

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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HEARING

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FRIDAY
NOVEMBER 14, 2014

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The Panel met in the Fairfax,
Glebe, and Wilson Rooms, Holiday Inn Arlington
at Ballston, 4610 Fairfax Drive, Arlington,
Virginia, at 8:42 a.m., Hon. Elizabeth
Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman
Hon. Barbara Jones
Victor Stone
Tom Taylor
VADM(R) Patricia Tracey (by telephone)

WITNESSES

Lieutenant Colonel Ryan Oakley, U.S. Air
Force
Meg Garvin
Michael Andrews
Colonel James Robert McKee, U.S. Army
Colonel Carol K. Joyce, U.S. Marine Corps
Captain Karen Fischer-Anderson, U.S. Navy
Lieutenant Colonel Andrea M. deCamara, U.S.
Air Force
Commander Ted Fowles, U.S. Coast Guard
Commander Colleen Shook, U.S. Navy
Lieutenant Commander Kismet Wunder, U.S.

Coast Guard

Major Marc R. Tilney, U.S. Marine Corps

Captain Jesse Sommer, U.S. Army

Captain Aaron Kirk, U.S. Air Force

James W. Boerner

Mark Walker

Mike Defamio

Major William Babor, U.S. Air Force

Lieutenant Commander Nate Gross, U.S. Navy

Major Kyle Kilian, U.S. Marine Corps

Captain Sarah Robbins, U.S. Army

Lieutenant Colonel Scott Hutmacher, U.S.

Army

Lieutenant Commander Philip J. Hamon, U.S.

Navy

Major Douglas C. Hatch, U.S. Marine Corps

Major Brent Jones, U.S. Air Force

Lieutenant Jeffrey C. Barnum, U.S. Coast

Guard

STAFF:

Lieutenant Colonel Kyle W. Green, U.S. Air

Force - Staff Director

William Sprance - Designated Federal

Official

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

2 (8:45 a.m.)

3 CHAIR HOLTZMAN: Good morning,
4 everyone to the November meeting of the
5 Judicial Proceedings Panel. Four members of
6 the panel are here today. Admiral Pat Tracey
7 will be joining us by phone, when she is able.
8 Oh, she's on the phone now. Sorry.

9 Today's meeting is being
10 transcribed and also video recorded by Army
11 Television. Transcripts and the link to the
12 video record of this meeting will be posted on
13 the JPP website.

14 Judicial Proceedings Panel was
15 created by the National Defense Authorization
16 Act of 2013. Our mandate is to conduct an
17 independent review and assessment of judicial
18 proceeding conducted under the Uniform Code of
19 Military Justice, involving adult sexual
20 assault and related offense since the most
21 recent amendments to Article 120 of the UCMJ
22 in 2012.

1 The agenda for today's meeting
2 focuses on the Panel's responsibilities to
3 echo the implementation and effect of the
4 Special Victims' Counsel or SVC Programs
5 established by each of the military services
6 in 2013.

7 In this morning's first section,
8 we will hear an overview about the
9 implementation of the military's SVC programs
10 and how these programs compare to programs and
11 services available in civilian jurisdictions.
12 Since most civilian jurisdictions don't even
13 have these programs, that will be an
14 interesting comparison to make.

15 The presenters will help us
16 identify legal and practical issues involved
17 in representing victims of sexual assault and
18 in determining how these victims receive
19 information about these cases.

20 Next, we will hear from the SVC
21 Program managers from each of the military
22 services. They will provide information about

1 the organization of their programs, how
2 counsel are selected and trained to Service
3 SVCs, and the practical issues they are
4 addressing in their programs.

5 Then, we will hear from individual
6 SVCs from each of the military services about
7 their experiences in representing victims of
8 sexual assault crimes.

9 Following our lunch break, Mr.
10 Stone will share with us information and his
11 observations from the Special Victims' Counsel
12 training course he attended in August at the
13 Army JAG School in Charlottesville, Virginia.
14 His trip report was distributed to members of
15 the panel and is also posted on today's
16 meeting page on the JPP website.

17 The remainder of the afternoon
18 agenda will include sessions with military
19 investigators, defense counsel, and trial
20 counsel to hear their insights about the
21 Special Victims' Counsel Programs. We are
22 grateful to each of them for coming to speak

1 with us and sharing their impressions of how
2 the SVC Programs have affected their work.

