UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

PUBLIC MEETING

FRIDAY
APRIL 7, 2017

The Panel met in Suite 1432, One Liberty Center, 875 N. Randolph Street, at 9:30 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT
Hon. Elizabeth Holtzman
Hon. Barbara Jones (via teleconference)
Mr. Victor Stone
Mr. Tom Taylor
VADM(R) Patricia Tracey

PRESENTERS

Dr. Cassia Spohn, Professor and Director, School of Criminology and Criminal Justice, Arizona State University
Dr. Nathan Galbreath, Deputy Director, Sexual Assault Prevention and Response Office, U.S. Department of Defense
Ms. Kathy Robertson, LCSW, Family Advocacy Program Manager, Office of the Deputy Assistant Secretary, Military Community and Family Policy, U.S. Department of Defense
STAFF:

Captain Tammy Tideswell, Staff Director

Mr. Bill Sprance, Designated Federal Official

Ms. Theresa Gallagher, Attorney Advisor

Ms. Nalini Gupta, Attorney Advisor

Ms. Meghan Peters, JPP Staff Attorney
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(9:31 a.m.)

MR. SPRANCE: Good morning, everyone.

My name is Bill Sprance. I'm the Designated

Federal Official for this meeting and the meeting

of the Judicial Proceedings Panel is now open.

At this time, I will now turn the

meeting over to the chairwoman, the Honorable

Elizabeth Holtzman. Good morning, Madam Chair.

CHAIR HOLTZMAN: Good morning, Mr. Sprance and thank you. I would like to welcome

the participants and everyone in attendance today
to the 29th meeting of the Judicial Proceedings

Panel. All five of the Panel Members are

participating today; four of the Panel Members

are physically present and Judge Jones is

participating via telephone. We hope it will

work and we appreciate, Judge Jones, that you are

making this effort to be in communication with us

and participate in this process.

JUDGE JONES: Thanks, Liz.

CHAIR HOLTZMAN: Today's meeting is
being transcribed and the full written transcript
will be posted on the JPP website.

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

Today's meeting will begin with
deliberations on the JPP Victims' Appellate
Rights Report. The deliberations will be
followed by a presentation of Fiscal Year 2015
Military Sexual Assault Adjudication Data by Dr.
Cassia Spohn, Director of the School of
Criminology and Criminal Justice at Arizona State
University and JPP Staff Attorney, Ms. Meghan
Peters.

In today's last session, the Panel
will receive presentations from Dr. Nathan Galbreath, Deputy Director of the Department of Defense Sexual Assault Prevention and Response Office on DoD Statistical Data Regarding Military Adjudication of Sexual Assault Offenses and from Ms. Kathy Robertson, the Department of Defense Family Advocacy Program Manager regarding that program's collection of spousal and intimate partner sexual assault data.

Each public meeting of the Judicial Proceedings Panel includes time to receive input from the public. The JPP received no requests for public comment at today's meeting.

Thank you very much for joining us today. We're ready to begin deliberations on victim's appellate rights.

Ms. Gupta, thank you for being here.

Please proceed.

MS. GUPTA: Good morning, Panel Members. I would like to begin with a --

CHAIR HOLTZMAN: Can you speak a little louder?
MS. GUPTA: I would like to begin with a brief overview --

CHAIR HOLTZMAN: Do you have a mike?

MS. GUPTA: I would like to begin with a brief overview of Recommendation 39. The Panel voted on Recommendation 39 at its last meeting, which would address the Joint Service Committee's proposal to amend Rule for Courts-martial 1103A on appellate counsel access to sealed materials.

The recommendation discussed by the Panel stated the Joint Service Committee on Military Justice revise its proposed amendment to Rule for Courts-martial 1103A(b)(4)(B)(ii) to include the following language: "Prior to a decision to permit examination of material described in the subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be examined or to be examined and to appellate counsel."

This recommendation reflects a four-one vote, with Judge Jones dissenting.

Upon further review and in
consultation with the Chair, the Staff drafted a
list of additional options for Recommendation 39,
which is available in your folder.

Mr. Stone also submitted a proposed
revised Recommendation 39.

Both sets of proposals were circulated
to the individual Panel Members via email for
discussion and deliberation today.

CHAIR HOLTZMAN: Judge Jones, can you
hear?

JUDGE JONES: It's very difficult to
hear our Staff Member. I can hear you perfectly.

CHAIR HOLTZMAN: We'll try to have the
Staff speak more loudly. I think the Staff was
just summarizing where we stand.

JUDGE JONES: All right. All right.
Yes, absolutely. Okay, thank you.

CHAIR HOLTZMAN: So what's next is for
us to --

MS. GUPTA: If the Panel would like to
consider --

CHAIR HOLTZMAN: Could you pull the
mike right up to you, really right up close?

MS. GUPTA: Okay. If the Panel would like to consider --

CHAIR HOLTZMAN: Is that better?

Excuse me. Is that better?

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Okay.

MS. GUPTA: In the folder, if the Panel would like to consider additional options, there are two documents relating to Recommendation 39. There is one prepared by the Staff per the -- in consultation with the Chair and then there's a proposal by Mr. Stone.

CHAIR HOLTZMAN: Okay, do you want to summarize the proposals? You know if you pull your notebook and pull the microphone closer to you, I think it's going to work.

MS. GUPTA: Okay. So, Mr. Stone, would you like to begin with your proposal?

MR. STONE: I can do that. That's fine.

I've had a chance to look at the
various proposals and I have also submitted my
own proposal.

        CHAIR HOLTZMAN: If you would also try
to speak into the mike so Barbara can hear.

        MR. STONE: I'll try to get as close
as I can. Okay.

        But what I would like to say is that
I think the original language that we agreed on
at the last meeting is the correct language and
I'll explain why briefly.

        There are several proposals to try and
limit what was said about giving -- not giving a
person notice, giving a victim or a witness
notice but it's not always clear exactly what
status a person will have whose records are
there. And if you say victim or witness, you
impose a burden on the clerk or whoever it is in
the appellate court to figure out -- do they
figure out if they fit into that category. If
you say person, there is no question.

        The same issue arises with respect to
some of these examples, in particular 39D and 39C
that says -- 39C talks about victims with a privilege; 39D talks about victims and witnesses with privilege and then it names one privilege. The problem with that is, in addition to a clerk figuring out whether or not the person is a person whose records are at issue is going to fall under that rubric. And I gave an example at the last meeting where the records of a chain of command officer who made a decision about whether to prosecute might be involved and he might be neither a victim nor a witness. He may just be a person in the chain of command who made the prosecutor decision. But labeling a particular privilege like this does not work either because we know, at a minimum, that in addition to 513, there is a privilege under Rule 514, which we have discussed time again, which is also covered. And I looked at the Military Rules of Evidence because I was concerned other privileges that we have heard about if there is means that could come up and they include the lawyer-client privilege. They include especially Rule --
that's 502 -- Rule 503, which is communications
to clergy. There's a privilege if a victim were
to talk to clergy instead of a medical officer.
There's Rule 504, husband and wife privilege. We
heard testimony from one young lady at one of our
meetings that her sexual assault was committed by
her husband. There is, in addition to some of
these others, I could go down the whole list but
there are actually 13 privileges. There is the
classified information privilege in Rule 505.
There is the government information other than
classified information but detrimental to public
interest, which is a privilege under Rule 506 and
in the General Petraeus's case, some of that was
involved.

It is impossible to determine in
advance that in a sexual assault case the only
privilege that is at issue is going to be 514.
And again, we don't want to say, just say when
there's a privilege involved because that puts
the burden on whoever it is in the appellate
court to decide initially whether or not what
they have and they are about to unseal is a
privilege. So the original language took care of
those problems, in effect, by saying anything
that is sealed by the original trial court and
not seen by the parties, that meant -- and any
person whose records those are, that would mean
it would not apply if it is an organization's
records but not a person because the organization
wouldn't be able to raise the privilege.

So the language at issue seemed to
take care of all these issues about which
privilege. Is it a privilege? Is the person --
were they called as a witness? It also, the way
it is currently phrased, leaves out an even more
important privilege that is recognized, which is
the privilege concerning compulsory self-
incrimination.

We have heard time and again that
sometimes in these cases, the person who is the
victim of a sexual assault has been involved,
let's say, in drug use at the time of the sexual
assault and they don't want that to come out
because of their self-incrimination privilege. They may have raised that privilege for that information not to come in. Or it could be any number of permutations that will also, by the way, provide a benefit, which we don't want to overlook, to a defendant who wants to raise their self-incrimination privilege and their material is sealed by the judge or the defendant's attorney-client privilege when there is a question about whether there was a crime fraud exception.

So given that there are about 13 privileges in the Military Rules of Evidence and there are permutations that one or more can be involved and they don't always involve persons, named persons like defendants, witnesses, victims, the language that we adopted on the first go around that they are the records of a person, that person gets notice and a chance to be heard with respect to anything that was sealed by the lower court judge and not shared seems to me to be the correct phraseology and it doesn't
have the problems of 39C, 39D, and, therefore, I would go with our original language.

And to the extent that even I have thought about whether or not, in my own proposed recommendation, I guess we could call it 39E for the moment but it was different, whether to add in the words in sexual assault cases, I realize that even that is too limiting because some cases start out as sexual assault cases and then the count of conviction is plain assault, or conduct unbecoming an officer, or some other permutation and we've heard that as well. And the same issue will happen with let's say the psychotherapist privilege when that woman's records and that conduct unbecoming case goes up on appeal or the plain assault case, the lesser included assault goes up on appeal. So I realize even that turns out to be too limiting and that the language, the simple straightforward language that we approved last time will cover all the situations because we're trying -- sexual assault as fact is one variety of a greater number of similar type
assaults that go on and get prosecuted in the military. Some might even be attempted murder but it's one variety and that language covers those cases. And I don't have any trouble if in the prefatory language, the introductory language we said something like recognizing that the JPP's scope is limited to sexual assault cases; nonetheless, the JPP recommends that -- and then we say what the original recommendation was because I see no point in us coming up with a recommendation that, frankly, creates loopholes. We're trying to close them. Thank you.

CHAIR HOLTZMAN: Thank you. Can I just I summarize where we are please, before we get into the detail of every amendment?

We have four -- how many choices do we have in front of us -- six choices, okay, as I get it. And I don't want to be incorrect here. I'm trying just to make it clear for everybody.

Barbara, can you hear us? Judge Jones?

JUDGE JONES: I can and it's crystal
clear now.

CHAIR HOLTZMAN: Wow, great. Thank you.

Okay, so recommendation 39A and 39B are basically identical, with the exception that 39B also says that -- also includes appellate counsel. So basically what 39A and B say is that prior to a decision to permit examination of materials described in this subparagraph -- and the material described in this subparagraph is material that has been sealed below and it is unsealed in the appellate court --

MS. GUPTA: Has not been reviewed by counsel, actually.

CHAIR HOLTZMAN: Okay. Prior to a decision for examination of this material, an opportunity -- notice and an opportunity to be heard shall be given to any person whose records are about to be examined or to be examined and to appellate counsel.

The second recommendation that is similar but not exactly the same removes the
words appellate counsel. So no notice is to be
given to appellate counsel. Is that correct?

    MS. GALLAGHER: Yes, ma'am.

    CHAIR HOLTZMAN: And what's the reason
for that?

    MS. GALLAGHER: It is difficult to
envision a scenario in which appellate counsel
who are parties to the case would not have an
opportunity to brief an issue. Either the issues
is going to be raised by them --

    CHAIR HOLTZMAN: Pull the mike closer
to you so she can hear you. Is your mike on?
Tap the mike to see if it's on. It's not on.
Okay.

    MS. GALLAGHER: Yes, it's difficult to
envision a scenario in which appellate counsel
who are parties to the case won't have an
opportunity to file a brief. Either they
originate the motion in the first place to
examine the records and have the opportunity to
file a brief --

    CHAIR HOLTZMAN: So in other words,
its superfluous. I want to try and get this really short.

MS. GALLAGHER: Yes, that's exactly correct.

CHAIR HOLTZMAN: Okay, so what you are saying is that the second version, 39B, eliminates the words and to appellate counsel because it's superfluous.

MS. GALLAGHER: Yes, ma'am.

CHAIR HOLTZMAN: Is that correct, it's not supposed to make --

MS. GALLAGHER: Yes, ma'am.

CHAIR HOLTZMAN: -- substantive difference?

MS. GALLAGHER: It is not.

CHAIR HOLTZMAN: Okay. And that is the recommendation that we adopted at our last meeting.

MS. GALLAGHER: It is. That is the language before.

CHAIR HOLTZMAN: Okay.

MR. STONE: I would like to interject.
I don't understand why it is different than what I was given when I asked the staff to provide me our recommendation, which is listed under paragraph 1 of my note, which is materially different. It doesn't appear in any A, B, C or D because it says or to be examined and to appellate counsel. It includes appellate counsel and has the person whose records would be examined. It doesn't have the words or to be examined or about to be examined. And I was told that that was the recommendation language.

So I think that there is a missing version here, which is the one that we did approve, which is in bold letters. It is the second paragraph of what I distributed.

I guess I can pull up the email. I communicated with the Executive Director and I was told that was what the language was.

CHAIR HOLTZMAN: Okay, what was it that we approved at the last session? Which of these? Mine isn't working either.

MS. GUPTA: Our understanding was that
it was 39A. Mr. Stone, we apologize if there was any mistake. So 39A was what was approved by the Panel.

MR. STONE: See, we never used the words about to be examined or to be examined. I mean that's something new. We just had or to be examined. So I don't know where the about to be examined came in.

So really, there's another option that is a little similar.

MS. GALLAGHER: Yes, we did try to take it from the transcript.

CHAIR HOLTZMAN: Okay.

MS. GALLAGHER: I think that's where it came from but --

CHAIR HOLTZMAN: All right, there is no -- Mr. Stone, for present purposes, there is no substantive difference between with the adding of those words about to be examined or are to be examined. It is pretty much --

MR. STONE: Okay, it's just extra words.
CHAIR HOLTZMAN: Yes, we can go over the wordsmithing in a minute.

MR. STONE: Okay.

CHAIR HOLTZMAN: But I'm just trying to get the substance of what --

MR. STONE: Okay. Okay, I was just confused because I didn't see what I got sent to me as the original.

CHAIR HOLTZMAN: Right. The only substantive difference between A and B, which are the original recommendations on which we voted last time is that B includes appellate counsel -- or excludes appellate counsel on the grounds that that's superfluous.

MS. GALLAGHER: Correct, ma'am.

CHAIR HOLTZMAN: And it also excludes about to be examined or to be examined on the grounds -- also wordsmithing are we talking?

MS. GALLAGHER: Yes.

CHAIR HOLTZMAN: Okay so basically 39A and B are essentially similar, although there is some slight verbiage difference. Is that
correct?

MS. GALLAGHER: Right. There was --

CHAIR HOLTZMAN: Okay, there's no

substantive difference.

MS. GALLAGHER: I don't believe so.

CHAIR HOLTZMAN: All right.

MR. STONE: Well, let's --

CHAIR HOLTZMAN: For the moment -- no,

Mr. Stone. I am the chair.

MR. STONE: There is a substantive
difference, if you would like to hear it.

CHAIR HOLTZMAN: Excuse me. I have

not recognized you.

MR. STONE: Okay.

CHAIR HOLTZMAN: I'm just trying at
the moment to outline where we are. Then, we can
go into depth about each proposal. If I'm not
being exact -- I'm not trying to be inexact. I'm
just trying to get us to a place where can make a
decision about this.

Proposed recommendation 39C varies

from the proposal on what grounds? Can you just
really summarize it?

MS. GUPTA: Yes, ma'am. It limits the recommendation to victims with a privilege under M.R.E. 513, which would be mental health records.

CHAIR HOLTZMAN: Okay, so that's 39C.

MS. GUPTA: That's correct.

CHAIR HOLTZMAN: And then we have 39D, which includes victims and witnesses with a mental health privilege. Okay.

And then 39E.

MS. GUPTA: 39E limits the recommendation to victims for the privilege under M.R.E. 513 who elect to be notified.

CHAIR HOLTZMAN: Okay.

JUDGE JONES: I'm sorry, who what?

CHAIR HOLTZMAN: Elect to be notified.

JUDGE JONES: Thank you.

CHAIR HOLTZMAN: And 39F is victims and witnesses who elect to be notified.

MS. GUPTA: Yes.

CHAIR HOLTZMAN: Okay. So we have, basically, the original proposal. We can argue
as to whether it was original but more or less
what we adopted the last time.

And then we have two alternatives to
that -- essential alternative. One is limiting
the recommendation to victims who have a
privilege under 513 and the second one is
limiting it to victims -- expanding that and
limiting it to victims and witnesses under 513.

And E and F are a little bit more
restrictive because it requires people, victims
and witnesses, or victims or witnesses, or just
victims alone to be covered only if they have
elected to be notified.

So, if it is possible, I would like to
-- is there any further discussion about this so
that we could just -- does anybody want to
further discuss the two options C and D and E and
F, so we can decide what we want to do about
those? And then we can get these or reject them
and then we can go back to 39A and, in any case,
look at the verbiage issue that Mr. Stone raises.

I'm not going to exclude that, Mr.
Stone. I just want to get us to a point where we
deal with these other issues.

So, any other comment? Judge Jones,
do you have a comment about 39 C, D, E, or F?

JUDGE JONES: Not really, at this
point.

CHAIR HOLTZMAN: Mr. Taylor?

MR. TAYLOR: No, thank you.

CHAIR HOLTZMAN: Admiral Tracey?

VADM TRACEY: I have a question with
regard to E and F, which requires that the victim
or the witness have elected to be notified. Now,
the victim gets to make that election at the end
of trial, right? They get to say they do or
don't want to be kept informed of post-trial
actions. Is that right?

MS. GUPTA: That's certainly an option
for the Panel to consider.

CHAIR HOLTZMAN: No, no, the question
is do they, today.

VADM TRACEY: Doesn't the victim have
the opportunity to leave their contact
information available to the Government for any
further actions?

MS. GALLAGHER: I believe they do.

I'm not certain that all the Services have
uniform procedures of how they do it.

VADM TRACEY: Agreed but witnesses
probably don't get asked that question.

MS. GALLAGHER: That's correct.

VADM TRACEY: So implementing E and F
represents another layer of complexity, compared
to everything else because now we have to figure
out how the Government is going to locate
witnesses many months, perhaps, after the fact of
the trial.

MS. GALLAGHER: Yes, if that
information is not captured at the time of trial
or the witnesses and victims don't continue to
provide new addresses --

VADM TRACEY: People who remain on
active duty are probably locatable. People who
are not or are not any longer on active duty
creates a science project that has to be taken
care of in a timely fashion or we otherwise go
down the line that Services are concerned about
an untimely handling of the appeals.

MS. GALLAGHER: I believe so, ma'am.

CHAIR HOLTZMAN: I think, though, in
the fairness, the point you raise, which is an
important point, Admiral, is a problem with
regard to our original proposal as well. So that
I mean I think the notice requirement here is
actually broadest in A and B. And what we are
saying there, basically, is okay, Services, you
figure this one out. But I think the point you
raised is totally appropriate and worth noticing.

And perhaps that was the reason for
the narrowing the scope of 39A and B in
recommendations 39C and D. I don't know.

Mr. Stone, did you have a point you
wanted to make about that?

MR. STONE: With respect to saying
that a victim or a witness first have to pass
through sort of make the first objection, in
other words, say they want to be notified, it
seems to me that what that's going to do is, as a matter of preventive action in every case where material is sealed, their counsel is going to say we want to be notified. So you are going to have that complexity in 100 percent of the case.

Whereas, if you wait until the appellate court is faced with a decision, after getting a request, either its own sua sponte or somebody else's, you probably don't even open this issue up, well certainly to less than 100 percent of the cases where there's sealed material, and more likely to some smaller fraction because it may not be an issue on appeal. It may never be relevant to what's raised on the appeal. It might not even be that ultimately that that count or that issue is what goes up.

So this goes back to the Admiral's question. If the victim or the witness has to put in their contact data at the trial court level, which could change if they retire, we are complicating -- we are getting our hands in to
the trial court's handling of this, which doesn't have a permanent clerk, and then complicating
their business.

Instead, if we wait until the issue is raised, we could simply append to the end of whichever other 39 we choose the language that I put in my proposed recommendation 40, which said shall be given to any person whose records are about to be examined and then we would just say and whose point of contact is reasonably available.

That's all we have to say, that their point of contact is reasonably available. That way, if they didn't choose to leave a point of contact, the clerk's office at the appellate level is not obligated to do something. If they have a reasonable point of contact, whether it's an SVC, a private attorney, or themselves, a phone number or an address because it is reasonably available, then if the issue comes up, they will get notice.

So it seems to me we don't want to
complicate every single case. I mean that's what
would happen on the E and F. You are just going
to cause those attorneys, as a preventative
matter, in every case, to say okay and here's my
data and we want to be notified if anything comes
up later. And you are requiring that to get
passed along to somebody at the appellate office,
who may not have access, ready access even to
that trial level information.

So by saying to whose point of contact
is reasonably available, we leave it to the
Services how a person who was involved we might
want to let them know. It may be a letter. It
may be entering an appearance. It may be by
simply letting Government counsel know but each
Service can do it in a way that works out for
them whether they have electronic systems or they
don't have electronic systems yet operating.

And I will just throw in one other
item and I think that this is relevant in this
context about notice, too. I think the reason
that the 39A says and to appellate counsel and
that that is way preferable to not putting it in, which is in 39B, is because we want to be sure that the appellate counsel get notice. There are plenty of circumstances where a defense counsel -- I have seen this in private practice -- a defense counsel may move for particular privileged material and the prosecution tells them, we are not interested in this issue. They don't want to be served. They don't get service. They don't respond. They say that's between you and the witness whose stuff is privileged. And they don't file any pleading at all.

In fact, the Hoile case which I cited in an earlier document that was included in our materials, which talks about appellate standing for victims, in that very case, the Maryland high court states in the opinion Government counsel didn't want to be involved; didn't show up for the hearing that they had on standing; and didn't file any pleadings. They really said this is not our issue; we're not interested.

And so by saying and to appellate
counsel, we just make sure that all the appellate
counsel have copies and I think that is a good
idea, whether it is a defense counsel or the
Government counsel. And especially since many
times they may be the person, according to the
Service, that should give notice to the victim
because the prosecution probably has the contact
data or they can say should keep the contact data
and make the notice. The clerk of the court
doesn't have to do it. He could instruct
appellate counsel to do it within five days or
something.

So it is better to say and to
appellate counsel and that is a real difference.
It is not superfluous because it relates to this
notice issue as a way of giving notice.

CHAIR HOLTZMAN: Okay. So let's try
and narrow down what our choices are here.

The first -- I think, by the way, if
I recall correctly, the issue wasn't so much
about notice, wasn't so much about whether the
people could be tracked down, although that is a
very important point, but was whether people
wanted to be even bothered with receiving some of
this notice. Sometimes people just wanted to end
their involvement with the matter altogether and
so didn't want to get notice.

So it seems to me we could break this
down. There are really a couple of issues here.
One, do we want to limit the applicability of our
recommendation to victims or witnesses who have
military -- with 513 privilege? We get past
that, we can decide whether we want to include
witnesses. And then we can decide include or
whether or not whether we want those who elect to
be notified.

Does anybody disagree with going
through it that way? Okay.

MR. STONE: Can we talk to that for a
minute?

CHAIR HOLTZMAN: The procedure?

MR. STONE: About whether or not they
want to be notified, your last point?

CHAIR HOLTZMAN: Why don't we get to
that? We may not even get to that.

MR. STONE: Well, okay. I'll point out that that implicates another of the Military Rules of Evidence when we get to it.

CHAIR HOLTZMAN: Okay. No, no, I'm not trying to preclude.

