?

JUDGE BAKER: Is the what?

VADM TRACEY: By what means clear.

JUDGE BAKER: It's as clear as case law is clear. And I would note that *LMR* was a three-to-two decision. And therefore, you know, there's nothing as clear as statute or there's nothing that could be as clear as statute, right? And case law can change a lot quicker and more easily then statute can.

But there is longstanding precedent, in multiple courts, that the holder of a privilege has the right to protect it.

One of the issues in *LMR* was not just, is that a proper statement of the law, but how do you protect it? And you get to have the counsel come in.

And one of the subordinate issues was, do you get to make legal arguments, or merely factual agreements, that you're the holder of the privilege. And *LMR* said, you get the full kit.

You get to have a counsel. Being heard means, having a counsel. And because of the legal question, as to whether the privilege

exists at all, it most necessarily includes the right to argue the law as well as fact.

Now you can't go in there and start arguing the elements of the effects, right? I mean you're bound by the issue presented by 513 or 412. I think we're in alignment.

So the question is not, does the law today make that clear, will this law change with case law.

CHAIR HOLTZMAN: You get a five-minute break now. If you have more questions we can --

JUDGE BAKER: Okay.

CHAIR HOLTZMAN: Okay, thanks. We'll take a five-minute break.

(Whereupon, the above-entitled matter went off the record at 10:32 a.m. and resumed at 10:42 a.m.)

CHAIR HOLTZMAN: Admiral Tracey, do you have additional questions?

VADM TRACEY: I think just one more question. Do you, in your view, do these communications that you shared with us, do they

include enough information for victims on how they can exercise their rights as the privilege holders around the 412, et cetera?

COL LIND: Again, on appeal right now, the only way that I'm aware of that a victim can do that is as an *amicus*. The parties currently recognized are the United States and the accused. To my knowledge, a victim has not tried to do that.

VADM TRACEY: At the Army Court of Criminal Appeals?

COL LIND: At the appellate level.

VADM TRACEY: But do the documents explain how to -- what is an *amicus*, how do you become an *amicus*, what does it mean to be an *amicus*?

Is there anything in here that allows a victim to weigh in if they see the possibility that information they were successful at having withheld from the court might become public? That's what started us down this path, right?

COL LIND: No.

VADM TRACEY: Okay. They don't make it clear.

COL LIND: No.

VADM TRACEY: Okay. I think that's my last question.

CHAIR HOLTZMAN: Okay. I know Mr. Stone is the next speaker, but I just wanted to ask a quick question.

Because I think one of the focuses of the response of the Panel has been to say that the law protects the rights of the privilege holders. But as we understand -- or it was raised by -- I think Colonel Orr -- 413 -- 412 is not a privilege. So how do we deal -- if this is your suggestion for how the legislation should deal with the concerns of victims, how does 412 fit within this rubric? Anyone.

JUDGE BAKER: Well I'd like to -- I'm not sure we're proposing legislation, we are just --

CHAIR HOLTZMAN: Well you're not proposing, you're commenting on them. I don't

mean to put words in your mouth, but we have to --

JUDGE BAKER: Right.

CHAIR HOLTZMAN: -- we've been proposing, and people have been proposed -- have suggested that legislation be proposed. And the Senate, at this moment, is interested, apparently, in adopting some legislations.

So the concern -- the suggestion that this problem be resolved under the rubric of enforcing rights, or enforcing privileges -- if 412 doesn't articulate a privilege, how do you enforce the rights under 412 on appeal. That's my question.

JUDGE BAKER: This is -- in my opening statement I referred to privileges and protections. And the real issue is one of standing.

Do you have standing to be heard before the court, whatever the matter is. And our court has gone back and forth on interpreting 412.

The original lead case was ***Banker***. Which I authored. And I'm sorry to report it was then overruled about eight years later, in ***Ellerbrock***.

But in ***Banker*** we took -- and these I think were both three-two cases. ***Banker*** was a three-two and I think ***Ellerbrock*** was as well. Which is a way of saying, whatever 412 said, a court made up of five rational judges couldn't agree on what it said, so it probably needs to say it with greater clarity.

But 412 itself built in a right to be heard on the question of privacy and protection of the privacy right without it being called a privilege. And the question is, how clear and which courts would uphold that right and in what manner?

So that's clearly an area that -- in my view, if you accept my rubric, that clarity in the law is always helpful. That is an area where you could deal with greater clarity. Exactly what it means to be heard on that matter.

And I would -- without question, that protection of privacy is critical. That being said, it is also right at the -- can be right at the focal point of the due process right to put on a trial and have a fair adversarial proceeding.

So that's a place where judges will be busy and will have to do work. There's a lot of 412 cases.

I might make one comment too. We tend to focus on the legal aspects of this, which is the privilege that gives you standing and so on. We talk in the law about substantive justice, the outcome. There's also the concept of procedural justice.

And the opportunity for a victim -- however defined -- to be heard, is a part of procedural justice. Whether they're trying to be heard on a particular privilege or a particular protection or in some other manner, there are reasons why one might want to legislate the opportunity to be heard beyond privilege.

Which have to do with the opportunity of the victim to be heard at all. As part of the sense of procedural justice.

So that's something -- apropos of our conversation with Mr. Taylor, that's not something judges -- judges apply the law, not concepts of procedural justice, unless it's due process. But that certainly is an area where a legislative body or a policy-making body might say, no, we want more than protection of privilege. Or protection.

CHAIR HOLTZMAN: Did you have something --

COL LIND: Chair, it might be worth the Panel's -- the cases that Judge Baker was talking about are ***United States versus Gaddis***, which is at 70 M.J. 248, the Court of Appeals for the Armed Forces 2011. And ***Ellerbrock***, which is at 70 M.J. 314, Court of Appeals for 2011.

And both of those cases discuss the contrasting and competing interests on the constitutionally required evidence for the

accused's and victim's privacy.

CHAIR HOLTZMAN: I get that. I get that. I'm concerned about how we get -- whether we should have an appellate right, for a victim, to raise that issue on appeal. Not the trial counsel.

Is this victim going to have a right to have his or her voice heard on appeal on this point?

COL LIND: On -- I guess I'm confused on a couple of things. Is the voice to be heard on whether appellate counsel have access to the sealed records --

CHAIR HOLTZMAN: No.

COL LIND: -- or is the voice to be heard on the merits of the 412?

CHAIR HOLTZMAN: Merits of 412. And possibly sealed records. That's what the focus point is of the -- I think of the legislation that was presented to us by -- or at least one of the focus points of the legislation that was proposed to us by the representatives of the

special services on special victims' counsel, legal -- victims' legal counsel. And also of the Senate -- proposed legislature --

RADM REISMEIER: It may depend on what exactly one is trying to achieve. I mean if for the first instance what you're trying to do is identify the sort of class of information you're talking about, then the rubric that Judge Baker is talking about is something to, I guess, start with. That is, privilege holders or protected privacy information.

I mean it's easy enough to come up with some plain language that identifies the group of information bins that you're trying to reach.

I think the more difficult thing to address is, when we talk about this right of appeal, what are we talking about. If what we're saying is that the privilege holder or the person who holds the protected information at the trial level should be able to access an appellate court if that trial court has reached an adverse

decision, well, okay. And there's precedent for that that Judge Baker has already talked about.

That's not all that extraordinary to have the ability to go, okay, my right is about to be extinguished, I get to take a writ to the appellate court. And you can change that so it's not by writ, you can change it so it's by direct appeal, then that raises a whole host of priority problems and everything else that Judge Baker has mentioned.

But that's sort of different than saying, okay, when the trial is all over and done with, the record has now gone up to the Court of Appeals and the first instance -- or the Service Courts of Criminal Appeals -- now what's the status of the victim?

Because now you're no longer talking about extinguishing a right of some sort. That's over and done with at the trial level, with or without the writ, with or without a direct appeal. Now you're talking about trying to manage something that inherently is bound by the

record.

When that case comes up to the Court of Criminal Appeals, the Service Court of Criminal Appeals, there is a record of trial. Whatever it is that I'm reviewing as a CCA judge is in that record.

The necessity of someone being heard at that point is a bit different than the necessity of being heard in the first instance when the decision is being made. Because the decision, ultimately, is not going to be based on a bunch of extraneous information that someone wants to offer me. The decision is going to be based on what's in the record in front of me. The equities are a bit different.

Now, I get that victims and victim advocates would like the opportunity to present their argument. I guess the point I'm making is that the need for it, at that level, is vastly different than the need to be heard in the first instance, before the decision has been made. Or to appeal it because the rights are about to be

extinguished.

Said differently, I don't know how much help it is to an appellate court to have yet another party coming in and briefing something that I can already read in the record. I know what the law is, I know what the positions of the parties are. I'm not sure what benefit it is to the system, to the resolution of a legal issue in front of me, to have another lawyer talking.

Now that said, I get it. I'm not the smartest guy in the room. I'm sure there's a lawyer who can come up with something I'm not seeing in the record.

But the intrusion into the system, with all the things that we've talked about, it's the briefing schedule, it's the access to the information, it's the notice of all these ancillary pleadings, it's trying to define what those pleadings are. All those other things.

That gets more and more complicated for what I think is a smaller and smaller diminishing return.

So we've got to sort of separate those, this right of appeal out. Are you talking about before the rights extinguished or are you talking about, I want to review the stuff after it's all said and done with?

CHAIR HOLTZMAN: Okay, I'm going to -- Mr. Stone, I didn't expect --

MR. STONE: I have to pick that right out, if you don't mind.

RADM REISMEIER: Okay.

MR. STONE: Because I really think that it sounds like, and I recognize you're retired judges, of you looking backwards and frankly not contemporaneously or forward, when a defendant says that he wants to appeal the privilege that was upheld and he moves for those records from the court. It sounds to me like you're doing it in an *ex parte* fashion.

Because the holder of the records, you don't want to give them a chance to show up. You don't want to give that lawyer a chance to come in and brief it.

Now, I'm not telling you how long you have to spend reading his pleadings, but I frankly don't think that the rest of the legal community, outside of the military, in the civilian courts, ever does that.

JUDGE BAKER: As a spectator of this exchange, I'm not sure you're talking about the same thing.

RADM REISMEIER: No.

JUDGE BAKER: I think you were talking about a direct appeal after a conviction.

RADM REISMEIER: That's right.

JUDGE BAKER: Where there's been a trial court ruling and the CCA is now bound by the facts in the record at the trial court ruling. I'm going to offer just a slightly different perspective.

Let's say the thing comes up, the case comes up on direct. So the ruling has been had. The ruling on MRE 9. I'm making it up.

And as part of the appellant's appeal, he's appealing a Fourth Amendment search issue, a

412 issue and eight other things.

RADM REISMEIER: Right.

JUDGE BAKER: So the question you're posing is, why not let the person who was the protected party in the 412 ruling, participate at the appellate level. I'll give you my view on that, which is not necessarily, it's solely mine.

My view is, why not get a brief. I love reading. I want more. And it's my piece.

So here's the concern on the one end and here's the concern on the other hand. On the one hand you don't want it to impact the due process rights of the now appellant, right?

And I raised a couple of concerns about that. But as a professor I can come up with some scenarios where it might, but I don't think it inherently does so. Unless it affects oral argument in some way.

But in my view, why not hear it. Why not have a brief. The more the merrier, right? I want to hear from everybody.

By the way, not all judges agree with

this, but I don't mind. The more I read the better, the more informed I am.

And so I'm not sure what the push back, what the reason not to get at least a brief is. I think there are concerns if everybody at oral argument, at the direct appeal level, if you're having multiple people argue, now it looks like it's uneven and not fair.

Because the government side has two or three people arguing and the defendant, now appellant, only has this. So you have to worry about the due process perception.

RADM REISMEIER: Right.

JUDGE BAKER: And I'd have no problem reading a brief and the argument from someone, just as I'd have no problem reading an *amicus* brief.

MR. STONE: Once again, I think you're making an assumption. And I've heard it consistently from the Panel that I don't think it's to the future.

The assumption is, when you spoke

about due process, that the government is getting two bites at the apple or twice as much time. First of all, I've never seen a civilian court rule that way, second of all, it can be dealt with by extending the time of the defendant. But third of all --

JUDGE BAKER: Exactly as I said. That's --

MR. STONE: But third of all --

JUDGE BAKER: -- the perception.

MR. STONE: Just respond to this argument.

JUDGE BAKER: All right.

MR. STONE: Because this is the common situation. A prosecutor comes in, there's an objection to a privileged document, which may have been on a closed issue, and the prosecution says, on appeal, well, we don't need to defend that particular privilege ruling. If that's what the court wants a reverse on, be my guest and reverse and we'll try the case again.

Where the prosecutor does not defend

the victim's privilege, they're willing to go back, either because they have a plea offer in the works or because they're going to get cooperation or whatever, but they are not going to defend the victim's privilege. And the victim's privilege has no one to defend it.

That's the situation where afterwards the victims come to victim's counsel, if they can find them, and they say, what happened there? I won before and now, based on some other negotiations between the defense counsel and the government, they're giving up my privilege and no one is defending it on appeal. That's the circumstance. And --

JUDGE BAKER: I'm not pushing back on that.

MR. STONE: -- this comes up.

JUDGE BAKER: I'm not pushing back on that. I was spotting issues, not reaching conclusions.

MR. STONE: No, I understand that.

JUDGE BAKER: Yes.

MR. STONE: But Rear Admiral Reismeier doesn't want to give the victim a chance to defend on the 412, or whatever the privilege is, because presumably this is going to interfere with the procedures of the court.

Well no civilian court has ever made that kind of a ruling, nor have they spoken about the difficulties of giving notice to victims or having an extra brief be filed or any kind of due process motion because the parties all get their chances to argue. So I don't really understand --

RADM REISMEIER: I would push back on the hypothetical and say that to my knowledge I have never seen a CCA reverse a conviction because the government has conceded on an issue where the government frankly was wrong. If in fact the privilege was appropriately upheld, a CCA, I would be shocked to find that a Court of Criminal Appeals would reverse the conviction.

If the law, if the judge was right on the law, the judge doesn't become wrong because

the government conceded. The CCA isn't going to reverse.

I get the hypothetical, I'm just saying, I'm not aware of that ever occurring. The CCAs disagree with the position that the government takes all the time. That said, they disagree with the position the defense takes all the time. That's just not the way that it would work.

But my point, perhaps my point is a little untethered to the rest of what I think probably needs to be done.

Right now you have this weird inversion of process under the privileges. Put 412 aside for a second, that really is different.

Right now at the trial level, if the judge looks at some of this privileged material *in camera* and says, you're not getting it, well, the defense never sees anything. For whatever reason on appeal, because of the way that Rule for Courts-Martial is written, well now everybody gets to see it.

So to some extent, the people who would have been in the best position to be able to articulate why this is or is not relevant, never see it. Those are the trial practitioners.

And yet on appeal, because of the way the rule is written, well now they get to see it and the CCAs have no option to say, I'm not going to give you access to it. To the extent that you're considered that somebody is going to concede to something, that can all be resolved by simply saying, RCM.

Assuming you can get over any potential due process issues, back to that in a second, that can all be resolved by altering RCM 1103 Alpha and say, no, it's going to be reviewed in camera by the CCA judges. And then if they decide, the trial judge will say, well then you can address these other issues as to whether anybody is going to be, it needs to be heard.

But right now you can't even get to that dialogue because of the way the RCM is written.

With regard to whether their due process concerns are there, I would just simply, I guess, ask this question. If it does not violate due process for an accused not to get access at the trial level, how can it violate due process by not having access at the appellate level if now instead of one judge reviewing a trial, you have three judges reviewing it on appeal, how does that violate due process?

I'm not going to answer that, you can probably divine my supposed response from the question. But you can get at these issues by simply altering that process.

But I stand on the point which the right to be heard should exist at the trial level where the decision is being made. The right to be heard on appeal, when you're talking about now reviewing the way that it was all developed at the trial level, I'm just not sure that you gain very much.

And I agree, you're right. Would I be smarter if I got to read an extra pleading? Yes.

But unlike CAAF, the Service Courts aren't reviewing 55 pages a year. They're reviewing hundreds and hundreds of cases a year.

Those are hundreds and hundreds of additional pleadings and hundreds and hundreds of additional attorney's schedules that have to be managed. There are additional times for enlargements because they can't meet the filing deadline.

It's really easy to say that sure, I'd love to be made smart about everybody coming in and spending an hour talking to me. There is not the time in the day to do it.

And again, speaking of, the *Moreno* was a Navy-Marine Corps case. We spent years trying to dig out an appellate backlog to get to the point where frankly the CCAs have pretty good processing times. You just have to be mindful that the last time we were taken to the woodshed it was because it took too long.

I don't -- you just have to be mindful of every time you insert an additional process,

you're inserting additional time. It comes with a cost.

My push back is saying, I'm not sure how much you gain by giving somebody else the right to talk about something that's already in the record.

MR. STONE: But the gain is not for the judges, the gain is to the victims. And if the Marine Corps case you mentioned caused such a problem, then why do you think it is that the Marine Corps decided to extend victims' counsel to all victims. Unlike the other Services.

RADM REISMEIER: That's a different question. Extending the counsel to them is not the same as extending the right to now file on appeal and get access to substantive pleadings and have a right of direct appeal and all these other things that are now under discovery.

MR. STONE: So the burden on the trial judges doesn't bother you, just the burden on the appellate judges?

RADM REISMEIER: No.

MR. STONE: That's not been the rational in any civilian court anywhere in the country. And that, actually, leads me to the second area that I wanted to talk about.

Which was what Judge Baker opened with, that there are certain structural problems. He was mentioning the structural problem of the fact that the judges may need more time to handle these cases because they only have limited tours of duty and they don't gather that much expertise before they moved around.

But another structural problem, in the second structural problem he mentioned, that originally the military cases weren't meant to be portable and these aren't so easily portable anymore when you have to go move and find a victims' counsel and other people who --

JUDGE BAKER: I actually didn't mention that, that was the Rear Admiral.

MR. STONE: Oh, you didn't mention the portable -- oh, that's true. That's true.

But then there was also the issue that

you did mention. You said a vast majority, I think you said in excess of 90 percent of the cases that you saw, involve sexual assault and child pornography. Thousands of cases you mentioned.

JUDGE BAKER: Yes, I did.

MR. STONE: And what that makes me wonder --

JUDGE BAKER: The only other thing I'd say, 90 would be a guestimate since we don't --

MR. STONE: Yes.

JUDGE BAKER: -- practice statistics.

MR. STONE: Okay.

JUDGE BAKER: But a large, a majority of the cases.

MR. STONE: I mean, when you --

JUDGE BAKER: We didn't want you to pocket the 90 because it's hard to get stuff back like that. Go ahead. Go ahead.

MR. STONE: When you tell me that you see a practical problem in extending victims their appellate rights, and they might get them

at the trial level, but tough luck if there's been a wrong ruling, they don't get to have those same rights on appeal.

And as an aside let me just say, *amicus* does not cut it because it's discretionary by the courts. The courts of military appeals have denied *amicus* status in various cases. And even when they grant it and there is argument, they do not extend the argument right to the *amicus* party.

But assuming that what you're telling me is that you have a practical problem and it's this overwhelming majority, the sexual assault and child pornography cases, that pushes me in the direction of saying that maybe the people out there who say that sexual assaults in the military ought to be transferred to civilian authorities, along with the child pornography cases. That your original mandate was to look at questions of insubordination, crimes of treason, espionage, maybe theft.

And I understand those in the field as

having implications that might need to be handled in the field and might need to be handled by the military. But I don't think when the UCMJ was originally promulgated, anybody thought that an overwhelming majority of the cases that found their way up were going to deal with sexual assaults and child pornography.

And if that is the case, you're making me wondering whether the proponents of moving at least those two categories of crime to the civil authorities aren't correct. And I wonder if you'll comment on that.

COL LIND: If I might speak in on that. Going back historically, if you're familiar with the Supreme Court's case in *Solorio*, which basically said that service connection is what gave the military jurisdiction, prior to *Solorio* cases had to have a military connection for the military to take the case.

Solorio was a child molestation case and it went on for years. When the person moved

from Alaska to San Antonio to move somewhere else. So you have a venue problem.

So if you're at the somewhere else, you're not going to be able to capture the ones that occurred earlier. And I think that was some of the foundation for why *Solorio* ruled the way it did.

So with military people moving around like that, that would pose a challenge should these things go civilian.

MR. STONE: Well, we had bank robbers who move around between different districts. You may know, I've been an assistant U.S. Attorney and we had bank robbers who would move between states because they figured they wouldn't be caught. But we still managed to successfully prosecute them.

And I don't know if anybody else wants to comment on how the military judges, why wouldn't they be benefitted if this huge number of cases that's troubling them was moved out so that they had time for the ones that did seem to

relate to the military's mission. Primary mission.

RADM REISMEIER: I guess I'm too sure where it is that you, maybe it's just simply I'm not being clear. At the trial level, where the decisions are being made in the first instance, the funnel should be fairly broad. You should be sucking in as much input as you can in order to make sure that the decision is informed.

I don't think anybody is pushing back with the idea of a victim or a victim's counsel having the right to be heard when there is a privilege or a privacy interest at issue. That's the law.

I mean no matter how much one agrees or disagrees with it, that's the law. The narrow question here is, what happens after that decision has been made.

And again, I think it's important to separate out whether you're talking about the right to appeal that an adverse decision at the trial level before the right is extinguished. So

whether that's an extraordinary writ or a right of direct appeal, that's to go forward and do it prior to the completion of the trial.

That's a separate issue from what I'm trying to focus on. Which is, okay, once the conviction is final and the case is now at the trial level, and it's going up and it's being reviewed by the CCA, what should the right of access be to victim, and Victim Legal Counsel at that point?

The point that I'm trying to make is, that the importance of having that additional voice at that level is very different than having it at the point when the decision is being made up front.

CCAs, perhaps the reason why there is not a good analog to what's happening in the civilian jurisdictions, is the civilian jurisdictions aren't like CCAs. The CCAs have factual review authority.

The CCAs make their own factual determination. They are reading the entire

record. Not just simply a little excerpt that attaches to the issue that's being directly appealed, they are reading the whole thing. They will specify issues that the parties haven't raised. They will make a decision based on the entire record.

So what it is that they're doing, the amount of time that goes into it and everything, it's not like in the civilian world.

So trying to import what happens in the civilian world to what's happening in the military courts, can you do it? Sure, you've just got to recognize if you're importing an overlay into something that is just radically different.

MR. STONE: So are you suggesting we should change the CCAs jurisdiction? That they don't need to read the whole record because there's been a trial judge?

RADM REISMEIER: Not at all. What I'm suggesting is that when the court is already reviewing the entire record, that the importance

of having input from another party, in my own personal view, is far less than having that input before the full record is developed.

MR. STONE: I don't know why that analysis doesn't extend to the prosecutor. I don't think you need the prosecution's brief then. You've got the prosecution's brief below, you've got the whole record and you've got the ruling. Why are you letting the prosecutor file the brief, that's killing more of your time.

I really don't see how excluding the victim from that preceding on appeal makes any sense at all. It certainly doesn't show enforcement of their rights if, for example, the trial judge only granted part of the privilege that they wanted.

And let me go beyond that for a minute. And this, again, relates to my not understanding why I think the comments we've heard look backward and not forward.