MR. STONE: Okay.

CHAIR HOLTZMAN: I'm just trying to figure out how we can get going on this. Okay.

So, our first question is do we want to limit our recommendation to victims and/or witnesses -- or I should say victims and maybe witnesses who have a 513 privilege?

Barbara are you with me?

JUDGE JONES: Yes, I'm with you.

CHAIR HOLTZMAN: Okay. So all in favor of limiting the 513 -- does anyone want to speak on that? Okay.

All in favor of limiting the 513 -- I'm sorry -- the recommendation 39 to people with 513 privilege say aye.

JUDGE JONES: Aye.
CHAIR HOLTZMAN:  Aye.

No?

MR. STONE:  No.

VADM TRACEY:  No.

MR. TAYLOR:  No.

CHAIR HOLTZMAN:  Okay, three to two, it's not carried.

So then I guess we don't have to do the witnesses because we may not be limiting it to witnesses. Well, let's just vote on that, too.

Do we want to include witnesses in our recommendation? All in favor say aye.

VADM TRACEY:  May I ask a question?

CHAIR HOLTZMAN:  Yes.

VADM TRACEY:  There is two ways in which we have tried to address this. One, we used the word person.

CHAIR HOLTZMAN:  Right.

VADM TRACEY:  And the other, we discussed --

JUDGE JONES:  I'm having a little
trouble hearing you.

VADM TRACEY: I'm sorry. There are two ways in which we have attempted to address this issue. One, we have used the word person and in the other case, we have specified victims and witnesses. Is there a material difference?

CHAIR HOLTZMAN: Not really because I think right now we don't even probably have -- I'm not sure we have to vote on this issue. If we use the language, the original language or the language in blue, I think person includes --

VADM TRACEY: I agree. It is a bigger sect than victims and witnesses.

CHAIR HOLTZMAN: It is. It is a bigger sect.

MR. TAYLOR: That's my interpretation of it.

CHAIR HOLTZMAN: Right. So we just decided we weren't -- our first decision was we are not limiting to people who are just have Military Rule Evidence 513 privileges.

Okay, I guess the second question is
are we limiting it to victims and witnesses or
are we not limiting it and having it all persons.

    Okay, so let's just have that vote.

Are we limiting this to -- all in favor of
limiting this to victims and -- I don't know how
to say that because this is complicated now.

    Maybe we won't vote on this at all
because if we adopt 39A, then that would cover
this.

    So I am just going to go to elect to
be notified point, which I think is a material
difference between 39A and B and 39E and F.

    Without worrying about the language
exactly, are we all -- I think we should vote on
whether we want to limit the applicability of our
recommendation to people who elect to be
notified.

    MR. STONE:  Okay, that I need to talk
to.

    CHAIR HOLTZMAN:  Okay.

    MR. STONE:  Okay.  I saw that in E and
F, when that was distributed to the panel members
before this hearing and I need to point out that
current Military Rule of Evidence 511, which is
called Privilege Matter Disclosed under
Compulsion or Without Opportunity to Claim
Privilege, and subsection of (a) of that current
rule says that such privileged material is not
admissible against the holder of the privilege if
disclosure is made without an opportunity for the
holder of the privilege to claim the privilege.

So if we don't give the holder an
opportunity to claim it, then should the case be
reversed and go back, the material will not be
admissible. And frankly, from a defendant's
point of view, they wouldn't want that because it
meant that if they won on appeal, they still
couldn't use the material when they got back to a
new trial.

So, not giving them the opportunity by
giving them notice is potentially going to run
into conflict with current Rule 511 of the
Military Rules of Evidence. If they don't want
to get involved, then they simply don't get
involved. They don't respond by whatever the
deadline is that the court has given them notice
it wants to hear from them if they have something
to say by whatever amount of days that Service
decides. If they do want to respond, then they
do.

This also raises the issue that they
may have, for the first time after the
conviction, counsel, a special victims' counsel,
which they may not have thought was necessary
before or they may have a different counsel. And
if they don't get counsel, then they have not had
the opportunity to discuss with their counsel
whether they care enough to want to file a
pleading and be heard or whether they don't.

So the way they can effectuate not
wanting to get the notice is simply by not making
their point of contact reasonably available. If
they make the point of contact reasonably
available, then they get the opportunity to file
it and that would satisfy Rule 511. So that is
reasonable. I don't think we want to --
I think the discussion that we had previously about them opting out was in the context of our Recommendation 40, it was not in context of Recommendation 39.

CHAIR HOLTZMAN: Barbara -- Judge Jones?

JUDGE JONES: Yes, I'm just a little confused. The rule you are talking about basically says that if the victim or witness does not have the opportunity to contest, then the information cannot be used against them. Is that right?

MR. STONE: That's what it is, Rule --

JUDGE JONES: That would seem to me to be irrelevant because we are talking about evidence that comes against a defendant.

MR. STONE: But this all arises on a defendant's appeal. The victim is not appealing. The Government is not appealing.

CHAIR HOLTZMAN: What happens on an interlocutory appeal. Do we have one?

JUDGE JONES: Well I'm just saying
that I don't understand this in the context of protecting them or it being used against them.

When a victim/witness' information is disclosed after a judge rules for it to be disclosed or it isn't, it is not about it being used against them. It is being used against the defendant.

MR. STONE: That's correct.

JUDGE JONES: They are not in a position where anything is being used against them.

I know this may not matter in the context of this conversation. I just don't know what the relevance is and I don't have the text in front of me. So, I apologize.

CHAIR HOLTZMAN: None of us has the text in front of us and I think my concern is that that rule 11 -- was it the number?

MR. STONE: It's 511, Military Rule of Evidence 511.

CHAIR HOLTZMAN: We haven't even looked at it. The Panel hasn't looked at it. So
to make a decision based on it, I think is inappropriate.

    MR. STONE: Well, we're raising a question which didn't come up in the Joint Service Committee's proposal and I think that is why it didn't come up.

    I'm just bringing out that if we add this new consideration, which the Joint Service Committee didn't add, we are going to create a complexity in administration of the Military Rules of Evidence that is not meant to be there.

    CHAIR HOLTZMAN: Is there any further discussion of this proposal?

    Okay, so we will vote on whether the notice provision should be limited to those persons or however we determine it, victims or witnesses who elect -- what's the language?

    VADM TRACEY: Who elect to be notified.

    CHAIR HOLTZMAN: -- who elect to be notified. Who elect to be notified. Okay.

    Everyone in favor of limiting the
applicability of the rule to -- the recommendation to those who elect to be notified say aye.

CHAIR HOLTZMAN: Aye.

JUDGE JONES: Aye.

CHAIR HOLTZMAN: Those opposed?

MR. TAYLOR: No.

VADM TRACEY: No.

MR. STONE: No.

CHAIR HOLTZMAN: Okay, three to two, it's not carried.

Okay, now I guess we just have two more changes or three, possibly. So we are back to I think the recommendation 39A or B. And there are two issues, three issues here, possibly.

One is do we want the language of 39A excludes -- 39B excludes appellate counsel. The question is do we want to include appellate counsel? That is one decision.

The two -- this is just wordsmithing stuff.
The second one is the language in one
is person whose records are about to be examined
or to be examined, the other one says just whose
records are about to be examined.

I would make a suggestion whose
records are being sought, which eliminates the
need to say both the other things. I don't know
how you feel about that because it seems to me
that eliminates about seven or eight words.

That's one.

And then we have to go the final point
about that Mr. Stone mentioned in his proposal
about point of contact.

So, let's go through this in order.

One, in favor of having appellate counsel
explicitly named in our recommendation. Those in
favor say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Aye.

VADM TRACEY: Aye.

MR. TAYLOR: Aye.

CHAIR HOLTZMAN: Opposed?
JUDGE JONES: No.

CHAIR HOLTZMAN: Okay, so the ayes have it.

The second one is do we want to have the version suggested in A, or the version suggested in B, or my proposal -- I don't know how we get three in -- three options.

Is anyone in favor of A, which is about to be examined or to be examined say aye.

(No audible response.)

CHAIR HOLTZMAN: The second one is just whose records are about to be examined, say aye.

MR. STONE: Aye.

VADM TRACEY: Aye.

MR. TAYLOR: Aye.

CHAIR HOLTZMAN: The third is whose records are being sought. I say aye to that.

JUDGE JONES: Aye.

CHAIR HOLTZMAN: All right, so anyway, the second one is carried, whose records are about to be examined.
Okay and then we have number three, the issues is on point of contact. I have a problem with that, Mr. Stone, not the concept of it but the language. I don't know what a point of contact is. And so I think we need to have a better statement of what we are looking for there.

MR. TAYLOR: Can I weigh in on that one, please?

CHAIR HOLTZMAN: Yes.

MR. TAYLOR: It seems to me that we need to give the Services enough latitude and use of common sense just for the notice and we don't really need to go beyond that. They will figure out how to do that in a way that works for each Service and their procedures.

So, I would suggest that notice works fine for me, with all due respect, Mr. Stone.

MR. STONE: That's fine and I will withdraw my suggestion, because I basically agree. I was just saying that was language I had thrown out if people were troubled. But I want
to give the Services as much leeway as well.

CHAIR HOLTZMAN: Okay. Admiral, how do you feel about that?

VADM TRACEY: I will agree with it.

CHAIR HOLTZMAN: Me, too.

Judge Jones?

JUDGE JONES: Me, too.

CHAIR HOLTZMAN: Okay, so that's unanimous.

All right, so I think we are finished with the Appellate Rights Report.

MS. GUPTA: So I think where we landed, if I may, is 39B with the words and appellate counsel added. Is that it?

CHAIR HOLTZMAN: Correct.

The problem I see, I just want to say it again, if you look at the recommendation, of course it's not in legislation, but whose records are about to be examined suggests that there has been a decision already to examine them and they are about to be examined, as opposed to a prior process in which you are trying to get those.
So I mean I just wanted to point that out. There is a deficiency if what you -- in how the language is worded in 39B. However, we are done with that.

Let's go to --

MS. GUPTA: We actually have a couple more issues on victims' appellate rights.

CHAIR HOLTZMAN: Oh, we do?

MS. GUPTA: Yes.

CHAIR HOLTZMAN: How did that happen?

MS. GUPTA: The next recommendation is Recommendation 40. At the last meeting, the panel approved by a five-zero vote Recommendation 40 on notice. The recommendation stated the Services formalize procedures to (1) provide victims with a means to receive notice of significant appellate matters, including but not limited to the date and time of any appellate courtroom proceedings and the final decision of any appellate court, if requested, and (2) provide victims with a means to receive appellate pleadings and briefs, if requested.
Mr. Stone has since proposed alternate language for the Panel's consideration, which is included in your folder. Mr. Stone's proposal was circulated to the individual Panel members via email this past week for discussion.

CHAIR HOLTZMAN: Where is Recommendation 40 in our materials? I don't see it. I just have 39.

MS. GUPTA: There should have been two loose papers.

CHAIR HOLTZMAN: Oh, here it is, 40.

Oh, okay, on the bottom.

Mr. Taylor, how does this recommendation comport with the issue you just or the point you just made.

MR. TAYLOR: Well again, with great respect, Mr. Stone, it seems to me that it's not really necessary, although it is possible that we could provide more detailed guidance to the Services about how to do this. So, I would just ask if that generally comports with what just discussed --
MR. STONE: Well, again, I'm fine with taking out the words whose point of contact is reasonably available but I just wanted to make the point, as we were looking these over since the last meeting, that we had actually, as a Panel here, while we were deliberating went from providing victims with notice to the words provide victims with a means to receive notice. And what concerned me was that I didn't want that to include the means being a totally passive means, namely, that something gets posted on a public website and a victim or witness has to check it every single day.

Because for example, in the federal PACER system, while stuff is posted, people who have an interest in the case and they have registered, and that even includes intervenors, they get an email that says to them and entry has made today in your case. Then, they go look it up.

But I was a little concerned just saying and has notice. And that is what the
federal analogue to this, 18 U.S.C. 3771 requires
and that's how they meet it. That is the federal
analogue to 6b. I was a little worried that mine
just says provide victims with a means to receive
notice of appellate matters. I didn't want to
suggest that you can just post it on the website
and that anybody who is interested has to look at
it every day because for some of these people, it
is kind of painful to have to go look up the case
name every single day, assuming that they are not
on vacation and they have access to an electronic
database.

So I just wanted to say to provide
them with timely notice and not only taking it
now towards whether or not they wanted to decline
it and I wrote, unless declined, of significant
matters, including. And I thought these were the
minimum ones which we noted above.

And then on the bottom, I actually
tried to make it, my item number two was to make
it easier for the appellate courts because we had
said provide victims with a means to receive
appellate pleadings and briefs if requested. And again, that is the past and I wasn't sure what that meant and I just wanted to say with convenient access to any unsealed document filed in the case they have requested. The court could just simply instruct the other counsel please make sure to serve the victim. And then the court wouldn't have to do anything about providing documents.

Now it's true that is included in the language of 2 above, provide victims with a means to receive but I thought that that phrase was, again, passive and it might suggest that the means to receive was if you are on the web, go to the web, download this document, and print it. Not every person in a military zone who may be, by the time this gets to the appeal court is going to have access on a daily basis to the internet and a printer to go print it down.

So I just thought that the words with the means to receive was just -- it was too vague. It didn't convey what we wanted. I just
wanted them to make sure that people got notice and convenient access. And again, let the Services figure out how it best works for them.

I frankly think that most of these cases, if given the choice, they are going to say the counsel of one side or the other, please just serve the victims and that will take care of it. But I was trying to get language that wasn't so vague.

CHAIR HOLTZMAN: Okay, so we have the current recommendation. Has that been voted on, Ms. Gupta, by the Panel?

MS. GUPTA: Yes, it was approved by the Panel.

CHAIR HOLTZMAN: So we have a proposed amendment by Mr. Stone to that language.

MS. GUPTA: Yes.

CHAIR HOLTZMAN: Why don't we vote on the proposal?

MR. STONE: And but I do want to lift whose point of contact is reasonably available.

And Professor Taylor, as you suggested, that
might be too prescriptive. That's fine. I'm trying not to be prescriptive.

CHAIR HOLTZMAN: So provide victims in sexual assault cases and you struck out whose point of contact is reasonably available?

MR. STONE: Yes.

CHAIR HOLTZMAN: Is that your proposal?

MR. STONE: Yes, and I put in sexual assault cases --

CHAIR HOLTZMAN: Yes, we got that. So the only change in your amendment to the currently voted on proposal is to strike in line two the words "whose point of contact is reasonably available." So it is basically: The Services formalize procedures to provide victims in sexual assault cases (1) with timely notice, et cetera; and (2) with convenient access. Okay.

Those in favor of Mr. Stone's proposal, as amended, say aye.

MR. TAYLOR: Aye.

MR. STONE: Aye.
JUDGE JONES:  Aye.

CHAIR HOLTZMAN:  Those opposed?

No.

CHAIR HOLTZMAN:  They ayes have it.

Okay, so we're finished with that.

What else do we have?

MS. GUPTA:  That last recommendation is Recommendation 41. At the last meeting, the Panel decided to wait until today's meeting to finalize its recommendation regarding Section 547 of Senate Bill S2943, which would allow victims to file appellate pleadings as a quote "real party in interest."

Mr. Stone has proposed language for the Panel's consideration. His proposal was given to individual members of the Panel.

CHAIR HOLTZMAN:  Haven't we dealt with this already?

MS. GUPTA:  There was no vote last month and the Panel decided to wait until today to decide.

CHAIR HOLTZMAN:  On this?
MS. GUPTA: Section 547 of Recommendation 41.

CHAIR HOLTZMAN: Sorry. I didn't mean to interrupt you.

MS. GUPTA: Oh, that's it. It is available in everyone's folder. I think everyone has it.

MR. STONE: And I might add, I dropped all references to real party in interest, I dropped the definition of victim, simply referring to if they were a victim below. I dropped all references to what issue it had to be, as opposed to the victim's issue below.

And I just said the operative language was that the same victim, so we didn't have to redefine it, may respond in the same manner as a party, it makes it clear they are not a party, regarding that same issue, meaning the one they participated in below. And it says may respond, which means they don't have to respond.

CHAIR HOLTZMAN: And what's the language that this is trying to amend?
MR. STONE: Okay, that we have.

MS. GUPTA: That's available in your booklet at Tab 9.

CHAIR HOLTZMAN: Tab 9, okay.

MR. TAYLOR: So may I speak to this, Madam Chair?

CHAIR HOLTZMAN: Yes, just a moment. Can I just get oriented first, Mr. Taylor?

MR. TAYLOR: Of course.

CHAIR HOLTZMAN: I'm sorry. What is the existing language that we are dealing with? It's the Senate version. Is it subparagraph (f) or is it subparagraph (a) and (f)? What is it that we are looking at here?

MS. GUPTA: (f).

CHAIR HOLTZMAN: Well (a) also says victim as a real party in interest.

MR. STONE: Yes.

CHAIR HOLTZMAN: So I'm just trying to understand where we are.

MR. STONE: Yes, I struck that, yes.

CHAIR HOLTZMAN: Okay, so your
proposal, I'm trying to understand it, is to tell
the Senate that we don't like their -- is to tell
them that we don't like their proposed Section
547 and we want to amend it in what way? We want
to take out (a)?

MR. STONE: We would replace (a) with
a much more simplified version and that's what I
included. We would suggest that they not
complicate matters and add all kinds of
determinations that have to be made but to simply
replace their (a) with our (a), much shorter.

CHAIR HOLTZMAN: Excuse me. Let me
just see what it is but what is the necessity for
this if we have just voted on our Recommendation
39?

MS. GUPTA: Ma'am, I think this would
be broader than Recommendation 39. This would
allow victims of an offense to file pleadings in
an appellate matter. So it wouldn't just be
related to when their sealed materials are being
disclosed to counsel.

MR. STONE: 39, if I may add, just has
to do with whether or not defense counsel gets the material that was sealed. If they get the material because the court thinks they should have it, I presume they are going to write an argument about why that material is relevant and requires a new trial. And as we have discussed earlier and as I explained in the Maryland Hoile case that I cited, sometimes the Government sits on the sideline and says well, it's not my material. I don't really have an oar in this fight. I don't really care. If I have to retry the case because you think it is relevant, I will retry it with the material. If you don't think it made a different in the outcome, I won't retry it.

So it is typically the victim who has an issue with whether it's relevant. And again, this only applies if they got to argue this below on this issue. It is not allowing them to raise any new issues. It's not allowing them to bring to the court an issue that didn't come up. It says may respond in the same manner regarding
that same issue, the substantive issue which they
got to litigate under 513 or 514, or whatever,
before. They get to defend their win. That's
the due process issue.

When a litigant is allowed to argue
for anything, and this even applies -- I mean the
Supreme Court Goldberg vs. Kelly case goes back
to the 1960s where people who had housing, low-
income housing benefits were losing them. And
they said wait a second, if we had the benefit
and you are taking it away, don't we get to be
heard before you take it away on appeal? And the
Supreme Court said yes, that's a matter of due
process.

This is the same thing. The victim
litigated something below. They won. And they
are just simply saying before you take it away on
that same issue, I am the same victim; I would
like to be heard.

CHAIR HOLTZMAN: Mr. Stone --

MR. STONE: In fact, they could

litigate this, even if they didn't object to the
material coming out.

    If you go back to Rule 39 for a minute
or Recommendation 39, they may not object to it
being released but they still might object on the
ground that it shouldn't come in an cause a new
trial.

    CHAIR HOLTZMAN:  Mr. Taylor, I think
you wanted to be heard on this.

    MR. TAYLOR:  Yes, just briefly.  My
recollection, which may not be precise, about
this issue when it came up last time was that
this proposal to adopt 547 was a 2-2 vote and you
asked me do I have an opinion.  And I said well,
I do, there are some things I like about 547 and
some things I don't like, including the whole
issue about what is a real party in interest and
what does it have to do.  I thought it was too
broad, as constructed by the Senate version.  And
at that point, Mr. Stone said that he would seek
to limit it to address some of the objections
that I had.

    So it is my fault that we have to look
at this again. For that, I apologize. But I
will say that I think that Mr. Stone has done a
good job of taking into account the
considerations and objections I had to more
narrowly limit this to a class of individuals
who, in my opinion, should have these appellate
rights. Obviously, somebody on the Senate
Drafting Committee, on the Senate Armed Services
Committee thought so as well.

    CHAIR HOLTZMAN: Why do you say that?

    MR. TAYLOR: Well because they put it
in, we had this. I mean this was, at some point,
proposed by somebody. That's why we have it.

    CHAIR HOLTZMAN: Oh, yes, right but
Mr. Stone's -- I thought you were saying Mr.
Stone's --

    MR. TAYLOR: No, no, I mean that as to
Section 547. I apologize.

    CHAIR HOLTZMAN: Okay, I just want to
ask a few questions about this. I mean I have
serious concerns about victim as a real party in
interest and the term real party in interest
seems to me just confusing and problematic in a
variety of ways.

But what happens with (2)? Is that
out or in?

MR. TAYLOR: It's out.

MR. STONE: Yes, subparagraph (2) is
out. Those are definitions. You don't need them
anymore.

CHAIR HOLTZMAN: Any why is that?

MR. STONE: Because we are saying that
where we have regarding that same issue takes
care of that. Nobody has to look at it and say
oh, is this a 412, or 513, or 514 issue? They
knew this was communications with clergy, I don't
know but the point is it has to be regarding the
same issue that the victim got to litigate below.
The trial judge decided whether they had an
interest and that they were not.

In theory -- in theory under the
Senate's version any issue with regards to 412,
513, and 514, even though they didn't raise or
they didn't win on it, again, that is kind of
broader than what I tried to craft. I tried to
keep it as narrow as possible to what they
already litigated and was decided and only they
can raise it, only that victim, the same victim.

CHAIR HOLTZMAN: Yes, but you see your
language doesn't say that they previously had to
have raised it. You say they previously had
standing to file pleadings and be heard. It
doesn't say that they raised the issue. So
that's not -- I mean --

MR. STONE: Well the reason that it
says that is because a judge might cut them off
and say I don't need to hear you; I can see on
its face that you stood up, you have standing on
that issue. I don't need to hear you. I'm not
releasing this, just in like an attorney-client
context. I mean the judges have a certain amount
of experience and they're trying to save time.
So that's the only reason it doesn't say that.

CHAIR HOLTZMAN: Yes, well, but to me

MR. STONE: But it has to be the same
issue that they had standing.

CHAIR HOLTZMAN: You wouldn't know what issue it is because if the person hasn't talked, how would you know what issue it is?

MR. STONE: Well you know the issue because it's being raised on appeal and it is one they --

CHAIR HOLTZMAN: But now your notice is saying that the person had standing below if it never was resolved below.

MR. STONE: Then it wouldn't be -- this is only if it is called into question. That's the second line.

CHAIR HOLTZMAN: No, it says calling into question --

MR. STONE: A prior judicial ruling.

CHAIR HOLTZMAN: Right. Counsel for the accused files appellate brief calling into question. That's calling into question on the appeal.

MR. STONE: Yes.

CHAIR HOLTZMAN: Right.
MR. STONE: A prior judicial ruling, meaning the trial court decision --

CHAIR HOLTZMAN: Right.

MR. STONE: -- on an issue --

CHAIR HOLTZMAN: Right.

MR. STONE: -- as to which the victim previously had standing to file pleadings and be heard.

CHAIR HOLTZMAN: Right but that's saying that they did.

MR. STONE: That's all admitted by 513 and other rules. We don't even have to cite 513 because that is all what goes on in the trial court.

CHAIR HOLTZMAN: So what you're saying is that even though a victim did not raise -- what this allows is if a victim or a witness did not raise the issue below, they can raise it for the first time now on appeal.