6b is not limited to privilege. If you look at 6b rights today, the rights include a

public hearing concerning the continuation of confinement by the trial of accused. And one of the rights that the victim has is that there should be a public hearing concerning confinement.

Well, it may be that that bail status is a question that's up. A second issue is, it talks about the right to be reasonably heard at a sentencing hearing.

But we heard the people who came to our last meeting say, now, for some reason they don't understand sentencing reassessment in accordance with review under Article 66 of UCMJ, is not included and the victim doesn't get to be heard in their sentence reassessment. And they find out after the fact that their sentence, which they thought was harsh, has been completely suspended. As has been the forfeiture of pay. And the person is allowed to just leave the military.

There's more than the privilege at stake. And that's why, to the extent your

discussion talks about a person whose privilege is at issue, does not cover the full spectrum of victims' rights. The crime victim is not necessarily a person whose privilege is the only issue about which they're concerned.

And as to the interlocutory appeals we're talking about, there are also two comments that I don't understand, and maybe Judge Baker and Colonel Lind can explain those to me.

Judge Baker said that, he talked about mandamus being a very, he said narrow remedy here, and --

JUDGE BAKER: It's a high standard --

MR. STONE: -- high standard. And Colonel Lind talked about being an extraordinary remedy.

When 6b was enacted, it's quite clear from its legislative history, was meant to reflect the 2004 Civilian Victims' Rights Act. That language includes the word mandamus.

And there was a dispute there after about whether mandamus was used to indicate that

this was a swift interlocutory appeal, under normal appellate standards, or whether this was truly a mandamus, like any other mandamus, where there was an extraordinary high degree of necessity before a court would grant it.

And there was a split in the circuits. Despite the legislative history that said that that was taking the place of an ordinary appeal.

That language has since been changed by the U.S. Congress. It now says that that mandamus is under standard appellate standards. That this is a normal appeal. The only thing that makes it a mandamus is that it happens very quickly.

And so I think the fact that the military courts continue, both in the *E.V.* case you talked about and *Martinez*, where the Military Court of Appeals denied even hearing the mandamus and the CAAF decided it wouldn't hear, not only this but any mandamus, gives short shrift to the fact that Congress is trying to make it clear that victims ought to have rights to argue before

their various rights. Whether their privilege or not privilege, are invaded.

And I think they give short shrift to this notion that, oh, it's going to take up more judicial time. If that's the problem, then propose to us how many more judges you need or ask to change the procedure where you have to review the entire record.

But I don't think the practicalities of what the judges would like, and apparently that's been denying *amicus* status and denying mandamus petitions on a regular basis in the Military Courts of Appeals. Because very few mandamuses have been granted.

And I know, from the last panel we had, that there's been multiple applications for mandamus, by victims. Then I think you should be asking us to change the rules that cause you to be overburdened. Do you have any feelings about that?

RADM REISMEIER: If I could just return to this issue. Look, I'm not saying the

courts are overburdened, what I'm, as my grandmother used to say, I'm not sure that the game is worth the candle. All I'm saying is, the added benefit of inserting some of these rights on appeal may not necessarily be worth everything that goes with it. That's a judgment call. If the answer is, hey, it's worth it, that's fine.

But I'd like to talk about the sentence rehearing thing or sentence reassessment thing, because I think that this all stems from something, or a misunderstanding, of what a CCA actually does on sentence reassessment.

I mean you have to recognize that in many instances the government doesn't even get heard on sentence reassessment. Because under the statute, the CCA is required to approve the findings and sentence, which it finds is appropriate, based on the entire record.

If the CCA goes through and finds some reason to reassess, whether it's because -- and remember, they can reassess even without setting aside a finding. They can reassess even if they

don't find an error. If their only judgment is that they think that the sentence is not appropriate.

There are many cases where the CCAs actually grant some sort of sentence relief where the government doesn't even know that that's under consideration until the opinion is actually issued.

So I recognize that there's the issue of, okay, should the victim be heard. Just recognize that in order for the victim to be heard, if nobody has raised that for some reason, you now are going to require the court to go, okay, I need to notify all the parties that I'm going to be considering sentence reassessment.

So you are now releasing, during the midst of your judicial deliberations, what it is that the court is contemplating and specifying the issue to get people the right to comment.

It's somewhat problematic for a court to do that. Because you haven't made a decision and you're telling the parties you want to be

heard on sentence reassessment, you're sort of communicating that you're reassessing the sentence.

If that's what you want to do, I supposed you do it. Courts specify issues all the time. CCAs specify issues all the time.

But there's nothing extraordinary about nobody getting the opportunity to be heard on reassessment because that's the way the statute reads. The statute charges the CCA with that authority, not the parties of some, when I say parties I mean the victim, the accused, the government. They're not granted some right to be able to raise that issue because it's the courts obligation to consider that regard.

MR. STONE: I guess I disagree. 6b(4)(b) currently says they have a right to be heard at a sentencing hearing. And you're just telling me now that a CCA sentencing hearing is somehow a different sentencing hearing.

RADM REISMEIER: That's right.

MR. STONE: And I know that in the

U.S. Courts of Appeals, and in courts all the time, judges, including the Supreme Court, when the court sees an issue that it believes the parties have a right to say something about it says, well, we'll allow further briefing on that issue by the parties, by such and such date, before we rule. And I don't think that that's either extraordinary and I don't think it's that difficult.

RADM REISMEIER: So with due respect, Article 6b is only one of the statutes that somebody has to consider. You also have to consider Article 66. And Article 66 does not treat sentence reassessment as a sentence hearing.

Now, if somebody wants to then I supposed you'd have to, you know, somehow address the statutes. But that's not how it works and it's not what the statute says.

MR. STONE: Today. That --

RADM REISMEIER: Yes, sir.

(Simultaneous speaking.)

RADM REISMEIER: Absolutely.

MR. STONE: That's what we're trying to figure out.

RADM REISMEIER: That's correct.

MR. STONE: How the victims can feel like they have input and so that you won't lose qualified, typically woman in the service, when they find out that even after that was a conviction for sexual assault and a heavy sentence, that a CCA turned it into a light sentence.

RADM REISMEIER: And recognize that under the amendments that are being proposed, all of this changes under the amendments that are being proposed to the UCMJ. These concepts all change.

Where you start getting segmented sentencing, you remove the authority of the CCAs to do factual sufficiency's, except in narrow situations, sentence reassessment goes away. I mean this all, if you want to talk about looking forward with the statute changes, all of this

obviously changes.

MR. STONE: Maybe the last question I had for this round.

CHAIR HOLTZMAN: Yes. I want, first of all, to explore the issue that you raised, Admiral, about why, and does it make sense, to have the material under 513 revealed on appeal for the first time when it hasn't been revealed beforehand. And to allow access to everybody. The trial counsel and defense counsel.

I mean, is there any reason that any of you sitting here can think of, to permit that disclosure at the appellate level when it hasn't happened at the trial level? I mean disclosure to counsel.

And wouldn't it be sufficient simply to have the appellate court review the substance of the document, or the substance of the records, and then decide whether an error was made?

COL LIND: Ma'am, I certainly -- as I said earlier, with the findings required now at the trial level, a lot of the records aren't even

going to come up with a record of trial because they weren't produced in the first place.

CHAIR HOLTZMAN: Right.

COL LIND: So the issue you're talking about is going to be with MRE 513 and 514. And it's going to be where the judge has done an in camera review --

CHAIR HOLTZMAN: Correct.

COL LIND: -- and given either none or some of the records to the defense --

CHAIR HOLTZMAN: Correct.

COL LIND: -- and kept the rest sealed.

It could certainly be a way, and I'm not sure having people file pleadings as to access is the most efficient way of doing that. There could certainly be statutory authority in there for something you suggest.

Like maybe just the court itself does the in camera review of those sealed records that were not disclosed. And unless there was some reason to order them disclosed, that's it, nobody

else looks at the record.

I think that's certainly something feasible that can be done.

CHAIR HOLTZMAN: Right. Okay, feasible is good, but what about desirable?

COL LIND: This is where I'm a little concerned, as a retired judge opining, but I think it could certainly be done.

CHAIR HOLTZMAN: Okay. Anybody else have any --

COL ORR: Well, I mean, it could be done. The real question is the cost to the person who now has a conviction or is in confinement. And if you want to make that balance, it could be done.

But the President and the Congress have already kind of looked at it and said weighing those two interests together, we're going to go and give the benefit of the doubt to the person on trial and not the victim. They can change it, but that's where we are right now.

CHAIR HOLTZMAN: Right, I understand

that. And the suggestion has been to change that because actually it would make a lot more sense to have that kind of disclosure at trial level.

But in any case, my question to you is is there a reason, well I guess the obvious reason is that the defense doesn't have an opportunity to challenge, doesn't have the opportunity to file papers and to challenge the court below, and to explain to the judges why that information is so important.

COL ORR: Correct.

CHAIR HOLTZMAN: Can the judges figure that out themselves?

COL ORR: You mean at the trial level or at another level?

CHAIR HOLTZMAN: At the appellate level. You got three, I mean, what the present structure is is that it assumes that the trial judge can figure out for himself or herself the significance of the records, the medical records.

But the law now says that the three appellate judges can't figure it out for

themselves. So it's a little bit of a logical inconsistency here.

And so I'm just asking you, you know, whether the present system makes sense and whether it should be changed. You don't have to get to the present system to make sense. You just get to the issue to be changed.

COL ORR: Well, my concern is if the judges on appeal, the three, the Board judges say the judge below is correct, if the whole idea is to satisfy the victim or the appellant, how do they know? I mean, you still haven't given them that insight to contest it.

CHAIR HOLTZMAN: We have the due process issue here if the defense is not or the trial counsel's not allowed to see the medical records on appeal?

COL ORR: You may. But we're not talking about the -- now you actually have to make a standard to get those records. Before it was pretty much a counsel would come to you and say it's constitutionally required that I look at

this.

As a trial judge I would sit there and go I don't know if it is or not, and you don't know if it is. I guess I got to look at it. Now we're in a situation where there's things you must assert and know before it even gets to the point.

So you have more leeway as a judge to say this doesn't even meet the standards of me opening it up and looking at it. That was an option I didn't feel like I had until the law just recently changed.

Now we're in a situation where if it comes in and I get a chance to look at it, I'm not bothered by three appellate judges coming to the same conclusion as before. But it still doesn't get rid of that lingering doubt for counsel for either side or the victim.

CHAIR HOLTZMAN: Okay. The other question I want to ask has to do with some drafting issues which probably, you know, maybe not of such great import to this panel.

But Judge Baker, when you talked about your concern that the use of the word all, or something that bothers me is somebody who's been responsible in the past for drafting legislation, and I think that removing that language with that add of where it says all in the various places here, is that something that would set your heart at ease a little bit?

JUDGE BAKER: Setting my heart at ease? Well first, this gets to Mr. Taylor's question about the role of judges. Judges, of course, their role is to interpret and apply the law as it comes, not to apply the law they wish they had. And they're very dedicated to doing so.

So it's really up to Congress to decide how to frame it. I would work back from the goal rather than forward from the text. And yes, without question, eliminating all helps, but you're still going to have litigation and doubt over well then what's meant by pleadings and what's meant by blank and blank.

So yes, does that help, yes. Does it solve the problem, no. I think you still have to, if you're a legislator and I know you know what that feels like, you still need to decide who's going to be encompassed within the class of victim and how are they going to be defined.

And then I would be as express as possible as to which pleadings. Otherwise, there will just be litigation about this was one of those pleadings or this wasn't. Now I understand that's probably why they put all in because -- but we --

CHAIR HOLTZMAN: It's a lazy solution.

JUDGE BAKER: Yes, exactly. We can come up with pleadings that I think, or at least I would agree should be included. And then I can come up with some that clearly people would say I don't want the burden of even having notice on that because now I have to deal with that.

What's an example that all the filings about time extensions for filing a brief or something whereas a hearing on the applicability

of the rule and whether the privilege applies would certainly be in the other category.

So personally if it were me, I would work back from the overall intent and then give it to my best legislative drafter.

COL LIND: I would like to make a suggestion. The letters that I gave you I think outline some of the important proceedings and pleadings and things that take place while the case is on appeal. It might be a place to start.

CHAIR HOLTZMAN: Thank you for that. I appreciate that.

JUDGE BAKER: And then you could qualify it with adjectives, you know, fundamental or significant. There is still going to be litigation there, but it might be possible to pick up a line of cases.

The word fundamental right for example, there is a definition to that. It's a moving definition because it's in case law, but it is possible to find some substantive qualifier. But it will be litigated. It's best

to just lay it out in the following seven circumstances, in the following two circumstances.

CHAIR HOLTZMAN: Well, yes. I mean, let's put it this way, this draft was done in about two hours, am I correct?

JUDGE BAKER: It's serving its purpose in having people have something to respond to.

CHAIR HOLTZMAN: It could have some, yes. It's a beginning. I didn't mean to be derogatory when I said lazy out. It just was in two hours how much can you, how much nuance can you include?

With regard to the issue of victims and how broad the right should be on appeal, I mean, in a way the Defense Department has taken a kind of first stab at this by, except for the Marine Corps, restricting the right of Special Victims' Counsel or Victims' Legal Counsel to cases of sexual assault.

I mean, that might be a legitimate place to begin ultimately. Maybe the question,

you could expand the rights to other victims. But it could be where you have a Special Victims' Counsel. Maybe the appellate right goes to the victim where that Special Victims' Counsel has been appointed.

I just throw that out as a way of drawing a distinction here among victims. I'm not saying one is better than the other, but the military has already made this decision.

COL LIND: But what you do have with respect to this is then you'll have, say you have a sexual assault case with two victims on an evening. One of them is entitled to the Special Victims' Counsel and the other one is say a college student across town that has nothing to do with the military and doesn't get one, there's a bit of an inequity there.

You know, whether that should be, and the other thing I will throw out is any time we expand duties and expand things without funding, without resources, that causes challenges.

CHAIR HOLTZMAN: Okay, anybody have

any other questions? Professor Taylor?

PROF. TAYLOR: I would just like to come back to just a couple of points that I raised at the beginning and that both the Chair and Mr. Stone raised.

And that is that in the aftermath of the *Martinez* case which appears to say that if a court of criminal appeals denies the petition for a writ of mandamus, it's over, no appeal to the CAAF, is that correct? Is that basically what *Martinez* said?

JUDGE BAKER: Yes, sir.

PROF. TAYLOR: And back to you, Colonel Orr, you said earlier as long as victims can file writs, it's not necessary to make them real parties in interest.

COL ORR: Correct.

PROF. TAYLOR: So what is the comfort level that the victim really has had a chance to have his or her rights vindicated if it stops at the Court of Criminal Appeals if one of the things we're trying to do here is to increase the

trust in victims to come forward knowing that their interests are going to be protected to the highest degree possible.

It just seems to me that we're not building a culture of trust when we have rulings that move the ball in that direction, particularly when you have a Senate proposal now that's of course in the course of markup and that's Section 547 which I'm sure you're familiar with which talks about making victims real parties in interest in this very area that we're talking about.

I just can't wrap my brain around how those two fit together. So if you could help --

COL ORR: I think they fit together very well. By stopping at the Service Courts, I wasn't saying that that's what had to happen, I'm just saying that's what it is now.

The real party in interest is where I have concern because that brings with it certain obligations and duties of all the parties. And what that may do is when you have multiple

victims, and this is where we have cases in the Air Force Court where you have multiple victims and the appellant was convicted of one of them.

But within that record of trial, there were sealed exhibits relating to the privacy of multiple victims. If you're a real party in interest, the court has no mechanism to say you can't have the private information of these victims in which your client was not convicted of.

Nor should the other victims' counsel get all of that as well. So you have access, you can file, but as far as the sealed portions of the records, there should be, it's almost like an on/off switch.

If you are a real party in interest, you get it all and that takes away the court's discretion in terms of doing what's right to protect those victims whose information was not put in the record of trial and the person was not convicted of.

(Simultaneous speaking.)

PROF. TAYLOR: That's a drafting question --

COL ORR: That's the concern, right.

PROF. TAYLOR: -- to be sure that you limit the access to that which pertains to the victim who is asserting the real party in interest in that case. That would be a drafting issue.

But would anyone else like to comment on 547?

JUDGE BAKER: Well, I would comment on two things. First, and I know you know this but the Court is not making a policy choice here. It's in good faith trying to interpret 6B.

I didn't sit on it, and so I'm just reading it. And it says when examined, this statute is quite straightforward. It is a clear and unambiguous grant of limited jurisdiction of the Courts of Criminal Appeals.

Now the debate might be whether it's a clear and unambiguous grant of jurisdiction to the Court of Criminal Appeals. Whether it's

limited to the Court of Criminal Appeals, that someone can debate.

PROF. TAYLOR: Precisely.

JUDGE BAKER: But the Court having decided *Martinez*, the answer is well, this goes back to my comment about literal which is if the Congress wishes the US Court of Appeals for the Armed Forces to play a role, then say so. That's the way to do it, not by inference but by direct language.

And as I indicated in my policy points, there's the issue about how victims are treated and where the line might be drawn between them, the importance of uniformity in the military, and that I think comes from going up to the CAAF, and the importance of civilian review in terms of a confidence establishing mechanism.

And so I believe that. But that's not the law or expressly in the law. I would be careful about real party in interest as the standard because to be perfectly honest, and I speak only for myself as I have all day, I

haven't a clue what that means.

And I kind of get that the United States is a party in interest, and I kind of get that the defendant is a party in interest. But what I'm looking for after that is who is standing in jurisdiction to be heard.

And those are terms that courts understand, real party in interest, if we did a closed book exam right now, we would all guess the answer and come up with different answers.

And that's a place where some clarity, there's clear doctrine on standing and jurisdiction can be clear if written clearly. So I would encourage movement away from that and towards saying what you mean or else deferring to the traditional concept of standing.

COL LIND: May I bring up a couple of points as well after you've finished writing?

CHAIR HOLTZMAN: Is it in response to Mr. Taylor's question? Please.

COL LIND: One of the other concerns that you might want to consider is right now the

Court of Appeals for the Armed Forces has ruled it doesn't have jurisdiction to consider these writs that come up.

E.V. has filed in Federal District Court. And the Federal District Court in DC has transferred venue over to California. It's *E.V.* v. Robinson 2016 US District Lexis 100866. So one of the other considerations you might have is is this how you wish this to play out.

The other concern on the other side is delay, particularly when you have accused of pre-trial confinement. So you have a case that is now taking its time going to the CCA District Court or the Court of Appeals for the Armed Forces, each of those scenarios is going to add extra steps, extra delay to impact potentially the speedy trial rights of the accused.

So just, that's another consideration that you might want to keep in mind.

PROF. TAYLOR: I would just like to thank you all for your service and as well as your testimony here today, but I have no other

questions.

VADM TRACEY: I have no other questions, thank you.

MR. STONE: I want to go if we can on the comment about speedy trial. Article 6B as it currently stands specifically gives a victim the right to proceedings free from unreasonable delay.

And it seems to me that impacts on this question that Judge Baker mentioned about whether victims have an interest when motions are filed routinely on timeliness matters.

And the timeliness matters come up quite often in civilian victims' rights cases. And the example I would give in the military is if you have a case where the defense counsel has moved repeatedly for delays and sometimes they may be unavoidable.

Military judges get new assignments, they can't be found when needed, courtrooms are not available, people get transferred around, and a case has been repeatedly delayed.

It's not uncommon for a victim to come to the victims' counsel and say this is really crazy. My right to be free from unreasonable delay is being violated either because I'm about to be transferred to a different assignment where I can't be present, or I'm about to leave the Service and I would like to see some resolution before I do, or I have an illness like AIDS. I'm going to die in a few months and I would like to see this resolved before I die.

So absolutely, victims have a right and an interest, a legal interest in proceedings free from unreasonable delay. And if you start artificially limiting public pleadings and tell victims they don't have a right to get them, then victims lose the chance to figure out if they need to respond, if they can be available at the new trial date which the defense counsel or even the prosecution is moving for.

And it's often true that the victim and the victims' counsel will say well, the day you want doesn't work for us, but could you

postpone it one more week and then everybody says sure. But if you don't give the victims notice of that, they find out when it's too late.

So there is a reason that it says all pleadings filed by all parties, it's not simply a lazy man solution, it's not simply a statement with no necessity. And frankly, I would like you to expound, if you would, on why you think, you said this is the burden of noticing them.

In the military proceedings I have been involved with, the notice was and the pleadings were all done electronically as I think Colonel Lind is now expressing, the pleadings are on file and accessed electronically and we were filing electronically and giving notice electronically.

And adding more addresses to the electronic distribution was definitely not something that I would call much of a burden. So I want to know what burden you think it adds to give people notice of all pleadings and to avoid all litigation, which by the way you don't get in

the civilian courts. When you get all pleadings, you get all the pleadings. Why the military is different again?

JUDGE BAKER: Well, if that's directed at me, I hope you haven't misheard me. I did not say it was a burden. I raised a number of concerns, and by saying the word concern, a factor to consider.

And one of the issues that came up before our court, and this dealt with the jurisdictional timeline for appealing. So defendants had to appeal within a certain time limit to our court to invoke its jurisdiction.

And what happened in a number of cases is that they couldn't locate the appellant in a timely way in order to invoke the jurisdiction. And so the only thing I was trying to suggest is that on issues of notice, in the military where people do move around and get out of the military and sometimes do or do not leave their home of record and so on, it's something that the Congress should take into account.

That doesn't mean don't do it. Figure out how to do it. Perhaps when you check out, you have to do it in a certain way. So I hope you didn't get from me a sense that I didn't believe in notice. I just said it was something that has to be done in a particular way and with great care in the military because in my experience, I've seen endless litigation on whether someone received notice and how.

On the question of whether all pleadings should brief, all I was hoping to suggest there is be express as to which pleadings, and there may be some that all parties can agree you don't need to have notice on. And there may be some in which everybody agrees you should have notice on.

MR. STONE: Well, I don't understand. You just said all parties agree, but if a victim is not a party, they're not even on notice when --

JUDGE BAKER: No, I meant, in the context of that sentence I meant to include all

people with standing over the subject. That's what I meant.

MR. STONE: Then let's take that last comment because I think the last comment you just made, standing over the subject goes to this question of what is a real party in interest.

In Maryland law, for example, the victim has standing over in any court where an issue of the victim's rights is at issue and as to that issue. And I think when they say real party in interest, they're saying that a victim is a real party where their interest, mainly their rights, are at stake.

Would I rather have them, their statute use language like Maryland uses, it's a little clearer? Yes, I certainly would. But I don't think it's a phrase that's that difficult to comprehend that when a victim's right is being litigated, they therefore have standing as to that right.

Again, I don't understand why there needs to be, maybe you could tell me, endless

litigation on receiving notice. If you get notice electronically of every document, that's easily resolved.

And states like Maryland simply have a regulation that says if you want notice, victim has to register either, in this case it would be with the military or the military court where the pleading, the proceeding is going on, the address they wish to be contacted at. And if they don't provide an address or if they say they don't want notice, it's very easy, they don't get notice.

But in this electronic age, providing notice is not only easy, it's easily documented. So I don't understand what the difficulty is.

JUDGE BAKER: Then my proposal would simply be the military should look very carefully at adopting Maryland's law and see if it would address the issues presented. No push back there. We're really trying to help here, not debate. If there's a law out there that will do it better --

RADM REISMEIER: With one small caveat

and that is when the word all is used, you necessarily are sweeping in *ex parte* pleadings into it because now you've said all. So you just have to recognize if you say all, then you're going to get notice of *ex parte* filings as well, even though that may not be what anybody wants.

MR. STONE: When you get notice of them, whether the *ex parte* pleading is sealed from the prosecutor, then it would say it's sealed from the victim too. It's entirely possible that the person filing the *ex parte* pleading doesn't mind having the victim get it.

RADM REISMEIER: No, no, I understand. I'm just saying, just recognize that there are ex parte pleadings that are filed where nobody gets notice other than the person who filed it. The other side may not even get notice that there was an *ex parte* --

MR. STONE: Well in fact, isn't that what's going on with the privilege rulings now in terms of access to the documents --

(Simultaneous speaking.)

RADM REISMEIER: Yes, I'm not pushing back --

MR. STONE: -- appeals that the victims are not getting notice, that the defense counsel is getting access to documents which as Chair Holtzman said, they didn't get access to when this was litigated and they made the initial record.

And a judge there felt perfectly competent to rule on it, and now all of a sudden without notice to the victims, those documents are being distributed to defense counsel in pursuant to a practice which is not followed in any US Court of Appeals, I don't think any state court anywhere in the country.

RADM REISMEIER: Yes, I'm not disagreeing. I'm just saying that all is going to include them.

CHAIR HOLTZMAN: Okay, just to follow up, I just myself want to say that as a drafting matter, we're not talking necessarily about anything else, but generally speaking from a

drafting point of view you don't want to use words like all. Okay? I'll just leave it at that.

Secondly, I take your concern with the term real party in interest very seriously because we don't want to use language that the courts are not familiar with, and that will lead to endless litigation and results that are not necessarily what we want.

And if the courts, and if what we're really talking about here is the standing to have your position heard, and the right to have that position heard, I think it's a very important point that you make because this could, you may have to file pleadings to real party in interest. Well, suppose they decide you're not a real party in interest and you can't file the pleading. So the whole --

JUDGE BAKER: You'll find that out later.

CHAIR HOLTZMAN: Yes, you'll find that later on. So the whole purpose of point four

could be completely vitiated. So I think that it's a very useful point to try to structure these rights in language and in ways that are familiar to the courts and that use existing language if we can do that.

And I don't know if there's time to do that. But I take your point and I think that that's a very useful point to us.

I just wanted to ask one other thing in terms of rights. We don't generally have this in our system, although maybe Maryland is way ahead of everybody here. But I know in Europe they do allow witnesses who are victims in certain cases to have some standing, some appearance in proceedings.

And I don't know whether any of you are familiar with that, whether there's language or concepts that could be drawn from that experience.

MR. STONE: Do you mean attorneys?

CHAIR HOLTZMAN: No, I'm talking about --

MR. STONE: You mean witnesses?

CHAIR HOLTZMAN: I'm talking about, maybe not witnesses but victims, and it may be, I know that victims, and I don't mean necessarily, we're not talking about sexual assault cases, have the right to call witnesses, I mean much broader rights than being discussed here, and they have the right to call witnesses for example in trial.

And so I'm assuming that there may be some appellate rights as well. And I just was wondering if any of you knew about that and whether that's a place that we could look to for some enlightenment in terms of language and approach, that's all.

JUDGE BAKER: And are these in common law countries or civil law countries, do you happen to know?

CHAIR HOLTZMAN: I don't --

MR. STONE: Civil law countries.

JUDGE BAKER: Okay.

CHAIR HOLTZMAN: Yes, right,

definitely. I mean, I'm thinking specifically of Poland as an example. But if you knew, that would have been helpful. But I guess we have to do some research on that.

Okay, if we have no further questions, let me thank you very much for your time, for your willingness to share your expertise. This is really very important to us.

I don't know whether the train is out of the station on this legislation in the sense that it could get adopted without our input. But I hope that some of the suggestions you've made and the thoughtful views you've given us can bear some fruit in connection with whatever legislation is adopted. So thank you for your time again. Appreciate it very much.

I guess we'll take a ten minute break. Well, we actually have a break for lunch.

(Whereupon, the above-entitled matter went off the record at 11:52 a.m. and resumed at 1:04 p.m.)

CHAIR HOLTZMAN: Good afternoon.

We're going to resume our -- our public meeting. We are very pleased to hear from Service Defense Appellate Division's perspectives on victims' appellate rights, and we have the following presenters. I want to thank each of you for coming here and sharing with us your expertise and your thoughts and reflections.

First, we will have Lieutenant Colonel Christopher Carrier, U.S. Army, Chief, Capital and Complex Litigation Branch; then Mr. Brian Mizer, U.S. Air Force, Appellate Defense Division, Senior Appellate Defense Counsel; then Major Lauren Shure, U.S. Air Force, Appellate Defense Counsel; then Captain Andrew House, U.S. Navy, Director, Navy Marine Corps Appellate Defense Division; and finally, Lieutenant Commander Michael Meyer, U.S. Coast Guard, Chief, Defense Services Division.

Thank you again for being here, and we will start with Lieutenant Colonel Carrier.

LTC CARRIER: Thank you, Madam Chair and members of the Panel. Thank you for the

opportunity to address these important issues today.

I am currently the Chief of the Capital and Complex Litigation Branch at Army Defense Appellate Division, but my comments are my own and do not necessarily reflect the positions of the Department of the Army or the Army Judge Advocate General. They do reflect my experience as a trial counsel, trial defense counsel, appellate defense counsel, detainee abuse prosecution team chief, Joint Service Committee Working Group Executive Secretary, and court-martial judge.

As the Army representative on the JSC Working Group, I worked on the 2012 Revision to Article 120 of the UCMJ and the 2013 Revision to the Military Rules of Evidence. Then, as a court-martial judge, I worked in the system affected by those changes. To anyone who has ever said that it would be poetic justice that the people who make rules and regulations should have to live with the results, I can confirm that

yes, that can be awkward.

That experience also makes me more keenly aware that anyone in a position to influence changes in law and policy should to the maximum extent possible foresee and minimize unintended effects when enacting improvements. Closely identifying the problems to be solved and the goals to be achieved is the burden that we should take on now rather than making broad changes and relying on the courts to sort out the details.

There is famously in the military culture some reluctance to change. The Duke of Wellington, victor of Waterloo, of course, and then later the Chief of Staff for the British Army, famously said that he was not opposed to change, but that change had to come at the right time, and the right time for change was when it could no longer be avoided. I'm not opposed to changes in the military justice system in principal or in the particular matter of stressing or enhancing the participation of

victims' counsel.

As a court-martial judge, I use my discretion over trial proceedings under Rule for Courts-Martial 801 to ensure that victims' counsel were treated as officers of the court in matters such as access to pleadings, participation in trial sessions and pre-trial conferences, addressing the court from the lectern, and reasonable consideration in scheduling. As a matter of justice as well as settled law, people who are not a party to a criminal case often have rights that must be recognized and protected.

I would also add, and this is a departure just based on a question that came up this morning, on the subject of the confidential practice, I was an Army court-martial judge in Bavaria and Italy, and before that, I was also assigned in Belgium, and indeed, on the Continent, in trials that I observed, there was a victim's attorney who would make an opening statement, question witnesses, and make a closing

statement, but now you would need an actual expert in comparative law to talk about how that works and how to implement that. I don't know that. The only trial that I observed that I understood for the most part was a trial in Belgium. My German is not that great.

But it's not as an opponent of change in general or as an opponent of victims' rights in particular that I join in the specific cautions that were raised by the other Services and raised this morning. Bold and broad changes to the law may seem more stirring, but that approach increases the repercussions, and those -- and by repercussions, I mean uncertainty, inconsistency, and possibly the alienation of the rights of trial participants, most of whom are the men and women of the Armed Forces.

A lot of the points were made this morning very well, and so I don't want to be repetitious. My remarks were prepared last night. But I would say that, to me, it was clear from what was said this morning and looking at my

notes and hearing the response and the questions from the Panel that a lot of the issues that are raised are what might be called alarmism or concerns based on certain provisions, or sort of the generalities, that are not necessarily the heart of the matter, or are not necessarily a point of contention, and can be ironed out.

The Office of General Counsel and the other Services have provided in writing and here today sound articulation of many reasons that particular portions of the proposed amendments would undoubtedly have unintended consequences harmful to the military justice system and to accused Service members. I'd like to comment on a few of these, but first I want to defend the proposition that the alternative approach -- and by alternative approach I mean specific changes, changes that are specific to the rights of victims -- is a viable alternative. It's not just some kind of subterfuge or some kind of attempt to stall or sabotage improved protection of the rights of victims.

A lot of the concern this morning was about whether alleged victims should be made to be parties -- should be stated to be parties or treated as parties. The importance of that to trial practitioners is important because it increases the likelihood of unintended broad changes to the law, broad consequences, and alleged victims should not and need not be made party to the case or accorded all the rights of parties in a criminal case.

And in defense of this proposition, I have several paragraphs here on ***Kastenberg***, and my opening is -- of this section, in 2013, Chief Judge Baker, who sat I believe in this chair this morning. So I prepared this yesterday to cite this, but I wanted to talk about ***Kastenberg*** and point out that ***LMR*** was the alleged victim or the victim in the case. ***Kastenberg*** is the military judge. So we have a case here being heard by the Court of Appeals for the Armed Forces called, effectively, victim versus military judge, and in this decision, in response to a prospective

motion from the victim's counsel asking to be heard on any matter implicating the victim's rights -- and this is important -- the request was to be heard under rights arising under the Military Rules of Evidence, so that's under an executive order under the Rules of Evidence, or the United States Constitution. That was also mentioned in this initial motion.

The military judge, at that point -- this is before any specific motion has even been filed -- found that *LMR* had no standing, and I am quoting here, "through counsel or otherwise to motion the Court for relief in the production of documents, and the victim's counsel could not argue evidentiary matters in *LMR's* interest." And the court ruled that this was erroneous, and at the time this decision came out, so this is 2013, this is when I was beginning my term as a military judge, and so I can tell you that I saw and heard the hand-wringing and teeth-gnashing when this decision came out among military judges who construed this as some kind of new craziness

that was allegedly created by the ***Kastenberg*** decision.

The problem with that interpretation of what was going on there is that the ***Kastenberg*** decision itself made clear that it was not a change. It may have been an unusual situation or clarification of a point, but it was actually pretty well-settled. And so probably Judge Baker would not want to seem immodest and sit here and quote himself, but I will quote his opinion, if you'll allow me.

He said that -- this is the quote here, omitting the internal citations: ***"LMR's*** position as a non-party to the court-martial does not preclude standing. There is a long-standing precedent that the holder of a privilege has the right to contest and protect privilege," and there followed then a string of quotes, and notice that these go beyond privilege: United States v. Wuterich, that was standing for CBS News, so that's under the -- they cited Rule for Court-Martial 703, so that's an executive order,

but also freedom of the press; Center for Constitutional Rights v. United States and Lind, Colonel Lind sat at the other end of this table this morning; United States v. Hardy, that was standing for the victim's mental health provider to assert the right, so that is a privileged case; United States v. Johnson in 2000, finding standing for a non-party to challenge a subpoena during the pre-trial investigation; ABC v. Powell, the famous Colin Powell, finding standing under the First Amendment for ABC News, that was in 1997; and Carson v. Smith, 1995.

These are military cases. Next he goes on to cite limited -- pardon me, limited participant standing has also been recognized by the Supreme Court and other federal courts, and here he cites other cases where standing did not depend on being a party, but on the person having rights under the Constitution, attorney-client privilege, or an interest in preventing the disclosure of material in criminal proceedings. That is the -- that's what follows in the string

cite of specifically CAAF decisions going back 20 years.

So it is an established principle long-protected by CAAF that people have a right to be heard in the military justice system when they have rights created by an executive order, by a statute, or the Constitution. The rights of alleged victims at trial and on appeal can therefore be established by specific measures targeted to the actual issues of importance to them. It is not necessary to make sweeping changes and incur unintended legal and logistical consequences in order to protect these rights.

And an example of potential unintended consequences: for technical reasons, I can discuss further if desired, but I will give you the thumbnail sketch here. The proposed addition in Article 6b(A)(4)(e), a victim's right to be heard in administrative proceedings, when read in conjunction with the proposed Article 70(e)3, could have the confusing and possibly absurd consequence regarding military -- pardon me, the

jurisdiction of military appellate courts, and hence, victim right protection in administrative proceedings could instead be established in separate legislation applicable to the Department of Defense, that is to say, outside the Uniform Code of Military Justice.

The current proposal could potentially create a right for alleged victims to appeal administrative decisions to military appellate courts to which the real party and interest, by which I mean the respondent, the person who is adversely affected by the adverse administrative action, would not have a right to appeal. And an alternative reading would be an expansion of the writ authority of the military courts, although that was presumably not the drafters' intent, but it does create a tension in the system.

There is no need to create confusion about the jurisdiction of military appellate courts by addressing administrative proceedings in an article of the UCMJ rather than a separate chapter of the United States Code. Moreover,

some of the problems identified by the commenters, and in all likelihood, some consequences that no one has yet identified, would interfere with the rights of the parties. To the extent that new practices enacted by statute or executive order infringe on constitutional rights of the accused, the purported infringement, for example, barring ex parte communications necessary for the examination of a constitutional question at trial or on appeal, should and presumably will ultimately fail after much litigation and harm to people's lives.

Another source of overbreadth is the proposal -- pardon me, in the proposal as initially drafted, is eliding the distinction between the right to be heard and the provision of counsel at public expense. Not only should the proponents of a change to Article 70 consider circumscribing the scope of representation provided by counsel at public expense, they should consider what class of persons should be

entitled to greater protection. Individuals, especially Servicemembers who have been victims of crimes against the person, such as sexual offenses or domestic violence, surely have a greater need for publicly provided counsel than do large corporations with legal departments.

And there was discussion on this point as well this morning. One of the questions was what is the -- the scope? Judge Baker asked -- pointed out, why make a distinction between the victims of a sexual assault as opposed to child pornography? Other people -- I mentioned domestic violence as a particular point. There is the phrase "crimes against the person," which is a historical term. There's also the question of any offense -- and looking at Article 120 and that revision and defining what the sex offenses were, what we considered was sex offenses as crimes against bodily integrity and the dignity of the person, and if you look at crimes against the person as a class of people who deserve special protections, that would make sense.

Also, and I admit bias here, I am more in favor of military members and their families having protection as well as an incident of service and something provided by the Services, by the judge advocate generals. I respect the legal rights of institutions with financial resources and lawyers already on the payroll, but I don't worry that their rights will be trampled underfoot because they lack the means to vindicate their rights.

And when I say "military," I don't mean as much the officers as much as the enlisted Soldiers, who are not as well-paid and would not necessarily have access to legal representation unless it is provided for them. And it is the men and women of the Armed Forces and their families that we should worry about in this context more so than AAFES or Google or Walmart.

Also, a concern for those of us who represent Servicemembers is the delay that would result from the proposed amendments as currently drafted, and again, I think this goes to the

question of the initial draft not necessarily considering some of the matters that we would deal with logistically. A criminal accused has a constitutional right to a speedy trial, and responsibility for delay caused by assertion of victims' rights should be attributed to the Government.

I mentioned that I do detainee abuse prosecutions. Of the detainees who were abused by Servicemembers, a couple of them are deceased. One was in Guantanamo, which made him easy to find. Others were unnamed. Others were in Iraq or Afghanistan. The logistical difficulties potentially are -- are considerable, and as for crimes against the person, that's even if anyone listens to my recommendation of narrowing the scope. If it goes to all offenses, then any time there is credit card fraud or a bad check is written or anything like that, you could have many victims. You could have victims who could be hard to find, or you could certainly have victims who do not actually need to have counsel

provided by the Services to protect their rights.

And appellants themselves, or their counsel, should not be required to find and serve pleadings on alleged victims, as would be required under the proposed amendment to Article 6b(e)4. Rather, it should be expressly the government's responsibility to conduct administrative duties necessary to the enforcement of the victim's rights because to do otherwise would prejudice appellant's constitutional rights by requiring them to devote resources to a matter not germane to their defense or appeal.

Finally, I would note concerns about the possible effect of the proposed Article 6b(a)2 amendments in the context of capital litigation. The current very broad language would require disclosure of appellant's *ex parte* request to victim's appellate counsel. When requesting expert assistance to determine the competency of a client, such *ex parte* requests would be available to victim's counsel. This

practice would effectively disclose the kind of personal information about the appellant that the amendment seeks to protect on behalf of victims.

In four capital cases arising in the Army, ***Loving, Murphy, Kreutzer, and Akbar,*** all these appellants requested and received appellate sanity boards as well as mental health expert assistance on appeal. For ***Akbar***, the request was made ***ex parte***. Similar ***ex parte*** requests have been pursued in United States v. Hennis.

The bases of these requests often include mental health and medical records. Thus, requiring such an ***ex parte*** motion to be served on victim's counsel would sacrifice the appellant's privacy and privileged communications in favor of alleging a broad right to receive all filings, even though such motions have no bearing on the victim's privacy or other cognizable right.

This may violate appellant's constitutional right to due process and privacy. In United States v. Garries, this was a 1986 case, so it's the Court of Appeals for the Armed

Forces, the former name of the higher court, CAAF, that court found that, and I'm quoting here, "Although Appellate provided no authority for the use of *ex parte* proceedings in the military, we recognize inherent authority in the military judge to permit such procedure in the unusual circumstances where it is necessary to ensure a fair trial."

In other words, where no provision is made in statutes or executive orders, sometimes it is necessary to find one in the power of the court because it protects a constitutional right, but that is the kind of problem that if it can be identified up front, then people who have what are construed as less important cases, the cases that don't make the headlines, the cases that don't get all the way to the higher courts, they may have been settled wrongly and according to the wrong rule until it gets to the point of an issue like that being decided by the highest court.

Even -- so in this and similar

circumstances, the due process rights of the criminal accused will necessarily invalidate overly broad statutes and executive orders, and finding these boundaries through litigation will cause unnecessary confusion.

In summary, although it is more difficult and less exciting to make changes to the law that are narrow and carefully targeted, we should remember that the matters we rather clinically refer to as cases, are landmark events in the lives of the accusers and the accused. The more carefully the changes are made, the less there will be unintended, unnecessary, and undesirable effects on the trial participants. Thank you.

CHAIR HOLTZMAN: Thank you very much, Colonel. We'll hear next from Mr. Brian Mizer.

MR. MIZER: Good afternoon, Madam Chair, honorable members of the Panel. I am Brian Mizer, Senior Appellate Defense Counsel with the Air Force Appellate Defense Division, and along with Major Lauren Shure, we'd like to

thank the Panel for this opportunity.

I know the Panel has our biographies, but I will briefly state that I have been doing appellate-specific work for the U.S. Navy as both an active duty and Reserve judge advocate since 2004. I served as an assistant federal public defender here in the Eastern District of Virginia for five years, and I spent the last two years as a civilian with the Air Force Appellate Defense Division.

Major Shure is also an experienced defense counsel. She served as a trial defense counsel and served the last two-and-a-half years at the Air Force Appellate Defense Division defending Airmen.

And that is where I would like to begin my brief comments, with Airmen. Major Shure and I are here today for one simple reason: to speak on behalf of the Airmen who are our clients. We are here on their behalf. As you know, the Air Force has been the vanguard of a concerted effort to acknowledge and help victims

of sexual assault while always remaining faithful to our nation's founding charter.

Now those efforts have continued on appeal. Just this week, I was informed the Air Force Trial and Appellate Government Division has established a program to provide timely appellate notice to special victims' counsel of filings made on direct appeal. As my counterpart in that division, Mr. Gerald R. Bruce, is scheduled to testify before this Panel later this afternoon, I will let him discuss that matter with you.

As for my comments, I believe I can best address apparent misconceptions about military appellate practice by accurately describing our military appellate practice before, then turning to reasons that the Panel should continue on its deliberate and measured approach to balancing the equities of all involved in the appellate process.

On this, I want to talk to you about two things: access and timeliness. Along the

way, I will also explain what happens on appeal, what appellate defense counsel do, and I will also clarify the process for handling records that have been ordered sealed by the court-martial.

First, I want to talk about access. By access, I mean access to the entire appellate record. Appellate defense counsel require full access to the appellate record to fulfill our constitutional, as well as statutory and ethical responsibilities. This naturally brings up the issue of sealed records. With respect to sealed materials, the practice before the Air Force Court of Criminal Appeals closely parallels the handling of classified materials familiar to me and my former appellate defender colleagues here in the Eastern District of Virginia.

As we currently practice in the Air Force, the defense files a motion to view sealed exhibits and motions pursuant to Rule 23.3f, which is granted approximately a month later. The court then issues what amounts to a

protective order prohibiting appellate counsel from disclosing the contents of those records. Counsel then schedules an appointment with the clerk of court to examine the materials. This takes place in a windowless court space that is indistinguishable from any classified SCIF in which I have worked.

After reviewing the materials, counsel is required to reseal with labels bearing counsel's name and the date of access and return the materials to the court. You actually just call the clerk in the court, the clerk comes and retrieves them from that space.

Additionally, I want to add, while appellate counsel must fulfill our professional and ethical duties to our client, this does not involve disclosing any of the sealed material to our clients except where it is both reasonably necessary to advise our clients and expressly authorized by the court. This is what the Rules say, and this is what we must do.

This brings out an important

distinction between military and trial -- trial appellate -- and trial practice, where the accused is physically with his attorneys in the courtroom, and military appellate practice, where the accused and counsel will likely never meet, and the accused never appears before a court.

To the extent sealed materials become the subject of litigation on direct appeal, which occurs in a minority of cases with sealed material, the pleadings are filed under seal, and the appeal often ends with an unpublished decision in which the court does not discuss sealed material. Oral argument is statistically rare before the Air Force Court of Criminal Appeals, and to the extent sealed material would need to be discussed, the court would issue an additional protective order, as the Court of Appeals for the Armed Forces did this last term in United States v. Martin last April, and the hearing could also potentially be sealed.

While the handling of sealed materials by appellate defense counsel mirrors the handling

of classified materials pursuant to the national security privilege in federal district court, our responsibilities are broader than our counterparts' in the federal public defender's offices in light of our obligation to raise ineffective assistance of counsel claims on direct appeal, unlike in the federal system, and safeguards rooted in the historical distrust of military tribunals.

As Justice Black said in Toth v. Quarles, there are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article 3 of our Constitution. Among these safeguards is the requirement that both appellate defense counsel and the Court of Criminal Appeals review the entire record of trial, and let me emphasize, the entire record of trial.

Post-conviction, an appellate defender steps in to grade the homework, and when we do, we are there to grade everyone's work. The standard that we use is the Constitution, the

Uniform Code of Military Justice, the Manual for Courts-Martial, as well as 66 years of military justice jurisprudence.

To make this a bit clearer, military appellate counsel scrutinizes the evidentiary rulings of the military judge and assesses whether counsel, both trial and defense, fulfilled their respective constitutional obligations. This is our job, and there is no substitute for an appellate defense counsel acting in this role.

As the Court of Appeals for the Armed Forces said in *United States v. May*, which is at 47 M.J. 478, a military appellant is entitled to "a champion on appeal." It's a language taken from the *Douglas* case out of the Supreme Court. While these words may sound like hyperbole, I assure you, they're not. They're not to an Airman who has had constitutional legal errors in his case, an Airman whose guilt is in a lesser degree than found, or an Airman who has received an unjust sentence.