MR. STONE: No, they would need a prior judicial ruling. And the victim is never able here to raise the issue. It says may respond. It
doesn't say may raise an issue. It says the same victim may respond --

        CHAIR HOLTZMAN: No, respond --
        MR. STONE: -- regarding the same issue.

        CHAIR HOLTZMAN: Yes, but respond doesn't -- just means -- so I just think you have a little ambiguity here. I'm not going to the merits. I'm just going to what this raises. So I have some questions about it. That's all.

        Because it allows first for -- it seems to me, for these issues to be raised for the first time on appeal. Maybe I'm wrong in my reading of it.

        MR. STONE: Well, that was attempted to be eliminated in the second half of --

        CHAIR HOLTZMAN: But do I understand you correctly --

        MR. STONE: Now they can't raise a new issue on appeal. I totally agree.

        CHAIR HOLTZMAN: All right.

        MR. STONE: The question do you think
this language does it. I think it does.

CHAIR HOLTZMAN: Okay. And then let me

just go to --

MR. STONE: Do you want to say that
same issue previously decided? That means it
can't be a new issue.

It is a previously decided issue.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: No, I was just saying a

prior judicial ruling is a previously decided

issue.

CHAIR HOLTZMAN: Yes, right, but it may

not be one that the victim was heard on in any

way. That's all.

JUDGE JONES: Right.

MR. STONE: But then we wouldn't have

standing to file pleadings below.

CHAIR HOLTZMAN: They might have but

they decided -- exercised their judgment not to do

that. Now, they're doing it for the first time on

appeal. That's all I'm saying.

VADM TRACEY: So if you said a victim
previously had standing and filed pleadings to be heard.

CHAIR HOLTZMAN: Had standing. You don't need to file pleadings to be heard. Maybe it is just enough to be heard.

VADM TRACEY: I'm sorry, doesn't that --

CHAIR HOLTZMAN: Have standing and was heard.

VADM TRACEY: And was heard.

CHAIR HOLTZMAN: Yes. Right in which a victim previously had standing and was heard.

MR. STONE: Okay. That's even more limiting but that's okay.

CHAIR HOLTZMAN: Previously was heard or had standing and was heard during -- okay, so we narrowed that or made it clear of the point that I was concerned about.

Now, during the appellate review, that same victim may respond in the same manner as a party.

MR. STONE: That language is drawn from
Maryland Rules of Court approved by the high court
and Maryland decisions. When they don't want to
call somebody a party they say as a party. It
makes clear they are not a party but whatever the
rules are that apply to a party as to that issue
apply to them.

Actually in Maryland they call them
victim. They don't want to call them appellant or
appellee they say an issue for quote victim
unquote. I don't think we have to go that far.

CHAIR HOLTZMAN: Okay. My concern
about this is the respond is a little bit narrow
because it means that you are responding to -- it
sounds like you may need to be responding to
somebody else. Suppose the victim is just raising
the issue, nobody else has raised it, they are not
responding to somebody. They are just responding.
So maybe just victim may raise the issue in the
same manner as a party. Is that better?

MR. STONE: I think it's broad. If you
want, put raise the issue, be my guest.

CHAIR HOLTZMAN: Yes, I think it's --
well, I don't know.

    MR. STONE: I asked Professor Taylor

whether he likes raise better than respond. I was

trying to be as narrow as I possibly could to

address his thoughts.

    CHAIR HOLTZMAN: Okay. Anybody have

any other thoughts on that subject?

    JUDGE JONES: So I mean I'm in favor of

-- I've been thinking about what to say when you

do this because I was against this, I believe, we

talked on the phone about it. Respond I agree

with instead of raise. And I guess in the same

manner as a party, I guess that means that they

get the briefing and argument rights. Is that

what you would contemplate, Mr. Stone?

    MR. STONE: Well, in theory yes, but we

know that the Military Courts of Appeals almost

never grant argument to anybody. What it means is

they know what their deadlines are. They know

what their documenting in the files looks like.

They know what the type size is, all those rules

that apply to a party when you file a pleading.
You have to know what they were. We don't want to make them to have to issue brand new rules that you have got to use like you normally have: you got to use type size 13, you have got to have word limits on pleadings, you have so many days to file a response. All of that is taken care of by saying in the same manner as a party.

JUDGE JONES: Okay.

CHAIR HOLTZMAN: Any further discussion on this? Okay, let's vote on it, as amended.

All in favor say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Aye.

MR. TAYLOR: Aye.

VADM TRACEY: Aye.

CHAIR HOLTZMAN: Opposed?

JUDGE JONES: I'm opposed, period.

This language is better, I agree.

CHAIR HOLTZMAN: Right, I agree, too, that it's better but I'm voting in favor for that reason but I don't favor it.

Okay, the proposal is carried.
Are we now finished, Ms. Gupta, with this subject?

MS. GUPTA: Yes, I have one clarification question.

So, Mr. Stone, from Section 547, everything else would be eliminated except for what you proposed?

MR. STONE: Well, I didn't even address subsection (b). In other words, this was a proposal to replace subsection (a).

Subsection (b) had to do with their notice concerns and we didn't really address it last time. And I don't think it was even controversial. I thought that that was what it was. So we would just say we're just addressing subsection (a) of 547, that we would prefer, you know we recommend that it be simplified as follows. I wouldn't even address (b).

VADM TRACEY: So does subparagraph (f)(3), does that go away?

MR. STONE: Yes, (f)(3) goes away.

CHAIR HOLTZMAN: All done?
MS. GUPTA: We're all done.

CHAIR HOLTZMAN: Great. Thank you very much. We will take a break now before we hear from Professor Spohn and start on the data.

Thank you.

(Whereupon, the above-entitled matter went off the record at 10:42 a.m. and resumed at 10:51 a.m.)

CHAIR HOLTZMAN: Now we're up to Dr. Spohn. And do we have a tab number that we're focusing on?

MS. PETERS: Yes, ma'am. This block will begin with an overview I can provide the Staff about the tasks that relate to Dr. Spohn's data and you can -- I will walk those through on the slides but you can refer to Tab 2, which have the prior report's recommendations, and I believe you received Dr. Spohn's narrative report, to which her presentation will correspond. And that is in Tab 6 of your read ahead materials.

CHAIR HOLTZMAN: Okay, so what are we starting with?
MS. PETERS: Ma'am, I'd like to give the Members of the Panel a brief overview of the statutory tasks and the information that the Staff collected this year that supports the data project.

Because all the information you are about to hear is tied to three specific JPP statutory tasks, I would like to start with an overview of those tasks and then describe the information that the Staff collected in order to enable the panel to address those tasks.

The first task that is addressed by the data that has been collected is to review and evaluate current trends in response to sexual assault crimes, whether by courts-martial proceedings, nonjudicial punishment, and administrative actions, including the number of punishments by type and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

If I may, the second task addressed by
the data and that the Panel has to address with regards to the data that has been collected is to identify any trends in punishments rendered by military courts-martial, including general, special, and summary courts-martial in response to sexual assault, including the number of punishments by type and the consistency of the punishments, based on the facts of each case, compared to the punishments rendered by federal and state criminal courts.

Finally, the Panel is to review and evaluate court-martial convictions for sexual assault in the year covered by the most recent report of the Judicial Proceedings Panel and the number and description of instances when punishments were reduced or set aside on appeal in instances in which the defendant appealed following a plea agreement, if such information is available.

Now, the Panel has addressed these tasks in its April 2016 Report on Statistical Data Regarding Military Adjudication of Sex Assault
Offenses. At this time, the Panel is revisiting some of these issues with new data collected representing courts-martial tried in Fiscal Year '15. Previously, the Panel examined data from courts-martial in cases that arose in Fiscal Years '12 through '14.

And what the Staff collected, again, are cases that were tried, dismissed, or resulted in alternate forum in Fiscal Year '14. So you are getting a snapshot of judicial proceedings, mainly, that took place in FY15.

And for our purposes, a case was tried when findings or sentence was adjudged. That's when we considered a case ripe for assessment in our database and by Dr. Spohn.

All of the cases that we collected involved one preferred charge of sexual assault, some type of sexual assault offense. We know that preferral can happen long before trial. If the trial takes a long time to happen, it could have been preferred in a previous Fiscal Year but if that charge was tried or dismissed in Fiscal Year
'15, we counted it. But all of these cases were considered for prosecution and we know that because we collected a charge sheet that included at least one charge of sexual assault.

Our approach, similar to last time, was to request specific case documents that would help us chart out the procedural history of each case. And it is roughly similar to the cases or the documents we collected last time, such as the charge sheet, documents that record the result of trial, the Article 32 hearing, the SJA's advice and any post-trial issues identified by the SJA or the convening authority.

The major difference in this year's data set is that we requested all sexual assault cases from the Services and that includes cases involving spouses or intimate partners.

Last year -- last time, when we collected data for '12 through '14, those cases were limited to cases covered by DoD SAPRO's policies and were recorded in the DoD SAPRO report. The cases that DoD SAPRO does not cover
are spouse and intimate partner cases. And because last time we asked the Services, Services give us the cases that you listed in your SAPRO report because it is this massive compilation of data, we only got the SAPRO policy-covered cases. This year, we said give us all of your cases no matter what you call it, no matter who reports it. And so the Services used SAPRO-reported cases and then had to independently identify spouse and intimate partner cases and bring them all to us this year.

And then what we did is we looked for a document in every file that had the date that the trial or the findings were adjudged, or the sentence was adjudged, or the date of dismissal, or the date that the case was resolved by ultimate resolution. So we can say that every case we have was resolved in Fiscal Year '15 and that's an improvement I think over some of the issues we had run into last time.

Here's the number of cases that we have for you. When we went to the Services and
requested data, overall, they identified 963 cases. And ultimately, we were able to get a full record of documents of cases meeting our criteria for 738 cases across all of the military Services, including the Coast Guard.

CHAIR HOLTZMAN: What page on this document?

MS. PETERS: In our slides, we are on slide 7.

CHAIR HOLTZMAN: Slide 7, is that this one, the courts-martial statistics?

MS. PETERS: It says courts-martial data collection at the top.

CHAIR HOLTZMAN: Okay, I found it.

Great. So just before you get to that, you said that the total number of cases was 963?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: But we only found 738?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Can you account for the disparity?

MS. PETERS: Yes. The way we got from
963 to 738 was that if the Services gave us two lists, a list of cases reported to SAPRO and then everything else that involves spouses or intimate partners, the cases that were reported to SAPRO tended to include -- first of all they tended to be listed multiple times because SAPRO requests that you list every case by victim. In a multi-victim case, the same case is going to be listed two or three times.

CHAIR HOLTZMAN: Oh, okay.

MS. PETERS: We had to take the list and sift out duplicates.

And then where we found that the Services were quoted in FY15 a case that had actually been tried in '12, '13, '14, of FY16, we also took that case out as well because we had a document to verify when the trial date or the resolution occurred.

And after we conducted that weeding out process and said also, do you have a complete set of documents, if they couldn't locate the documents, and that's included in the delta here,
they couldn't locate the documents, then we did not enter the case.

CHAIR HOLTZMAN: Do you have a number next to the instances in which they couldn't locate the documents?

MS. PETERS: I could get that for you, ma'am. I didn't prepare that for today.

Some of the cases that they did not provide it turned out also fell into the category of cases that were tried in prior Fiscal Years. So I could cross-reference our previous list of cases from '12 through '14, ran the name, and if it came up as a case from the previous report, we didn't count that as a case not delivered because it wouldn't count anyways.

CHAIR HOLTZMAN: Okay, right.

MR. STONE: Can you give us even an guesstimate of the Fiscal Year '15 cases, how many cases you wouldn't have had documents in? Was it really exceptionally small?

MS. PETERS: It is relatively small, relative to the other categories like cases that
were previously reported or were tried in other years, it is a relatively small number. It's just a handful in some of the Services. And I think because the Army has almost half of the overall cases, that's where we see the largest number of cases not provided or cases really that fell into the category of they belonged in another fiscal year group.

MR. STONE: Okay. If you -- and I don't know, maybe you'll get to this, if anybody tried -- and this follows up on the Chair's question, if anybody's tried to look and see if those all come from a particular military judge or a particular military base that needs a few more resources because it is skewing the data, while everybody else is managing to give you documents.

MS. PETERS: We can do -- we can easily, for you, sir, go back and do a Service by Service analysis. We don't have a reason, necessarily. We could go back to the Services and ask why it was difficult to locate.

MR. STONE: No, I mean in your most
recent full Fiscal Year --

MS. PETERS: Okay.

MR. STONE: -- to see if it comes from -- and maybe it is telling us that there's a problem, a particular location doesn't have enough services.

MS. PETERS: Yes, sir, we can do that.

MR. STONE: And you know that may be something that is worth addressing.

MS. PETERS: Okay.

MR. STONE: You know I mean it's possible it is a location on the front lines, somewhere, and that's understandable. But I think it would be useful to know if it is something that can be readily addressed, that is worth a recommendation to others for us to help them fix that little problem that maybe is overlooked, except by somebody like you who is looking at do we have -- did we get the right paperwork done.

MS. PETERS: Okay, we can definitely do that for you, sir.

I will comment that from the Staff's
perspective, the document production has improved for the Fiscal Year '15 data set over what we were able to retrieve for the '12 through '14 cases. And on the next slide, I can give you a Service by Service breakdown. Again, it doesn't get to any particular specific circumstances but this will tell you specifically how many cases were identified by Service and then how many ended up on our data base, according to each Service.

CHAIR HOLTZMAN: Okay.

MS. PETERS: In the Staff's research, we did find that some of the reasons for the cases from other Fiscal Years were done so systematically in that there is an annual requirement or there is a little requirement from Congress to report on every case. If a Service missed a case from a prior Fiscal Year, they included it in the 2015 report. In the previous years' reporting, in '12 and '13, Congress had less stringent reporting requirements. Each year they added more. So their approach was also to say if in '12, and '13, and '14 you reported a
case that was pending or you didn't include the full information about the case's resolution, it was re-reported. So what we found is that Services aren't just catching up, they are re-reporting the same case in 2015 that was tried or resolved in a prior Fiscal Year because there is less robust information provided in that report.

Now, again, all these cases had a '15 label on them when they came to us. We had to do our own research to find all of this out.

And lastly, there is some bleed over from one Fiscal Year to the next. By 30 September, they don't have every case tried into the SAPRO database. And everyone has agreed that there is going to be bleed-over from one year to the next and that is sort of a Service practice. And I think there is a continual improvement in database entry and Service collaboration in uniformity but we are still running into some of the same issues we ran into in previous data collection years.

I would also just note that the Coast
Guard's case data are not reported in the SAPRO report because they are not within DoD for the purposes of DoD SAPRO reporting. So we were able to retrieve some information that is not available through the SAPRO reports that way.

CHAIR HOLTZMAN: So our report includes the Coast Guard.

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay.

MS. PETERS: And this is a brief overview of our process. Once again, we took all of the case documents and the Staff entered information in those documents into an electronic database. We then uploaded the documents into that database to retain them for reference. And we provided the aggregate data, an output file in a Microsoft Excel format, to Dr. Spohn and she was able to analyze data for 738 cases.

CHAIR HOLTZMAN: So it sounds like it is a huge job that the Staff undertook to take all these numbers then massage them to come up with the accurate number of cases where there was a
final disposition, in essence, in 2015, Fiscal Year for that.

   MS. PETERS: Yes, ma'am. It was an extensive amount of work to come up with an FY15 only dataset.

   CHAIR HOLTZMAN: I know this is an extraneous question in a way but if JPP is not here, who will do this in the future if DoD needs to get this information? Do they have the capability? Or maybe I should ask that of Mr. Galbreath.

   MS. PETERS: I think he can elaborate on that.

   CHAIR HOLTZMAN: Okay.

   MS. PETERS: My understanding is they are making improvements towards that every year. It doesn't appear for the cases listed in the SAPRO report, for a variety of ostensibly legitimate reasons, that it is purely annual data.

   We had to divorce ourselves from the SAPRO report in order to come up with annual data for you all.
CHAIR HOLTZMAN: Okay, thank you.

MR. STONE: Do you know if the follow-on panel after us will at least quarterly be tracking some of these same numbers that you have looked at? I don't know if you know the answer, but if you do.

CAPT TIDESWELL: Well, Mr. Stone, they have only met once back in January. They have another meeting on the 28th of April. What I did learn during the January meeting is they are very, very interested in the Panel and data. Every question that was raised was what does the data tell us on X.

So, Dr. Spohn is actually a member of the DAC-IPAD --

MR. STONE: Oh, great.

CAPT TIDESWELL: -- which is the acronym for the new Panel. So I suspect they will make a decision to keep up the database.

MR. STONE: Great.

CAPT TIDESWELL: But that is up to them, sir.
MR. STONE: Sure.

CHAIR HOLTZMAN: But they are not mandated by Congress, as we were to get this information.

CAPT TIDESWELL: No, sir -- no, ma'am. I'm sorry.

What they are mandated to do, though, is to do case reviews and to look at basically from start to finish. And I think what they see the data will do is help them inform so they --

CHAIR HOLTZMAN: Right but nobody has the mandate we have.

CAPT TIDESWELL: No, ma'am, they do not.

CHAIR HOLTZMAN: Okay, thanks.

Okay, Dr. Spohn, are we ready for you now or Ms. Peters, you still have more?

MS. PETERS: I have one more bit of information for you.

CHAIR HOLTZMAN: Okay.

MS. PETERS: And that is outside of our statistical data, the Staff has requested
information from the Department of Defense.

Because the Panel issued two recommendations in
its last report, we have requested a written and
oral response from DoD in regards to the
implementation status of those recommendations.

We did not receive a written response
from DoD. My understanding is the afternoon's
speakers will address this issue for you.

Separately, in the Staff's work with
data collection, we have become aware of a Sexual
Assault Data Initiative the Secretary of Defense
initiated the middle of last year in May of 2016.
They wanted to harness the Defense Digital
Service, which are private sector technology
experts hired from Google and other software
companies to work temporarily in the federal
government throughout the federal agencies and
enhance the technological capabilities and enhance
functioning, basically.

The Secretary of Defense issued a memo
saying Defense Digital Services please look at the
SAPRO data or our sexual assault data more
broadly. And we just know that the initiative began in May of last year and we have just asked for any substantive results, policy changes, or anything that might have come from their look at their own data collection.

CHAIR HOLTZMAN: And we haven't heard back.

MS. PETERS: No, ma'am. And I believe it should be addressed by the afternoon session speaker.

CHAIR HOLTZMAN: Oh, okay.

MS. PETERS: We did request a written response on that as well.

CHAIR HOLTZMAN: Thank you.

MS. PETERS: But we did not receive one yet so I think it will have to be addressed in the comments today.

And lastly, just to remind the Panel that in the FY17 of NDAA, it contained Military Justice Act provisions that are broad sweeping reforms to the entire UCMJ. And you did hear on one of them, which is Article 140(a). I think
Judge Effron might have briefed that for you but, even so, I wanted to remind you that this new article, which would take effect in four years on case management data collection and accessibility is new and relevant in that one of its intended purposes is to provide uniform standards and criteria for military justice data collection across all stages of the military justice process.

And I think the language of this article is written broadly so the Services and DoD can collaborate to come up with the contours of that system. But this is something new that there will be uniform across the Service, data collection mandated in the NDAA. It does have an implementation date of four years from now and it doesn't just pertain to sexual assault but I wanted to make the Panel aware of that upcoming change.

And that is all I have for you today, subject to your questions.

CHAIR HOLTZMAN: Thank you very much.
Dr. Spohn, are we ready for you? Thank
you.

DR. SPOHN: So, as Ms. Peters indicated, they provided me with an Excel spreadsheet containing the 738 cases.

CHAIR HOLTZMAN: Is this our document? It's called Adjudication of Sexual Offices Reported to the Military Services in 2015 data.

DR. SPOHN: Yes.

CHAIR HOLTZMAN: It's in our packets, everyone. Okay, thank you.

DR. SPOHN: So they provided me with an Excel spreadsheet containing the 738 cases and all of the relevant data on those cases, which I then entered into a statistical analysis package and produced the results that I'm going to be talking about today.

I'm going to start by talking about just descriptive data. What were the characteristics of the accused, the victim, the case, the outcomes? And then talk more about the factors that affected dispositions and outcomes, ending with a discussion of what predicted those
outcomes.

So, as Ms. Peters pointed out, the data includes all cases in which there was at least one count of either a penetrative or a contact offense. And 530 were penetrative offenses and 208 were contact cases in which the most serious charge was a contact offense. Two thirds of these cases were from the Army or the Air Force.

In terms of the accused, the typical accused was an enlisted Servicemember.

MR. STONE: In looking at your numbers, before we skip to that, in that last slide data where you said two-third were from the Army or Air Force, did you try to compare numbers versus the size of that Military service so we know whether -- because looking at this data, it sounds like wow, the Army far and away has got the most number of sexual assaults but maybe the answer is that the Army is five times larger, so in terms of which Service has seen the most problems by virtue of its size.

Is that in here somewhere?
DR. SPOHN: It is not and I did not have that data.

MR. STONE: Can you -- is there --

DR. SPOHN: We can certainly calculate that.

MR. STONE: Okay, that would be really helpful because I don't want to give a misleading notion that --

DR. SPOHN: Right, right.

MR. STONE: -- you know -- okay.

DR. SPOHN: Exactly.

CHAIR HOLTZMAN: How does this compare with the numbers last year, the total number?

DR. SPOHN: It's very similar --

CHAIR HOLTZMAN: In 2014.

DR. SPOHN: -- in '12 to '14. Do you mean just in terms of the breakdown from the various Services?

CHAIR HOLTZMAN: The breakdown and the total number of cases.

DR. SPOHN: We did 1761 for '12, '13, and '14. So we have slightly more cases in terms
of proportion but then we do have the family
cases, which are 130 cases of the total of the 738
are cases that involve spouses or intimate
partners. So it's roughly comparable, then. If
we had three years before with 1761 and this time
you take out the 130, we've got 608. So, it's
roughly comparable.

MS. PETERS: Ma'am, we did also find
that in FY14 there were over 100 cases that were
actually tried in '15. So the reason these
datasets are not directly comparable is 100 cases
are repeated in terms of analysis.

CHAIR HOLTZMAN: I got that. Okay,

thank you.

DR. SPOHN: So, again, the typical --

VADM TRACEY: May I ask -- I'm sorry.

I think you said they are duplicative but are
there cases that were reported in the '15 data
that had not been previously reported?

MS. PETERS: A few, yes.

VADM TRACEY: And did we go back and

amend the data for those few?
MS. PETERS: No, we did not. In an ideal world, we would regroup all years. We would need to take the time to regroup all '12, '13, '14, and '15 sets and we haven't done that yet, ma'am.

VADM TRACEY: We have to report on trends, right? So at some point we are going to need to do something.

MS. PETERS: Yes, ma'am. We are in the process. We have gotten through a few of the Services already in re-inputting their data.

VADM TRACEY: Okay.

DR. SPOHN: So in terms of the accused in the data file, the typical accused was an enlisted Servicemember with about just under eight percent being officers. Most were male. And data that we did not have in the previous study but which someone had asked for, we looked at where the accused was assigned when charges were preferred. And you can see that about just over 80 percent were in units in the United States or its territories when charges were preferred.
This, of course, does not necessarily indicate that that's where the incident occurred but it is where the accused was stationed when charges were preferred. That is where data was recorded.

MR. STONE: I guess that leads me to ask another question, which maybe would have been nice to have asked you before this, which was what percentage of the one overseas do we think are in -- and I'm not sure I know the right term for this -- in the old days I would have said combat zones. But I mean it may be some kind of zones where they get a higher pay because they are at risk. In other words, not including let's say Japan, where the officers in Japan don't feel a threat but would include officers in Afghanistan or something.