To be sure, after reviewing the entire record, the appellate defender may have knowledge of the case that the military judge, trial or appellate, does not. This may make certain information in the records important, relevant, or even exculpatory.

With this in mind, there is Rule for Court-Martial 1103A, which you heard discussed this morning. This rule permits access to defense counsel and other appellate reviewing authorities, but not disclosure of sealed records, in order to ensure that there were no Brady violations, no abuses of discretion by the military judge, and no ineffective assistance of counsel.

The point that I am making is that the Rules for Courts-Martial strike the necessary balance between protecting the rights of victims and assuring appellants' due process rights are protected. For the victim, it protects their rights by limiting access to a very limited number of authorized parties, and then limiting

disclosure thereafter to the military courts of appeals.

As for the appellant, this leads me to my second point, and that is timeliness. For the appellant, his or her rights include the due process right to timely appellate review. The court has held that that must occur within 18 months of docketing before the presumption of unreasonable delay set forth in United States v. Moreno, which is at 63 M.J. 129, is triggered.

The Air Force Court of Criminal Appeals has exceeded this time frame in at least three cases this year, which may in fact result in the outright dismissal of the charges and specifications at the Court of Appeals for the Armed Forces. In recent months, there has been significant litigation in the Air Force Court of Criminal Appeals regarding the proper application of RCM 1103A, and this litigation has resulted in delay.

For example, in a recent case, between the filing of the motion to view the sealed

materials and the court's order permitting me to actually see them, there was a 31-day delay. As drafted, RCM 1103A firmly protects the disclosure of sealed materials, but it does not prohibit access to those materials. The current procedure protects victims' privacy rights while also balancing appellant's right to competent appellate representation.

One potential change that may alleviate some concerns with regard to sealed records is this: RCM 1103A could be amended so that the appellate court could limit access to only appellate defense counsel. That is because at the early stages of review, the government has no obligation to review that record of trial, and it could be triggered by a situation where the court -- if the appellant was able to convince the court that it was an issue, then the records could be further disclosed.

By doing this, we eliminate potentially two, possibly more, government counsels reviewing those privileged records.

Ultimately, this is a reasonable balance between the rights of the accused and the need to ensure the victim's continuing privacy rights.

In summary, I submit that the appellate procedures set forth in the Manual for Courts-Martial currently strike the proper balance between the due process and rights to counsel of military appellants and the victim's privacy interests. I urge the members of the Panel to move deliberately and cautiously as it considers changes to a system of appellate review that already deprives Airmen of many rights afforded to their civilian counterparts, such as you heard this morning, the right to tenured trial and appellate judges and an independent judiciary, and which has thus far survived due process challenges at the Supreme Court in both *Weiss* and *Edmond.*

Thank you for letting us speak on behalf of our clients. Major Shure and I stand ready to answer any questions that the Panel may have.

CHAIR HOLTZMAN: Thank you very much, Mr. Mizer. Major Shure, welcome. Do you have a separate statement that you want to make?

MAJ SHURE: No ma'am, no additional element.

CHAIR HOLTZMAN: Okay. Thank you very much.

Our next presenter will be Captain Andrew House, Navy.

CAPT HOUSE: Thank you, ma'am, thank you.

Good afternoon, ladies and gentlemen. It is an honor and privilege to speak before this Panel today, and I sincerely appreciate this opportunity to render my thoughts on the potential expansion of victims' rights practice into the appellate phase of military justice.

I should begin by noting that my comments and thoughts today are my own and do not reflect the official policy of the Navy or Marine Corps or their respective judge advocate divisions.

As I provide these comments and answer any questions you may have, I think it is also fair to advise you that I've served in my current position as Director of Navy and Marine Corps Appellate Division -- the Appellate Defense Division for the Navy-Marine Corps for a little over three very interesting weeks, and I am by no means an expert in the mechanics of military appellate work.

That said, I have discussed this issue with my appellate defense team. I have served three tours as an active duty Navy defense counsel and believe the issues being discussed here today transcend in some ways the nuts and bolts of practice and instead touch on bedrock principles, expectations, and aspirations of our military justice system. At end, our system must provide, is expected to provide, and must be seen to provide a fair and honorable disposition of justice.

As you may have noticed in my assignment history, I had the pleasure of serving

as one of the inaugural planners and managers of the Navy Victims' Legal Counsel Program. While that might seem odd perhaps to those VLC or some of the VLC in this audience or to the appellate defense attorneys I discussed this with this morning that I am now working at a division that may be tasked with trying to limit those victim rights, as I thought about it, it is really not odd to me at all.

I can say for myself that as we've built the Navy victims' rights practice in the Victims' Legal Counsel Program, we were always aware and understood that our policies and efforts could not undermine the fundamental due process and constitutional rights of the defendant, for to do so would risk curtailing the very victims' rights we sought to advance. We knew that to place a victim's rights in direct conflict with the essential rights of a defendant would invite a trial or appellate court to scale back that victim's rights consistent with our loss.

We thus focused our efforts and practice in areas where we believed a meaningful victim interest was clear, to include a victim's interest in personal privacy; protection from unnecessary, humiliating, or degrading practices; rights of support from caregivers and counselors; the right to weigh in on the disposition of his or her case. Accordingly, in regard to the execution of court-martial proceedings, that intent largely focused on Military Rules of Evidence 412, 513, and 514. It is from that perspective that I would like to address you today, and specifically, I'd like to share my thoughts on the appropriate limits of victim appellate practice.

In reviewing the Senate version of Section 547 of the Fiscal Year 2017 National Defense Authorization Act provided to us, I believe the most important statement I can make is that the extension of victim appellate rights should be as carefully and concretely linked to meaningful victim interests as now acknowledged

and accepted in our trial courts. In other words, victim appellate rights should be placed and targeted on issues where the victim in fact has a lawful interest that can be effectively explained and legally defended. As established in this version of Section 547, I think that goal is met by clearly limiting victim appellate practice to matters implicating MRE 412, 513, or 514.

In considering the practical application of victim appellate activity with regard to those enumerated interests, I do believe that advocacy on matters involving MRE 513 and the psychotherapist-patient privilege may prove the most challenging. MREs 412 and 514 seem to me to be less controversial.

Regarding MRE 412, years of practice have established expectations on all sides. The protections of MRE 412 that forestall any irrelevant discussions or disclosure of the sexual behavior or predisposition of a victim are no doubt critical to a victim, but over the

years, trial courts have become adept at appropriately closing our courts and limiting disclosure only to individuals with a lawful need to know. This relatively consistent application of MRE 412 provides significant steps to mitigate the fears of a victim without undercutting the rights of a defendant to a zealous and effective defense.

I would anticipate this stability to carry over to appellate practice, allowing for the fine-tuning of MRE 412 without dragging out appellate review or eroding a defendant's due process rights. Additionally, in my experience, significant challenges to a victim's interest in confidential communications with his or her victim advocate per MRE 514 may be emerging but are not prevalent in our current practice.

On the other hand, regarding MRE 513, a defendant's access to portions of a victim's mental health medical records, where that access is necessary to mount an effective defense, is a matter of great concern and may constitute a

significant portion of victim-related appellate activity. Here, appellate VLC and appellate defense counsel may be -- may be able to better shape the law, but that effort will require recognition that appellate defenders must have access to the relevant matters in order to press and counter appeals.

In the appellate phase, where the most likely scenarios for review are a defense appeal to access records or a victim appeal to halt it, it is impossible to see how an appellate defense counsel could mount effective representation of the defendant's due process and fair trial rights without access to the records in question. This would be akin to asking appellate defense counsel to pilot a ship without a rudder.

If seeking record access for defendants, the appellate defense counsel has to review those records to know how and why they might be relevant. This is the cardinal purpose for access rights codified in RCM 1103A. Further, to effectively oppose a victim appeal to

halt that disclosure, the same direct analysis would be required.

An *ex parte* proceeding whereby only the appellate VLC and appellate judge view the records renders a potentially critical issue for the defendant moot and his or her appellate representation pointless. Neither of those authorities represents the defendant or has his or her interests at stake. Only by viewing the records at issue can appellate defense counsel determine whether the records are arguably necessary to the defense and make that claim for the defendant to the appellate authority.

If we can agree that basic access is at least necessary, then we can discuss what procedures can be in place to limit disclosure or exposure to only those necessary. In the current Navy and Marine Corps appellate practice, when questions are raised in the trial record as to whether the trial judge improperly withheld important mental health records from the defendant and his defense, appellate defense

counsel contact the clerk of court to review those records. If they wish to copy those records, they must file a motion to do so. They must also destroy any copies of those records when case processing is completed, and file a motion with the court confirming that they have done so.

The same procedure would apply to access to records to effectively oppose a VLC appeal to halt that disclosure. In either instance, appellate defense counsel access is not unchecked or at whim. Rather, the counsel must explain to the clerk why they need access, can only make copies of sealed records by affirmative motion, and must make clear any copies of the records have been destroyed when no longer needed. Thus, the exposure of the victim is limited to authorities having an official need to know with an official purpose for access. The victim's privacy interest is protected to the greatest extent possible without infringing on the defendant's right to a fair and meaningful

defense.

This -- it is at this point that I'd like to suggest that victims can and should be reminded by their counsel that any mental health record access by the defense was according to law, determined to be necessary, and was required to execute a fair trial. Victim counsel and victims themselves may disagree with those findings, but victims should not be left to presume or suppose that access was easy, improper, malicious, or aimed solely to harm or embarrass the victim.

Just as military victims' counsel, military prosecutors, military judges are bound by the rules of professional conduct, so are Navy and Marine Corps appellate defense counsel and their trial defense brethren. They are not authorized to share, distribute, or discuss sealed materials with any party without an official reason to know, nor may they retain those materials. This is an issue where better awareness of the professional responsibilities

and expectations placed on military defense counsel as both attorneys and military officers might help diminish victim concerns on privacy exposure.

In considering related questions, I would reiterate that I believe that victim rights must be tied closely to established and consequential victim interests. While a victim certainly deserves notice of appellate actions that might impact those interests, including matters involving MRE 412, 513, or 514, requiring notice of all other appellate matters where the victim has no legal interests seems unnecessary and might prove counterproductive to victims.

Navy and Marine Corps trials often include allegations involving multiple victims. Shall all matters related to one victim be provided to all victims if those matters become an issue in appellate matters? Additionally, if a victim has the right to appeal any decision or action taken in the trial court, the defendant will face a potentially unending deluge of legal

challenges and delays. While the victim or his or her advocate may not like a military judge's ruling on a piece of evidence, inclusion or exclusion of a member, findings in regard to a claim of unlawful command influence, or any other matter at issue, the victim has no clear personal privacy interest that has been established in law in any of those decisions. As that has been the basis for expansion of victim's rights in our court, absence of that interest should preclude an appellate right to engage.

If this Panel recommends that notice be provided regardless of the issues raised on appeal, perhaps to further a victim's general case awareness, I believe that notice must be provided by the government and should be a simple notice right rather than an opportunity for appellate litigation by the VLC or a victim's counsel. The victim should not be an equal party to the government in matters unrelated to concrete victim rights.

As to another specific question, I

would note that Section 547's expansive definition of a victim for Part 3 for the purposes of representation by counsel would be problematic for the Navy, at least in our current system, as Navy victims' counsel are only detailed to alleged victims of sexual assault. I would hate to inadvertently create an expectation of representation where no right currently exists, and it is not in my authority to explain how the Navy might meet such a mandate.

I can say that I believe it would be impossible to justify any system where a victim has a right to representation by counsel and a right to be heard at certain proceedings where the defendant has no such rights. It is interesting and timely that we attended a joint appellate -- all of us attended a joint appellate advocacy training event last week with both appellate, government, and victims' counsel. One of the presenters was Mr. Russell Butler, the Executive Director of the Maryland Crime Victims' Resource Center, who has been a long-term leading

light in victims' rights establishment in the State of Maryland.

His presentation focused on the development of those rights in Maryland via its courts and legislation. What became obvious was that victims' rights has been repeatedly interpreted as those established in Maryland statutes and that any appellate activity by victim counsel must be linked to those established rights.

He even noted that in his opinion, victims have an interest in appellate matters related to those rights by standing as a party, and that if they are to be considered a party, it is only in the context of those specific rights. As Maryland has lawfully advanced the rights of victims without apparently undercutting defendants, I would propose his guidance is well-founded.

In closing, I'd just like to thank you for this opportunity to discuss a careful and thoughtful expansion of victims' rights into the

appellate arena. These matters are important and challenging, and their successful execution will impact the primary due process and constitutional rights of our defendants; the place and status of victims; and the associated faith, confidence, and reliability we, our Servicemembers, and the American people have in our system. Thank you.

CHAIR HOLTZMAN: Thank you, Captain. We'll next hear from Lieutenant Commander Michael Meyer --

LCDR MEYER: Madam Chair --

CHAIR HOLTZMAN: -- from the Coast Guard. Thank you.

LCDR MEYER: -- distinguished members of the Panel, thank you.

Thank you for inviting me to speak here with you today. My name is Lieutenant Commander Michael Meyer. I am the Chief of Defense for the Coast Guard, and I need to start with the disclaimer that my remarks are mine and not those of the Coast Guard or the Judge Advocate General.

I'd like to structure my remarks today, which are brief, into four areas: first, a discussion of privacy interests during the appellate counsel's review of the record of trial; second, victim participation in direct appeal by the government or defense counsel; and third, victims' appeals to CAAF from interlocutory rulings by the Service courts; and fourth, victims' notice of appellate proceedings.

To begin then with the victim's privacy interests during appellate counsel's review of the record of trial: I echo the concern of my DoD colleagues, and I wish to point out that to preserve the public perception of a fair system of justice, trial judges' decisions must be open to higher-level review. And in our military system, that is frequently done by an appellate defense counsel who reads through the record of trial carefully, looking for legal errors, and brings them to the attention of the -- the higher court.

Any attempt to truncate, then, or

restrict the appellate defense counsel's ability to review the entire record of trial, that would denude the appellate review over those areas, and it would risk erosion of public confidence in due process in our proceeding.

I believe that victim concerns in this regard can be mitigated using existing tools and practices. I know first that the Coast Guard appellate practitioners that seek to review these files must first coordinate that review with court authorities, and in my limited experience doing so, the Chief Trial Judge of the Coast Guard Court of Criminal Appeals was physically present.

Further, Rule for Court-Martial 1103A(b)4(D) empowers each appellate court to fashion appropriate limitations on further disclosure. Breach of any of these requirements exposes appellate defense counsel to sanctions and professional responsibility review. Therefore, victims should be assured that wide dissemination of their private information is

both prohibited and unlikely.

Nevertheless, I do not object to recognizing that victims can have standing at the appellate courts to request that their private information not be disseminated beyond the counsel for the parties and the court itself. However, in light of the already-existing protections of information under seal, the need to so intervene is likely to be infrequent.

The second main issue I'd like to discuss is the concern of the special victims' counsel that when the appellate defense counsel appeals an adverse ruling under 412, 513, or 514, the victims do not have standing to file pleadings in response. I don't object to victims having standing to file such responsive documents as real party in interest. A real party in interest is one who actually possesses the substantive right being asserted, and in matters arising under 412, 513, and 514, those privacy interests belong to the victim. But because their standing is necessarily founded in the

possession of one of these three enumerated privacy interests, an expansion of victim appellate standing beyond those interests should be avoided as a serious risk to clogging the judicial system and harming the due process rights of the accused thereby.

The due process rights of the accused can be further protected by creating a requirement that appellate victims' counsel file only those claims that they believe to be meritorious, which is in contrast to the right of the accused to file any claim, meritorious or otherwise.

I would also like to mention that permitting victims to participate as real party in interest is preferable over other forms of communication with the court, such as *amicus* briefs or motions to intervene. *Amicus* briefs are better suited for bringing broader policy considerations to the attention of the court, not necessarily for arguing case-specific determinations of a privacy interest. And

because victims' standing should be limited to those three areas I have mentioned, requiring a motion to intervene on those three areas would be an unnecessary burden for the litigants and for the court. They would become boilerplate and granted pro forma.

Finally, on this point, I'd mention that the privacy interests under Rules 412, 513, and 514 are appropriately given equal weight when it comes to victim standing, as each confers the sort of justiciable privacy interests contemplated on appeal, and as such, either standing exists, or it does not.

Third, I'd like to address the victim's access to the Court of Appeals for the Armed Forces after interlocutory writ petitions are denied at the Service courts. While Article 6b presently permits victims to seek interlocutory writs at the Service courts, I understand that case law presently does not permit this appeal to CAAF. Again, consistent with my view that broad judicial review increases

public confidence in our system, I believe that victims should be granted this standing at CAAF. This also presents disparities in the treatment of victims among the Services.

However, my brief review of Section 547 did not reveal language that expressly overturns the case law precluding such standing at CAAF. Section 547 instead appears only to modify Article 70 of the UCMJ to authorize appellate victims' counsel to represent the victim on CAAF -- at CAAF, but does not expressly confer to the victim standing to petition CAAF in the first place. If it is the intent of Congress to confer the standing, that should be clarified.

Fourth, and finally, I would like to address briefly the concerns about notice to victims of appellate proceedings. It is my notice that -- or it is my position that victims should be provided notice of any appellate proceeding that reasonably could implicate the victims' rights as recognized under Rules 412, 513, and 514, but to require additional notice

beyond that would become unduly burdensome and unnecessary.

This notice can be accomplished by the adoption of a court rule that requires any counsel filing appellate pleadings that reasonably could be expected to implicate those enumerated victim rights to provide a certificate of service on the victim or the victim's counsel, if known.

I recognize the concern that, when the victim has not elected counsel, appellate defense counsel might have to search high and low for a victim who, in the end, may not wish to be found, simply to comply with this requirement. I suggest that the victims be provided an opt-in mechanism for receiving notice and for announcing his or her preferences on the manner of such notice.

I note that these concerns could also be mitigated by the eventual transition to an electronic court filing system that automatically provides email notice to those who appropriately

receive it.

In closing, I'd like to thank you again for this opportunity to discuss the expansion of victims' rights into our military appellate practice, and I'm happy to answer any questions that you have.

CHAIR HOLTZMAN: Thank you very much, Commander Meyer. We'll start with you, Mr. Stone.

MR. STONE: Thank you. Commander Meyer, I was very happy to hear your comments because I think that they do reflect what I think is a way for us to move forward with victim rights.

I do have one question, though. There is a difference between 547, which talks about victim rights in relation to 412, 513, and 514, and the proposal which was drafted by this committee. If you look back, page 2 of it, the first paragraph of what's now five, actually -- I am sorry, it's in the current 6b. The current 6b says with respect to victims' rights, protection

is afforded to the following, and it starts with (a), this section, before it starts enumerating.

What that means is -- and I'll give you an example, and -- and then I'd like your opinion on it -- my example is suppose the victim said under the circumstances "I am entitled to restitution under 6b(a)(6)," and the military judge had decided for reasons that didn't make a whole lot of sense at the time, well, there was a loss, but I just decided I don't like this idea of restitution, I'm not giving it to you.

And so the victim would like to participate only on that question of restitution, which is in 6b, okay? The current 547 language does not cover that, and they don't get standing, and they don't get notice of anything. So my question is why shouldn't the current 547 language, instead of articulating three things there, have the same language, exactly the same language that's currently in 6b, and just simply repeat it, that it has to do with any victim rights that relate to 6b, and then it lists 832,

412, 513, 514, and 615, so that it covers the same landscape as 6b, but limited to those? Does that make some sense to you?

LCDR MEYER: It does, sir, and I think that the victim's right to appeal a ruling of a trial court should be coexistent with any right that that victim has. And I'm not sure of the current status of our restitution authority in the military. To the extent that we have it or develop it greater, it should be part of the standing that a victim has to appeal.

MR. STONE: Great. Now just to take that one step further, I know the current 6b that's enacted does not talk about sentence reassessment in accordance with Article 66 of UCMJ. We mentioned it earlier to the last panel. That goes a little further. That goes to the court of appeals' desire to change the sentence without notice, as they pointed out, to any of the counsel in the case.

I wonder if you have some thoughts about whether, before a military court of appeals

decides to change the sentence, they ought to give notice to all the counsel and the possibility of filing a supplemental brief of some kind on that before a sentence reassessment occurs, including victim's counsel, because they have that right to know.

LCDR MEYER: Sir, I need to be a little more circumspect in this regard because my understanding is that the manner in which sentence reassessments occur is changing, and I think I would prefer to see what the end result of that is before it becomes ripe for a determination of what kind of standing would be appropriate.

MR. STONE: I presume, though, as defense counsel, you'd like a chance to comment before the -- the appellate court changes the sentence on your defendant, wouldn't you?

LCDR MEYER: In my experience, it usually reduces the sentence, so --

(Laughter.)

LCDR MEYER: -- yes sir.

MR. STONE: I guess -- oh, the other question that I had was -- and I'll stay with you, if I may, because you did talk about that notice as to some of the other appellate filings. You did use the term "unduly burdensome," and do you mean unduly burdensome because you might have trouble finding who to serve? I presume you don't mean serving them electronically is unduly burdensome because I think that, as long as the proposal specified that the SVC got service, that that would be easy.

In other words, you don't have to go looking for an individual victim. You just have to go looking for the victim's representative, SVC, VLC who represented them, that that would not present that unduly burdensome problem, am I right?

LCDR MEYER: That is correct, sir. So I break it into two categories, one in which the SVC has filed a notice of appearance, and then filing notices are easy. You simply, as you mentioned this morning, you add an email address

and serve.

It is the other category of cases where the victim has not elected to be represented by any counsel and has not otherwise made known to the court or parties how they wish to receive notice, if they wish to receive notice --

MR. STONE: Right.

LCDR MEYER: -- in that circumstance, I think that they should be given an opt-in mechanism, filing something with the court so that any party can access it and determine how it is supposed to -- notice is supposed to occur.

MR. STONE: Sure. So as long as the appellate court provided a place for the victim or the victim's representative, an email address to be notified, that would relieve the burdensome problem?

LCDR MEYER: It would, and to the extent that we move towards a system much like the federal courts use with ECF or PACER, that automatically generates that notice, simply

uploading the document generates notice, it would become much easier. So it is something that can be remedied.

MR. STONE: And -- and now that you mention PACER, let me just ask, you know, on PACER, every non-sealed document is available to anybody in the world, and I presume if that was the case in the military, that would be fine with you too. As long as it's a non-sealed document, you don't have -- and in fact, if one -- if a sealed document is filed, it will typically just say sealed document filed, but you get notice a document was filed, you just can't get the document without permission. I presume that a system like that wouldn't trouble you either?

LCDR MEYER: No, that is correct, sir, and so an open system of justice I think is healthy, as I would welcome all of our documents being open for public observation. I think probably though that the manner in which victims give notice should be filed in a sealed manner because my guess is they are not going to want

their address, phone number, that sort of thing --

MR. STONE: Right.

LCDR MEYER: -- broadly made public.

MR. STONE: I don't know if anybody else on the Panel has any comments. I think many of your comments were consistent with those answers, but if you have other thoughts you want to say, I'll be happy to hear them. Yes.

LCDR CARRIER: Sir, one note on -- on restitution, which I think is connected structurally to the idea of continuing jurisdiction. Historically and at present, court-martial do not have authority to provide restitution to the victims.