So I don't know if there is a way for that 18.7 percent to be broken down but I think that is a real difference. Some are facing real stress every day and others are in a situation that is more or less comparable to being in the U.S. or a territory.
MS. PETERS: Sir, the information we available is that one location on the charge sheet, unless we wanted to go back and look at the incident location for each and every specification. So we can't determine necessarily. The unit doesn't determine whether necessarily they are in Afghanistan, or in Germany, or on a ship out at sea. It is difficult from that piece of information to determine where the case necessarily was prosecuted in terms of being deployed or being in garrison stateside.

MR. STONE: Can we tell from that Member's pay? Do they get a bump up in pay when they are in an active zone?

MS. PETERS: We don't have that information. We only have their base pay available on the charge sheet and so we wouldn't have any supplemental pay available to us.

CHAIR HOLTZMAN: Plus we don't have any figures showing the proportion of troops that are in the U.S. and its territories versus those that are not. So, the figures are pretty --
MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: I don't know what significance these have at all. In fact, it is misleading, in a way, to have them here because they don't even shown where the alleged crime took place.

MR. STONE: Well, I don't know. I think they are of some value because certainly in the U.S. and its territories we would hope, for example, that we would get all the paperwork. I mean in other words, I think to some extent we would hope there is a more regularized procedure. I just don't know what to say about the other 18.5 percent, whether those are in situations where everybody is on call and on alert most of the time, as opposed to not on alert most of the time and, therefore, paperwork is not as important as keeping yourself in readiness for immediate combat.

CHAIR HOLTZMAN: Well do you have any information here on the relative ranks of the -- is that someplace else we are going to see?
DR. SPOHN: It's not in the presentation but in terms of pay grade or in terms of rank?

CHAIR HOLTZMAN: Rank.

DR. SPOHN: Oh, okay.

CHAIR HOLTZMAN: Do you have that information someplace?

DR. SPOHN: Yes. So, more than two-thirds of the accused who were enlisted Servicemembers were E3, E4, or E5. Two-thirds of the enlisted fell in the E3, E4, and E5. And 40 of the 54 officers were 02, 03, or 04. So they are in that midrange.

CHAIR HOLTZMAN: And what about the relationship to the victim in terms of rank?

MS. PETERS: We didn't collect rank on the victim, due to the mix of civilian and military victims. We would have to go back and try to collect that for you. We did not provide that data to Dr. Spohn.

CHAIR HOLTZMAN: Okay.

DR. SPOHN: So moving on to the
victims, the number of victims ranged from 1 to 15
but most cases involved only one or two victims.
So about 95 percent of the cases involved one or
two victims.

The typical victim was female but there
was a fairly substantial number of cases involving
male victims. The typical victim was a member of
Military services, about two-thirds, and was not
the spouse or intimate partner of the accused.

Of the victims who were spouses or
intimate partners, 82 of the 130 were civilians.
The remaining 48 were members of the Military.

So in terms of case dispositions, 526
of the 738 cases were referred to a court-martial;
16.4 percent received an alternative disposition;
and 12.3 percent were dismissed without further
action.

And of those cases that were referred
to court-martial, most went to a general court-
martial with the remainder going to either a
special court-martial or a summary court-martial.

And again, of the 526 cases, that were
referred to a court-martial, just over half were
decided by a military judge; 40 percent were
decided by a panel of military members; and then
the 39 cases that went to a summary court-martial
were decided by a summary court-martial officer.

CHAIR HOLTZMAN: Well, one other
question about the accused. In how many cases was
there more than one accused?

DR. SPOHN: They are all a single
accused. I mean it is based on the --

CHAIR HOLTZMAN: Can that be if you
have 15 victims?

DR. SPOHN: Pardon me?

CHAIR HOLTZMAN: When you have 15
victims, just one defendant?

MR. STONE: I'm guessing the cases get
sentenced. In other words, that you might have
more than one accused but for trial they ask for
severance so it appears to be even if the victims
are the same in 10 or 15 of those trials because
of the party got out of hand, everybody got drunk,
you would still have one defendant and the same
group of victims testifying about what was going on in those cases and that's why it is one defendant cases.

DR. SPOHN: So I didn't have any information on the names because names of victims and defendants were all redacted. But the data file is based on a single offender. So we can't --

CHAIR HOLTZMAN: Yes, but that might be something that is important to know. I mean how many cases are we talking about in which people are acting in pairs or in groups of defendants?

MS. PETERS: We can look at the conspiracy charges and cases that involved those type of offenses.

CHAIR HOLTZMAN: Would there be a conspiracy charge in those cases?

MS. PETERS: Potentially, yes, ma'am, and we have seen instances of that in our database.

We could go back and look at ways to provide that information.
CHAIR HOLTZMAN: You probably need to do that just in terms of understanding the picture that we're seeing.

MR. TAYLOR: I have a couple of questions, if I may, about the case dispositions.

CHAIR HOLTZMAN: Yes, Mr. Taylor.

MR. TAYLOR: Did you break this down as to the numbers and percentages by Service, in terms of whether one Service is typically using more courts-martial than others?

DR. SPOHN: That will be coming on --

MR. TAYLOR: Okay.

DR. SPOHN: -- in a later slide.

MR. TAYLOR: Okay, thank you. And the second one may be in that same category and that is do you have a breakdown as to the alternative dispositions and how they pair out as to the Services -- what some of the alternative dispositions are and if there is any pattern or trend among the Services that one is doing things significantly different from the other.

DR. SPOHN: Can you speak to the
alternative dispositions?

    MS. PETERS: We did break down the
number of courts-martial, alternative
dispositions, or case dismissals by Services.
Yes, sir, so that's in the data report and I
believe it is in a later slide.

    MR. TAYLOR: Okay, thank you.

    MS. PETERS: Yes.

    DR. SPOHN: So the next slide looks at
the penetrative offenses and looks at the outcomes
of these offenses. And you can see that about a
quarter of the accused who were charged with a
penetrative offense were convicted of a
penetrative offense. Very few were convicted of
a contact offense but about 20 percent, just over
20 percent were convicted of a non-sex offense; 21
percent were acquitted; 14 percent received some
sort of alternative disposition; and 14.7 percent
were dismissed, all charges were dismissed without
further action.

    CHAIR HOLTZMAN: How does this compare
to the prior -- I mean I know that the comparison
isn't great but to '12, '13, and '14?

DR. SPOHN: I believe it's very similar.

So in the 2012-2014 data, 24.5 percent of those charged with a penetrative offense were convicted, so almost identical. More were convicted were of a sexual contact offense, 16.7 and fewer were convicted of a non-sex offense, 10 percent.

So the overall conviction rate for the penetrative offenses is just under 50 percent and these are of all cases that were preferred and in a later slide I will talk about cases that were referred to trial and the conviction rate for those.

CHAIR HOLTZMAN: So when you say overall conviction rate, you mean convicted of --

DR. SPOHN: Of something.

CHAIR HOLTZMAN: -- something.

DR. SPOHN: Something.

If you look at the contact offenses, you will see that the pattern is somewhat
different. We find that most of those who were
charged at least one contact offense were
convicted of a non-sex offense, with 17.8 percent
convicted of a contact offense. The overall
conviction rate, then, adding those two figures
together is 58.7 percent.

Dismissals were less likely in contact
offenses than they were in the penetrative
offenses and alternative dispositions were
somewhat more likely to be used in the sexual
contact offenses.

So this presents the data of cases that
were actually referred to trial. And so it takes
out those cases where charges were dismissed with
no further action and those cases that received an
alternative disposition. So the cases that went
to court-martial of some type, you can see for the
penetrative offenses, just over a third of them
were convicted of penetrative offenses with just
under a third convicted of a non-sex offense and
then a very small percentage convicted of a
contact offense.
But if you look at the cases that were referred to trial, the overall conviction rate is 70 percent. And for the contact offenses, the overall conviction rate, adding together of the convicted for a contact offense and the convicted for a non-sex offense, it was 81.9 percent.

And I know we are reluctant to make any comparisons to the civilian world but the data that was provided by the Bureau of Justice Statistics shows that sexual assaults in the 75 largest counties in the United States in 2009 had a conviction rate of 68 percent.

So it's --

CHAIR HOLTZMAN: Excuse me. Can you explain the difference between case outcomes, cases referred to trial, and the prior slide? What's being omitted in the cases referred to trial?

DR. SPOHN: Those cases were all charges were dismissed without further action and most --

CHAIR HOLTZMAN: Okay and
adjudications, different kind of adjudication.

DR. SPOHN: I'm sorry.

CHAIR HOLTZMAN: What's it called?

Alternative adjudications.

DR. SPOHN: Right, yes.

CHAIR HOLTZMAN: Okay, so those are not included.

DR. SPOHN: Those are not included. So these are only the cases that were referred to some sort of court-martial, general, special, or summary. And so the conviction rate is obviously going to be higher because those dismissals and alternative dispositions are taken out.

MR. STONE: Will this include, though, pleas, if somebody wants to plead guilty?

DR. SPOHN: Yes.

MR. STONE: Okay, so it includes pleas.

DR. SPOHN: Pleas and trials.

MR. STONE: Okay. So it would be nice to separate out the ones that when they go to trial but there is no plea of guilty because that skews the data some.
CHAIR HOLTZMAN: Do you have a trial conviction -- in other words, a trial conviction rate?

MS. PETERS: No, we do not. We just separately, the Staff looked at how many cases overall involved a guilty plea to a sex assault offense but we did not parse out guilty pleas versus contested trials for this data or in the data that we provided to Dr. Spohn.

DR. SPOHN: But you can see that of the cases that went to trial, 30 percent of the penetrative offenses resulted in an acquittal at trial and 18.1 percent of the cases of the contact offenses resulted in an acquittal at trial.

So we're moving on now to the sentence type.

MR. STONE: I guess the trouble with that data, the reason that it leaves me a little confused is for example, if 30 percent resulted in acquittal, we don't know if only 50 percent from those other two categories went to trial and the 30 percent is way more than half or way less than
half of the contested cases because the rest all pled out. So that's why I think that is a little confusing, at least to me, not to know which percentage of these are guilty pleas and which are literally contested trials.

MS. PETERS: Yes, sir. Overall, only 55 cases, total, involved a guilty plea to a sexual assault offense. We were able to parse that out. And the number of cases involving a plea to other offenses I think numbered 190.

So in 190 cases, they might have pled and it might still be a contested case. It may have been a mixed plea but there was at least one plea to a non-sex offense in 190 cases; 55 cases only out of our total data set involved a guilty plea to a sexual assault offense and that includes both penetrative and contact offenses.

But we didn't parse it out percentage-wise for this information.

MR. STONE: It sounds like, though, you might be able to do it, though, if you know those numbers.
MS. PETERS: Yes, sir.

DR. SPOHN: So moving on to sentences, we looked at whether the accused with a conviction received a confinement sentence, a punitive separation, or confinement plus punitive separation and as you can see, about just under three-quarters of the convictions resulted in some sort of confinement sentence; 60 percent resulted in a punitive separation; and just over half received both confinement and separation.

CHAIR HOLTZMAN: What's an approved sentence?

DR. SPOHN: As opposed to the adjudged sentence. The approved sentence is the sentence that is actually imposed by the judge.

MS. PETERS: It would reflect any clemency matters or pretrial agreement terms that cap a sentence.

CHAIR HOLTZMAN: Okay and what about the alternative adjudications? Are those included in the confinement? Have you analyzed what the alternative adjudications consisted of?
MS. PETERS: The vast majority, meaning all but a handful, were discharges in lieu of trial, which is a request by an accused officer or enlisted facing trial to be dismissed or discharged in lieu of facing court-martial.

CHAIR HOLTZMAN: Okay.

MR. STONE: Does the fact that these totals are more than 100 in the first two categories mean that some people who were punitively separated -- no, if they also had confinement, they would have been in the third category. I'm confused as to why don't equal 100. I don't understand columns one and two equaling more than 100.

DR. SPOHN: Because some people got punitive separation but not confinement.

MR. STONE: But how could that be 59 percent?

DR. SPOHN: And some got both. So, the 52.1 percent is captured in both of those columns.

MR. STONE: It's from both of those columns.
DR. SPOHN: Right.

MR. STONE: But don't the other two columns need to add up to 100 percent?

DR. SPOHN: No because included in one of those --

MR. STONE: No, then they would have been in this one.

CHAIR HOLTZMAN: They are in this one but they are also in that one.

MR. STONE: Oh, I see. So there are people in column one who are also in column two and column three.

DR. SPOHN: Yes. So just looking at these sentences separately.

MR. STONE: Okay.

DR. SPOHN: Moving on to the length of the sentence, in terms of the adjudged sentence, it ranged from less than six months to life in prison. The approved sentence was similar, the range was six months to life in prison. The mean was 43 for the adjudge sentence and 36 for the approved sentence, meaning that there was only a
reduction, an average reduction of seven months, about seven months between the adjudged and the approved sentence.

For penetrative offenses, the mean sentence was 66 months and for contact offenses it was ten months and we will get to that. I thought that might come up now but we will get to that a little bit later.

So the next part of the analysis is just looking at the relationships between two variables, type of disposition or type of outcome and one other factor.

So for example, is the accused's military Service a statistically significant predictor of the type of disposition, that is, the type of court-martial or is the relationship between the victim and the accused a statistically significant predictor of the case outcome?

And so here we are just looking at the relationship between one factor and the type of disposition or the outcome.

So if we look at the significant
predictors of the type of disposition, that is whether the case when to a general, a special, or a summary court-martial, the significant predictors were the type of charge so that penetrative offenses were much more likely to go to a general court-martial than were contact offenses. And by juxtaposition, the contact offenses were more likely to be disposed at either a special or a summary court-martial.

Military service of the accused was also related to the type of disposition, with cases from the Army and Air Force more likely than cases from the Coast Guard, Navy, or Marine Corps to be disposed at a general court-martial.

All 43 cases involving officers were disposed at general courts-martial, which my understanding is that is required by Statute. So it's nice to see the data confirming it.

And the type of disposition was more varied for cases involving enlisted Members but even there, 77 percent of those cases were disposed at a general court-martial.
VADM TRACEY: Are you able to tell whether the 23 or 22 percent that were not, were they more senior or junior enlisted personnel? Are you able to tell that?

DR. SPOHN: We didn't break it down that way but we could. We could break it down the rank or the pay grade first by disposition. Is that what you are asking?

Last year in the analysis or in the data file we did not include the pay grade of the accused but we did have that this time.

In terms of the case outcomes, those were broken down by penetrative and contact offenses, since outcome was significantly related to the type of offense that was charged. The only significant predictor was the Military service of the accused and this was penetrative offenses only. And I will show you some of the differences there, which was a question that was asked just a moment ago.

Outcomes in this bivariate analysis were not affected by the variables that are listed...
here.

So moving on to looking at case outcomes by military Service, for the penetrative offenses these outcomes, Mr. Stone, do add up to 100 percent.

MR. STONE: Thank you. I was not a math major. I defer to you on that stuff.

DR. SPOHN: Looking at whether the case resulted in a conviction, which is the lowest bar and acquittal, which is the sort of light blue bar, and alternative disposition, which is the mustard-colored bar, and then a dismissal at the top. And you can see -- I'm not going to put much emphasis on the Coast Guard, given that there were so few cases from the Coast Guard. The pattern is different but I'm not sure what to make of it, just given the small number of cases there.

But if you look at the Army, you can see that the likelihood of conviction for accused who were from the Army is greater than it is from the Air Force and the Marine Corps and the Navy are just somewhat less than that.
We also see that the likelihood of the case being dismissed is smaller for the Army, larger for the Air Force, the Marine Corps, and the Navy. And although this is purely speculative, this could reflect the fact that cases are screened out differently in the Army than in the other Services, so that cases with weaker evidence or with reluctant victims might be screened out earlier in some Services than in others. So, you would get a lower dismissal rate and a higher conviction rate if that were in fact the case, if the charges were simply not preferred in those cases.

But again, that is pure speculation because we don't have data on what happened prior or the kinds of cases that were in the system prior to charges being preferred. That is where the data starts with this project.

MR. STONE: Do you know if we have asked anybody just on a subjective basis to ask some of the prosecutors in the various Services whether that's --
DR. SPOHN: That would be interesting.

MR. STONE: Just a subjective basis to see if they think that's the solution. Perhaps the Staff can ask some representative prosecutors if they agree with that. It's an interesting supposition.

DR. SPOHN: Yes. So this is just a slightly different way of presenting the data. This looks at the conviction charge. The previous chart combined all convictions together in the lower bar. This breaks it out by the type of conviction charge. Again, this is only those who were initially charged with penetrative offense. And you can see that the likelihood of being convicted of a penetrative offense varies pretty dramatically across the Services with the Army having a higher conviction rate for the most serious offense than the Navy, which is higher than the Air Force, with the Marine Corps having the lowest conviction rate for penetrative offenses.

None of the Services has a particularly
high rate of conviction for contact offenses but
the likelihood of being convicted of a non-sex
offense also varies with the highest rate value in
the Marine Corps and lower rates in the other
Services.

So, here we break it down in the same
way that I did earlier, that is, let's just look
at the cases that went to trial. And this
presents the conviction and acquittal rates across
the Services. Again, we see -- and just help me
for a moment -- the Coast Guard we see that
acquittal is more likely in the Air Force and the
Navy than it is in the Army and the Marine Corps.

So moving on to sentences. The
significant predictors of whether the convicted
accused was confined, were the status of the
victim. Confinement was more likely if the victim
was a civilian. The type of conviction charged,
not surprisingly, confinement was more likely if
the -- that should say if the accused was
convicted of a penetrative offense, not charged.
Confinement more likely if the offender was
convicted by general court-martial, as opposed to special or summary. And confinement was more likely if the conviction was by a military judge or a panel of Military Members, rather than by summary court-martial.

We will skip over the factors that did not affect confinement and just go on and I will illustrate with some charts the likelihood of confinement. This breaks it down by the status of the victim. And you can see that confinement was more likely if the victim was a civilian than if the victim was in the military. It was also fairly high if there were both military and civilian victims. There were very few cases in which -- I think there were eight cases involving both military and civilian victims.

Confinement and the conviction charge, again, it is not surprising that those convicted of the more serious penetrative offenses were substantially more likely to be given a sentence of confinement than those convicted of either non-sex offenses or sexual contact offenses. But 90
percent of those who were convicted of penetrative
offenses received at least some term of
confinement.

MR. STONE: Do you have a theory about
the prior chart, why the status of the victim in
civilian cases was so much higher resulting in
confinement than the status of military cases? I
would have thought -- I mean without knowing any
of the data, I would have thought they would have
been roughly equal and I'm sort of surprised by
that. Did you have any theory about that
yourself?

DR. SPOHN: I don't have any theory
about that but it could be that cases involving
civilians might involve more victims. I mean it's
possible.

Meghan and I talked about this a little
bit yesterday. It could be that there are -- if
some of those civilian cases are the spouse or
intimate partner of the accused and in many of
those cases there are collateral charges involving
child abuse --
MS. PETERS: Domestic violence.

DR. SPOHN: -- domestic violence. And so I mean there could be something going on there in those civilian cases involving other behavior, especially in the partner and family -- or spouse and intimate partner cases.

And as we will see as we move forward, cases involving spouses and intimate partners resulted in longer sentences.

Again, the type of court-martial was a significant predictor of whether the offender would receive confinement and the difference there, not surprisingly, is the summary courts-martial versus the general and special courts-martial. There is no difference between those in terms of the odds of confinement.

And finally, trial forum. Cases that were decided by a military judge had the highest likelihood of confinement followed by those cases that were disposed of by a Panel of Military Members and then, again, that 26.3 is the summary court-martial.
So moving on to the --

CHAIR HOLTZMAN: Who is the officer in a summary court-martial? What is the rank?

MS. PETERS: It can be a captain or a major that is an O-3 or an O-4, typically.

MR. TAYLOR: I was just going ask a further question about that. I know at one point there was a question about whether certain summary courts-martial were even authorized to adjudicate confinement. So might some of that result from the fact that there are summary courts-martial existing that actually do not have the authority to issue confinement?

MS. PETERS: I don't have any information on that. My understanding is most still have the authority to issue up to 30 days.

MR. TAYLOR: Okay.

MS. PETERS: I'm not aware of any other alternate rules for summary courts.

MR. TAYLOR: Thank you.

DR. SPOHN: So in terms of the length of the confinement sentence, this was affected by
the status of the victim, the relationship between
the accused and the victim, the type of conviction
charge, type of court-martial, and type of trial
forum.

So we see the same pattern that we saw
-- well actually it is a little bit different
pattern than we saw with whether it was a
confinement sentence or not with sentence length
being shorter if the victim was in the military
than if the victim was a civilian, and then being
substantially higher if they were both military
and civilian victims. And I suspect that that is
more a function of the fact that if there were
military and civilian victims, by definition,
there was more than one victim. And so that may
reflect that more than anything else for that
particular --

But again, it is interesting that cases
involving civilians received longer sentences than
those involving victims who are in the military
Services.

CHAIR HOLTZMAN: And how do we -- what
information would we need to understand that better?

DR. SPOHN: I think we would want to look at the nature of the charges and the collateral charges in those cases. That might help explain that.

Again, this is just looking at Military service and sentence length. It is not controlling for anything else, which we will do in a little bit. We will move to that next stage.

CHAIR HOLTZMAN: Okay.

DR. SPOHN: So here is -- I referred to this just a moment ago that cases involving spouses or intimate partners, the sentences were longer in those cases than cases in which the victim was not the spouse or intimate partner of the accused. And keep in mind that in the spouse or intimate partner cases 82 of the 130 were civilians. And so we are kind of -- we have to disentangle those things as we go forward.

MR. STONE: And your earlier number showed that that was a very small percentage, the
intimate partner and spouse sexual assault cases.

It's less than 20 percent.

DR. SPOHN: A hundred and thirty --

MR. STONE: Right. So more than 80 percent. This is looking at a little piece of it.

DR. SPOHN: It is.

MR. STONE: Okay.

DR. SPOHN: And then type of conviction charge, again, not surprising that cases involving penetrative offense convictions received substantially longer sentences, 66 months as opposed to, it's 9.45 months for the contact offenses and 12 and a half months for the non-sex offenses.

So the final analysis is a multivariate analysis that is used to identify the statistically-significant predictors of outcomes, and the analysis simultaneously controls for all of the variables that are in the analysis so that, if a variable has a statistically-significant effect on an outcome, it does so while holding all of the other variables in the model constant. And
so this is an attempt to sort of disentangle some of those interactions between things like the seriousness of the charge and the status of the victim and the relationship between the victim and the accused.

So if, for example, we do find that the number of victims is a statistically-significant predictor of conviction for a penetrative offense, and this is net of the effects of all of the other variables included in the model. So we start with the likelihood of conviction, and here we're looking at both conviction for a penetrative offense, and this includes, of course, only those offenders who were charged with a penetrative offense; and then conviction for any offense, and this will include those who were charged with both penetrative and contact offenses.

In terms of conviction for a penetrative offense, the military service of the accused was a predictor. Conviction for a penetrative offense was about three times more likely if the accused was in the Army rather than
the Marine Corps. The Marine Corps was the
comparison group here. And that really showed up
on the earlier chart that we looked at.

The number of victims, more victims
equals a greater likelihood of conviction for a
penetrative offense, and the number of counts
preferred were the three variables that determined
whether someone would be convicted of a
penetrative offense.

A different pattern results if we look
at conviction for any offense. Again, military
service of the accused, the difference here was
between the Coast Guard and the Marine Corps. I
don't know how much credence I put on that, given
the small number of cases.

CHAIR HOLTZMAN: Suppose you used
another Service, like the Army or the Navy or the
Marine Corps --

DR. SPOHN: I could do that. I could
run it with every Service --

CHAIR HOLTZMAN: Yes, I think that
would be better because the Coast Guard numbers
are so small. It's just not really terribly meaningful but --

DR. SPOHN: Well, the Marine Corps is the comparison group, and the only difference on conviction for any offense was between the Marine Corps and the Coast Guard. The differences between the Marine Corps and the Army, the Air Force, and the Navy were not significant.

CHAIR HOLTZMAN: I see. But they were significant with regard to penetrative offenses. How do you explain that or what information would we need to understand that disparity better?

DR. SPOHN: Again, it could be that the cases that are coming from the Army where it's three times more likely to be a penetrative offenses are different in unmeasured ways than the cases from the other Services.

CHAIR HOLTZMAN: What about the other Services? What's the relationship between the Marine Corps to the Navy to the Air Force?

DR. SPOHN: No difference.

CHAIR HOLTZMAN: No difference.
DR. SPOHN: On conviction for a penetrative offense between the Marine Corps and the Coast Guard, the Navy, or the Air Force.

CHAIR HOLTZMAN: Right. So in other words, so in other words, the Army, it's about 3 and a half, 3.2 times more likely to have a conviction in the Army than any of the other Services, except maybe the Coast Guard; is that what you're saying?

DR. SPOHN: I would have to run the analysis with the Army as the comparison category, and I could do that. And that would tell us whether that was, in fact, the case.

MR. STONE: I wonder if I could throw out something that I have no basis in fact but, as a theory maybe, that goes back to something I asked before. Is it more likely that the Marine Corps has more troops in a theater of operations that's on high alert than the other Services; and, therefore, there's just more stress on all parties, and sometimes that relates to more drinking, too, that could be a reason why there's
a lower rate of conviction because both the
military judge or a panel is aware of that and
they get a little more weight in deciding how to
decide the case?

That's sort of why I asked before
whether in some way, either through corroborating
the date or the time of the alleged offense and
the persons pay status or location or something,
to see if -- because, I mean, I think that would
be really relevant if we could see whether the
stress of the particular operation they were in at
the time of the offense has an effect on the
conviction rate. I mean, it might be useful for
us to know. It might tell us things that we're
not so worried about, that we realize a high-
stress environment is something that, you know, is
going to lead to more problems. And I don't know
what the preventative steps might be to take, but
it certainly, it would tell us a lot of data.

I mean, in a sense, when you look at
different states, you might say, for example,
there's more stress in Alaska because they're in
darkness half the year, and so people up there
have a higher alcoholism rate, and so they might
wind up having more of these types of assaults, as
compared with a state, I don't know, in the middle
of the country where there's an equal balance of
day and night most of the year.

So I'm just wondering if that's
something we can figure out because I think sort
of at a gut level -- again, I have no independent
data to confirm it -- I think that's a really
useful consideration that I would really like to
know about the data. I mean, it may be true for
some of the other Services, too, being able to
separate out the number of cases in an -- I don't
know if active theater of operation is the right
term but --

DR. SPOHN: But, again, the data that
I had did not include that. And, again, part of
the problem here is that we don't have data on
intoxication of the victim or the accused or
whether that was an element of, you know,
something that was taken into consideration in
deciding whether to convict for a penetrative
offense or convict for any --

    MR. STONE: Is that in the files, though?

    MS. PETERS: Right, yes. The type of
penetrative offense, whether it was rape or -- by
intoxication, a select group of offenses, as you
know, where intoxication would have to be proven
if it had to be established that that person was
incapable of consenting due to intoxication.
Since we have the charge sheet, those charges, if
they were present in the case, are identifiable.
We did not code each specific type of penetrative
-- well, we would have to go back and just do
further research for you, but we have information
on the type of offense and, of course, the
location where it occurred.

    CHAIR HOLTZMAN: Yes. I think also
there's a very real question as to whether there's
any relationship between, quote/unquote, stress
and sexual assault. You could just as easily
argue that it's the hyper-macho image in the
Marine Corps that produces these results, so I think we need to be really careful if we're speculating on reasons. What I would like to know is what other kind of information we would need to understand the difference between this. When you start talking about stress and you start talking, it sounds like you're giving excuses to people for engaging in this conduct.

MR. TAYLOR: It seems like there are -- I totally agree with the Chair. I mean, I'm familiar with the studies that have been done over the last five or six years about the relationship between deployments and suicides, and the bottom line to most of those studies is that there is no correlation between deployments to Iraq and Afghanistan and suicides, which often is related to stress in one way or the other. So that's one point.

But the second is, when you're looking at the Army numbers and where the forces had been deployed over time, back to Mr. Stone's point, it's clear that the Army has really carried most
of the burden, along with the Marines from time to
time, in deployments over the last several years.
So there might be something there; I'm not sure
what.

CHAIR HOLTZMAN: But maybe you could
start thinking about what additional information
we would need to understand this difference. And
I think that would be helped if you could look at
the comparison between the Army and the other
Services here, too, so that we can see if this is
just the Army or if it's just -- who's the
outlier? Is it the Marine Corps or is it the
Army, and then what's the difference?

VADM TRACEY: If a case went to Article
32 and then did not get tried, that's in this
data, right?

MS. PETERS: Yes, ma'am.

VADM TRACEY: But if it never got to an
Article 32, it's not in there?

MS. PETERS: If a charge was preferred
and it fell out any time after that, it's captured
in the data.
MR. STONE: And an Article 32 would mean an alternative disposition mostly?

MS. PETERS: Not necessarily, sir. I don't know that we identified a correlation. It's not like you need to have a 32 before you go to an alternate disposition.

MR. STONE: Oh, an Article 15 would be an alternative disposition, right?

MS. PETERS: It was, but in relatively few of the cases was that the alternate disposition. If a case was dismissed outright, we consider that the end of the judicial proceedings, and that individual, where it says cases were dismissed, may have had an Article 15 or an administrative separation in their future. We didn't capture that information because we don't have the documents and for a host of other logistical reasons really.

VADM TRACEY: You were hypothesizing, not suggesting that they told you this, that it might be that one Service is producing better cases to trial than the others are? I think
that's one of the Chair's question: what would we need to see to enable us to strengthen our understanding of whether that's the case or not?

CHAIR HOLTZMAN: Or what additional information should we be asking from the Services in the future to be able to understand this kind of discrepancy?

DR. SPOHN: Well, something like the promptness of the report, whether there was a forensic medical exam conducted, and what kind of evidence was produced? I mean, there are ways that one can capture strength of evidence directly.

CHAIR HOLTZMAN: But then how would that explain the disparity? See, that's what we're trying to figure out here is what accounts for this difference? And I don't know what information you would need to help understand that.

VADM TRACEY: Well, you would be a little informed if, in fact, you saw data that suggested that the Marine Corps produced less
complete cases than the Army cases.

DR. SPOHN: And the promptness of the report. If it was a delayed report, it was more likely in those cases, if victims were more reluctant to go forward and we had nothing on the victim's willingness to cooperate as the case moves forward. It could be, there could be a number of factors that could account for these differences that we don't capture in the data.

CHAIR HOLTZMAN: Okay. Do you want to continue, please?

DR. SPOHN: So moving on to whether the -- well, if you just go back, Stayce -- whether the offender was convicted for any offense, I just want to point out that conviction was less likely if the victim was a spouse or intimate partner or if the victim was a member of the military Services. And it was, conviction was also less likely if the accused was charged with a penetrative offense, and Meghan and I were talking about that yesterday. Obviously, a penetrative offense is a more difficult crime to prove. The
elements of the crime are going to be different, and it's going to take more evidence to prove that. So that's not particularly surprising.

So I also looked at --

CHAIR HOLTZMAN: But it should be surprising in a way if the defendant is accused, is charged with several counts, one is a penetrative offense and the other is not, and there's not a conviction, so why should the conviction be less likely when you have a variety of charges? Is that, or am I assuming something in my question?

MR. STONE: This says dismissal, not acquittal, on that count. Is that intentional?

CHAIR HOLTZMAN: No, I'm back under conviction for any offense.

DR. SPOHN: So in the data --

CHAIR HOLTZMAN: So this doesn't say that the person was charged with several offenses, including penetrative offenses.

DR. SPOHN: No.

CHAIR HOLTZMAN: Okay. So we just --
DR. SPOHN: It's just whether the most serious charge was a penetrative offense versus the most serious charge was a contact offense.

CHAIR HOLTZMAN: Okay.

DR. SPOHN: And the number of counts is a predictor of whether they would be convicted of something.

CHAIR HOLTZMAN: Okay.

VADM TRACEY: Back on your first finding, it's the Army that's the outlier by this analysis, right?

DR. SPOHN: Compared to the Marine Corps, but I will run the analysis with the Army as the comparison group to see if there are any differences between the Army and any of the Services other than the Marine Corps. I can tell --

VADM TRACEY: But you compared everybody else to the Marine Corps?

DR. SPOHN: To the Marine Corps.

VADM TRACEY: And you found no statistical differences?
DR. SPOHN: Between the Marine Corps and the Air Force, right. That's correct. So moving on to --

VADM TRACEY: It may be important to communicate whether the Marine Corps is an outlier or not because that data looks so . . .

DR. SPOHN: So looking at the likelihood of acquittal and dismissal of all charges, acquittal at trial, the number of counts, more counts equals a smaller likelihood of acquittal. And if the accused was charged with a penetrative offense as the most serious offense, acquittal was more likely.

Dismissal of all charges, those in the Army and Air Force were less likely than those in the Marine Corps to have all charges dismissed. If the victim was a spouse or intimate partner, dismissal was more likely. Number of counts, more counts equals a smaller likelihood of dismissal. And if the accused was charged with penetrative offense, dismissal was more likely.

CHAIR HOLTZMAN: And when you say
dismissal, is this dismissal at trial or dismissal at any step in the process? So it could be dismissed by --

    MS. PETERS: It has to be before trial
the way we segregated the data. If we say dismissal, it means it happened before a trial happened.

    CHAIR HOLTZMAN: Does dismissal mean, for example, that there's an Article 32, then, after the 32, the convening authority decides not to prefer charges?

    MS. PETERS: Yes, ma'am, that would be a dismissal.

    CHAIR HOLTZMAN: That would be a dismissal under this. Oh, okay.

    DR. SPOHN: So let's see. Just a couple more here.

    CHAIR HOLTZMAN: So it seems to me, also, when you prepare this chart, that you should describe what the term dismissal means so that people reading it would understand that.

    DR. SPOHN: So looking at confinement
and punitive separation sentences, whether the accused was sentenced to confinement, those in the Air Force were more likely than those in the Marine Corps to receive confinement. Those convicted of penetrative offenses were, of all the factors in the model, more likely to be confined. And the confinement was less likely if the victim was a member of the military Services, rather than a civilian.

Looking at the length of the confinement sentence, this type of analysis allows you to identify the difference between the sentence lengths, and I'll explain that here, so that, if the accused was convicted of a penetrative offense, they received sentences that were 55.16 months longer compared to accused who were convicted of non-sex offenses, which was the reference category. Again, that controls for the number of counts, the status of the victim, the relationship, and so on.

If the victim was a spouse or intimate partner, the sentences averaged 31 months longer
than if the victim was a stranger or had some other kind of relationship to the suspect. And the number of counts preferred, each additional count resulted in about two and a quarter-months longer sentences.

Terms of punitive separation. Those who were convicted of penetrative offenses were more likely to get a punitive separation. Punitive separation was less likely for those in the Coast Guard compared to those in the Army. Punitive separation was less likely for those convicted of crimes against military victims, and, the more victims there were, the greater the likelihood of a punitive separation.

So let me just sort of sum this all up in terms of the multivariate analysis. In all of the analyses, the strongest predictor of outcomes was whether the accused was charged with or convicted of a penetrative offense. It predicated every outcome so that, compared to those charged with a contact offense, those charged with penetrative offenses were less likely to be
convicted, more likely to be acquitted, and more
likely to have all charges dismissed. And then
compared to those convicted of non-sex offenses,
those convicted of penetrative offenses were more
likely to be sentenced to confinement, to receive
a punitive separation, and they faced longer
confinement sentences.

Two variables that had no effect on any
of the outcomes were the rank of the accused,
whether it was an officer or an enlisted man, or
the gender of the victim. So outcomes did not
vary depending on whether the victim was a male or
a female or whether the accused was an officer or
an enlisted man. It did not affect any of the
outcomes.

MR. STONE: On the last category that
you say compared to those convicted of non-sex
offenses and they're more likely to be sentenced
and receive a separation more than confinement
sentences, do you think some of that difference
between the contact and punitive offenses and the
non-sex offenses could relate to the reluctance to
have to require that convicted person to be on the
sex offender registry forever? Is there any
intimation of that -- that it results in people
wanting to both plead to and people sentencing,
wanting to give a sentence that doesn't require
lifetime registration? I don't know how we would
measure it. Again, I'm throwing that out for
discussion as to whether that may be playing some
role in what's happening.

DR. SPOHN: So are those convicted of
penetrative offenses required to register as sex
defenses, sex offenders?

MS. PETERS: And some contact.

MR. TAYLOR: Well, when you've got this
category of convicted of non-sex offenses, this is
when you are convicted of non-sex offenses but on
the same charge sheet you are charged with sexual
offenses? Is that what this category is?

DR. SPOHN: Yes.

MR. TAYLOR: Okay. It's not the
universe of people?

MS. PETERS: Yes, sir, that's correct.
DR. SPOHN: So in terms of the other variables that were included in the models, they had less consistent effects. That is, they affected some of the outcomes but not others.

And let me just skip to the last slide and talk about the status of the victim and the relationship between the accused and the victim. So if the victim was military rather than civilian, and, again, this controls for the relationship between the accused and the victim, so this is taking into consideration the fact that some of the civilian and military victims were spouses or intimate partners, but, if the victim was in the military rather than a civilian, the likelihood of the conviction was lower, the likelihood of acquittal was higher, the likelihood of a confinement sentence was lower, and the likelihood punitive separation was lower.

In terms of the relationship between the accused and the victim, if the victim was a spouse or intimate partner, the likelihood of conviction was lower, the likelihood of dismissal
was higher, but the confinement sentence was longer. So those cases involving spouses and intimate partners are more likely to be, case attrition was higher, but those that survived and resulted in a conviction did receive longer, harsher sentences.

CHAIR HOLTZMAN: What more would we need to know to understand why there's a higher conviction, acquittal rate or lower conviction rate with respect to an accused, I mean the victim who's in a military? Is it because there's some kind of a standard that's being imposed on on the behavior of the victim? Is it because they should be able to defend themselves? I mean, what's going on here? What do we need to know to understand what's going on?

DR. SPOHN: I think we need qualitative data.

CHAIR HOLTZMAN: And how do we get that?

DR. SPOHN: We talk to the people who make these decisions. So we ask them, you know,
do you have a --

CHAIR HOLTZMAN:  Oh, okay.  So let me ask you did you separate it out by judge versus panel in terms of the status of the victim?  I mean, does it make a difference when there's a judge, as opposed to a panel member?

DR. SPOHN:  I did not look at that, but we could look at that.

CHAIR HOLTZMAN:  Okay.  Maybe that would help.

DR. SPOHN:  That might help explain that.

CHAIR HOLTZMAN:  Sort something out.

VADM TRACEY:  Could it also be the extent, as you said earlier, maybe the extent, the nature of the charges?

MR. STONE:  I have the same thought.  I wonder whether you could, in running your data, drop all cases that also involve domestic violence and/or child abuse, so we were looking at civilian and military cases that were a little more alike, because, typically, in the military cases, it's
probably a much lower number that involve those
domestic violence and those child abuse charges,
so we would have, maybe the numbers --

     DR. SPOHN: One thing that occurred to
me in going back through this is that one could
look at cases involving one victim only and cases
involving, most cases had more than one charge,
but I think the number of charges was from one to
43. But one could try to come up with a group of
cases that, on its face, involves more
similarities than differences and then try to see
if some of these factors still influence. I mean,
I could certainly look at single victim cases and
see if that is perhaps -- and judge versus jury.

     MR. STONE: But those, too, would have
the domestic violence ones in there. In other
words, I think you would need to drop to see if
you can, you know, compare this and this but not
cases with domestic violence and child abuse
charges.

     MR. TAYLOR: Is it possible to come up
with a survey instrument that you could send to
collect some of the qualitative data that you're referring to, or would it require personal interviews or phone interviews to get that kind of data?

DR. SPOHN: Personal or phone interviews would be better in that you could follow up on questions that you ask, but survey data would be better than what we have now. And I know this is something that the next committee has talked about doing is doing some surveys of individuals in the military justice system.

CHAIR HOLTZMAN: Well, I think it would be really good, before we get to the survey, I agree, the survey or the interviews, get a little bit of a better handle on what we think is happening here because, if it's a judge versus panel situation, it's easier also to interview judges than it may be to interview panel members. That's all I'm just thinking of. I don't know.

DR. SPOHN: And the other thing that I could do is look at the cases involving spouses or intimate partners that are kind of the outliers in
terms of sentences --

CHAIR HOLTZMAN: Right.

DR. SPOHN: -- and look at what those cases look like.

CHAIR HOLTZMAN: Okay.

DR. SPOHN: And that, I think, might provide us with some additional information if those are cases with lots of charges, including domestic violence and child abuse.

MR. STONE: If you dropped all the intimate partner cases entirely, that would get rid of the domestic violence and the child abuse, wouldn't it?

DR. SPOHN: Well, yes, I guess it would.

MS. PETERS: Theoretically, yes, sir, because --

MR. STONE: And they're 20 percent, so that might be an interesting subset to compare.

VADM TRACEY: This data, including the previous data set, includes cases that were tried under almost all provisions of Article 120, right?
MS. PETERS: The latter two, most likely, ma'am. The 2007 and the 2012 version would be most common.

VADM TRACEY: And the sex offender registration became effective when?

MS. PETERS: It has been effective for all Article 120 offenses, broadly speaking I think, at least under DoD policy for the last few years. And that would capture most of these cases, I would think. So --

VADM TRACEY: And it didn't matter which version the case was being tried under?

MS. PETERS: I don't think so, ma'am. The only exception that's clear, without doing further research on sex offenders, is wrongful sexual conduct was an offense under the 2007 version of the statute. That went away and became abusive sexual contact with a max punishment of seven years, and there's some sort of bodily harm involved in it. So I think that those contact cases almost invariably could be subject to sex offender registration. The federal and state
differences would apply there, but, largely
speaking, we assume abusive sexual contact in the
2012 version is going to be a registrable offense.

CHAIR HOLTZMAN: Well, how do we get,
I mean, I think your question is an important one:
how do we get at whether the imposition of a
sentence or a conviction is going to produce a
lifetime consequence? How do we get at that, how
that factors into the decision-making on the
sentence? How do we get at that issue? Is that
sort of what you're asking?

MS. PETERS: I could speak to that in
a little bit more detail. Broadly speaking, and
you might want to talk to service military justice
experts for further information, but sex offender
registry is not a factor, it is not to be brought
up in sentencing hearings, meaning the panel and
the judge can't consider that as a factor in
sentencing.

CHAIR HOLTZMAN: Yes, but they know
about it, they know about it.

MR. STONE: They sure know about it.
CHAIR HOLTZMAN: So how does that factor in? I mean, that's what I'm trying to, that's what I think the Admiral was trying to get at and what I'm trying to get at, too. Is that a factor in the back of people's minds when they make a decision, whether the judge's mind or the panel members' minds? I just don't know. How do we get at that? I mean, if we're suggesting a survey or a personal interview -- and are you allowed, by the way, even to interview members of panels afterwards? Is that permissible?

MR. STONE: Well, maybe not as to a particular case, but you could certainly go back to a large select sample of judges and say we're just doing an evaluative survey. Military judges.

CHAIR HOLTZMAN: But I'm talking about members. I'm talking about members of the panel. Are we allowed to question them? I don't know.

MS. PETERS: Service members, members of the JAG Corps, after a trial, due to a limited voir dire of the panel, panel members, you could go back to the Services and see if we have leeway
there.

CHAIR HOLTZMAN: Oh, yes, that would be useful. I mean, at least whatever their information is, it would be helpful. I mean, you know, there's some big questions that are raised here that the military, you know, that military members are more vulnerable in the military justice system. What needs to be done -- I mean, is that the right outcome, is there some problem, is something wrong going on here, and then question about is the Marine Corps an outlier or not and then these disparity issues.

DR. SPOHN: So someone who is charged with an Article 120 offense but convicted of a non-sex offense would not have to --

MS. PETERS: Register.

DR. SPOHN: Only upon conviction.

CHAIR HOLTZMAN: Right. And people know that, so how does that factor into their decision-making?

MR. STONE: And one other question is whether we simply want to pose those questions or
whether we can get even a little pilot data feedback before we have to write a final report on the data because we can't wait until August to write it, so we'll have to, you know, see what you think is plausible in a quick turnaround or maybe even from your current data in response to some of these questions so that -- I mean, some of these things I think we're just going to be able to pose some questions that maybe the follow-on panel would want to consider and we just leave it that way.

MS. PETERS: If I could add, with respect to talking with panel members, I don't want to over-promise because there's a number of logistical hurdles and there might be legal hurdles, as well, the signals I'm getting over my shoulder from some of our helpful service representatives are that there may be a --

CHAIR HOLTZMAN: It's not permissible, right?

MS. PETERS: -- are that it may be a difficult bridge to cross, yes.
CHAIR HOLTZMAN: Okay. So that's not permissible, but there may be, if they're doing voir dire, maybe some of that information could be something you could begin to look at and see whether that information is something you want to factor into any kind of future examinations. But think hard about the military status and the outlier status of the Marine Corps.

MR. TAYLOR: One reason that I mentioned the possibility of some sort of survey document or instrument together with qualitative data from military judges is because this might be something the military judges themselves are unaware of.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: So it may be that, as part of simply asking the question and having them think about it, you'll improve the process.

CHAIR HOLTZMAN: Right. So that may be something, that might be another thing, what kind of a survey could we send out, could it be done quickly, and how much time could that take?
How should we proceed? Should we take our lunch break now and maybe come back afterwards and see whether we have any further questions, or are we finished with our panel?

MS. PETERS: We have appellate data for you, as well.

CHAIR HOLTZMAN: Oh, okay. So then we should take a lunch break now. Thank you. What is it, a half-hour? Okay, 45 minutes. Okay, thank you.

(Whereupon, the foregoing matter went off the record at 12:29 p.m. and resumed at 1:28 p.m.)

CHAIR HOLTZMAN: Okay. Dr. Spohn, are you ready to get back into the hot seat? Are we going to need you for the second part of this?

MS. PETERS: It's me, ma'am.

CHAIR HOLTZMAN: Oh, okay. So Ms. Peters.

MS. PETERS: Thank you, members.

Before we begin, we just received a written response from the Department of Defense in regards
to those questions I referenced that we had asked them about the JPP recommendations, and so there's a two-page letter from the Undersecretary of Defense for Personnel and Readiness or the person performing the duties of, and that two-page letter was just placed in front of you for reference.

CHAIR HOLTZMAN: What else is it that has to be presented?

MS. PETERS: The appellate data, ma'am.

CHAIR HOLTZMAN: Oh, okay. So are you ready to do that?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Great. Where is that?

MS. PETERS: In front of you -- well, I'm sorry. Within the same slide presentation that I began originally, we were at slide 12.

CHAIR HOLTZMAN: And that's called the court-martial statistics?

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: Okay. This is page what?

MS. PETERS: Twelve.
CHAIR HOLTZMAN: Okay.

MS. PETERS: And the reason we're bringing you appellate decision data was because the statutory asks, again, asks for the number and description of incidences when punishments were reduced or set aside on appeal and the incidences in which the defendants appealed following a plea agreement, if such information is available.

CHAIR HOLTZMAN: Okay.