And so you have -- in Article 6b, we now have a right that is afforded to the -- to the victim of a crime that is in parallel with the federal civilian statute, but the UCMJ structure does not, to my knowledge, have a way that that is being enforced through the military courts. The court-martial comes into existence

and goes out of existence, and it is gone, and there is no restitution.

MR. STONE: And I guess my -- my question that follows on that is, just like the last question, we know the system is in flux. One of the suggestions of this Panel was that restitution should be tied with compensation so there might be a compensation system, and if the system changes so that that military judge has the right to order compensation to the victim, but then chooses -- says I think this is a compensation/restitution system, but I just decided I don't want to order it, I don't like ordering compensation, should the victim then --

LCDR CARRIER: Right.

MR. STONE: -- have -- in other words --

LCDR CARRIER: I understand.

MR. STONE: -- that's not articulated in these others, but if it's a victim's right, then --

LCDR CARRIER: Right.

MR. STONE: -- then that narrow issue, they have standing and a right to go up on, I presume that would be okay with you?

LCDR CARRIER: Well absolutely, sir, and in fact, I would hate to be on the other side of someone standing in court with *Kastenberg* and the string cites from *Kastenberg* trying to argue that a person who had court-ordered restitution did not have standing. I think that is -- I think that is clear, but it's an example of how the interplay can be tricky.

And this morning, there was I think some -- I don't know if confusion is the right word, but some uncertainty about how reassessment would work since it is not actually done in a hearing. So if you have in one place in the code, it says that they have to have notice of public hearings, opportunity to be present, and then in another part of the code, you have -- they're both at the statutory level of authority, so which one trumps which, or how do you possibly read them together when in one case there is no

hearing -- it's a deliberation of a court that is generally closed -- and in another place, it says hearing. How does that even work?

And the point I wanted to make about it, it's at Article 6b(a)4(e) about administrative boards and other adverse administrative proceedings. Courts-martial don't have any -- at federal courts, we don't have federal district court, we don't have like a court of common jurisdiction that you can come in, common pleas court and raise some issue. If someone has an administrative board in the location where I was a court-martial judge, that was none of my business. I had no authority there.

But now, and how would that get to the appellate court? Arguably, that could be enacted in some other way to provide that protection of that right, but how to work that into the system is -- is a bit tricky.

MR. STONE: Well, I might add in the civilian system, courts of appeals don't always

have oral arguments either, so therefore, if there is no hearing, your right to appeal is in writing, and that would be the same thing here. If there's an administrative proceeding and there is no appeal, then there is no worry about being represented there, and if there's an appeal but there's no oral argument on it, then there is no denial of the opportunity to be present at an oral hearing.

LCDR CARRIER: Well right, exactly.

CHAIR HOLTZMAN: I think what he's saying is that there is no appeal to the -- because there is no court-martial, there is no appeal --

LCDR CARRIER: There's no appeal, yes ma'am.

CHAIR HOLTZMAN: -- there's no appeal here, so --

LCDR CARRIER: Right.

(Simultaneous speaking.)

CHAIR HOLTZMAN: There is no system-wide.

LCDR CARRIER: But I don't know how that would work. I don't know what the triggering mechanism would be or how that would work, so --

MR. STONE: Well, the way the Statute currently reads, the right to be heard at any of the following, and the reason the administrative boards, as we heard from at an earlier meeting, and other adverse proceedings is in there is so that if a prosecutor decides to downgrade the proceeding from a court-martial to an Article 15 or something else, the victim wouldn't automatically be excluded after the charge is downgraded. That was the idea, not necessarily that they're creating a new appeal mechanism or new hearings or things that aren't there.

LCDR CARRIER: Right, sir.

MR. STONE: And I think that -- I don't know how you feel about it, that makes some sense to me, that it may be appropriately downgraded, but the victim still gets some notice there's a proceeding going on, and if there's a

proceeding that's in person, they have the right to show up unless there is that decision that it would unduly affect their testimony.

LCDR CARRIER: Yes sir.

CHAIR HOLTZMAN: Major?

MAJ SHURE: Yes, two brief add-ons to sort of answer your question, Mr. Stone.

In the Air Force Court of Criminal Appeals -- and frankly, we at the Appellate Defense Division have long said these are public filings, but I can't get them anywhere. I have them because they are on our drive, but if a member of the public or civilian counsel wants access to those, they are not available anywhere at the Court of Appeals for the Armed Forces. When there is oral argument, those pleadings go up on their website.

However, with the Air Force Court rules, we have recently moved to there are no names, no emails, no addresses, no phone numbers in any of our pleadings, so making any of them public would not be problematic with regard to

privacy rights or privacy interests.

Everyone, regardless of whether they are a victim or just a plain witness, is referred to by initials. All email addresses are blacked out except for one or two characters. Those kinds of protections are all written into the Air Force Court rules, and that is how we currently practice.

I would just add on, and I believe this was mentioned in the DoD General Counsel's motion, looking forward with sentence reassessment, it may no longer function as we see it today, and so until that occurs, and until we know how that is going to happen, I would caution or -- or be wary of making any changes until we're aware how that is going to work, because it may no longer be an issue once those changes go into effect.

MR. STONE: Is the Air Force moving to the same kind of system that we heard in the last panel that the Army is moving to, where there is an electronic system where -- where pleadings are

--

MAJ SHURE: We --

MR. STONE: -- accessed --

MAJ SHURE: -- we currently file everything electronically, sir. The only thing we file hand-delivered, actually, is sealed documents, and so if you have a sealed pleading that you physically walk it over to the --

MR. STONE: Right.

MAJ SHURE: -- court, walk it to the government, but yeah, we -- we do everything electronically. The problem is once it goes to the court, that is it. So we have our copy, and then the government serves us with a copy --

MR. STONE: Yes.

MAJ SHURE: -- but there is no public access to be able to get to those pleadings by somebody who is not served with the documents.

MR. STONE: Right, but if you had the name of a special victims' counsel, it wouldn't be any problem to see that they were routinely copied, right?

MAJ SHURE: I don't see it as being a problem from our perspective, sir. I would be concerned about the burden on the special victims' counsel.

(Laughter.)

MR. STONE: Well, we'll let them worry about that.

MAJ SHURE: Yes sir, yes sir.

CHAIR HOLTZMAN: Captain, did you have something you wanted to add to this? You were --

CAPT HOUSE: I guess I just wanted to chime in on the -- particularly the issue of restitution. I think personally -- and again, this is in flux, and we'll see whether any kind of sentencing recommendations and changes come forward -- but if we look at this from the sense of we have tried to develop and expand victim rights where there's a legitimate victim interest, in the area of a potential punishment, it is restitution that is really the primary interest.

I mean, certainly the victim has an

interest in the overall punishment, but we send someone to the brig, that's the United States sending them to the brig, and if there's a fine imposed, the fine is paid to the United States. And if they're reduced in rank -- I mean, so it is restitution that is really particularly focused on that victim, trying to make that victim whole again.

So I guess philosophically, if we were to maintain that line, if restitution were at some point to be placed as a potential court-martial punishment, then the victim would have a legally arguable and defendable position in perhaps having standing to make a claim regarding that restitution decision.

I do think, on the practical level and on the philosophical level, though, we are potentially talking about a scenario where we are increasing the punishment on a defendant that they did not receive in a lower court, and we are -- we're potentially doing so in a scenario where the victim is not able to add any new evidence or

any new facts, but is simply asking to have the decision of the military judge to not grant restitution be reconsidered. And without -- without being able to add more facts or being able to find some qualification with a change of law to do that, I don't know what the basis for that change would be.

So bottom line, I guess I just would say I think this falls philosophically in that realm of identifiable victim interest, if we get there, but I still think the practical application of this will prove difficult the way we currently process in appellate practice.

MR. STONE: Well, I guess the -- the response to that is that at least the way this Panel recommended it, and I -- I believe our recommendation for a compensation/restitution scheme would be that the military itself would make the payment of up to like $2,000 in an appropriate case, and the victim says he smashed my cell phone for a $500 cell phone, and I never got it back again, and I would at least like that

replaced, and there may be other mechanisms to do it, but at least this is one way to avoid some of that other -- some of those other mechanisms.

You're right that the record may be no different, but if a military judge should say -- and I'll tell you, I don't expect they will, I am talking about the one case in, I don't know, 1,000, because it's only in one case in a thousand that civilian judges don't do what they should in restitution, but we do have the one case in 1,000 where a judge says, I don't like cell phones, I'm not giving it to you. If the victim cannot raise that restitution issue on appeal, the restitution isn't going to the government.

It may not be raised, so it may be that the victim's brief is three pages long. The record shows that I showed my cell phone was broken. The judge should have ordered restitution. The judge chose not to. It is wrong, and it ought to be reversed. I mean, that may be all the victim needs to say, but they

still should have a right to be able to say it.

CAPT HOUSE: Understood.

MR. STONE: Do you have any -- does that sound right?

CAPT HOUSE: I think if we can establish that a restitution becomes a potential court-martial punishment, which gets you in the door, then I think you could argue that there is certainly a victim interest in that restitution because that's what that provision is solely focused on accomplishing.

MR. STONE: Right.

CHAIR HOLTZMAN: Okay. Admiral Tracey?

VADM TRACEY: Let me just calibrate myself here. I think that does materially change the role of the appellate court. You've now changed it from a review of whether the accused was given a fair trial and an appropriate sentence to whether the victim got appropriate restitution, and I agree there may need to be an appeal process, but it doesn't seem to me it

ought to be via that mechanism. That -- you -- that does materially change what the focus of this process is, doesn't it?

PARTICIPANT: Yes ma'am.

MR. STONE: Well, it's for the Panel to answer, but in the federal courts, because the restitution is a part of the judgment, and it is the judgment on appeal that is getting reviewed, that is why it is up there and not a separate, independent suit.

CHAIR HOLTZMAN: I am not sure we made a recommendation that courts-martial issue restitution.

PROF. TAYLOR: I don't think we did.

CHAIR HOLTZMAN: I don't think we did.

PROF. TAYLOR: I mean, my recollection of that is that we ultimately, even though we discussed that at length, we ultimately determined that we felt it would be in the best interest to have a uniform compensation system that would be administered by the Department of Defense --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- across the board.

MR. STONE: Right.

CHAIR HOLTZMAN: Separate from the court-martial --

PROF. TAYLOR: Correct.

CHAIR HOLTZMAN: -- system.

MR. STONE: Right.

CHAIR HOLTZMAN: So this wouldn't be part of it.

MR. STONE: Right. My only point in raising that before was to make the point that the scope of the victims' rights on appeal ought to be Article 6b, whatever is in 6b, because the 6b rights can change, as we say, under our feet as we're talking. The Congress may or may not decide to do it our way or may make it part of the judgment, but numbering, as they do, Articles 412, 513, and 514 is -- doesn't -- doesn't line up with 6b's requirements right now, what the victim gets in the trial court. That's all I am saying, it ought to be the same as the trial

court, whatever that is.

VADM TRACEY: But for me, the focus of what we've been trying to do here is to be sure that nothing in the appeals process abridges the rights of the victim, and that that -- it seems to be a different -- an important, but different vector than whether the evidence that was excluded at trial suddenly is allowed to be considered, and the disposition a victim assumed they got at the end of the court-martial gets turned around in some material way that will undermine the victim's confidence in the system in a way that upends everything that we've been trying to do here in the last several years.

Can I just ask the Panel across the board, do -- is there general agreement that the victim should have an ability by some means to present counterargument to something that will materially change the outcome at the trial? The defense advocate is -- is doing that, is making the case that something was not done right at trial. Should the victim have a voice by some

means to lodge counterarguments when that is about to become a factor in the appeals court?

We've gotten hung up on the language in the various proposals, and so it is really hard for me to determine whether you have a fundamental objection to the notion that the victim should be able to reassert the arguments that weighed in at trial, or strengthen them by some means, whether represented by counsel or some other means. I am trying to sort out what you actually think here.

MAJ SHURE: Ma'am, I will try to give not so much anecdotal as just, in my personal practical experience in the last two-and-a-half years, when I have had a victim intervene, it has delayed the process so significantly that there is a chance of upsetting the very sentence the victim sought at trial, and that is my overarching concern with any victim intervention.

Is there a place in the world where possibly this may work? I can't rule it out. But in my practical personal experience, me,

Major Lauren Shure, I have seen such significant delays that it causes me concern that the overall sentence and the outcome sought by the victim at the very beginning may be upset by arguing and intervening on these positions at appeal.

VADM TRACEY: But do you disagree with the principle that if a victim exited a court-martial assuming something had been determined, and the appeals process is going to overturn that, or is likely to overturn that, by changing some of the ground rules under which it was decided -- admitting evidence that was excluded and what have you -- do you disagree with the principle that if we could figure out how to do that practically, that that is consistent with the rights of victims we've been trying to assert?

MAJ SHURE: Not necessarily, no, and I will, as we all are lawyers sitting here -- it depends.

(Laughter.)

MAJ SHURE: And so I would say,

though, that the -- the caveat, or the distinction I would make with your hypothetical situation, would be that it is not my opinion that the appellate court is changing the rules. They are simply looking at it and saying either the judge or the government got it wrong.

And the particular circumstance where I find the biggest problem is with the mental health records and Brady, and so when we assert that a military judge got it wrong, that is not even frankly what I argue. I am arguing that there was a Brady violation. The government failed to review those records and find exculpatory information and provide that to the defense counsel.

In this world that we have started to live in, the government is very cautious of looking at those records, understandably so. However, when they fail in their Brady obligations, that is that constitutional concern that we have, and so the question we pose to the appellate courts is not change the rules, allow

this evidence in. The question is was there some constitutional violation that needs corrected? And whether they can correct it on the appellate level or whether they have to send it back for more trial work, generally, they're sending it back for more trial work.

In a most recent opinion, the court said, in this very issue, we can't opine at this point whether or not this was a Brady violation, but Brady is our biggest concern in these cases, those discovery violations and those discovery issues. So, while no, I don't necessarily disagree with the basic notion, I would change the hypothetical and say I don't think that the -- the rules are changing on appeal.

I think that provided the SVC is doing their job at the very beginning, the victim is aware of what their rights are from day one through the appellate level, and they have the option to opt-in or say no, I don't want to go through this. And so no one should be blindsided when it comes to the appeal that we are taking a

look at this and we are addressing any constitutional questions.

VADM TRACEY: To define my question a little bit more clearly, because my language may be imprecise because I am not a lawyer, I know it depends, but -- and I'm not a lawyer -- is the -- what I'm trying to argue is that the victim -- special victims' counsel made a case that ends up with the evidence being excluded at trial. On review, a different attorney, the defense appellate review, suggests that that was an error. Is there a window for which the arguments should be reinforced, revisited, the arguments in favor of excluding the evidence are revisited?

MAJ SHURE: Well, they are there. They are already in the record of trial, and that is exactly the point that the -- that is different about the military appellate system than the civilian appellate system, is we look -- they have to look at everything.

The difference on appeal is the defense counsel stepping in and having the

opportunity to articulate why those records are relevant, why it was a Brady violation, or why it was an abuse of discretion. That's my opinion. I will let my colleagues weigh in.

CAPT HOUSE: If I take your question, ma'am, as where we've established standing in our lower courts that the victim has an interest, should they have the same similar standing in appellate courts if those issues come under question, I think they should. I think they should. I think we need to be consistent. I think if we're going to allow victims -- and that has been the Navy practice regarding to these privacy interests that have been established in 513, 412, and 514, because there's a clear victim.

That's the reason we have those rules, that in order to be consistent and fair, that victims should have some opportunity -- again, the mechanism, the way we will practically work that to make sure that there is little delay and that information passes and that the people get

the information they need to do their jobs, that's the hard part of this, but the philosophy itself, I think we have to concede that they should have that right.

VADM TRACEY: Okay.

LCDR CARRIER: Well, I agree with Captain House, and I believe that not only do I not have some philosophical quarrel with that, I believe it is the current state of the law. And I think -- and that's what I was trying to get across, and I think that is what Judge Baker was trying to say this morning, is that under -- under *Kastenberg*, and even under -- *Martinez* was cited on very technical, specific grounds about jurisdiction, but under *Kastenberg*, and citing those cases going back 20 years, when there is -- and this question of who is a real party in interest is when there is someone who has a right created by executive order or statute or a constitutional right, that person has the right to be heard in the military justice system. No offence, but this is not -- you're not creating

one here. You are perhaps adding to it or giving it structure or codification. It already exists.

And again, I remember, in 2013, a lot of military -- but it's not -- it's not -- it's unusual. It's unusual, and in 2013, there were a lot of military judges who said what is this? This is crazy. We don't do this. This is not normal. But it was just unusual. It was not new at the time that *Kastenberg* was announced, and -- and Judge Baker proved it by having a -- a set of citations going back 20 years.

So it -- that is exactly right. That is -- I think the concern in looking at this is that if you statutorily broaden beyond what has traditionally -- what has traditionally existed is the real party in interest analysis of what is the basis in executive order, statute, or constitutional right that creates this right to be heard at trial or creates this right to -- to send a petition to the appellate court?

This language as -- and I am gesturing here toward the proposal -- is potentially

broader than that, and so we're war-gaming this and thinking, well, what is this -- how does it -- what is this actually -- how does this play out? Does this mean that -- like at trial, we would generally not allow the victim's counsel to jump up and object on hearsay grounds to something a witness says. We don't let the victim's counsel, you know, jump up and say we -- we think that's hearsay and you shouldn't allow it.

What exactly are we talking about on appeal? The -- the parties on the appeal, the -- the defense counsel frames up the issue, and I think what counsel are concerned about creating is a situation where the appellate defense counsel is arguing that 412 is wrongly decided, is arguing that a question of privilege is wrongly decided, and now in order to make that argument, there will be further hurdles, further obstacles, there's like a showing that it's not enough just to say well we have this record and we want to review the sealed exhibits of the 412

and see what's in there so we can challenge it.

No, we've got to like ask for special permission and make some threshold showing just to get access to the trial record, which is inherently sort of crazy because in order for there to be something included in the record as a sealed exhibit, there's a reason it's in there. There is a threshold showing under 513 for the judge to do the in camera review. I think it's 513e requires that there is the hearing, and there's the recent adding of what we call the clinic factors, where the military borrowed from Wisconsin court the question of when do you actually order production of something that is privileged just for the in camera review?

In like 412, 412 is not an *ex parte* secret hearing. It is closed to the public, but the trial participants are there, and if you are going to evaluate whether the trial judge messed up the 412, you have got to be able to look at it.

So that's what we're all paranoid

about, so what you're hearing from the defense bar here at the table is the concern that someone will try to say, based on these things, that there is like an additional hurdle at the threshold or additional fights just to -- just to look at the record, to review it on behalf of our clients and see if there is a basis for a challenge.

But there already exists -- exactly, I think your initial question hit exactly what exists already as a matter of law, it is just not very commonly enacted, which brings up the other point, then. With the Article 70 change, if you create a statutory entitlement to government-provided counsel, then of course it is much more likely people will actually try -- you know, show up with this. And my question is who actually should get this, right? Who should -- what class of people should be protected?

If someone shoplifts at Walmart, I don't approve of that and I think that Walmart has a right to protect their property, but I am

not really that worried about Walmart getting the victims' counsel, to be blunt. I am not picking on Walmart, just pick a large institution of some kind. So it's not the corporate victims that concern me. I think if we're dealing with the victims of crimes against the person, if they have appointed counsel, maybe we serve them notice in certain cases of the pleadings. It's not logistically difficult, but it would be tied to these -- what are actually traditional, longstanding rights that -- that exist for reasons of justice. We're just concerned about casting that net so broadly that it has unintended consequences.

CHAIR HOLTZMAN: Professor Taylor.

PROF. TAYLOR: So first of all, we're close to the end of this Panel, so I'll just have a couple of quick questions, but thank you all for your service. This is a very important function that you are performing, and we deeply appreciate what you're doing.

We have heard different formulations

on how to deal with this 1103A issue regarding access to information, and my question is would it impact the ability that you now have to represent your clients if there were some minor restrictions imposed along the lines that you've already heard described this morning and some of you have already adopted? In other words, can there be a way to provide greater protection, greater -- fewer access without impairing your ability to protect your clients?

MR. MIZER: I don't believe so, sir. I think 1103A strikes the appropriate balance. As I've described, that process is very much like a CICA process. We have to be able to --

CHAIR HOLTZMAN: Why don't you just identify what 1103A is.

MR. MIZER: 1103A, my apologies, ma'am, is RCM 1103A, and it is a rule for court-martial that was enacted by President Bush in 2005, and it governs access and disclosure of sealed materials. 1103A --

(Simultaneous speaking.)

CHAIR HOLTZMAN: -- the -- the medical records on appeal.

MR. MIZER: That is right --

CHAIR HOLTZMAN: Okay.

MR. MIZER: -- ma'am.

CHAIR HOLTZMAN: Right --

MR. MIZER: So --

CHAIR HOLTZMAN: -- okay, that is fine.

MR. MIZER: -- 1103A gets -- gets us the access to the documents, which then can trigger standing so we can litigate the substantive issues, and I think that Colonel Carrier is absolutely right that ***LMR*** says that there is standing, but we have to be able to have access to those records to argue that there is an issue that the military judge abused his discretion in not allowing the 412 questioning, not releasing the 513 records.

I don't know how you do this without the defense counsel having access and satisfy due process. That is my concern, sir.

PROF. TAYLOR: Did anyone else have any thoughts on that?

LCDR CARRIER: Sir, just to agree, I think 1103 is actually quite strict. I think it's strict as it is. Maybe I'm just not aware of the news, but I didn't know that there's a problem with spillage in the Services. I am not aware of a problem in the Army with the spillage --

PROF. TAYLOR: Well, I mean, I say that because it is clear that every Service has figured out some way within your own rules on how to deal with it in terms of you go into a room, someone has described it as a room that looks like a SCIF, secure information, you know, you can't make copies. I mean, there clearly is a lot of care and attention being paid to this, and so my question is is it about right, or do we need to do something different?

CAPT HOUSE: Sir, looking a little bit at this from the VLC side a couple years ago, I think there's just a -- there's always going to

be a fundamental conflict with a victim's basic desire not to have people know this stuff, conflicted with the -- particularly at the appellate level, and even at the trial level -- whether or not that information is critical to a zealous and effective defense for our Sailor or Marine.

So I don't know that we will ever come up with measures that will solve that very personal, intense, very natural desire not to have people know something that that victim doesn't want them to know. I feel that we do as good as we can to try to -- I mean, we treat this like classified information, really, and this information is personally identifiable and generally very private healthcare information, so we already have all of those restrictions and requirements that go along with that information.

And I think we -- I would agree with my colleagues that forcing us to go through some type of other hearing or other proceeding to even look at this information, the military judge --

excuse me, the appellate judge is going to see the information. That information is still going to be discussed and viewed by people, so we can never -- unless we just want to eliminate a defendant's right to appeal matters under 513, which I think you may as well -- we can start shutting down courts-martial, I don't think we will ever scratch -- and that's a bad -- we will never satisfy victims' basic personal violation sense, perhaps, unless -- unless we just do a better job of explaining to victims how we do this.

You know, they are aware -- I mean, I get the sense -- and I have seen it from the defense, I am from the victim side -- there is this sense I think sometimes that this is like a coffee book that's sitting out on a table, everybody can take a look at it. That's not the way it is. It's like it is child pornography. I mean, we -- we don't look at it unless we need to look at it. We look at it under a controlled circumstance, and we don't keep our hands on it

either. We get rid of it as soon as this case is no longer being processed.