MS. PETERS: And I just put a slide in here to note that the Service Courts of Criminal Appeals have jurisdiction over cases in which the sentence included either a bad conduct discharge or a dismissal or a dishonorable discharge or one year or more of confinement. So those are the, that's the jurisdictional threshold to get to a criminal court of appeals, unless the Service TJAG otherwise wanted to refer the case to the CCA.

So what we did for the panel is we gathered cases reviewed by the Criminal Courts of Appeals that involved a conviction under Article 120 or Article 125 that involved adult victims or
attempts to commit those offenses. And we looked at all types of issuances from the Service Courts of Criminal Appeals, so that includes cases whether or not an opinion was issued or it was a summary disposition, it was maybe affirmed without an opinion. We were able to look at all of that information.

MR. STONE: About your first comment, if the sentence includes confinement for more than one year as a result of a guilty plea, does it still go up to the military Courts of Appeal?

MS. PETERS: Yes, sir. We were able to look at those types of cases, and so I will have information on that for you.

So we did two things. We looked at the opinions that were publicly available on the Service courts' websites separately. Cases that were summarily affirmed are not necessarily hung on the website. The Services had to provide that to us.

And so here is a breakout of the decisions of the court by Service. The first
column is the military Service court that issued, or the Service of the court that issued the decision. Please note that the Marine Corps and the Navy both fall under the Navy and Marine Corps Court of Criminal Appeals. Their numbers, in particular, I'm going to go back and talk to each of the Services about because a Navy convening authority and a Navy JAG can try a Marine, just as a Marine prosecutor and a Marine convening authority can try a sailor, and that blending does happen in these cases. So how you attribute a case to what Service, we're going to go back and verify that.

Nonetheless, the first column that you see with the numbers in bold contain cases in which a sex assault conviction was reviewed and relief was granted, meaning either the sex assault conviction was set aside or there was some type of sentence relief. The second column will show you all of the sex assault convictions reviewed in which no relief was granted related to the findings of guilt of sexual assault or the
sentence that resulted from the case. And in the
third column, we just tallied the body of work
that each Service corps had in terms of review of
sexual assault cases.

CHAIR HOLTZMAN: Do you have a
percentage? I know it's easy to calculate but .
.
.
MS. PETERS: Yes, ma'am, we can work on
that. I just didn't include that in here.

CHAIR HOLTZMAN: Yes, okay.

MS. PETERS: Where relief was granted,
most of those cases involved the setting aside of
a charge or specification. And the most typical
reason, in fact in the majority of the cases in
which a conviction for a sex assault offense was
set aside involved an unreasonable multiplication
of charges, meaning the same conduct was charged
multiple ways resulting in these duplicative
findings of guilt. And so in most cases, there
was a finding of guilt to a sex assault offense
that survived appellate review, but one of the
second or third versions of that same charge were
dismissed, and that often did not, in and of itself, result in a reduction in the sentence.

There were a few cases in which the cases were found to be factually insufficient and a handful in which the post-trial processing of the case was so delayed that the CCA granted sentencing relief. And, again, that had nothing to do with the sex assault offense per se, but we have a unitary sentence. It does mean that the sentence of confinement that the person is serving is going to be reduced. So we thought we should reflect that in the data we provide you. But, again, it had nothing to do with the sex assault offense itself. It was a separate issue that affected the whole case.

CHAIR HOLTZMAN: Could you explain the improper admission of MRE 413 evidence? Why would that cause a reduction in sentence?

MS. PETERS: I'm sorry. That was for, that caused a conviction to be set aside.

CHAIR HOLTZMAN: Oh, okay.

MS. PETERS: I may have presented that
out of order and it seemed unclear, but, in that particular case, the conviction was set aside.

CHAIR HOLTZMAN: Just one case?

MS. PETERS: Yes, ma'am, there was only one case out of all the cases reviewed.

CHAIR HOLTZMAN: I got confused. This is not 412?

MS. PETERS: No, this is another, evidence of another sex assault offense that was uncharged.

CHAIR HOLTZMAN: Okay.

MR. STONE: Isn't there a fairly standard body of law, talking about the unreasonable multiplication of charges, about which offenses merge into what offenses? In the non-military context, it's fairly standard. Everybody knows, after they get the verdict, well, wait, this has to merge into that, judge, and this merge into that. The judges actually know.

Something like that is not in the judge's handbook?

MS. PETERS: Without undertaking a
really detailed analysis, at least a portion of
those cases, the judge at the trial level had
merged the offenses for sentencing purposes,
meaning there were two findings of guilt but you
said you were only going to sentence as if it was
one conviction and the appellate court said that
was an inadequate remedy. So that's one way that
this could happen.

VADM TRACEY: What's a UCI?

MS. PETERS: Unlawful command
influence. And that's the appearance of unlawful
command influence.

MR. STONE: Well, it says in counsel's
argument, you mean it was an improper argument?

MS. PETERS: Yes, sir.

MR. STONE: Okay.

MS. PETERS: Closing argument.

CHAIR HOLTZMAN: Okay. Do you want to
proceed?

MS. PETERS: Okay. The other portion
of the task actually asks, in the cases in which
an accused pled guilty, they said, pursuant to a
plea agreement, if that was reviewed on appeal, in how many of those cases was relief granted? We didn't find any cases, except for two in the Army in which someone pled guilty but, afterwards, due to, again, lengthy post-trial processing, they were just granted a small amount of sentencing relief. And so I noted those two cases occurred in the Army, and they were decided in the Army in 2015, and that's really the only time that's occurred. So, in essence, guilty pleas are not being granted relief on appeal.

MR. STONE: I'm not sure I get, following up on the last question, I'm not sure that I get how unlawful command influence in counsel's arguments ought to work. In a closing argument, the prosecutor would have said this conviction needs to be found because of the --

MS. PETERS: Service's law on sexual assault, for example, something that --

MR. STONE: So a prosecutor going too far --

MS. PETERS: Yes, sir. And I don't
want to be over-inclusive. There were other
errors in the argument. That might have been one
of the primary ones that drew the court's
attention. But it is possible to convey the
command's prerogative in a trial counsel's
argument in an improper way that would convey that
the commander wants you to find a certain way
because his priority is to do X. And I'm not
saying that that's, per se, what this person said.
That's theoretically how an argument could amount
to the appearance, and only the appearance, of an
unlawful command influence from a public
perception standpoint.

MR. TAYLOR: Yes, I'm somewhat familiar
with that case, having read about it. But I think
it was a situation where counsel argued that
because of a larger problem that the military was
having. So as Ms. Peters said, it was sort of
appealing to a problem in general. That's what
led to the --

MR. STONE: Okay. It wasn't a specific
--
MR. TAYLOR: I don't think it was a specific, no.

MR. STONE: Okay.

MS. PETERS: And I've given you, this is the guilty plea data. And that really is the extent of the appellate data and, before moving on to the next topic, I should note that when we reviewed the decisions from the Court of Appeals for the Armed Forces, the military's highest court, there was only one case issued in 2015 that we found where there was relief granted in a sex assault case, and it was for an unrelated reason. There was an improper denial of a panel member challenge by the defense, and the Court of Appeals for the Armed Forces found that that denial was improper and it warranted setting aside the conviction.

There are just a few items to wrap up beyond appellate data, and that is one of the tasks asked you to reflect on punishments rendered in the military compared to punishments rendered in federal and civilian, federal, civilian, and
state civilian courts. We did not provide you any
new federal or state data in this presentation.
And the reasons are sort of highlighted on these
slides, but we found, and it's in your data report
from last year, relatively few federal sex abuse
cases had enough similarities to really warrant
comparison with the military. The numbers were
very few and had a number of other differences.

There have been no new state-level
studies on a nationwide basis. So what we brought
you last year was one study from the Bureau of
Justice Statistics. We contacted them again, is
this being updated, have you updated your study in
any regard, and the answer was no. And so I think
the best nationally-representative information is
the information you considered in your last data
project.

Finally, because the first task said
we'll get case dispositions to include courts-
martial, non-judicial punishment, and the adverse
administrative actions, again, based on the staff
and the panel's experience last year, we did not,
at least for this presentation, bring you any
information to review. We do not have records of
non-judicial punishment or administrative actions,
and our system is a document-based system so that
we can verify whether a sex offense was involved
and what happened to it.

These records, for a host of reasons on
the slide, are just very difficult, if not
impossible, to obtain on a systemic reliable
basis, and so we did not bring those to you for
today.

And last year, we looked at the SAPR
annual report. We found it difficult to take the
information from the SAPR report and really
address your tasks, so we declined. We have not
done the same review of the SAPR report for you
this year.

CHAIR HOLTZMAN: And that question, I
mean, is there some reason that we couldn't ask
DoD to try to create better records with regard to
alternative administrative action? Is that an
inappropriate request?
MS. PETERS: No, if what you want is
the way they're willing to provide the
information. If they, if we want to accept raw
numbers and summaries that they provide us that we
don't have the documents for, that's one approach.
But it is, each year, I think, the Services'
systems are more accustomed to these types of
requests for information, and so they adjust
appropriately. But generally speaking, we're not
familiar, from our research last year, we're not
familiar with a very accessible system that the
Services have for readily pushing or pulling those
numbers for us and finding the cases and giving
you the level of detail that you might need. That
would be my concern.

We can always ask, but the answer lies
in the difficulty that they will have in pulling
the information. And from our experience, I think
it would be very difficult to find, again, in a
sufficient level of detail, that you would have
something to analyze.

I should note that last year nearly
all, 99 ½ percent probably, of the non-judicial
punishment cases involved contact offenses. So we
were able last year to determine that these
alternate, these lower forms of disciplinary
action did not involve the more serious rape or
sex assault allegations.

MR. STONE: I might ask whether you
might find out whether you could get this data if
you first asked or suggested application of a
program of the type that I know the District of
Columbia now is talking about using where, when
that program is run on data such as Privacy Act
data, it automatically strips out -- they use a
very sophisticated program. It strips out all
names, all the addresses, all the Social Security
numbers, and it sort of does the redacting on its
own, so you're left with data but data that can't
be attributed to an individual. And I think it's
called the Criminal Coordinating Committee of the
District of Columbia was looking at these programs
because they want to put more of their victim data
online, but they want to be sure the victim's name
is not in there, the victim's address, phone
number, you know, and not just victim data but a
lot of their court data, they want to make it
available without violating the Privacy Act.

And until recently, they said these
programs have been getting more sophisticated
almost by the, you know, even less often than
every year. They keep coming out with new
versions because there's a big demand for them as
things get to be electronic.

So maybe you could find out whether
either we could supply or they could get a program
like that to anonymize the personnel records, and
then they would be in a position not to violate
the Privacy Act by giving you, you know, lots more
data and numbers. I know most people aren't
thinking about that, but that's the newest
technology out there.

CHAIR HOLTZMAN: But, Mr. Stone, I
think the issue is not just that they're worried
about the Privacy Act. I think it's more
fundamental, which is the records aren't centrally
maintained. And who knows what records they
maintain, and who knows what their destruction
document management system. So it's really kind
of fundamental, which is what about getting a data
system in place to record the non-judicial
punishments? Is that a recommendation we could
make? Would it make sense to make?

MS. PETERS: Yes, ma'am, absolutely.

Yes, I mean, there's no reason, I see no
organization-related reason why you couldn't ask
if they maintain that data. They just simply
don't right now.

CHAIR HOLTZMAN: Collect it and
maintain it and maintain it in a form that's
easily accessible and that may --

MS. PETERS: So that it would --

CHAIR HOLTZMAN: Because, otherwise,
what do we say to Congress? I mean, we have a
task that says, you know, tell us about what's
going on with non-judicial punishments, and we
can't answer it. I mean, I think the reason we
can't answer it is because they don't have the
data.

MS. PETERS: Because DoD's SAPR program collects this information in one form, maybe the DoD speaker could address this in more detail about ways that they could adjust or expand their information collection because they're doing it very close to realtime, and they could possibly do it differently in such a way that actually gives you comprehensive data.

Right now, when someone is disciplined, they only allow the Services to log in, it says this in the text of the SAPR report, one action. Any time someone gets a non-judicial punishment and it's separated, which is a very common pattern, they will only allow the Services to call that one thing or another. So it's either going to be a non-judicial punishment most likely, and the separation then won't be recorded in the case outcome.

And the DoD may be able to provide further detail on that, but those were the limitations we encountered last year. But could
adjustments be made to that system? Very possibly.

CHAIR HOLTZMAN: How do you all feel about making some kind of a recommendation? Should we wait to hear from the DoD people first?

MR. STONE: I guess I'd first like to see a request that, if we were able to employ one of these particularity-stripping programs, do they have a system in SAPR or the others that we could use for the query. If they say no, then yes, then we recognize that they do it. But they may be saying no because they don't think that their big systems can give us stuff without violating Privacy Act, and that stuff is out there now.

CHAIR HOLTZMAN: I don't think that's the issue. I think she just said that they're not, they only collect data, they don't collect full data on a case. So if somebody is both separated and given some non-judicial adverse administrative action, in addition to separate, they don't collect both items, they only collect one item. So we're not getting a complete
understanding of what happens in that --

MR. STONE: Oh, I thought they weren't sharing --

CHAIR HOLTZMAN: No, no, no, no, they're not collecting.

MR. STONE: They're not collecting it, or they're not sharing it?

MS. PETERS: For every case, DoD SAPR requests that the Services provide one disciplinary action, whether it be court-martial, non-judicial --

CHAIR HOLTZMAN: And no matter how many disciplinary actions they've taken. So this is a bigger issue.

MS. PETERS: And they take a summary. They do not take the copy of the documented action itself. Not to mention, they do not have control, should that Service member leave the Service, his records may not rest with the unit or with the Service any longer. There are personnel record centers scattered throughout the country for the various Services, but you need a name and a social
typically to request a record and that person's permission. So there's a host of issues in doing it in a document-based way when you look at the full scope of the project if you wanted to do it consistently.

MR. STONE: Do you think they could review all disciplinary personnel records for other than honorable discharges with a program that stripped out names and --

MS. PETERS: I can't speak to that, sir. I don't know --

MR. STONE: Okay. It just may be a question just before we make our recommendation. I mean, if the answer is no the answer is no. but it would be nice, I guess, to know that.

CHAIR HOLTZMAN: So then we will reconsider this issue about how to deal with DoD's record collection on these kinds of cases after we hear from our next panel. Well, thank you very much, Ms. Peters.

MS. PETERS: Yes, ma'am.

CHAIR HOLTZMAN: We really appreciate
your helping us here. And our next presenter is Dr. Nathan Galbreath.

CAPT TIDESWELL: We're about 40 minutes ahead of schedule. Dr. Galbreath is en route. He should literally be here any minute.

CHAIR HOLTZMAN: So who else is here?

CAPT TIDESWELL: The other speaker is Kathy Robertson.

CHAIR HOLTZMAN: Is she here?

CAPT TIDESWELL: I think she's with him so . . .

CHAIR HOLTZMAN: Oh. So we have, I guess, a 40-minute break, a half-hour break?

CAPT TIDESWELL: They should be here any minute so . . .

CHAIR HOLTZMAN: Oh, so --

CAPT TIDESWELL: They're en route.

MR. TAYLOR: Could I just ask a question --

CHAIR HOLTZMAN: Yes, sir.

MR. TAYLOR: -- while Ms. Peters is still here and since we have time? It appeared to
me that part of the purpose in having or asking
our Chair to provide additional people who were
going to testify today was basically get an update
on what happened to our recommendation last year
in which we recommended basically the same thing
we're talking about now, pointing out that DoD
does not collect sufficient adjudication data to
fully assess and then recommending that they go
ahead and develop some kind of process to do this.
And it appeared to me that the answer, just on
quick read, is really no answer at all, except to
a couple of specific sub-bullets having to do with
the timing of the report from the FAP, the Family
Advocacy Program or whatever it stands for, and
the SAPR.

So maybe you could just help us, as a
staff member, Ms. Peters, understand what you
think is happening here. I mean, why aren't we
getting the answer to the question, if you have
any idea?

MS. PETERS: I think, because the RSP
and the JPP have highlighted, both highlighted the
issue of the FAP and SAPRO data, basically, that there are cases missing from the SAPR report, it's been on their radar screen, and I know that it was addressed, I know that, sadly more than what's in their answer, that it was addressed in the FY 17 NDAA that FAP and SAPR were just now going to issue their reports simultaneously. One of those reports, the Family Advocacy Program report, will still not contain legal disposition information.

I'm not sure I can provide you anymore insights.

CAPT TIDESWELL: That would be an excellent question for Dr. Galbreath.

CHAIR HOLTZMAN: Well, the other point is do they have the capacity to collect this information now; and, if not, why haven't they been able to do it?

Well, as long as we're waiting here, are there any further questions we want or any further determinations we want to make with regard to the testimony that Dr. Spohn gave us before in terms of information that they might have, she
might prepare for us for our next meeting so that
we could determine whether we want to make a
recommendation? Panel members, do you have any
thoughts about that?

VADM TRACEY: Since we asked about a
number of things, some of which we thought might
be able to be determined and others we weren't
sure, are we going to address all of those, or
what's the plan?

CHAIR HOLTZMAN: Yes. Well, Dr. Spohn,
what do you think you can do, like, tomorrow?
Just joking. I mean, how quickly do you think you
could provide us with any of this information or
any of the responses to our questions, if you've
had a chance to think about --

DR. SPOHN: Yes, I can certainly parse
out some of the questions or answer some of the
questions you had about whether the Army is an
outlier. I can run the analysis different ways
and answer that question.

You had asked about the pay grade by
disposition. That I can easily do and add to the
narrative report.

I think the problem with the guilty
pleas is that, when I looked at the data, they
would plead to some things but not others. And so
the question then is is that a guilty plea or not?
If they go to court-martial on some of the
charges, but they plead to others, how does one
categorize that kind of a case?

VADM TRACEY: I think, though, that we
would benefit in that case, I think we'd benefit
from picking out of analysis those cases that
actually never went to a trial because of the way
the plea was done and understand what happens for
those cases that go to trial differently from
those -- because right now I think the numbers are
confounded by cases that never went to trial,
right?

For instance, the Marine Corps numbers
really stick out as different. And if you assume
that there's some number of cases that were pled
in the convictions, then the number of cases that
they actually went to trial and the cases were won
at trial becomes quite small.

CHAIR HOLTZMAN: Yes. Maybe you can get a trial conviction rate for us, too.

DR. SPOHN: Okay.

CHAIR HOLTZMAN: I don't know if that's of any interest to anybody else, but it might be useful.

DR. SPOHN: I think that's a little more difficult but doable.

CHAIR HOLTZMAN: All right. Whatever is not -- I mean, I think, obviously, we have very serious time constraints. So it seems to be doable from your point of view would be great.

DR. SPOHN: You also asked about the judge versus the panel.

CHAIR HOLTZMAN: Right.

DR. SPOHN: And in terms of outcomes, particularly sentences, that's easy to do.

CHAIR HOLTZMAN: Okay. That would be great.

VADM TRACEY: All that data so far only characterizes the FY 15 data, right?
CHAIR HOLTZMAN: Right.

VADM TRACEY: And our task is to actually talk about trends?

MS. PETERS: Yes, ma'am.

VADM TRACEY: Do we have a plan of attack to talk about trends?

MS. PETERS: Our limitation was the information available beyond the year 2012. The information available was so slim and difficult to come by, we might not have enough cases to make the analysis meaningful. Therefore, I defer to Dr. Spohn on whether three or four years with what we have now is adequate or what she would recommend.

I mean, I don't believe that we could collect any more than we did.

VADM TRACEY: Agreed. Can you parse the '12 to '14 data into '12, '13, '14, and then you have four data points?

DR. SPOHN: Except there's the overlap. Some of these cases are in both data sets.

MS. PETERS: It will take several weeks
more to parse things out by a concrete year '12, '13, and '14, and '15 final disposition date. So we are, I'm not sure when we, if we'd be able to accomplish that in time for you to look --

MR. STONE: Maybe you could, even with the overlap, just write on the name in the table this includes overlap. In other words, these are numbers we have for this year, but it includes overlap from the prior year, this one includes overlap -- in other words, if they all include overlap, I think it would still show something of a trend.

CHAIR HOLTZMAN: Would it? Well, you're the expert statistician. Would it, can we make a trend out of the numbers we have?

DR. SPOHN: Based on four years? Well, a short trend. You're just talking about outcome data, right? Convictions, acquittals, dismissals by year, or are you talking about something more complicated where it's by military Service by year?

VADM TRACEY: It would certainly be
interesting to understand whether the Army's results in '15, which are substantially different from others, were also substantially different in '14, '13, and '12, or is the Army doing something differently now based on the changes to the judicial proceedings and ending up in a higher conviction rate? I mean, I think that's the question that the people who formulated the panel would like to get their arms around. Maybe we can't. Have things changed, and did they change in a direction you would have wanted them to change?

MR. TAYLOR: I guess one of the questions that we talked about, I think, in the first couple of meetings of this panel was, even if they did, what would you be able to conclude from it, given the different standards used for the criminal offenses at different points in time? So I think that's what makes this so difficult is you have so many variables that it's very difficult to say that, even if you can show, and I've got some of my statistician friends that do,
what does it take to make a trend, and it was
pretty much your answer. Are you talking about a
short term or a long term, you know?

So I think all we're going to be able
to say is this is what we could find, without
classifying it one way or the other, is much of
a trend and subject to all the limitations that
we've discussed here today.

MR. STONE: And the two things that I
would ask, if you can do it quickly with the data
you have, is, one, on some of that data about
civilian and military victims, if you can drop out
all of the intimate partner ones and give us a
good, I mean, and see if that changes the result.
And the other thing that somebody sort of refined
for me, maybe I was using the wrong language,
during the lunch break was whether or not we could
compare some of these outcomes by deployment
versus non-deployment location of offense because
they said they thought maybe you had the location
of the offense in each one and would help the
Committee just say, okay, these are all deployment
locations, these are non-deployment locations, do
we see a difference? Maybe we'll see none, maybe
we'll see a huge difference. But I think that
would be an interesting comparison, too.

MS. PETERS: Dr. Spohn doesn't have
that particular data because we retain, the staff
retains the charge sheets, and we did not record
the location for each offense from the charge
sheet into the database. In other words, in order
to find out where each offense was located, we
probably have to build a new framework into the
database and pull all that information one by one
in each case --

MR. STONE: It can't be queried from
what's in there now, the data in there?

MS. PETERS: Correct. We cannot look
at offenses deployed and offenses not deployed
right now.

CHAIR HOLTZMAN: And the other thing
that I think would be really helpful to have from
you is what additional information we need to
understand the issue of why military victims are,
I mean, cases involving military victims have worse outcomes from the point of view of higher acquittal rates, and was it the sentences, too?
Yes. Why are those cases, in a way, being apparently treated less seriously by the military justice system? What else needs to be looked at so that we could help provide a roadmap both to Congress, the Secretary of Defense, and others to understand and try to get a better handle on this issue because this is really, it seems, the first time that we're identifying something that could be worth looking at.

Although, the other question comes about, and this, of course, thanks to the Admiral's concern about trends, I mean, was this the case, is this the first time we've noticed this? I mean, have we looked at this before? Was this a problem in 2012, '13, '14, or we just didn't have enough data or -- but, anyway, whatever the story is, I think that if you could help us think through what additional information we need, how we might get it, I think that would
be a useful, very helpful to us, so that we could	hen begin to pass that on to people who might be
able to do something about it.

MR. STONE: What did we use to find
those offenses in the 48, the 50 states and
territories? We must have had some data point
when we had that table about offenses in the 48
states and territories. I don't know if that can
be tweaked to help with deployments. It may not
even be that compared to all others; I don't know.
But maybe there's something there you could use.
I just throw it out for you guys to think about.