So I think we're doing the best we can under the circumstances, and I am not sure we can come up with a provision where we can satisfy that concern for a victim without undermining the defense.

PROF. TAYLOR: Okay. So a second question goes back to something Admiral Tracey asked, and it also came up this morning: there sometimes is a sense in this issue of fundamental fairness that if you give the victim -- the victims' legal counsel more rights, then it is like two against one. It tilts the system in favor of the prosecution and the victim in a way that is not good for your clients. And my question is, how do you feel about that? We hear this question about the fundamental fairness, you know, it's not fair, they've got two against one. What do you think about that?

MAJ SHURE: Sir, I would say -- and this is just an observation -- the Air Force

tends to -- a lot of times government has sometimes five, upwards of ten attorneys on a particular appeal, whereas it is just one of us, and then in the filings from the special victims' counsels that we've seen, there are upwards of five attorneys on those appeals, and so it is sometimes a feeling of, there's 15 people over here arguing one point, and then just me.

Obviously, I have the backing of my office, but I am it, I am the client's representation, and so there is that perception. Now, I feel very confident that I can take that on, and I -- you know, I think that the -- the Air Force has put that trust in me, but I would say that even -- even for my clients, I -- I hear that, that they have all these attorneys, and it is just you.

Sometimes I am combating that, you know. I have to build myself up in order for them to convince me.

(Laughter.)

CHAIR HOLTZMAN: But you still win

those cases 10 to 1, huh?

(Laughter.)

MAJ SHURE: I wouldn't go that far.

(Laughter.)

CHAIR HOLTZMAN: Okay. Well, that -- that -- I mean, I think that that is an important question that was just asked. I mean, how do we mitigate the -- the appearance here, because I think there is an issue of respect for the criminal justice -- the military justice system that is really important. It is important for morale, it is important for discipline people don't think that the system is stacked against the ordinary enlisted person. It's a problem, so I think there is a -- there is an importance in having the perception clear that the whole system isn't stacked against defendants.

So I don't know if you have any thoughts about what can be done in terms of the appellate issues that we're discussing here, because if the legislation gets through, it will be perceived as a new right, okay, a new,

important, enhanced right for victims. So how does one still establish that this is not going to undermine basic fairness in defendants' rights? Do you have any thoughts about that? I mean, I -- it's a kind of PR issue, but it's a substance issue, so Commander?

LCDR MEYER: If I may, having been a prosecutor of military sex assault and now a defense lawyer of military sex assault and tried these cases, I can say without hesitation that it is more than a perception. There really is more resources dedicated to prosecuting than to defending.

And the solace that I get now is that I have a fair system with an impartial judge to whom I can make my arguments, and a system that recognizes the limits of the ever-expanding field of victim involvement. As long as the victim appellate rights are narrowly tailored to their real interests, that is, that they not become parties, but they remain parties in interest when there's an identified interest, I think that goes

a long way to rebalancing the scales. Thank you.

CHAIR HOLTZMAN: Anyone else?

MAJ SHURE: I'm coming up to five years in defense work, which in the Air Force is a long time, and I will say that I sometimes feel that perception or reality, frankly, that it is -- the system is stacked against me. I -- I gracefully, you know, say all the time I really appreciate the government paying me to fight them, but I --

(Laughter.)

MAJ SHURE: -- it is -- it is that -- that -- it does feel that way at times. However, I have felt much more at the appellate level an even playing field, so I would say I think, to echo Mr. Mizer's comments, there is a balance at the appellate level that I think may not exist at the trial level, or may not feel or be perceived to exist.

CHAIR HOLTZMAN: Okay. Let me just ask one other question, just playing devil's advocate here, and in part because I myself am

not fully reconciled to the -- to this outcome, and that goes to the 513 question on appeal: so why is it so important to have access to the actual health records on appeal -- on appeal, when that is not in existence at the trial level?

How do you tell the -- let's say someone says, well, why -- if it's so important to have actual -- have the defense counsel look at these records, why isn't it important at the trial level? So if it's not important at the trial level, why is it important at the appellate level, when particularly, you've got three impartial judges looking at it? So what's the answer to that?

MR. MIZER: And ma'am, I think that the answer is this, and you heard some of this --

CHAIR HOLTZMAN: And I'm just asking because I am trying to grope for an answer here, and I think I want to understand what the rationale is.

MR. MIZER: You've heard a little bit more this morning with respect to the military

judges about the level of experience of these judges --

CHAIR HOLTZMAN: Right.

MR. MIZER: -- so you're talking about judges that are judges for two or three years. Admiral Reismeier actually helped robe me at the 58th Military Judges' Course two years ago, so I mean all respect to military judges, but they don't have tenure.

The Supreme Court in *Weiss* v. United States has held that they are essentially at-will employees of the Judge Advocates General, so they have this -- this two- or three-year term at the trial level, and at the appellate level, maybe you have more senior appellate judges doing that on -- on -- for the exact same period.

You already have, by the very nature of this system, given away many rights that civilians have: the right to grand jury indictment, the right to a jury selected at random, the prosecutor or the individual that is exercising prosecutorial discretion in this

system handpicks the members. You can be convicted by a panel as little as five members and by a non-unanimous verdict.

And so dealing with perception, larding in now pure *ex parte* proceedings where the rules haven't changed. The rules have been the same since 2005, where every SVC should be saying that you're going to go in, and if we beat this and keep this out of the trial level, that's not the end of the fight. There's going to be a very narrow piercing of those records at the appellate level by very senior attorneys and judges, and they're going to determine whether the judge got it wrong in that sealing, and so that's what I think we're up against is due process. That is why I think 1103A, ma'am, strikes the balance of protecting the privacy and also the defendant's due process rights.

CHAIR HOLTZMAN: Anybody else want to add anything?

CAPT HOUSE: It matters, ma'am, because being able to discuss and potentially

provide the information in those records to the members may impact whether or not the defendant is actually acquitted or found guilty or what type of punishment that Sailor or Marine gets, so if we have an issue in a case and it has come up on appeal and there are sealed records, this has clearly been an issue that has been at court: should the defense be able, not only to see these records, but to be able to use those records in court to effectively defend a Sailor or Marine or an Airman or a Solider?

So if we can't access those rights to determine whether or not a military judge who may not have a lot of experience made the right call, then we've effectively taken away what might have been a very important fact for the defense counsel and the defendant for the members to hear or to consider as to whether or not the person is actually guilty or what type of punishment they might get.

MAJ SHURE: I would add, ma'am, that Mr. Mizer said this recently in our training. We

had a large turnover in our office this summer, and so we spent a few days talking to the new counsel about the difference between our trial and appellate practice.

At trial, the judge, all the counsel, they are rapid fire. They don't have time to make -- to think through decisions at a large scope. I have seen more times than I can count developments throughout the trial that initially, when the judge made their ruling, maybe the records weren't relevant, but subsequently, in statements that came out, if the judge forgets or the counsel forgets or something else happens and nobody revisits the issue, then it becomes relevant, and me, the appellate defense, I have all the time in the world to take a look at this from a large-scale perspective.

So I see the whole trial. I see everything that is relevant to my client, everything that is relevant to the defense, to the trial strategies, to those decisions, and we are there, and that's exactly what Mr. Mizer

said, we are grading that homework from a much larger level than you have when you are rapid fire at the trial.

CHAIR HOLTZMAN: What -- I am sorry, just sort of one final question. I appreciate that answer. I just want to look at the language of the Statute for one second, the proposed 547.

I guess what all of you are saying, and I don't mean to put words in your mouth, but if I understand what you're saying, all of you are agreeing that right now, under existing law, victims have certain appellate rights to protect their specific interests such as in 412, 514, 513, and you're not opposed to that. Okay. It's the law anyway, so --

(Laughter.)

CHAIR HOLTZMAN: -- all right. But my question is you have concerns about 547 as drafted because you think it may go beyond that. Captain, you're shaking your head. You don't have concerns about --

CAPT HOUSE: Well, I may have the

wrong version. The version I have only cites 412, 513, and 514.

CHAIR HOLTZMAN: So you have no other problem with this -- you don't have a problem with the language of that?

CAPT HOUSE: Not with subparagraph 2 ma'am, no.

CHAIR HOLTZMAN: Oh, I know, but I am talking about the whole kit and caboodle.

CAPT HOUSE: Well, I think, you know, it goes -- paragraph 3 talking about who is a victim is going to be -- that a lot of discussion will have to go into that, and who is going to get this --

CHAIR HOLTZMAN: So --

CAPT HOUSE: -- counsel --

CHAIR HOLTZMAN: -- are you satisfied with 3? Are you satisfied with point (f), subparagraph (f)? Are you satisfied with (a)? I mean, maybe we don't have time to discuss this now, but I would really appreciate if you have specific statutory recommendations --

CAPT HOUSE: Okay.

CHAIR HOLTZMAN: -- okay, to let us know what they are.

VADM TRACEY: On the Senate version.

CHAIR HOLTZMAN: On the Senate version, yes, because that is what could become law.

CAPT HOUSE: Yes ma'am.

CHAIR HOLTZMAN: So we would appreciate that, and with an explanation as to why you think this language needs to be changed. That would be very helpful.

CAPT HOUSE: Yes ma'am.

CHAIR HOLTZMAN: And probably sooner rather than later is better because, you know, sometimes it's a moving train, and I have no idea when it's going to get into the station, so I just want to say unless anybody has --

MR. STONE: I have a question, yes.

CHAIR HOLTZMAN: Okay.

MR. STONE: I have a few questions. I want to stay with 1103A --

CHAIR HOLTZMAN: Well, you can't because we're supposed to be finished already, so just --

MR. STONE: Well --

CHAIR HOLTZMAN: -- take one.

MR. STONE: We'll make them quick. With 1103A right now, the way it functions, the victim doesn't get to -- to see your motion to see the access records. Maybe they will get to argue after you've seen them and you file a pleading.

The issue is whether they should be served notice before you get those records and have a chance to tell the Court it shouldn't give you the records, and I'll give you an example from my practice that's a real example, that the judge at the trial level said to the defense counsel, no, you don't get the psychological records of three years before when this person who is now an adult was a young teenager, and the judge didn't go on, but the teenager did crazy stuff like had suicidal thoughts back then.

And the teenager, the person now an adult, was very embarrassed by that, didn't want that to come out because they had left that all behind, had a regular job, had a normal life now, and it's even possible that that happened when they were on drugs. I have no idea. But -- but they were totally embarrassed that way back, they had suicidal inclinations.

Judge said, it doesn't have anything to do with the crime three years later, I'm not giving you the records. Now on appeal, you would want to say, wait, we want access to that. And what I am suggesting is 1103A is deficient because the victim should at least be able to say to the appellate panel, unless they have some plausible connection that they proffer to you between mental health records three years before the crime that are of an entirely different nature, unless they could connect even the time of it in some way, we don't see that they should get access or they should be opened up.

Now, the court could disagree and give

you the records, but at least the victim would have the chance to see your motion and have a chance to respond in the cases where they think you might not get them. Now, you get the records, and the victim still gets to say if they want on appeal, and I think you will agree with that, oh, on this issue, they shouldn't get the records, okay?

Now just to play this out, why I don't think it's doubling up and -- and helping the prosecution, it is my experience, and it was in that case, the prosecution was not -- did not care about those records because the prosecution said, you know, if this goes back on those records, I am going to argue to the judge this was totally irrelevant, it doesn't come in, it makes no difference at all.

So the prosecution was not standing firm because the prosecution's view was you want to send this back, those records, the judge to consider them, fine, I'm going to be arguing they're irrelevant, but the victim cared very

much because the victim said I will be so embarrassed when this comes out that frankly, I will want nothing to do -- I am not going to show up for that trial.

So the victim's interest does not always align with the -- the prosecution, and that is -- and so that is why I think 1103 doesn't go far enough now, not that it gives you the -- if it stays that way, it would give you access, but that it doesn't give the victim notice to say if they have a good reason why you shouldn't get access that there is no possible way it's relevant. Does that trouble any of you?

LCDR CARRIER: Well, so the way 513 is currently written -- I am sorry, Military Rule of Evidence 513, now requires the military judge before ordering production and therefore receiving these records, examining them in camera, and making them part of the record, there has to be a showing of potential relevance. Something like you described where the -- where there is obviously no relevance, the school

solution, sort of the -- the -- what we'd hope in the world properly happening is that those irrelevant records never become part of the record anyway.

So what becomes part of the record is something that at least there was that threshold showing, judge reviewed it in camera, and now we want to question whether that --

MR. STONE: I know, but --

LCDR CARRIER: -- ruling is correct.

MR. STONE: -- lawyers disagree about what's relevant all the time. That's what lawyers disagree about.

LCDR CARRIER: But sir --

MR. STONE: And all I am saying is they should have a right to be heard. They don't have to be right, they don't have to -- the ruling doesn't have to go that way, but they simply have the right to know about the pleading and file it. That is all I am saying.

LCDR CARRIER: Well, the more extreme the -- the example, or the hypo, the less likely

it is it would be part of the record and actually be part of our appellate --

MR. STONE: Oh --

LCDR CARRIER: -- access.

MR. STONE: Right, you don't think -- you think my hypo is extreme, but the judge ordered those records to be turned over, and we had to go to the Maryland high court, who had to issue a mandamus to the judge on the day of trial that said before you turn those over, you better write a reason and send it to us, and then he backed out because he knew there was no reason he could do it. All I'm saying is that that is the one out of 1,000. I'm not saying we face it all the time, but the victims would like that situation.

And in terms of the burden that was mentioned before about the practical burden, I presume your concerns would be met if it would -- there was a clear schedule so that after you filed your opening defense brief, the victim had to file his brief at the same time as the

government so it didn't delay the processing of it, and that you would be entitled in your reply brief to have as many pages of a reply to respond to the victim if you wanted on their issues separately than the government so you didn't feel like you were denied. Would that meet your concerns?

MAJ SHURE: I'll -- potentially yes, sir.

MR. STONE: Okay. That's what I wanted to know.

CHAIR HOLTZMAN: It depends.

MAJ SHURE: Yes ma'am.

(Laughter.)

CHAIR HOLTZMAN: Okay. Thank you very much, again, for your testimony, and we would really welcome any thoughts you have about the specific language. Thank you very much, again. We'll adjourn for about a five-minute break.

CAPT TIDESWELL: Ma'am, next is lunch.

CHAIR HOLTZMAN: Then we have our last panel.

(Whereupon, the meeting went off the record at 2:48 p.m. and resumed at 3:01 p.m.)

CHAIR HOLTZMAN: I guess -- are our other panelists here? We have the wrong names up there.

CAPT TIDESWELL: Yes, ma'am. Mr. Bruce is coming in telephonically.

CHAIR HOLTZMAN: Yes, I know but we don't have Lieutenant Colonel Carrier. We had him once. I don't think so.

All right, well, we will begin with what we have. That's it. If somebody's missing, we will get to them later.

Okay, the next panel will begin -- I'm sorry it is a little late -- dealing with the Government Appellate Division's perspective on victims' appellate rights. We have Major Anne Hsieh -- okay, thank you -- U.S. Army Senior Appellate Attorney and Branch Chief.

Is Mr. Roger Bruce here?

Maj STEER: He's on the phone, ma'am.

CHAIR HOLTZMAN: Okay, do we have a

name tag for you, sir? Okay.

We have Major Meredith Steer, U.S. Air Force Appellate Government Counsel, Mr. Brian Keller, U.S. Navy-Marine Corps Appellate Government Division, Supervisory Appellate Counsel, Lieutenant Commander Tereza Ohley, U.S. Coast Guard Appellate Government Counsel.

LT OHLEY: I'm a lieutenant now.

CHAIR HOLTZMAN: Lieutenant Commander, I apologize. Oh, just a lieutenant.

LT OHLEY: Yes, ma'am.

CHAIR HOLTZMAN: Okay, sorry. Well, I guess you should be sorry.

And this gentleman who is sitting here is?

LT MILLER: Lieutenant Robert Miller. I work with Mr. Keller at the Navy-Marine Corps Appellate Review.

CHAIR HOLTZMAN: Okay. So, we will begin with Major Anne Hsieh. Welcome.

Let me just say I welcome all the Panel Members and really appreciate your

willingness to spend some time with us and to educate us and give us the benefit of your thoughts and advice.

Major.

MAJ HSIEH: Thank you.

CHAIR HOLTZMAN: Oh, I didn't say that. He's not here in person? Oh, I thought when you said he was on the phone that he was outside on the phone having a conversation.

Where is the phone mechanism for him? Do you know where it is?

CAPT TIDESWELL: The controls are behind you, ma'am.

CHAIR HOLTZMAN: Okay, Major Hsieh.

MAJ HSIEH: So, my name is Major Anne Hsieh. I currently serve as a Branch Chief at the U.S. Army Government Appellate Division.

First, I just want to preface that my comments are my own personal opinion. They are not intended to express the official view of the Judge Advocate General or the U.S. Army.

Now, I have reviewed Section 547 in

the proposed changes to certain articles in the UCMJ, as well as the concerns from the concerns from the SVCs that prompted this proposal. I am prepared to answer your questions today as well as I can.

I do want to say that because there is very little legal precedent for these proposed changes, our office has not historically dealt with many victim appellate pleadings. My comments are going to focus more on our current practice and how we address the victim concerns, as well as the potential implications of this proposal that we can foresee at this time.

CHAIR HOLTZMAN: If you wouldn't mind focusing mostly on the proposals, that would be really helpful to us because -- but okay. Continue with the testimony as you had prepared it. That's fine.

MAJ HSIEH: So, I think the first topic was the victims' privacy concerns regarding appellate review. I wasn't here for most of the hearing today but I did catch some of it.

And so Article 66 appeals require review of the entire record. I'm sure you have already seen that. So, currently, if they are part of the record, we are authorized to review those. There is generally a presumption that if they are attached to the record, that those materials were already subject to the relevant evidentiary rules and that process that is involved and so, properly admitted.

And so once they become part of the record, if they are sealed materials, they are protected from the public view, even though on the appellate level, they are kept with the original record of the court and there is a process, I am sure you have already heard discussed, that we go through in order to view them, if we need to in the course of our work.

Now, in some cases, we have had appellants move to attach privileged materials that were not attached to the record. And so this is a different issue where I think I heard one of the last panel members talk about Brady

violations, for example, being alleged. And so sometimes, you will see appellants try to file a motion to attach and somehow they have acquired these privileged records. I have only seen it in a couple instances, not very often. But usually when that happens, we make a motion to seal those items immediately, if the court doesn't do it sua sponte. And also, typically, we also oppose their attachment under the relevant appellate discovery rules.

CHAIR HOLTZMAN: What kinds of privileged material would be attached, for example? I'm not following you.

MAJ HSIEH: I have seen in one case where a defense counsel moved to attach mental health records of a victim and that was very problematic.

CHAIR HOLTZMAN: Okay, so this is Brady material that was excluded?

MAJ HSIEH: Yes. I think it was actually -- I forget what the error alleged was. I think it may have been the sensing evidence or

something. But they said that this was necessary and they somehow acquired it I think through maybe basic -- I'm actually not sure how they acquired it but they moved to attach and we opposed it.

In my experience, the court, ACCA, is very sensitive to victim privacy concerns. And so it takes care to follow our own internal rules in sealing those materials. And usually these motions to attach are denied or motions to disclose. Sometimes they ask for appellate discovery. They want us to go and seek out more things on appeal and we will usually oppose those sort of motions, too.

And so in my experience, the court understands the case law and the rules that are in place and usually they are not appropriate or necessary on appeal.

However, in regards to what is already in the record, our perspective is that they have been -- they have gone through -- they have been vetted through a process and they are properly in

the record for a certain reason. And so that balancing test that the rules, when you look at 513 or 412 and these other rules and the way that they are crafted to strike at that balance between victim privacy and due process and so forth, it has already gone through that process. And so when they are in the record, they are appropriate for, I would say, both the Government for the review of these parties who are trying to litigate an issue on appeal.

Now, to move on to kind of the latest provisions in Section 547, it is about providing victims notice of any appellate matters. I would agree that notice is very important of appellate matters that do implicate victims' rights. And so some examples of these might be appeals, which raise errors with the MRE 412 or 513 rulings or, like I previously mentioned, those motions to attach privileged materials because of some other error.

There are concerns with providing notice of all appellate matters because, in

practice, most of the appeals that we see don't actually have any direct implication on victims' rights. And so I think trying to find at what point how we define what implicates victims' rights and really how we practically give notice of any appellate matters in cases where there is often multiple victims and different sorts of crimes and so forth, is something that can be a challenge.

I think it is also important that notice is accomplished in a way that is efficient and doesn't create an extraneous or unmanageable burden on the Government. I think I heard this discussed earlier but ACCA has not yet moved to an e-filing system. We are hoping that we get there soon but everything currently is hand-served. That has been my experience in the last three years in the Government Appellate Division. And so if this law now requires you to serve every matter on every victim directly in every case, that would be quite a burden on our offices.

And just to give some context, the Government Appellate Division is currently staffed with ten appellate attorneys and two paralegals. And in a single year, we will file around 400 to 500 briefs at ACCA, around 25 to 35 at CAAF, and any single one of those briefs or cases will have a range of different issues, ranging from a single error to I have seen up to 16 to 20 errors alleged. And so it can be, sometimes, very complicated cases.

And like I mentioned before, it gets more complicated when there are cases with you may have a range of different types of victims and multiple victims. And then to figure out where and how to serve them can be a challenge.

Now, there was a proposal I heard earlier about notice automatically occurring when you serve these filings on maybe like an SVC appellate office. So, just like we serve on the Defense Appellate Division and Civilian Defense Counsel, maybe there is like an automatic -- you know they have notice of there has been a

pleading filed. I think that would relieve the burden greatly.

To move into the victim participation on direct appeal, again, this is something that is unprecedented so our office has not previously experienced victim filings on direct appeal. We have seen a couple writs here and there on interlocutory issues. So, the provision, I think, raises several questions and it will be interesting to see how this is going to be interpreted.

Again, most assigned errors that we see don't pertain to just MRE 412, 513, 514, which is one way I think to read this provision is that the victim only has a right to file when those rights are directly implicated.

I think there is questions if you have, for example, like a factual legal sufficiency error. So, they are saying well, the evidence is not sufficient for the conviction of guilt, based off of a review of 412 evidence, for example. At that point, does the victim also

have standing to file a pleading under the Statute or does it not. And I think those are questions that we are going to need to wrestle with and figure out based off of the way that this is written.

Another potential question that I would have is we have seen the court, because it has very broad Article 66 powers. It is very unique and different from most other appellate courts, so it can do a lot of things on its own and so if it decides to, grant relief -- and I have seen this before -- for an issue that was not raised by appellant.

So, let's say appellant just raises like a normal post-trial delay issue and the court says you know we saw a problem with, I don't know, a 513 ruling or something, and they decide to grant some relief in light of that error, at that point, we don't have a chance, as the Government, to -- we have already filed in regards to the raised error. Obviously, the appeal has already been filed, too. Does the

victim, at that point, have a chance and what is their opportunity they have to say something about that?