MS. PETERS: Okay. Thank you, sir.

CHAIR HOLTZMAN: Okay. I think I saw
Dr. Galbreath here. So is there something else
you want to suggest to us, Dr. Spohn, that we can
look at?

DR. SPOHN: No, I think I have all I
can do tomorrow.

CHAIR HOLTZMAN: Okay. So thank you
both very, very much for your help on this and for
the good important work you did on this issue.
Okay. Should we take a two-minute break, or is Dr. Galbreath ready to go? Oh, okay. Yes, we're ready. Thank you.

Welcome, Dr. Galbreath. This is, you're a glutton for punishment. As I say, you've been here many times, and we appreciate it every time you've been here. Thank you, Ms. Robertson, for your presence here, and we welcome your testimony.

I just want to say my own personal time frame has changed a little bit. I've got to catch, I've got to leave here by 3:30. So if you could compress and --

DR. GALBREATH: Happy to compress.

CHAIR HOLTZMAN: Thank you. I'd be grateful. Of course, I have my colleagues who could continue without me. So please proceed. I don't know who wants to go first.

DR. GALBREATH: Kathy, would you like to go first?

MS. ROBERTSON: I have one slide.

CHAIR HOLTZMAN: Okay.
MS. ROBERTSON: Good afternoon. Thank you for this opportunity. Kathy Robertson. I'm the OSD Family Advocacy Program Manager, and I was here previously to talk about the Central Registry. And I feel better than I look, so, if you look at my face at all, I think the sidewalk won and I lost in Quantico. But other than that, I'm ready to start.

Okay. Next slide is -- I've got one whole slide. I really do appreciate the opportunity to be here. I'm just here to talk to you about domestic abuse-related sexual assaults, which is the sexual abuse of military spouses and intimate partners. And I know that that is your purview and what you're looking at.

So we included domestic abuse-related sexual assaults, and they're covered in the advocacy program. In the SAPRO report last year, we had just included preliminary data, FY 15, because the time lines were different. And so then we also included them in our annual report, which came out later in the summer.
So after that time, we did a memo informing the military departments we need to adjust our time line for all of our data to be released at the same time as SAPRO from now on. So we did our report on time this year, and it will be released simultaneously with the Sexual Assault Prevention and Response Office. So we worked closely on this together.

I talked to you before when I was here previously that all of our FAP data is captured by the military Services and clinical case management systems, and then 46 discrete elements are sent to DMDC, which houses our FAP Central Registry, our DoD FAP Central Registry. And to give you a little background, the FAP Central Registry is not a live database, like DSAID. It is really a repository, it's a static repository that's not -- so we pull it to do our annual report, we pull it to do media queries, but we don't have it in our office. We don't have any assistive data in our office. It's only maintained at DMDC.

The Family Advocacy Program has been
here since 1981, and so we're really a treatment rehabilitation program. So we do not collect, nor have we recorded, any rule adjudication or investigations. Those are separate and parallel processes from the Family Advocacy Program, and those processes still go on. We just don't have that data in our report.

Just basic background, FAP is responsible for the prevention, identification, reporting, and treatment of both victims and offenders. So, again, our main goal is prevention and rehabilitation and helping military families and Service members, if they've had an incident, get the treatment that they need so they don't have a further incident in the future.

And every one of our cases is immediately referred to law enforcement. We determine whether it's reviewed by military criminal investigators, if it rises to the federal level, or it's kept at the local law enforcement level. And then, of course, commanders consult with legal. So those processes still go on,
there's still command actions, there's still legal adjudication for domestic abuse-related sexual assaults and other FAP incidents. We just don't report it as a part of the Family Advocacy Program.

CHAIR HOLTZMAN: Okay. Any questions?

MR. STONE: Is your data Privacy Act-protected data; do you know? I mean, when they make a request, do you say, under the Privacy Act, we can't release anything?

MS. ROBERTSON: We do have some PII, but DMDC houses it. And we have a lot of media inquiries. We've had quite a few, and so we've worked with them to give them what they need without the parameters that we're releasing any confidential PII information, so they can't identify the victim, the location, or the offender.

MR. STONE: Do you have any statistical tools internally that you use to see how many people came in and how many complaints there were and how many were resolved?
MS. ROBERTSON: Yes, that's all in our Central Registry. So in our FAP data reports, we show that we have like 15,000 reports of domestic abuse, and domestic abuse-related sexual assaults are four percent of that total number, out of those 15,000, we have what we call an incident determination committee, which is about the clinical disposition, whether or not it meets the standardized definition of maltreatment. We use a decision tree algorithm that's standardized across the Services. And so out of those, like, 15,000 in 2015, I think it was like 7900 met criteria to go in our Central Registry and met criteria for maltreatment.

We brief Congress every year on the public domain, and so we do the whole breakout with how many offenders are Service members, how many are family members or civilians, how many of these cases are domestic abuse or domestic abuse-related sexual assault, how many were physical abuse, how many were emotional abuse. So we do a lot of the statistical information you're asking
for that annual report.

MR. STONE: But am I guessing that you only see people who come to you, so you might well only have half of the total number of cases if the other half didn't come to your program? Is that right? In other words, they're not obligated to come to your program?

MS. ROBERTSON: Correct, sir. We know what is reported to FAP, and it's either reported to us from command or medical, law enforcement, or, if the incident happens in the local civilian community, we have MOUs with the local civilian services in between military and civilian law enforcement. And so if the civilian law enforcement notifies military law enforcement and notifies command, then it's reported to FAP and we do a clinical assessment with both the offender and the victim.

So you're correct we know what's reported to FAP, but we think we're getting quite a few of them because we have a real good relationship with the civilian communities with
the MOUs and to the civilian court system because, if someone is connected to domestic abuse and are in the civilian community, they would go to a family court that we would also know about that that was a military member.

MR. STONE: So would you get in your database not only the cases where the people wanted to go forward but also the ones who made a restricted report? Do you think you have a mix in there with restricted and unrestricted, or do you just have unrestricted?

MS. ROBERTSON: We do unrestricted. Thank you for the question. We have a similar form, same thing as SAPRO, where victims of domestic abuse are given the opportunity to do restricted or unrestricted reports of sexual assault or domestic abuse. But we are different from SAPRO in the way that the majority of our victims come in and really want to stay in that relationship and they want their offender, who they're living with, to get treatment and to get command support for treatment. So we have a very
small percentage of restricted cases in our
domestic abuse.

MR. STONE: And the data you have, I
don't know if you already have or you could make
it available for the statistical people on our
staff to see if there's any way they could de-
conflict to see, to the extent that it makes any
sense, that it matches? They may well recognize
you have a subset, but then there may be areas
where you have more numbers than them, which would
cause us to want to be more, take a second look at
our own data. In other words, you may have more
ideas than they have been able to find by the
other reporting services which they look at. Is
it possible to share data?

MS. ROBERTSON: Oh, certainly. We can
release our FY 2015 report, and then, as soon as
our FY 2016 report is released, that will be in
early May --

MR. STONE: Well, actually, I meant
sort of the electronic files, not just reports, so
they could see if they could do matching or --
MS. ROBERTSON:  We do an aggregate report.  We don't do it by Service and we don't do it by -- ours doesn't have the legal adjudication data, so it's not showing the incident information that you're used to seeing in the SAPRO report.

MR. STONE: No, I understand that. But it has defendants, it has, you know, people, the victims.

MS. ROBERTSON: Yes, we roll it all up in an aggregate. So we say how many victims and how many offenders do we have, and, of those victims, how many were family members, how many were active duty. I'm not sure what we have, given what you're looking for, but I'd be happy to forward you our report.

CHAIR HOLTZMAN: Can I just follow-up a little bit on this? I think one of the things that we're trying to understand is is the data that we're getting about your system as comprehensive as the data that we're getting from SAPRO? In other words, if we look at all of the sexual assaults in the military, whether they are
intimate partners or whether they've never seen
each other before, are we going to get the same
information written up in some form, you know,
where the trial took place, what happened at the
trial, what happened in the, what the sentence
was, and all the rest of that? Where is that
information located?

MS. ROBERTSON: Ma'am, no, we don't
have that.

CHAIR HOLTZMAN: You don't have that.

MS. ROBERTSON: We never --

CHAIR HOLTZMAN: Do you have that?

DR. GALBREATH: Not for domestic, not
for intimate partner.

CHAIR HOLTZMAN: Okay. So we have a
big gap still with regard to the legal
surroundings of the domestic violence cases or
sexual assault of intimate partners.

MS. ROBERTSON: Yes, ma'am --

CHAIR HOLTZMAN: So how are we going to
get --

MS. ROBERTSON: -- Services have it,
but it's collected by each Service and there's no one --

CHAIR HOLTZMAN: There's no standard?

Okay. So somehow I think we talked about this before, but when it is ever going to happen that we're just going to have, if I want to find out how many sexual assaults took place in the military, regardless of whether it was an intimate partner or a non-intimate partner, how do I get an answer to that very question? Can I get an answer to that question, or do I have to look in one place for one thing and then add it up to another thing?

DR. GALBREATH: With your recommendation last year, you have a very good number. With the number that we report and then in the appendix of the SAPR report, you have the number of reports involving intimate partner. That's about 250.

CHAIR HOLTZMAN: Okay.

DR. GALBREATH: So you add that 250 to my number --
CHAIR HOLTZMAN: Okay. So we'll have to add that. But is there any other information that you have in your report about not intimate partners, Dr. Galbreath, that is not contained about intimate partners? So is the intimate partner, I know the total number might be there, but what else, but is there anything there that we should be having that's not there now with regard to intimate partners? I mean, in other words, will we get a report that's comparable to your report about intimate partners?

DR. GALBREATH: We've talked to Mr. Kurta about that, performing the duties of the Undersecretary of Defense Personnel and Readiness, and his response to us is that, yes, we're looking at that, but how we might view that is still pre-decisional for the department.

CHAIR HOLTZMAN: What does pre-decisional mean?

DR. GALBREATH: It means that we're still --

CHAIR HOLTZMAN: Thinking about it.
DR. GALBREATH: -- thinking about how we'll best do that.

CHAIR HOLTZMAN: And do you know how long it takes to think about such a subject?

DR. GALBREATH: I do not.

CHAIR HOLTZMAN: You do not. Okay. Do we have to make another recommendation about this subject?

DR. GALBREATH: I don't think you need to make another one. They have the recommendation, and they're looking at a number of ways to do this.

MR. STONE: But the way you think, today, we can get the best number would be, can you just sort of --

CHAIR HOLTZMAN: The number they have, the only number that you can get is the total number, the total number of cases in the FAP system and total number of cases in the non-FAP system. Anything else that you want about the FAP system is not, there's no number there, so you can't add it to their number. Is that a fair
statement?

DR. GALBREATH: So if you want the disposition information --

CHAIR HOLTZMAN: Yes.

DR. GALBREATH: -- you're correct.

CHAIR HOLTZMAN: Okay. So, I mean, that's the problem.

MR. STONE: With disposition, you mean sentence, or do you just mean even guilty/not guilty?

DR. GALBREATH: All the above.

CHAIR HOLTZMAN: We don't have any of that. That's the point.

DR. GALBREATH: I don't have that in my data. She does not have that in her data.

MR. STONE: But what I was asking before was, in each of your datas, are there proper names that could be run against the other data we have in like a de-confliction? When you have a two mailing lists, you can run a de-confliction program and come out with one and get rid of all the duplicates.
DR. GALBREATH: Right. So I read Dr. Spohn's analysis, and so bottom line is you have a different bucket of cases from the Services than what I do because they included FAP cases in Dr. Spohn's analysis. But, yes, if Dr. Spohn has a subject name and a social that we can run, then we can line up our data with the analysis that you've done and so you can see where it's overlapped and --

MR. STONE: Or at least be able to say we have no cases that you don't have or, yes, we do, we've got 100 cases you don't have.

DR. GALBREATH: You give me the names and the Socials, and I can do that.

MS. ROBERTSON: And we'd have to put in a request to DMDC and get the Service central registries.

MR. STONE: Maybe all -- at a first step, I think that's terrific because, if we have all those cases, then we don't have to make anybody jump through hoops in their organizations to give us more. If we find there's a difference,
then I think, certainly, that raises a question
that we would want to say, okay, somebody
somewhere figured out how to solve the difference.

CHAIR HOLTZMAN: Why aren't the
Services giving you that information? I mean,
where did we get the information from? We got the
information because the Services gave it to us.
Why aren't they giving that to you?

DR. GALBREATH: Our data collection
mandate from Congress is sexual assault by and
against Service members under the SAPRO program.

CHAIR HOLTZMAN: Oh, I see. So you're
not allowed to ask them for that information. It
exceeds your jurisdiction.

DR. GALBREATH: That's correct.

CHAIR HOLTZMAN: But we could because

--

DR. GALBREATH: Yes, ma'am.

CHAIR HOLTZMAN: I see. Okay. But the
point is, after we go out of existence, like in
September, there isn't going to be any way to
match up this information, okay? So that's a
problem here. We have a systemic fundamental
problem which we identified the last time, which
is that there's no database for the FAP cases
similar to the database that you have for the non-
FAP cases.

   DR. GALBREATH: Yes, ma'am, correct.

   CHAIR HOLTZMAN: I'm trying to
articulate it --

   DR. GALBREATH: You got it right.

   CHAIR HOLTZMAN: It took a few hours to
get there. Sorry about that. And you say that,
and the answer from the military is they're
working on it, they're thinking about it. It's
still pre-decisional --

   DR. GALBREATH: It is.

   CHAIR HOLTZMAN: -- which is quite a
wonderful phrase, yes.

   MS. ROBERTSON: But they definitely
know you have the recommendation. It's definitely
in discussion. We're not trying to hold back
information.

   CHAIR HOLTZMAN: No, no, no, no, we're
not, no one is accusing you of --

MS. ROBERTSON: It's just the structure
of how our program is focused on rehabilitation,
and we've never imported it.

CHAIR HOLTZMAN: Right. And so nobody
is really focused on how do you get a
comprehensive report of all of this stuff, which
I understand is fair. Nobody focused on it
before, but we did focus on it -- when was it? A
year ago?

DR. GALBREATH: And there was action
taken to --

CHAIR HOLTZMAN: Right. So we've moved
a little bit.

DR. GALBREATH: We have.

CHAIR HOLTZMAN: But we haven't moved
--

DR. GALBREATH: Haven't gotten there
yet.

CHAIR HOLTZMAN: No. I mean, you might
even say we're only 25 percent of the way there.

Okay. I'm sorry. I'm taking --
anybody else have any questions for Ms. Robertson? Otherwise, we'll go to Dr. Galbreath.

MR. STONE: I would just ask if they and the staff can coordinate to do that kind of a run because if it turns out every Social and name that they have is stuff that we already have, I am a lot less concerned about them being pre-decisional. If there's a lot of non-overlap, then I think it's a bigger concern. Maybe --

CHAIR HOLTZMAN: There is no overlap.
There can't be any overlap in the end because they don't collect the data. That's the point. Yes, they don't have the names and Socials. We're giving them the names and Socials. That's the point. They don't collect it. They're not allowed to collect it. That's what the conversation we just had --

MR. STONE: Then do a match then.

CHAIR HOLTZMAN: I would imagine if --

DR. GALBREATH: If you give me Dr. Spohn's data system or at least names, subject names and Socials, yes, I can tell you the extent
to which her database will overlap with mine. But I will tell you right now that if it's a Family Advocacy intimate partner sexual assault, automatically my system will not have that information. We only capture sexual assault cases and case dispositions taken in under the Sexual Assault Prevention Response program on each installation.

MR. STONE: I understand that. I guess I just still want to see the overlap, to the extent, to the extent that you can say something intelligible to us about the overlap. If you say, no, we can't match them up, that's fine and you'll tell me that. If you say we can only match up this or that or we would need this or that, that would be fine. But, you know --

DR. GALBREATH: We can do that. If I can resort to a psychological explanation and say, if I have Venn diagrams, I can tell you the degree to which your system overlaps with mine. And so there will be quite a bit of overlap with what Dr. Spohn did. But I can already tell you that the
part of the Venn diagrams that aren't overlapping
will be those FAP cases in Dr. Spohn's analysis.

CHAIR HOLTZMAN: You won't have them.
You can't have them.

DR. GALBREATH: I don't have them. So
I can tell you I've got 89 percent or 84 percent
of everything that Dr. Spohn looked at, and that
piece that didn't, we'll have to figure out why.

CHAIR HOLTZMAN: But we know what's not
in your system because --

DR. GALBREATH: You do.

CHAIR HOLTZMAN: -- we know what we got
from you and we know what we got from the
Services. So we don't need you to tell us what we
didn't get from you. We know that already.

DR. GALBREATH: Okay.

CHAIR HOLTZMAN: I think Meghan's
shaking her head.

MS. PETERS: Yes. Each one of our
cases ties to a line number in the FY 15 SAPRO
report. The other cases were coded specifically
to distinguish them as the Family Advocacy cases.
DR. GALBREATH: I didn't know you guys did that. Okay.

CHAIR HOLTZMAN: So, we know that already. So the only thing we need is a system that's somehow going to get the same kind of information you get for SAPRO about the family assistance program cases.

And that we can't get from you right now because you don't have the authority to do it.

DR. GALBREATH: That's correct.

CHAIR HOLTZMAN: Unfortunately. I know, as Dickens said, Barkis is willing. In other words, SAPRO is willing to do that if it had the authority to do it.

Okay. Dr. Galbreath, can you -- I'm sorry, we kind of stole your thunder. I'm sure you have some other information to give us so please proceed.

DR. GALBREATH: Yes, ma'am. So, if you want to put up my waterfall chart. Just to step through that very quickly.

And just to kind of remind you what's...
in each of our buckets as we're going forward.

We did make a couple of changes. As you all know, up until FY '13 we in the SAPRO office were largely at the mercy of the Services to report out the case dispositions that they had on sexual assaults every year.

This was a process that in the Air Force, in my 21 years in the Air Force we have a phrase that we're building the plane as we fly it, and that's exactly the kind of process that happens.

So, just briefly to remind you, in 2004 SAPRO's annual reports only captured the number of reports that were made.

And then we didn't have restricted reporting in those years.

And in addition to that we only had very high-level numbers about so many cases referred to court-martial, or to non-judicial punishment, or other adverse actions.

Over that time -- I got to SAPRO in 2007 and so we started to try to kind of make
sense of chaos with regard to -- I tried to use my
criminal investigative background to understand
all the outcomes.

And so with the assistance of the DoD
Inspector General and the DoD Office of General
Counsel I constructed the waterfalls that you have
in front of you.

Now, these have changed over time quite
a bit since when we first tried to do this in
about 2009-2010. Actually, I think the first time
we did this was about 2011.

But nonetheless these have really kind
of changed because now that we've automated this
with DSAID we've been able to make this -- have
greater visibility over the data.

And up until 2013 we relied on the
Services to report out their information.

In years 2013 and before I don't
necessarily know. I have great confidence that
what was reported to us was as accurate as it
could be at the time, but we didn't have any way
to kind of dig into the data, and clean it, and
make sure that it was being reported in a
standardized way across all four Services.

So, now with the advent of DSAID we
can. And we have -- 2016 will be the third year
that we have data in DSAID.

Now that I have trend data for three
years I am slowing the wheels of progress so that
we can stop and look at what we have and
understand how we're counting all of the data.

And so that's I think an important
thing from your perspective because what you all
want to know is what's the validity of the data
that we have in the system. So, yes, working on
that now.

So, what you see in front of you is
essentially the number of reports that we got in
'15. Again, 6,083 reports is substantively the
level of reporting that we saw in years prior to
2012.

And the reason we strongly believe that
we had an increase in the reporting is largely
because the Secretaries of Defense, the
Secretaries of the military departments and the Joint Chiefs all got together, this went onto their radar and they really started to put the heat on this problem to get some solutions in place.

So between 2012 and 2013 we saw a 54 percent increase in reporting. And then this number here 6,083 is well above, almost 72 percent above what we saw in 2012.

So, again, a sustained high level of reports and our number of reports actually for '16 -- I'm not supposed to say but it is going to be above this number even more.

So, we're very pleased because of the connection between making a report and giving access to care and Services provided by the department.

Whether it's an unrestricted report where you're going to participate in the justice system, or whether it's a restricted report where you're going to confidentially access care and Services in order to put your life back together
after the devastating event.

So as you see out of our 6,000 some
reports we had about 4,600 some unrestricted
reports and about 1,500 some restricted reports.

As you know there will be no
adjudication of those restricted reports unless
people choose to convert.

Here's some new and interesting
information about restricted reporting. Everybody
wants to know how long does it take on average for
someone to convert their report from restricted to
unrestricted, and the answer is between 30 and 45
days.

The vast majority of people that are
going to convert do it within the first month and
a half of making their report.

We've gone back and we've taken a look
to see, well, after I snap the chalk line on
September 30 for this data how many more
percentage points of people will convert after
that date? And the answer is only about 2 or 3
percent.
So, again, most people if they're going
to convert do it within the first 30 to 45 days,
and then after that very, very small numbers of
people convert after that point in time.

CHAIR HOLTZMAN: Where do I see the --
this is your material, right?

DR. GALBREATH: Yes, ma'am.

CHAIR HOLTZMAN: Where do I see the
comparative numbers year by year? Do you have
that in here?

DR. GALBREATH: Yes. Well, the
comparative numbers year by year is actually in
the -- are in the figures that the staff wanted me
to talk about. But I kind of presumed that they
would have those here since they asked me.

CHAIR HOLTZMAN: Okay. But they're not
in your --

DR. GALBREATH: They're not there.

CHAIR HOLTZMAN: Okay.

DR. GALBREATH: I'm sorry.

MR. STONE: Before you leave the
restricted reports, if you had to guesstimate just
based on prior years and what data you see of these roughly 1,500 reports how many would you on average pretty much turn out converted? Is it 1 percent, 2 percent? Overall. Of the 1,500.

DR. GALBREATH: So, this is actually post-conversion for most people.

MR. STONE: Okay.

DR. GALBREATH: So that year about 20 percent of folks converted. So we started out the year with probably closer to about 1,700 some restricted reports and on average people are converting at a much higher rate than they ever used to.

Early years of SAPRO program was about 13-14 percent a year. Now we're at a good 20 percent. And so that we think is good progress.

We're continuing to watch that to kind of see how quickly.

What we're finding is that over the three years of data I have in DSAID I'm finding that people are converting more quickly.

In other words, '14 took about -- a
little bit longer than '15, and '16 is taking even
less time than '15 and '14.

MR. STONE: So that's a trend.

DR. GALBREATH: It's a bit of a trend, yes, it is exactly what it is. My folks are still
working on it, but the average has come down by
about a day on average. So it's moving.

Anything else about restricted reports?
Okay.

So, what you have -- something else
that's new in this waterfall that you've not seen
before are points G, H, and I.

What we've found is that with the
direction of the change to DoD Instruction 5505.18
which is the Department of Defense Inspector
General's instruction telling the military
criminal investigators what to do when they get a
sexual assault.

They told them that they had to review
every allegation of sexual assault for
investigative purposes.

We were finding that -- we found in '14
that there was no way to kind of account for that review process.

Not every single case is within their jurisdiction and not every single case comes to them in a prima facie way to be able to say yes, indeed, this is something that we should be investigating as a sexual assault.

So what you see in the waterfall now, G, H, and I are some factoring out of a number of cases where if an allegation comes in as a sexual assault and then they look at it and they say we don't see any elements of proof here as a sexual assault. We cannot open the case. We factored out about 145 cases. So those are reports, individual reports that have come in.

Now, regardless of whether or not these cases are factored out of our waterfall or not folks that are making these reports, if they're a victim, if they've signed a 2910 they're eligible for care and services from a SARC, special victims counsel or whatever they need in order to recover. But it just might be outside their jurisdiction.
In addition there were 11 cases here where the MCIOs at the outset said sorry, this report is for something prior to your military service and the subject is not subject to the UCMJ. We can't investigate.