I think probably the final thing that I will talk about is there is a question about a right to appeal interlocutory issues at CAAF. And I think this emerges from the most recent CAAF case, *E.V.* v. U.S. and *Martinez*. I don't know, looking at 547 on its face, if it directly addresses the concern that was in *Martinez*, which is basically Congress spoke with Article 60 and gave the CCAs jurisdiction but expressly left out CAAF. And that is basically what CAAF said. The opinion says Congress, having legislated in this area, have bestowed certain third party rights on alleged victims. We must be guided by the choice the Congress has made. Congress certainly could have provided for further judicial review in this novel situation. It did not.

And there is nothing actually in this provision that actually mentions CAAF expressly. And so I mean there is other ways to interpret it

because Article 67 is in there to find room for jurisdiction but it is not expressly in there.

In general --

CHAIR HOLTZMAN: Well, do you agree with that?

MAJ HSIEH: Well, I think that --

CHAIR HOLTZMAN: Should 547 explicitly include *Martinez*, the ruling in *Martinez*?

MAJ HSIEH: I think that is one way to address it is to actually put an express provision that also grants further appeal to CAAF, instead of making -- what the Statute looks like right now is that or the way that CAAF has interpreted the Statute is that the CCAs are the final court on that issue.

CHAIR HOLTZMAN: Okay.

MAJ HSIEH: Now, in general, the concerns expressed by the SVCs are understandable and they are important to address in the Government's opinion. But we should, of course, be careful to be precise with the language of the proposed legislation to ensure that it is

appropriately tailored to these concerns and it doesn't result in negative, second or third order of consequences that were, of course, unintended.

I also understand that there are a range of changes that are forthcoming with the Military Justice Act and in different regulatory changes that might address many of these concerns. And so this proposed legislation should be coordinated in that context.

Thank you.

CHAIR HOLTZMAN: Thank you.

Major Meredith Steer.

Maj STEER: Yes, ma'am. Mr. Roger Bruce is going to give a statement on behalf of the Air Force Appellate Government Division.

CHAIR HOLTZMAN: Mr. Bruce.

MR. TREXLER: Could you speak up, maybe? We can't hear you.

CHAIR HOLTZMAN: Mr. Bruce, you are on next. We would like your testimony.

MR. TREXLER: Mr. Bruce, are you still there?

MR. BRUCE: I am.

MR. TREXLER: Okay. We are ready for you. If you have a statement you want to read, go ahead.

MR. BRUCE: Can you hear me okay?

CHAIR HOLTZMAN: Yes.

MR. TREXLER: Yes, sir.

MR. BRUCE: Okay. Good afternoon, Madam Chair and Panel Members. I am Gerald Roger Bruce. Major Speer and I have the privilege of speaking with you about victim participation in the appellate process. We are from the Air Force Appellate Government Division.

I would like to like three main points in addressing the discussion questions presented to us by the JPP Staff.

1) We should not adopt an unprecedented and potentially unconstitutional three-party criminal justice system at the appellate level. Moreover, appellate Section 547 will not solve the problem of the release of a victim's sealed mental health records.

2) Instead, there is a rather simple change to the law that will address and solve the biggest current problem affecting victims in the appellate process. We should, instead, fix Rules for Courts-Martial 1103A which governs appellate review of sealed records, including a victim's sealed medical and mental health records. And this should be done so in a fashion that provides due process to both the victim and the accused.

If we fix RCM Section 1103A, most, if not all, of the problems raised by the SVC community will be solved in a constitutional manner.

3) There already exists an underutilized opportunity for victims to be heard during the direct appellate review process, namely the filing of *amicus* briefs.

The problem -- we should first identify the problem so we can identify the fix. The first two discussion questions proposed by the JPP Staff cut straight to the heart of the matter. (1) Our current rules regarding

appellate counsel access to sealed materials sufficient to protect a victim's privacy interests; and (2) what would be the ideal mechanism to address victim privacy concerns with respect to appellate counsel review of the record of trial without impeding on due process rights of the accused?

Simply put, the current rules are not sufficient to protect a victim's privacy interest. But changing RCM 1103A to require Courts of Criminal Appeals to first conduct their own in camera review of a victim's medical and mental health records that were reviewed at trial in camera by a military judge before the appellate court could permit appellate counsel to review the records is a solution we want to propose today.

The gist of the RCM 1103A problem is that military judges, as a general rule, all properly conduct an in camera review of the victim's mental health records at trial. In many instances, the military judge concludes the

records are not relevant to the issues at trial, refuses to release them to either the trial defense counsel or the prosecutor, and orders them sealed and attached to the record of trial. Then, the record of trial comes up on appellate review with the sealed records attached.

The appellate defense counsel requests to review those sealed records the military judge found to be irrelevant and not releasable by merely citing to RCM 1103A. RCM 1103A provides that appellate defense counsel and appellate government counsel, among others, are "reviewing and appellate authorities" entitled to the review of the sealed material. The CCA follows the plain language of 1103A and grants the appellate attorney access to those irrelevant records. Therefore, appellate government counsel had vigorously opposed these requests from appellate defense counsel for access to victim's sealed and irrelevant records for a year in dozens of cases, all without success.

We have cited to older CMA and CAAF

case law that would require the CCA to conduct their own in camera review of the military judge's in camera review at trial to determine if the trial judge ruled correctly or not. Our CCA has declined to conduct an in camera review and determined that the plain language of RCM 1103A superseded the older case law.

Our office also filed five petitions for extraordinary relief at CAAF this year, asking CAAF to order the CCA to conduct an in camera review to determine if the trial judge properly refused to release the victims' records before releasing those same records to the appellate counsel. CAAF summarily denied all five of our petitions, no doubt, because of the clear language of RCM 1103A.

Question two asks for the ideal mechanism to fix this concern. If we fix RCM 1103A, we will address and solve some of the victim notification concerns that have been raised. RCM 1103A wipes away victim privacy concerns by declaring appellate defense counsel

and appellate government counsel are entitled to review those mental health records the judge found to be irrelevant. RCM 1103A should be amended to require the CCA to conduct their own in camera review of the sealed records to determine if the military judge abused his or her discretion in refusing to release the records.

If a CCA determines that the judge did not commit an abuse of discretion in refusing to release the records, the CCA would order the records to remain sealed and be attached to the record of trial. The accused could then seek further appellate review of that decision at CAAF and CAAF should be required by the same amendment to RCM 1103A to conduct its own in camera review to determine if the military judge and the CCA abused their discretion in refusing to disclose the sealed records.

On the other hand, if after conducting its in camera review a CCA determines the military judge abused his or her discretion in refusing to release the sealed records at trial,

the CCA would be required by the amended RCM to notify the victim, the appellate defense counsel, and the appellate government counsel, and provide all an opportunity to be heard before releasing the records. Such a procedure would provide due process to all, an opportunity to be heard, without creating an unprecedented, unmanageable, and possibly unconstitutional three-party legal system.

The same notification and opportunity to be heard prior to release should be required in the RCM to apply to CAAF.

CHAIR HOLTZMAN: Does that conclude your --

MR. BRUCE: Questions one and two of Part 2 of the JPP questions address due process concerns of a quote, "real party in interest" status to victims to file pleadings during direct appellate review. Real party in interest is an appellate term of art borrowed from petitions for extraordinary relief that is inapplicable to the direct appellate review, as confusingly proposed

by Section 547.

LMR v. Kastenberg provides a good illustration. *LMR* was not a direct appellate review case. It is an interlocutory appeal brought by a victim as a petition for extraordinary relief. The accused in that case, named Daniels, was in fact a real party in interest because he was, obviously, a party to the court-martial, as he was being prosecuted. Daniels was permitted, as a real party in interest, to file a brief in that victim's interlocutory appeal under the All Writs Act.

Section 547 refuses to place real party of interest status used in petitions for extraordinary relief by incongruently trying to apply to direct appeal. As noted above, yes, Section 537 poses due process concerns by creating an unprecedented three-party criminal appellate system in which two of the parties are aligned against one accused. It is not hard to imagine the trial court finding a due process concern with such an unbalanced appellate legal

system not found elsewhere in the United States. Future sexual assault convictions could be jeopardized by such a system, a system that is not rooted in RCM 1103A but also creating a three-party system that certainly prolongs the appellate process and likely undermines an accused's due process rights of timely appellate review.

If untimely appellate review occurs, appellate courts would grant relief, which could jeopardize convictions and sentences.

Question three in Part 2 asked if victims should be alternatively allowed to file *amicus* briefs during the appeal. Yes, they should and the rules of both CAAF and the CCAs currently permit them to file *amicus* briefs and both courts have accepted them, especially in the early stages of the SVC program, our office encourages victims and their SVCs to file *amicus* briefs.

The Air Force Corps specifically invited the victim and her counsel in the United

States v. O'Shaughnessy to file an amicus brief, after the CCA concluded the victim was not a party. We are going to attach a copy of the CCA's order in that case.

Unfortunately, the victim in that case did not file an amicus brief but, instead, sought to litigate the question of a victim status as a party. Amicus briefs by victims are an underutilized opportunity for a victim to be heard.

Part 3 addresses the lack of CAAF jurisdiction to review Article 6b interlocutory appeals filed by a victim as set forth in ***E.V.*** v. ***Martinez***.

Section 547 confuses the reciprocity of petitions for extraordinary relief. The first Section 547 does not fit the lack of jurisdiction gap found in ***E.V.*** In fact, the court expressly applied it to direct appellate review, which is Article 66 and 67 of the UCMJ. That has a very literal appellate perspective, especially when it comes to jurisdiction.

And we can expect the CAAF to once again hold that they have no jurisdiction to review a victim's writ appeal filed under Article 6b if Section 547 is adopted.

If the intent of Section 547 is to remedy the lack of jurisdiction in the review of a case, in my opinion, it does not accomplish that objective.

Question two asks if a victim should be permitted to appeal after an interlocutory review by the CCA Staff. And if so, does Section 547 provide this route?

CAAF has statutory authority to review virtually all other CCA decisions but there is no good reason why CAAF should not also have authority to review a victim's interlocutory appeal of a CCA decision under Article 6b. But as I mentioned, Section 547 does not provide that jurisdiction as presently drafted.

In conclusion, fixing RCM 1103A in a manner that would require notifications to a victim and his or her counsel before a CCA could

release sealed mental health records that were not released at trial and provide an opportunity to the victim, the accused, and the United States before a CCA could release previously rendered privileged material would solve most, if not all, of the victim notification problems we have experienced and it would do so in a manner that provides due process to all.

Thank you for the opportunity to address the panel.

CHAIR HOLTZMAN: Thank you, Mr. Bruce.

Our next presenter will be Brian Keller. You are with --

Maj STEER: Ma'am, I am with Mr. Bruce.

CHAIR HOLTZMAN: Okay, so the three of you are a team?

Maj STEER: No, ma'am.

CHAIR HOLTZMAN: Mr. Keller --

MR. KELLER: Did you have one to do?

CHAIR HOLTZMAN: -- you are with the Marine Corps. Is that correct?

Maj STEER: I was just going to note the fact that Mr. Bruce and I, of course, are expressing our own personal opinions and not the views of the Air Force.

CHAIR HOLTZMAN: We understand.

MR. KELLER: I would like to echo that, ma'am. My name is Brian Keller.

CHAIR HOLTZMAN: Okay, right.

MR. KELLER: And I am the Supervisory Appellate Counsel for the Navy-Marine Corps. And please interrupt me if I am less than clear. I may be less than clear but I will try my best to be helpful.

I would like to start by saying I think there are three underlying swaths of concern that my office -- or that I see. I am testifying in my personal capacity.

One is that when the CVRA was carried over to the military, it was diluted into 6b. So, there were parts taken out of it and I think that that is the cause of some of the issues today. I will get back to that.

The second one is that there are problems with the sealing rules. I agree vociferously with what my colleague and friend, Mr. Bruce just told you.

And third, I think that there is an issue with reconciling. And I think this has been in the letter that Mr. Koffsky, if I am saying his name correctly -- there was an issue with the notice and access provisions of 547 with the NDAA.

So, specifically, I am going to be talking about four things. One is that Section 547 is a great shot at trying to fix some of 6b's deficiencies but it is the wrong tool. And I will talk about that.

Second, the current proposal to see most pleadings needs to be reconciled. It is duplicative and should be reconciled with the NDAA 2017. And I will talk about that.

Third, is that the sealing rules do need to be fixed. Despite what I heard testified to earlier today, I think that there is an issue

with the fact -- I will get back to that. I think there is an issue with the fact that people on the appellate level can see things that were sealed to everybody else at the trial level. It, again, indicates distrust in what the judges are doing to say that we get to double-check their work at the appellate level and not trust their sealing order.

And fourth, I think that the real party in interest issue misses that the ultimate problem here is jurisdiction. And I think that Colonel Carrier mentioned that. I think that Mr. Bruce may have mentioned that. I think that it has been said before. The real issue is that jurisdiction is just not given to address these problems at the appellate level. I understand you can do it with amicus briefs and I will come back to that but I think the problem gets back to the CVRA being diluted.

So first of all, why is this important to us? Well, it is important to my office or to the attorneys that work with me, which is ten

attorneys and myself, because I don't have stats like Mr. Bruce does but we see this numerous times throughout the year and every year. First of all, we have cases that the CCA publishes. There is one specific case in Tso, T-S-O, where we believe that the CCA republished materials that shouldn't have been published and we moved the court to fix that. And we couldn't correct that at the CAAF level. But this happens all the time and if the victim was able to take action, then that would be somebody else in the process that could get that going. And I will come back to this.

The second issue is there is a case Barry, where the defense filed sealed materials in an unsealed manner. And we repeatedly have to file motions to make sure that those sealed materials are actually sealed. And if the victim was getting copies of these things, then they could also take action if they had jurisdiction at the CCA to do so and I understand they can do so with amicus briefs but there may be a

different route.

Third, I know I as a counsel, since I first got to Appellate Government in 2005, have gotten calls expressing surprise that a conviction was overturned because they didn't get a copy of the CCA's order. Now, I understand that the different CCAs may be sending copies or requiring copies to be sent but there is no uniform practice on that.

And fourth, defense counsel routinely, and this is the 1103A issue, wants to copy sealed materials or look at sealed materials and they get to do so with impunity because our rules are different than how practice is out in the federal circuit courts. And we have -- and I think that if we align our system more with what the federal circuit courts did as far as sealed materials and different certificates of confidentiality, then that would be more assurances for the victims that their privacy rights were being protected.

So, I would like to go through, hopefully quickly, these four points. The first

issue is 547 being flawed and I think that there are two main problems here. One is that it tries to add a victim as a real party in interest and that is just, as was testified to before and I don't want to be too duplicative, but that is kind of the totality. I mean, either they have standing or they don't have standing at the appellate court.

I think that the problem was that when the CVRA was enacted in the military, two provisions were taken out -- and I hope I am not skipping ahead of myself here. But I think that two provisions were taken out and one is that the courts must, in the CVRA it says that the courts must assure that the victims' rights under the CVRA are protected. And that applies to appellate courts in the federal court system but for us, it doesn't apply to us because that part was stricken. So, we don't really know if it applies at the appellate court level or not and I think that is part of what we are talking about today.

The second thing is when the CVRA was enacted in the military, there was a provision that said that officers engaged in the investigation and the prosecution of offenses shall ensure that the CVRA's rights are given to victims and that part was also stricken. I understand that that part was moved to the implementation section and it was given to the secretaries, I believe, or maybe the JAGs to issue implementing rules and regulations. But as we all know, in appellate practice, if there is no Statute, there is no jurisdiction. So in my view, if there is a Statute that says that the victims' rights must be accorded at the appellate level, it would be much easier for a victim to then go into the CCAs at the CAAF and say I am a real party in interest. I want my rights to be protected. So in my view, that is the first problem with 547. It tries to create a real party in interest without creating jurisdiction.

The second thing, it says the victims --

CHAIR HOLTZMAN: I'm not sure I understand that you are saying. I'm sorry, I'm just not following that.

MR. KELLER: Yes, ma'am.

CHAIR HOLTZMAN: Are you saying that if you just added back the appellate standard in CVRA, that would just solve everything?

MR. KELLER: I do believe, ma'am, that --

CHAIR HOLTZMAN: Do you need to add something on jurisdiction? I'm just not following that.

MR. KELLER: Yes. There are two -- my apologies and thank you for calling me on that. I think that there are two clauses in the CVRA that say that the courts shall afford the victims the rights under the CVRA. And the second provision is that the officers engaged in the investigation and prosecution of crimes shall ensure rights under the CVRA.

And there are actual rights that have an ascertainable person that is responsible for

those rights, like the court, which is what the CVRA says, then it will be very easy for a victim to go into our Courts of Criminal Appeals and to CAAF and say I am a real party in interest; I want you to strike the sealed material from your pleading. You can also --

CHAIR HOLTZMAN: So, I'm just asking you a simple question. Yes or no?

MR. KELLER: Yes.

CHAIR HOLTZMAN: All you have to do is adopt point one -- I don't know that you need point two -- saying that the court shall assure the rights of the victims and that would overrule the *Martinez* or the *E.V.* case as you called *Martinez*?

MR. KELLER: Well, I --

CHAIR HOLTZMAN: Would it overrule this recent decision saying the court doesn't have jurisdiction?

MR. KELLER: I'm not sure that I am saying that. I am saying that --

CHAIR HOLTZMAN: Well, that is what I

am trying to understand.

MR. KELLER: Yes. Right. Yes, ma'am. No, in fact, I know that I am not saying that.

CHAIR HOLTZMAN: Okay.

MR. KELLER: What I am saying is that the issues that I just talked about, which are the problems that my office sees, which is that there are unsealed materials filed, there are opinions with sealed materials in them -- so, and I think before we came up here, Lieutenant Miller put it this way and I think it is the best way to put it: that if issues arise with regard to 6b rights for the first time at the appellate court, then they could file as a real party in interest to say strike that pleading.

CHAIR HOLTZMAN: So, that would be your solution, as opposed to 547? I'm trying to understand what you are advocating here.

MR. KELLER: Well, I am saying that the real party in interest --

CHAIR HOLTZMAN: Is that instead of 547 real party in interest, you would just have

that provision of the Crime Victims' Act.

MR. KELLER: Yes, ma'am.

CHAIR HOLTZMAN: You don't need 547.

MR. KELLER: What I am saying is that provision that talks about real parties in interest does nothing. It doesn't create anything. It just says that you are a real party in interest and you can file pleadings. But if you have no right, then you can't file anything.

So, I think that --

CHAIR HOLTZMAN: Okay but if you are saying that if you just -- so you don't need this 547 provision on real party in interest.

MR. KELLER: Yes, ma'am.

CHAIR HOLTZMAN: You just need the Crime Victims' Act section about courts protecting the rights of victims.

MR. KELLER: I think that if it said that courts shall do their best to protect the rights, then those --

CHAIR HOLTZMAN: Okay. So, I'm just trying to understand what your point is.

MR. KELLER: Yes, ma'am, then the 6b rights could be easily protected without filing an amicus. That is what I'm saying.

MR. STONE: Don't you need the piece that says they have the right to go up on appeal, which is in 3771?

MR. KELLER: Well, I think that if you were to change the structure and if you wanted to do something different than what the feds do, then you would do that. That is not what I am advocating.

I am not saying you need further appeal or that you should be able to go up to CAAF. I'm just saying if you want to be able to address the concerns that the victims are raising about unsealed materials and you want to create the ability for them to then file in the CCAs or CAAF, I think all you need is that simple language from the CVRA.

That is my opinion. I could be wrong but I think --

CHAIR HOLTZMAN: I'm sorry. I didn't

mean to interrupt. I just wanted to clarify what you were saying.

MR. KELLER: Yes, ma'am. I realize I was unclear.

CHAIR HOLTZMAN: Okay, please forgive my interruption. Let's go.

MR. KELLER: I think that is the easiest.

The second one is the notice of appellate matters. And I think that that needs to be reconciled with the section in the NDAA which talks about creating an access system. Once we have that access system, assuming it ends up like PACER or CM-ECF, then we will have caught up to where the feds are and the victims will get notice of everything, just like they do in the federal system. Then, they will be able to file as real parties in interest because they want to protect their 6b rights. And I think that is an easy fix. So, number one, reconcile that.

And number two, there are provisions in the NDAA that specifically talk about victims

getting copies of number one, the record of trial; number two, the audio of the proceedings; number three, the entry of judgment. And it says that the victims need to get those.

So, if the panel does want to recommend that they are getting copies of something, it should be in somewhat like that format. It should say get a copy of the opinion and stick that into 66 and get a copy of the opinions, stick that into Article 67. Because that is really what matters at the appellate level and I think Major Hsieh talked about that. It is all baked into the record already.

And if there is something new, you could address that by simply letting them get copies two to four years down the road when that access provision comes into effect for the whole military justice system after looking to see if we can make it work.

So, the second point is that the NDAA is talking about access that is appropriate, should be granted in military justice

proceedings. Again, that needs to be reconciled. Those sections in the NDAA where they talk about victim access specifically are 901, 902, 903, and they are talking about Article 60 and Article 54(e) and they talk about giving the victim automatic access, I think, as to all crimes, not just sex assault crimes. So, again, if you wanted to put something like that in there, I think that that would be a revision to Article 66 and 67. Just say send a copy of the opinion to the accused. But, again, I think that is a reconciling because that will be happening two to four years down the road if this access system, if the legislation is enacted and an access system like CM-ECF is implemented. I understand that has been happening for years in the federal system and we are making baby steps but we are getting there. And I think that is what the legislation is talking about.

Okay, the other thing is notice of -- the second problem in 6b is the notice of -- I think that if there is anything that they get

notice of that should be in 6b is -- and this is again the problem with the CVRA being watered down.

If I could give a quick aside, so when the CVRA was changed in the military to the 6b, instead of just saying all public hearings, it was they made a specific list of things. And what they did is they, of course, left out appellate proceedings.

So, many years ago, when I first got to my office, I know I called Department of Justice and I think Mr. Victor Stone was on the other end of the phone. But I then called over to Criminal Appellate to find out what they did. And of course, they are notified of all oral arguments.

So, if anything that is done that goes into 6b, it should be oral arguments because those are the public proceedings that the military justice system has. So, that would be my recommendation there.

Third, the sealing issue. Again, I

agree entirely with my colleague, Mr. Bruce, and anybody else who has talked about this, 1103A318 is too broad. I could be incorrect but I believe several years ago when we pulled up the sealing rules from appellate courts in the Fourth Circuit, they have elaborate sealing rules. And there are certificates of confidentiality and there are different levels of sealing. It can be either in camera and only the judge sees it and that carries up to the appellate level in camera and one of the parties sees it, et cetera. Something like that should be enacted in our system, too.

That is not uniform across all the Services. I know that you have been hearing that some of the CCAs have rules for this. Well, first of all, Article 66(f) I think requires all JAGs to get together and together enact rules for the CCAs.

So, in the joint rules that are in Volume 44 of the MJ, I'm not sure that there are sealing rules currently but I know that they

don't mirror what is in many of the federal courts that I have seen.

So, what is the solution? And I do believe that defense counsel and government counsel should not be seeing some of these things, if they weren't seen by government counsel and defense counsel at the trial level. I don't think that creates a problem. I think you have a judge looking at the trial level. I think you have three or more judges looking at it at the CCA level. And if it gets up to CAAF, you are going to have several judges looking at it at CAAF, too. And they can determine whether it is a due process right to see some of those materials.

So, what is the fix? This is my proposed fix: 1103A should be amended to remove appellate government counsel and appellate defense counsel from the reviewing authorities because they are not like a court. They are litigants. They have an interest.

And 1103A should add a section that

talks about appellate litigants that basically says that whatever the level of sealing is that was given at the trial level carries on up through appeal and they can see them, pursuant to whatever sealing rules are enacted at the appellate courts.

Now, to make that consistent with federal practice, I would direct you -- I would suggest that you look at Article 36, which is a rule that applies to all courts-martial and I think that was used in Supreme Court case Hamden v. Rumsfeld and it talks about the President enacting rules for a courts-martial and military commissions that are the same, insofar as practicable, with the practice in the federal district courts.

Now what that leaves out is it leaves out the federal appellate courts. It doesn't say that you need to enact rules that are consistent with the federal appellate courts.

So, because there are many federal appellate courts out there that have rules that

talk about sealing that are not like ours, and they don't automatically let the defense counsel look into anything that was sealed at the trial level and let Government Counsel, me, look into any matters that were sealed at the trial level, I would suggest that we kind of throw the ball back to the JAGs.

Article 66(f) talks about making those joint rules for the CCAs. I think that Lieutenant Miller came up with this brilliant language but if you enacted something like Article 36 with regard to the CCAs, which is that the JAGs shall pass rules for the CCAs that are, insofar as practicable, close to those in federal appellate courts, then the ball goes back to the President, the ball goes back to the JAGs, and they can look at making rule and see if they work in the military. And it will make it more consistent with what is done out in federal practice.

I would note that not only is that in Article 36, it is also in the Military Rules of

Evidence, which 18 months after automatically follow what is in the Federal Rules of Evidence. And there is just example after example in the military system, where we are very close to what the feds did.

So, that is what I would suggest, something like that. So, let the JAGs figure out deliberately how to make our sealing rules more closely follow the feds and, of course, change 1103A.

Finally, and I realize I am going a little bit longer, so as quick as possible, I think that 547 goes far more than what the CVRA does, in some ways, but the problem is, as I mentioned before, it creates rights without a remedy. So, what can you do if you are a victim and you get to the CCA and you see sealed materials or you see a 6b violation and you want to remedy it? Well, first you need to be remedied but that is already in the works with the NDAA, in some state, but it doesn't give a specific right to relief.

So, I would just humbly suggest something like, as I mentioned up front, the language that is in the CVRA that says that the courts should afford those rights to victims. And it doesn't create a substantive right. It doesn't create a right that interferes with the military justice process. It just lets them file a pleading saying hey, there are sealed materials in here, please strike it, et cetera. I think that would be an easy fix to this issue.

I would not create a further direct review, just like the CVRA doesn't for victims. I wouldn't necessarily create further review at the CAAF level. I don't think that is needed. You could do that, if you wanted to. I think the feds don't have that. I think they don't have a statutory right to take the different circuits' CVRA rulings and appeal them to the Supreme Court but it does allow the different appellate courts to respect those 6b CVRA rights at each level of the process.

So, that's my only comments. Thank

you.

CHAIR HOLTZMAN: Thank you very much.

Lieutenant Ohley.

LT OHLEY: Yes, ma'am. Good afternoon, Madam Chair and Members of the Panel. Thank you for inviting me to speak.

I am Tereza Ohley, justice counsel at the Coast Guard's Office of Military Justice and we represent the United States at all levels of appeal and we also participate in the Joint Service Committee on Military Justice and are responsible for Service regulations and policy related to military justice. And we also provide trial counsel assistance.

Like all others have said, my opinions are my own.

I do not want to be repetitive of what has already been said by all the presenters here today, especially those on this panel and also in the written comments submitted by Department of Defense and by others.

First of all, I would just like to add

two assumptions and one suggestion for further study. I think we can all conclude that there are certainly situations where there is no one in our current adversarial process to represent an interest of a victim on appeal. And in some narrow situations, it will be necessary for the victim to be able to present their views but in many other situations, there might be a process for the victim to do that outside of the direct appellate process or their interests might be sufficiently aligned with one side or the other in a direct appeal that an amicus brief would be sufficient to raise any additional views or things that they might want to state.

And finally, 6b provides the victim an opportunity to present their views and speak at many different points in the trial process and those comments the victim will have made at that point would be available to appellate courts to look at, as they review the record.

I would also like to echo the comments that we should look at legislation that is

pending and things that are being proposed both legislatively and in rulemaking and in policy, to see whether any of those changes might address some of the concerns and some of the needs of that the victims have at the present. My colleagues have addressed many of those issues.

I would like to point towards some of the changes that are suggested to appellate practice and the National Defense Authorization of 2017, specifically in the Senate version, only to state that under the proposed Article 66, the Court of Criminal Appeals would no longer have the responsibility to review an entire record of trial but, rather, would review the issues raised and only if raised by appellate defense counsel. So, any rules that are being considered or any Statutes that are being considered must take into account the possibility that we might have a system where the Courts of Criminal Appeals no longer have independent responsibility to review the entire record of trial and to approve only such findings and sentences that they find or

correct.

With respect to the issue of continued study, many of my colleagues have stated and alluded to the fact that there may be other jurisdictions, federal jurisdictions, state jurisdictions, as Mr. Stone has stated, and maybe even foreign jurisdictions that have already dealt with some of these issues that have defined the important questions of what are the important victim rights that we are trying to protect, either through 6b or otherwise. What are the best practices for protecting these rights and what, if any, are the consequences on the judicial system in terms of economy on the accused, in terms of due process, and even on the victims themselves, in terms of unintended consequences that might curb the rights that they already have?

And for that matter, I would like to suggest that this panel take up Professor Meg Garvin on the offer that she made in her public comment. In her public comment, she offered that

the National Crime Victim Law Institute will conduct for this panel a detailed comparison of civilian and military law with respect to victim rights. Such comparison and study of the United States and even foreign practices will be invaluable to understanding how these concepts, practices, and procedures would work in practice and to help us avoid any pitfalls as we try to craft the system that will serve the needs of the victims, protect the rights of the accused, and serve the larger interest of preserving our military justice system.

Thank you very much.

CHAIR HOLTZMAN: Thank you.

PROF. TAYLOR: Well, in the interest of time, I will just make one comment and then ask one question.

The comment is that I am happy to hear what Mr. Bruce and Mr. Keller have said about some of the problems that I was suggesting to the earlier panel about the way that we are now dealing with sealed records at 1103A. So, thank

you for those comments.

My question is, would you consider the participation of SVCs/LVCs any kind of an intrusion or hindrance or nuisance in performing your overall appellate duties on behalf of the Government?

MR. KELLER: Can I jump in, sir?

PROF. TAYLOR: Anyone.

MR. KELLER: Okay, I will just say very, very briefly, since I was too long before, that that was one of the first things I said there, which is it is a burden on us to have to go in and continually file at the appellate courts to correct some of these errors, when sealed materials get included or we believe that the 6b rights aren't being protected. So, it would help.

PROF. TAYLOR: Would anyone else like to comment on that question?

Madam Chair, that's it for me.

CHAIR HOLTZMAN: Admiral Tracey.

VADM TRACEY: Just one question for

clarification. I think, Mr. Keller, you indicated that you repeatedly see sealed materials being posted in areas where you would not expect them to be or mishandled. Is that because the procedures are not standardized? You have heard fairly detailed descriptions of I think Army-Air Force procedures. Are they not standardized so Navy-Marine Corps doesn't use those procedures? Do you have those procedures but they are not followed or are the procedures themselves not sufficient?

MR. KELLER: I think that there are not standard procedures across all the Services.

VADM TRACEY: Are your procedures less robust than Army-Air Force procedures?

MR. KELLER: No, I don't think so. I think it is just human error but I think that -- I mean I am sure it happens. I think that Mr. Bruce was alluding to things happening, too, where under 1103A I think that anytime anything happens where you are aware there is a violation of 6b, you are going to go try to file something.

But I think the victims, if they are notified about what is going on, they are more likely to be able to step in and help themselves.

VADM TRACEY: Understood. I was asking a slightly different question. That is, we have heard two Services describe fairly robust procedures. One made them equivalent to the handling of classified material, which doesn't typically show up just anywhere. And you are saying that it is common to find materials posted in places you wouldn't expect it to be posted. And I was asking whether that is because -- could you remedy that by implementing procedures similar to those that the Army-Air Force have described?

MR. KELLER: Well, I think that the JAGs -- I mean, I guess. I haven't seen their procedures.

I think that 66(f) says that all procedures for the CCAs have to be done by the JAGs together. That is the joint rules. So, I don't know what they have in the Army and the Air

Force. I think it is just human error. I don't know. I'm not sure of the answer to that question.

CHAIR HOLTZMAN: Mr. Stone?

Okay, thank you.

MR. STONE: Yes, the last commentator said two things that confused me. One was something about there being unintended consequences. And I wondered if she would like to tell me what unintended consequences she had in mind because I need a specific. I don't know what unintended consequences you had in mind.

And you also said something about there is other ways to participate outside of the direct appellate process. I don't know what those are either. So, perhaps you could tell me what you had in mind.

LT OHLEY: Yes, sir. With respect to unintended consequences for the victims themselves, and again, I don't have a specific proposal as to how this might be remedied, but right now under 6b(e), the victims have a right

to petition for extraordinary relief in the form of a writ of mandamus. And part of the test required for granting such extraordinary relief is a showing that the applicant does not have any other form to receive said relief.

Now, if a victim were to have a right to participate in direct appeal on that very same issue, that might undermine the victim's ability to receive extraordinary relief at the time that they need it the most.

MR. STONE: But they won't need extraordinary relief, would they?

LT OHLEY: They would need extraordinary relief at that time, for example, to prevent the --

MR. STONE: You mean an interlocutory appeal, basically, as opposed to an appeal after the conviction is final.

LT OHLEY: No, sir. A writ of mandamus to prevent the records from being exposed in the first place.

MR. STONE: That would be an

interlocutory appeal, wouldn't it?

LT OHLEY: Yes, sir.

MR. STONE: So, therefore, since they have no other interlocutory appeal, the Statute I don't think would be a problem, would it?

LT OHLEY: That remains to be seen, sir. I don't have a proposal but I just wonder as to how courts would -- right now, the victims have no other form of relief, specifically, even as *E.V.* v. *Martinez* has said, once they have gone to the CCA, they cannot even go to CAAF to ask for additional relief and review of this petition. They have one shot.

They would have an additional shot if they were to have direct participation in direct appellate --

MR. STONE: But it would be too late, then, because the records would be disclosed.

LT OHLEY: That would be for the courts to decide but, certainly, it would erode the extremity of their situation where they absolutely would have no other voice in the

matter, after they make that petition.

MR. STONE: In other words, do you think it would erode their right to privacy if the records are disclosed and then they have an appeal?

LT OHLEY: It would not erode their right to privacy, sir, but their situation would be less extreme because they would have another voice in the matter later on down the road, where now it is very clear that they would not.

MR. STONE: What are the other views, the other ways you thought outside of the direct appellate process that they can express themselves, you said. And you mentioned also comments in the trial court. In other words, do you think if they make comments to the lower court, they don't need their own standing in the appellate court?

LT OHLEY: Sir, I was just stating that in some cases what the victim might have to add may be duplicative of the matters that they have already had a chance to express during the

trial court. There are certainly situations where they have a right or an interest that they have neither been able to present during the trial process under the current rules, and that they have not asked any other sort of relief on, and that they are not aligned with either side on. And in those cases, perhaps an amicus brief would be a way for them to express those views that are outside of what is already on the record before the court.

MR. STONE: Aren't the Government's arguments and the defense counsel's by definition also duplicative on appeal? Because you can't raise something on appeal you haven't raised below.

LT OHLEY: I'm not sure I understand your question, sir.

MR. STONE: That's okay. I thought you were opposing appellate standing on the ground that people should just look at what the victim might have said in the trial court.

LT OHLEY: I apologize if I was

unclear, sir. I'm really proposing that rather than granting broad standing or rights on direct appeal, we might look at those situations where the victim needs to state something on appeal as being somewhat more narrow.

For example, and this is not something that we have in the military, we discussed the situation that was previously discussed, the situation of a victim that has been granted restitution. And I thought that interesting on this matter was the case raised by Professor Garvin, United States v. Laraneta, it is a Seventh Circuit case, where Judge Posner had written the opinion and essentially that the victim had been granted restitution but, on appeal, the United States chose not to defend the restitution, defending only the sentence. And in that case, Judge Posner said this is a really specific and narrow situation, where the victim is not having their interests represented by argument of the Government because they are not defending this and they have a really specific

right that no one is protecting and that is individual to them, which is restitution. And for that reason, based on the broad federal judge's procedural authority, that victim was allowed to intervene.

And I believe there are narrow circumstances and I don't have a list of examples right now, sir, I apologize, where a military victim has that problem. They have something unique and particular to them and there is no other voice is that stating their --

MR. STONE: That's right and that wouldn't be covered, currently, by 547, would it? Because it limits itself to 412, 513, and 514. So that circumstance would not be covered, right?

LT OHLEY: No, sir, it wouldn't.

MR. STONE: And I guess the other thing I didn't hear any of the panelists comment on, any of them, has to do with the fact that 547 does not cover the circumstance I mentioned to the earlier panel, where defense counsel wants more time before trial. It is a repetitive

motion that maybe is a third or fourth request for an extension. The Government does not object but the victim does because the victim, let's say has AIDS and says I'm not going to be there. They may not care that I'm not a witness at the trial because I was drugged and sex was forced on me and other people are the witnesses. I'm not a witness but I do want to see the trial happen and then, on appeal, there is no one to defend the trial judge's ruling when he denies that last extension of time before trial, except the victim. That would not be covered by 547, as I read it.

And I didn't hear any comments from any of these panel members, I would appreciate one if you have them, as to any reason why we shouldn't broaden 547 to cover everything in 6b, period. So that if 6b covers it as a right in the trial court, then it is also a right in the appellate court and we should name both the Military Courts of Criminal Appeals and CAAF.

Does anybody have any thoughts on

that?

Maj STEER: Sir, I think LRM v. *Kastenberg* answers that. Under Article 6b, these are rights that victims have. And LRM v. *Kastenberg* said that you do have standing to bring issues on those things. So, I don't think you need to go and legislate again in Article 6b that you have the right to appeal these things. That has been answered. Jurisdiction has been the problem.

And so as Mr. Bruce stated, if you add in that the CAAF has jurisdiction to hear something that CCA has denied, I think the victim would be covered in that case.

I can also tell you in my personal practice, I have never seen the Government agree with defense on a delay when a victim did not want that. So, in my personal practice, I actually have never seen that happen.

MR. STONE: Of course, there are lots of circumstances we don't all see.

CHAIR HOLTZMAN: Okay. I'm going to

forego my questioning rights because we are four o'clock. If any of you have any further thoughts that you want to share with us with regard to 547, please feel free to do that.

Meanwhile, I just want to say thank you to all of you for coming, sharing your experience and your thoughts. It has been very helpful to us. And Mr. Bruce, thank you for appearing on the phone.

Okay, this will -- maybe we could just stay for a few minutes after.

You are excused. Again, thank you very much for your testimony.

(Whereupon, the above-entitled matter went off the record at 4:03 p.m. and resumed at 4:03 p.m.)

CHAIR HOLTZMAN: Excuse me. We are trying to talk here. So, if you have conversation, I know it is very important, would you mind either taking it outside? Would you mind doing that, please? Thank you.

Admiral Tracey asked, in light of the

concerns that we have heard expressed today and in light of the fact that legislation may be adopted on the subject, and in light of the restrictions upon us with regard to lobbying, how do we make -- how can we move quickly, can we say? Is that the right formulation? I don't want to put words in your mouth.

VADM TRACEY: Absolutely.

CHAIR HOLTZMAN: How can we move quickly in terms of any thoughts or recommendations we may have with regard to the subject and how should we proceed? Does anybody have any thoughts on that?

Admiral, do you have some thoughts that you want to express?

VADM TRACEY: No, I actually have questions for the Staff. Are we concerned that legislation may be enacted that has some issues? I think we all agree there are some concerns that legislation is currently proposed. Do we think that could happen prior to our next meeting or what is our --

MS. FRIED: I don't know.

PROF. TAYLOR: So, it seems to me that we understand from the fact that we have 547 and certain other language that we have looked at, that the Senate Arms Services Committee Staff, at least, is interested in the information that we are developing as we go along.

So, one thing we might do is to ask the Staff Director to provide a summary as quickly as possible of the transcript or whatever else might be appropriate, just by way of information. Because I don't know that we are in a position, at this point, to actually make a recommendation.

CHAIR HOLTZMAN: Right. I don't know that we are allowed to transmit material but we could put it on our website. Is that correct?

MS. FRIED: Yes.

CHAIR HOLTZMAN: All right. So, we could provide a summary of the concerns that were raised at this presentation and put them on our website.

The second question is do we have time and would there be a forum in which we could consider and make our own determination on the concerns that were raised?

MS. FRIED: So, I think you would have to articulate what those concerns are before we put them on the website.

CHAIR HOLTZMAN: Oh, we are not putting it on the website. That is a separate point. Maybe I wasn't clear.

One is to summarize, put a summary of what we have heard today on the website. Is everyone in agreement with that?

MR. STONE: As long as it is accompanied by an expedited transcript. That we move it to get the expedited transcript up there to follow it.

CHAIR HOLTZMAN: Well, I don't agree with that. We may not have an expedited transcript, in which case I think it should still go on, if we have a summary.

MR. STONE: As long as we are trying

to get an expedited transcript.

CHAIR HOLTZMAN: Yes.

MS. FRIED: We can post the minutes of the meeting.

CHAIR HOLTZMAN: Yes, whatever. But I think a summary would be useful because no one is going to go through the minutes. It is unlikely.

Okay, so that is number one. We have agreed on that.

The second point is we, ourselves, do we want to deliberate on some of the questions? First of all, do we have enough information? And two, do we want to deliberate on the proposals, the questions, the concerns that have been raised and come up with our own view about what should be done with regard to victims' rights on appeal?

I mean we started to consider that and so that is really -- I mean that's it but I don't know how quickly we can do that.

PROF. TAYLOR: Well, as I recall, the plan, were we not planning to have at our October

meeting more information about victims' rights? So, that makes me think that if there is information we don't have at this point, then I wouldn't feel as comfortable making a recommendation after deliberations, as I would, once we got a fuller view of what is out there.

I think today has been very useful but it seems there is more out there that we should probably know.

CHAIR HOLTZMAN: Right. Maybe one of the things the Staff could do is, in terms of preparing a summary, maybe prepare for us kind of the issues, a checklist of the issues so that we could begin to be thinking about what the choices are and how we feel about them to guide our own thoughts in this process.

Is that okay?

MS. FRIED: I think the Staff should propose the issues to the Chair and the Chair could adopt them, modify them, make whatever changes need to be made to reflect the views of the panel.

CHAIR HOLTZMAN: Oh, yes, well the panel would have to agree on that. I'm not saying that we --

MS. FRIED: Right.

CHAIR HOLTZMAN: But at least have a checklist of what the options are. Issue number one, should it be called a real party in interest?

MS. FRIED: Correct.

CHAIR HOLTZMAN: A says A, B says B, C says C. These are the issues. That's all I'm saying. No, we wouldn't make a determination. We would just see what the options that we have been presented so far. Maybe at the next hearing, we will hear further options. But at least for the moment, we could get an idea of what those issues are under the various concerns that have been raised. Does that seem sensible?

PROF. TAYLOR: Yes, I think it does but I think one of the things that appears to me is that some of the rules that we are asking questions about don't necessarily require

statutory changes.

CHAIR HOLTZMAN: Correct.

PROF. TAYLOR: So, just as we got a copy of the recommendations that we have been receiving, we have been making informally from the Secretary of Defense's Office, it may be that some of these changes can be made without regard to what happens with the NDAA FY17.

CHAIR HOLTZMAN: Exactly but I wouldn't limit the list of issues to what can be solved by Statute.

PROF. TAYLOR: I totally agree with that.

CHAIR HOLTZMAN: It would be just a list of the various issues that have been raised in this hearing and the prior hearing and what the options that have been suggested up until now to deal with them.

Does anybody disagree with that? We may not agree with any of those options. Or there may be a non-statutory approach or some -- or we may say nothing should be done about it.

MS. FRIED: And your objective is to have these items identified based on what you heard today for the purposes of further discussion.

CHAIR HOLTZMAN: Correct. That's all.

MR. STONE: So, can we -- are we allowed to have them emailed to us? And are we allowed, as Panel Members, to re-email back --

MS. FRIED: No. I think the Staff will be able to send you an issue paper, based on what the testimony reflected today. A discussion of what that is and what should remain and what shouldn't remain needs to be done in an open session at the next meeting.

CHAIR HOLTZMAN: Yes. So, at the next meeting, we may have some preliminary discussion about this and maybe there could be room on the agenda for that. But we obviously won't, if we hear new material, we obviously won't be able to finish that at the next session. But at least it will help guide us in terms also of the questioning and our thinking on the subject.

VADM TRACEY: Well, I have the opposite concern and perhaps there is nothing we can do about it. And that is that the Senate somehow manages to get an agreement on a piece of legislation that appears to be perhaps an off-point fix to a problem. And once that has happened, how do you recover from that?

PROF. TAYLOR: That would be unprecedented.

VADM TRACEY: Well, getting to a decision might be.

MR. STONE: Then we can meet on how to administratively make their statutory change work.

CHAIR HOLTZMAN: But let's all -- since they are paying so much attention, Admiral, to what we think, even before we think they seem to know what is going on in our minds -- we won't go into how they are doing that, the Senate Arms Services Committee has an extraordinary capacity. But it may well be that if they do read some of the comments on the website, it may affect their

thinking or maybe not.

MR. STONE: I have a slightly different suggestion.

CHAIR HOLTZMAN: Go ahead.

MR. STONE: When we did our prior publications that we released, the drafts of them were allowed to circulate for comment. So, I don't understand why a draft of what we think the important questions are can't similarly circulate among the Members for comment in a way that those drafts go on the public web site. So, if anybody wants to see what the drafts are, the comments, they can see them.

MS. FRIED: It is my understanding that we addressed, we sent it to the Panel Members and we sent -- the input was individually provided to the Staff Director, who then identified what the input was at that deliberation, going back and forth.

CHAIR HOLTZMAN: That is, I think, the point he is making.

MR. STONE: I'd like to do that.

MS. FRIED: To the extent we do that, which would be fine, --

MR. STONE: Yes, I would like to see the Staff Director send me their summary of what they think the issues were, the questions, or however you want to put it.

CHAIR HOLTZMAN: Yes and then you can send your comments back to them.

MR. STONE: And then I can simply send more comments back to the Staff Director. I thought that that is --

CHAIR HOLTZMAN: Yes, we can't share the comments but we can send them back.

MR. STONE: We send them back to the Staff Director.

CHAIR HOLTZMAN: Yes, it still doesn't obviate the problem about considering all of this material together.

MS. FRIED: Right.

MR. STONE: That's what I would like.

CHAIR HOLTZMAN: Thank you very much.

MR. STONE: So, with this summary,

maybe we can get -- I mean it may follow the summary and these are the issues we saw.

MS. FRIED: Anything else?

All right, the meeting is closed. Thank you.

(Whereupon, the above-entitled matter went off the record at 4:16 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 09-23-16

Place: Arlington, VA

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Neal R. Gross

Court Reporter