However, in those cases they connect those folks with the jurisdiction appropriate to the allegation.

The next one down is a matter outside an MCIO jurisdiction. And this is a bucket of cases where, again, it would probably be somewhat similar to the prior to service situation that someone's come in.

Cases that are in here are, for example, if someone is traveling to a foreign country where we do not have relationships with the host nation and something happens to them while they're there, there's no investigation possible because we don't have a relationship with that.

One of the cases for an example was someone was vacationing in the Republic of China,
mainland China, and they reported a sexual assault that occurred to them while they were at a massage spa. And there was nothing that the MCIOs could do. We just don't have that kind of relationship with the government of China to investigate. So it's that kind of case.

So what we're trying to do with those three buckets is getting a closer accounting now so that we can account for all of the cases that come in to the department.

And we're discovering things as we go, especially over the last three years where we're getting closer and closer where we know exactly where -- we can count every bean that goes into the bucket here. And so we want to make sure that we're accounting for everything that Congress told us we needed to.

I'm not going to try and make your brains hurt with the math here, but if you want to just go to point N what I can tell you in point N is the number of subjects, dispositions that we had to report out to Congress.
As you know or you might recall every year my cases as far as case dispositions go are a cross section of what occurred, or at least what was reported as finishing up in the year that I'm talking about.

So, in FY '15 the Services told me that they had about 3,386 dispositions to tell me about in DSAID. And that's where I begin to do my waterfall chart to kind of show you where things kind of wash in and wash out with regard to what happens next.

One of the things that I've just recently begun to look at is something that in reading Dr. Spohn's analysis and also talking with your staff, beginning to take a look at why is it that we -- that it looked like in your bucket of cases that you all were looking at you might have had duplicate records and duplicate things.

And so I began to look at our data, and my team and I that do this.

And what we found is that we constructed DSAID to do exactly what the law told
us to do which is provide a case disposition for every single criminal investigation that was done.

The interesting thing is that I am at the whim of the military criminal investigative organizations to report out how they have packaged a case.

And so, for example, I'll give you an example out of here, one of the subjects, in other words one person, one human body accounted for 15 separate investigations.

And that was because OSI decided to open up one case per victim despite the fact that they just had one subject perpetrating all 15 alleged crimes.

So, for them that makes sense and that's -- as an OSI detachment commander I might have done that. I might not have. But nonetheless that's within their jurisdiction and I don't get to comment on that other than say wow, that makes my life difficult.

That being said, I now have a duty to you and to Congress to maybe go beyond what I was
told to do and to collapse it down to what are we
talking about with regard to human bodies.

So, some of the work that I've done
with my team, we had been looking at over the past
couple of months is that if I were to report to
you what I have in each of these buckets are
dispositions of criminal investigations related to
subjects. Not necessarily a one to one subject
count. So that's why we see some duplication.

That being said, we're only over by
about 89 dispositions. It's a very small number.
And it's basically 64 unique subjects had
duplicate dispositions.

Those duplicate dispositions could be
a good call. They could be a fair call.

For example, if you had two separate
investigations, one for an abusive sexual contact
and one for a sexual assault you could receive an
NJP for that abusive sexual contact at an earlier
time depending on what happens.

If that happened in the year and that
came open. And then you were court-martialed for
this penetrating crime of sexual assault it makes
sense and logic that you would appear twice in our
buckets because you have the outcome of the court-
martial and you have the outcome of the non-
judicial punishment. That's fair.

What's not fair, what's hard to
understand is when you have a court-martial that
accounts for one subject's behavior with 15
different victims and 15 different cases. Then
our numbers get a little bit inflated with that.

But what I could tell you is that,
again, a very small number, this is less than
about 3 or 4 percent of our overall number that we
reported.

MR. STONE: That last example where you
have 1 defendant with 15 victims, did that get
reflected as 15 in here or 1?

DR. GALBREATH: So, in this version we
didn't know that this was going on until I had my
team dig in and make some new data rules for
cleaning this.

In here it's going to count as 15
because I'm counting 15 dispositions.

We're thinking about -- clearly I don't think that's what Congress wanted to know. They wanted us to account for all the dispositions, but tell us what happens to every accused.

And that's the thing where we're now looking at our three years of data that we have, what can we do to make sure that what we're reporting makes sense and it's not just following the letter of the law.

So, we're going back and we're taking a look.

The other thing that I've done with the team is instead of this cross-sectional look which is what you get when we snap the chalk line on September 30 every year.

We've gone back and we've done the longitudinal look. In other words, the longitudinal is that in 2014 there were 6,131 reports of sexual assault.

My analysis for that year, now I've gone back -- and we can account for all 6,131
reports because it's been about 2 or 3 years since
we got that data.

That's probably the most helpful
information that you guys would have. It's not on
the schedule that many of our leadership and our
decision-makers want because it takes two to three
years to get for all of these cases to flow
through the system.

But it's probably the most valid of
everything that you could do because you know in
a year's time if we receive a sexual assault
report you have a common denominator all the way
through. And that's the 6,131, what happens to
each one of those as you go through.

This data that you're looking at in
front of you, there's a break, and that's
represented by the black box of criminal
investigation.

There's a break between what was
reported to us by victims and the dispositions
that were ready to report.

As you know, these dispositions include
things that were opened and concluded in FY '15 as
well as cases that were opened in previous years
and concluded in FY '15. That's the cross-
sectional approach that we're talking about.

So, my recommendation at some point is
-- well, what we're going to do whether we're told
to or not is in SAPRO we're going to be issuing
some additional follow-up information, whether
it's with the annual report or some other time,
but when we are fairly confident that we've got
most of a given fiscal year's cases accounted for
we're going to be going through and updating the
numbers to reflect what all happened to all these
cases in a given year.

Again, it might be two years, it might
be three years later, but that I think is probably
the most useful.

Then we can really talk about, okay, of
this number after we subtract out our restricted
reports what happened to all those unrestricted
reports because all of those unrestricted reports
should have a case disposition in the system
somewhere. And that's my goal to be able to do
and that I don't think anybody else in the country
can do right now. And I think that that would be
very informative for everybody.

So, any questions about that before we
press on and I rapidly conclude?

MR. STONE: I guess I don't really
understand frankly why it would make so much
difference to do it by fiscal year even if you
have to wait two or three years.

I don't mind understanding that the
numbers you're giving me have to do with
dispositions in this year that came from a prior
year and that some are held over.

I mean, I don't think there's any
company that can look at its inventory or sales
and not have carryovers from one fiscal year to
the next. So I understand in terms of discrete
numbers it's a little easier to get, but I don't
know. I'm fine seeing you tell us how many are
carried over and how many dispositions are from a
prior year.
I mean, that disposition is still happening by judges or whatever in the year I'm looking at. And their trial probably has too.

DR. GALBREATH: And to respond to you and your not minding that, I'll have that data for you.

But I also think, and it might be my own personal obsessive compulsiveness, I want to know what happens to all those cases.

And I think from a research standpoint you get a different answer whether you look at cross-sectional or longitudinal.

And so I will tell you right now my initial look into the FY '14 data is that there's not a whole lot of difference.

For example, the percentage of cases going forward that I reported to you in FY '14 was about 76 percent of the subjects under the DoD authority to take some kind of action received some kind of action based on -- were substantiated. And they received some kind of disciplinary action.
When I look at it longitudinally that number goes to about 69 percent. Of course that also reflects additional information that comes through and things, but it's not that big of a difference.

But I still think it's a difference worth noting and looking at. So.

So that's one thing. So if we go to the next slide, please. And if we start at that point N at the top, again, of those 3,400 or so subjects of investigation we had dispositions for, a good portion of those every year are outside the legal jurisdiction of the department.

And so again, at point 0 you see that offenders, we had about 418 subjects where the offender is unknown.

We had 111 subjects that were civilian and foreign nationals that were accused of perpetrating crimes against active duty members.

We had about 12 subjects where they died or deserted. In this case we have 12 dispositions in that bucket for deaths of subjects
in point Q.

And then in point R we have our number of active duty folks that were prosecuted by a civilian or foreign authority. And they exercised their jurisdiction and the department ceded that to them.

So that leaves in that year about 2,783 subjects that were under the legal authority of the department.

If you turn to the next page under point S we'll just continue that on down.

At the very top there are three main buckets that I'll call your attention to. It's T, W, and X, and I'll walk you through each one of those.

Under point T is the evidence supported commander action in these cases. In other words, the department had the jurisdiction and the evidence to take some kind of action for a subject accused of a sexual assault. Doesn't necessarily mean that the adjudication was for a sexual assault, but the matter was investigated as sexual
assault.

And I'll talk about those in just a second.

Over on point W is where our command action was precluded. And that means that we could not move forward due to largely evidence problems.

And then under point X is our unfounded by command legal review. This basically means that evidence existed to prove that either the crime did not occur, or the accused did not commit the crime.

And that is based on both a legal review by a staff judge advocate and a commander agreeing with that review.

And so one of the things that changed this year was how we accounted for these cases. If you recall the Army had a separate accounting system for their unfounded cases.

This was the first year that the department went a singular accounting system for unfounded cases.
And essentially what we took a look at is it looks like those cases were really less unfounded and more insufficient evidence types of situations than anything else. And so that's where a lot of those cases ended up is in that bucket of insufficient evidence of any offense to prosecute.

I'll let the Army tell you about that themselves, but that's the high-level story about what was going on there.

And so this kind of reflects the legal process of the department where a commander upon review of case with their staff judge advocate is making a decision about whether to go or to not go.

So if we go back to point T I'll tell you that we have about 2,013 subjects where we could substantiate the allegation.

And we agreed as the department the Congress said you all need to come to an agreement about what "substantiated" means.

And so we all agreed if we had
sufficient evidence to take some kind of action
regardless of whatever that action was, that's our
substantiation point.

And so the next bucket underneath that
are the cases where we were able to take action
for a sexual assault charge of some kind. And
those are the 120 offenses that you all know
about.

And of course in that bucket are 926
subjects that -- where court-martial charges were
preffered.

Underneath that about 300 subject
dispositions for non-judicial punishment, 95
subjects for administrative discharges, and then
other adverse actions would be general officer
memorandums of reprimand, letters of reprimand,
things like that. Or not letting somebody
reenlist or things along those lines.

So, one thing I did want to make sure
that I made clear is under that court-martial
charges preferred I told you about the case with
the 15 different victims.
So, I asked my team to take a look inside that bucket. And what we found is that 42 subjects had more than 1 disposition in that bucket.

And so I asked them if we were to kind of subtract out, how many of those dispositions should we subtract out.

And so about 61 out of that 926 are multiple dispositions because we're counting the way Congress told us to, by disposition.

So, not off by much, but I think it's helpful to understand the difference.

And then if you go down to point V these are the cases where there wasn't sufficient information to prosecute the sexual assault, but there certainly was to take some kind of action against other misconduct.

So that could be Article 128 simple assault, it could be false official statement, it could be adultery, it could be whatever else the evidence backed up. And of course that's the drilldown there.
In these cases you'll notice that there is a proportionate difference of the number of court-martials taken. Usually we have non-judicial punishments in these buckets more than anything else, and court-martial charges are actually fairly few and far between there.

And then if we go up to bucket W we had 697 subjects where command action was precluded. The victim declined to participate in a justice action.

That basically meant that we had 257 subject cases where the victims declined to participate in that case.

Interestingly enough since about 2011 or so that percentage has stayed about 9 percent of all of the cases.

Even the past couple of years, and as a matter of fact 2016 is going to be about 9 percent as well. No movement in that case.

And so we're still watching that to kind of whether or not there's an intervention that we might do to be able to reduce that. We're
watching that from the aspect of the special
victims counsel, victim legal counsel. But again,
we're still in kind of a watch mode to see what
occurs with that.

MR. STONE: Is there any kind of a
voluntary questionnaire that gets sent out to
those people to see if they want to answer and
explain why they backed out?

DR. GALBREATH: Not yet, not directly.

What I would tell you is that we are
surveying victims that are participating in the
military justice process and one of the things
that we've included in that survey is if your case
did not go forward what's the reason.

And one of those would be is because I
didn't want to participate anymore.

The challenge is that the numbers that
I get are only a couple of hundred of folks want
to answer that survey. And so I don't have really
any good empirical data. It's just whoever
happened to respond to the survey.

So we're still trying to figure out
ways to tap into understanding that.

The challenge is that victims want to get on with their lives. And when we go back to them in this way it can be re-traumatizing and upsetting for folks. And so we have to think very, very carefully about balancing our want to know versus their privacy and their need to get on with life.

So, we're thinking about how do we do that in the most thoughtful way we can.

And that really kind of concludes the walk through the waterfall there. Any questions about any of that?

CHAIR HOLTZMAN: I just have a question about -- maybe it's not this waterfall, but back further where you were talking about reasons for not going forward.

Somewhere in the back of my mind I'm seeing a number that's closer to 10 percent of the number of reports that are made that cover sexual assaults that took place before entrance into the military.
DR. GALBREATH: That is correct.

CHAIR HOLTZMAN: Is that number holding up?

DR. GALBREATH: It is. It's actually very consistent as well.

I am actually very surprised to see how consistent our numbers are in these buckets where I thought -- I just kind of guessed that there might be more movement. But you're right.

And most of those cases though are restricted reports. And that's why we see a smaller number under the unrestricted reports.

CHAIR HOLTZMAN: Well, probably because it took place in the past and possibly they're looking for medical or psychological help.

DR. GALBREATH: Yes, ma'am.

CHAIR HOLTZMAN: Are you able to probe those numbers in any way, or is this just speculation?

DR. GALBREATH: Not really. Let me put it this way. We created restricted reports with the idea that people would have a number of
different experiences that could be addressed with
that, that would help them keep it private. And
that was one of our goals.

So we don't keep personal identifying
information about restricted reporters. So even
if I got hit with a subpoena tomorrow in DSAID you
would not know who the restricted reporters are
because I don't.

If you'd like we can go kind of quickly
on. Time is of the essence. And then I'll just
stop and ask for any more questions unless you
have something else you want to go to.

But if we were to take a look at the
court-martial outcomes for FY '15 that were
reported to us we start off with in the top
lefthand corner of this chart with 926 subjects.

Again, not all cases that were reported
to us. In other words, they came to an
investigative conclusion, but they're not all the
way through the court system. So I have about 113
subjects that are pending.

And my team is very good about
following up on that. And so as those conclude they are included in future reports to Congress.

The 813 subjects that had go forward, of those about 67 percent proceeded to trial in some way. So, in other words they made it past an Article 32 if there was one and then they went forward to an actual trial.

Down underneath that we have the RILOs and the DILOs. So that's the resignation in lieu of court-martial for officers or the discharge in lieu of court-martial for enlisted folks. That accounts for about 20 percent of cases.

And as you know in order to be in that bucket the accused needs to make a statement that says there's probably enough information to convict me here, or at least I acknowledge that there's evidence out there to my detriment and so I would rather be able to be discharged or resigned in lieu of that court-martial.

And so it's as close to a guilty plea as you can get without a guilty plea I guess as it's explained to me.
And then in addition to that we had about 111 subjects where court charges were dismissed at any point in the proceeding. So, whether that was at the 32, or right before the 32, or after the 32, that's where those folks go at our cut point.

If you go up to the top again to the proceeded to trial bucket in that same column we're going to follow the lines and go to the right. And we're going to look at the convicted of any charge at trial.

And we had about 76 percent convicted of any charge. So that means it could have been a sexual assault charge or it could have been any other misconduct for which they were charged.

And I would tell you right now that that's -- we have an additional analysis that I'll leave with you all to take a look at with regard to how all those broke out.

We had about 130 subjects in that year acquitted of all charges. If you look to the right of that column you'll see all the different
punishments awarded as a result.

These are the punishments awarded. And so we have about -- most folks getting confinement, a reduction in rank, a final forfeiture, or a punitive discharge or dismissal. And a very small percentage of other things as a result of the outcomes of those trials in the remaining buckets there.

Of the folks that were convicted at trial the Services reported to us that there were 255 subjects convicted of a qualifying sex offense that were required to register as a sex offender.

The rest of the blue space on that are just if the court charge -- if you've got a RILO or a DILO. We have 8 officer resignations, 3 disenrollments and 148 enlisted discharges, and the vast majority of those were under other than honorable conditions.

And then of the court charges dismissed commanders used the evidence gathered to that point to take non-judicial punishment against 22 subjects. You can see the outcomes of those.
Any questions about any of that? Yes, sir.

MR. STONE: In the middle column where you have convicted of any charge at trial, I presume that does not distinguish between guilty pleas and actual contested trials.

DR. GALBREATH: That is correct.

MR. STONE: Is there any way for you to get that data in the future? Are you looking at it? Because that's really, I think, what a lot of people are interested in.

Because if 99 percent of those are guilty pleas then it's quite different than if 99 percent are contested trials.

DR. GALBREATH: Okay, sir, that kind of goes beyond my mandate for reporting as far as the outcomes of things go.

I know that the Services are looking at solutions to give you greater granularity for that, but that goes beyond what I do.

CHAIR HOLTZMAN: I just want to make sure I don't lose track of this question.
DR. GALBREATH: Yes, ma'am.

CHAIR HOLTZMAN: We asked I believe that the Defense Department has implemented the recommendation that a form be created to track retaliation.

DR. GALBREATH: Yes.

CHAIR HOLTZMAN: Is someone keeping track of that?

DR. GALBREATH: Absolutely. So, part of the retaliation prevention and response strategy is to do exactly that so that people can come in and make a report of retaliation.

Right now the process that we're implementing will allow people to come in and make a report to a sexual assault response coordinator.

We have two ways to do this. So if you would like an allegation of retaliation reported at the case management group every month and have that matter discussed by the senior commander on that base then you can do that.

A small percentage of folks are doing that and mostly allegations of ostracism and
maltreatment.

Then of course you can go the IG route and be able to go that route.

So, at the risk of doing another form what we're looking at is we're capturing all of that data in DSAID.

And so that if you come in and do that the sexual assault response coordinator will actually capture that information instead, both for sexual assault reports as well as sexual assault harassment complaints. And so that's the route that I think that we're going to be taking.

CHAIR HOLTZMAN: And so, is somebody going to be looking at what happens in these cases?

DR. GALBREATH: That's us. Yes.

CHAIR HOLTZMAN: So you're going to be analyzing them. And when is that process going to start?

DR. GALBREATH: It actually started. I provide that information in both '14, '15, and this year's report as well.
And so I can tell you out of those two processes -- I don't have those memorized, but out of those two processes I have all that disposition data in appendices to our annual report.

CHAIR HOLTZMAN: So, someone could find out not only the number of cases, but in what percentage of cases the culprit was identified, there was corrective action taken, the victim is satisfied, and so forth, and so on.

DR. GALBREATH: All that. Yes, ma'am.

CHAIR HOLTZMAN: Okay, thank you.

DR. GALBREATH: I'll conclude my remarks unless there's something else that you're interested in.

CHAIR HOLTZMAN: Anybody else have any questions?

MR. STONE: I thought one of these tables before suggested that the outcome when I asked about trials was quite a bit lower than the -- you've got convicted of any charge at trial 76 percent.

I thought the numbers were all quite a
bit lower here on Dr. Spohn's analysis. I can't see any numbers here to 76 percent.

DR. GALBREATH: I noticed that in Dr. Spohn's analysis. So, Dr. Spohn used a different cut point for her denominator. And so that's at least what I could tell.

I haven't talked to her so I can't track exactly what she did a little bit differently.

But then in addition to that my guesstimate based on my criminal investigative experience and my working around this is that a fair number of those included the family advocacy program cases.

And I think there may be a lower rate of conviction in those cases then there are in sexual assault cases. And that probably also dragged down the average as well. That would be my supposition.

MR. STONE: All right. I guess I just recommend that you and she look because the data I thought was penetrative offenses. It wouldn't
--

DR. GALBREATH: So, I went in and she did such a great job I was able to kind of replicate what she did and where she did our cut points.

And actually, to tell you the truth we get very close except for one category.

So all of my numbers when I take a look and see the convictions for penetrating crimes, non-penetrating crimes, and then all the other misconduct that was -- where those convictions are, I get very close when I move my denominator to where she did in the process except for convictions for abusive and aggravated sexual contact. I can't account. We're not close in that. But I get real close for the other stuff.

CHAIR HOLTZMAN: I wanted to ask you again a couple of questions.

First on the retaliation. We made a recommendation and I don't think it was in 2014. I think it was in 2015 about retaliation.

We asked that a form be appended so
that it could be tracked always vis-a-vis the
person making the complaint whether there had been
retaliation and then what was done.

So, the way you're doing it would
basically allow the same kind of tracking so that
we could find out for every complainant what
happened and how many instances of retaliation
were reported for how many complaints and what
kinds of complaints and all that stuff.

DR. GALBREATH: Yes, ma'am.

CHAIR HOLTZMAN: Okay. The second
question has to do with the kind of interesting
outcome that -- or interesting fact that Dr. Spohn
found which was that you could -- one of the
predictive -- well, one of the things she found
was that if the victim was a member of the
military there was a lower conviction rate and a
lower sentence.

And one of the things we asked her to
do, or I asked her to do and other people asked as
well was to see how we could understand that
better.
What kinds of additional information would we need to begin to understand what that phenomenon is about?

Is that something that -- have you identified that as an issue? And how would you approach finding out the factors that determine that result?

DR. GALBREATH: So, my thought when I read that was -- and like I said I wasn't doing a full analysis of things.

But my thought was the threshold of reporting, or the kinds of crimes that our military folks are reporting might be different than our civilian folks.

My guess is that folks may have been reporting a larger percentage of abusive sexual contact than sexual assault and rape. And that's probably where I would start to look to see if that is the case or not.

Because I think it's easier for folks in the system to be able to find the SARC, access the SARC, tell us about stuff.
And they're motivated more by our leadership's message to please report and get the assistance that you need.

If you are a civilian on the outside coming in and making a report these are probably for things that are much more serious because a finding in the civilian literature is that the more serious the crime is the more likely you are to report it.

So that would be my first stop. But that's really kind of speculation on my part. It might not line up with what Dr. Spohn found.

CHAIR HOLTZMAN: Do you two talk to each other? Would you talk to her about this?

DR. GALBREATH: I did -- but I haven't got to talk to her yet.

CHAIR HOLTZMAN: Okay. I would appreciate it if you do because it's a kind of troubling thing that popped out and we'd love to get some kind of handle on it to see whether your analysis or your supposition is correct, or there's something else.
Any other questions that the panel has?

MR. STONE: Just that you don't really
give us any kind of little summary of trends. Any
kind of trend data you could give us literally
called out on a sheet what trends you see would be
really helpful as a supplement to this because
part of our obligation is to talk about trends.

So, even if you say this is totally
tentative, or this is, you know, not speaking for
the Service, but based on our best guess of the
trends these are some of the trends we see in some
of these numbers and data would be very helpful.

DR. GALBREATH: Absolutely. I'll get
with the staff right after we're done here and
I'll make sure that they pass on to you our trend
data that we include in the annual report every
year.

And if there's other trends that you
all would like to see tell the staff and I'll see
if that's something that we have.

CHAIR HOLTZMAN: Thank you very much.

Thank you too, Ms. Robertson. We really
appreciate your coming here and enlightening us as you have in the past. I hope DoD stops thinking and starts acting on the numbers.

Thanks, everybody. Mr. Sprance?

MR. SPRANCE: The meeting is closed.

CHAIR HOLTZMAN: Thank you very much.

(Whereupon, the above-entitled matter went off the record at 3:14 p.m.)
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel

Before: US Department of Defense

Date: 04-07-17

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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