3 Each public meeting of the
4 Judicial Proceedings Panel includes time to
5 receive comments and input from the public.
6 The panel did not receive any requests from
7 the public to appear at today's meeting.

8 All the materials received by
9 members for today's meeting and previous
10 meetings are available on the JPP website,
11 which is jpp.whs.mil.

12 Thanks very much for your
13 attention and I believe we are ready to hear
14 from our first panel of presenters.

15 Good morning and welcome. Our
16 first panel this morning to talk about
17 Victims' Counsel and Victim Access to
18 Information will be Lieutenant Colonel Ryan
19 Oakley, who is the Deputy Director of Legal
20 Policy, Office of the Under Secretary of
21 Defense for Personnel and Readiness; Ms. Meg
22 Garvin, Executive Director, National Crime

1 Victims' Law Institute, NCVLI and veteran,
2 with bruises to show, of the response panel.
3 Very glad to see you, Meg. Thank you for your
4 willingness to help out again. And Michael
5 Andrews, the Project Director and Managing
6 Attorney, District of Columbia Crime Victims'
7 Resource Center.

8 We will start with Lieutenant
9 Colonel Ryan Oakley.

10 LT. COL. OAKLEY: Well, thank you,
11 ma'am. We greatly appreciate the opportunity
12 to brief the panel on these important issues
13 and our shared role of ensuring that victims,
14 particularly victims of assault, understand
15 their rights, receive the information they are
16 entitled to, and that their needs are met.

17 My office is responsible for the
18 Department of Defense's Victim and Witness
19 Assistance Policy and I will provide a brief
20 update today on the key policy developments in
21 this area.

22 Over the past 20 years, the

1 Department has strived to protect the rights
2 of victim and witnesses, strengthening
3 cooperation during all stages of the military
4 justice process, while mitigating the
5 physical, psychological, and financial
6 hardships, relying on a multi-disciplinary
7 collaborative approach.

8 This began with our Victim Witness
9 Assistance Programs, or VWAP, located
10 worldwide, and is expanded to a network of
11 available support to include sexual assault
12 response coordinators, victim advocates, legal
13 assistance attorneys, special prosecutors, and
14 now special victims' counsel and victims'
15 legal counsel.

16 As the panel is aware, there have
17 been significant changes in the past year with
18 the establishment of victim counsel programs,
19 the implementation of the Special Victim
20 Capability, the enactment of Article 6(b)
21 Uniform Code of Military Justice to expand on
22 victims' rights.

1 Currently, the Department is in
2 the final stages of a major revision of our
3 victim assistance policy, which will be
4 published as a new combined issuance, DoD
5 Instruction 1030.02, Victim and Witness
6 Assistance. We contemplate that this revised
7 instruction will include a section addressing
8 Special Victims' Counsel and Victims' Legal
9 Counsel, reflecting the key legislative
10 provisions.

11 We look forward to the imminent
12 publication of the draft instruction in the
13 Federal Register and receiving public
14 comments, as well as the recommendations of
15 the panel. We will provide the panel with the
16 Federal Register notice as soon as it is
17 published.

18 All victims of crime, under the
19 UCMJ, have the right to reasonable, accurate,
20 and timely information from parties to a case
21 at key stages of the court-martial process.
22 We have established uniform procedures and

1 standard forms to ensure victims and witnesses
2 are provided with written information about
3 their rights, support services, and key points
4 of contact as soon as they are identified and
5 throughout the investigation, trial,
6 conviction, confinement, post-trial, and
7 appeal.

8 Victims' counsel, in particular,
9 provide holistic legal services ranging from
10 advising victims on all aspects of the
11 military justice system, ensuring their
12 privacy rights are protected, as well as
13 providing traditional legal assistance. By
14 statute, the designation, certification, and
15 training of victims' counsel in providing
16 legal assistance to a covered victim is a
17 service function, as are the development of
18 specific program responsibilities,
19 supervision, guidance, standards, rules of
20 practice and procedures.

21 Under their Article 6 inspection
22 authority, the Military Departments' Judge

1 Advocate Generals and the Staff Judge Advocate
2 to the Commandant of the Marine Corps ensure
3 that SVCs and VLCs are able to provide
4 independent, zealous, and effective legal
5 representation to empower victims and build
6 resiliency.

7 As these programs continue to
8 mature, we are greatly encouraged to hear of
9 the significant inter-service cooperation and
10 collaboration through regular meetings, joint
11 training, and sharing of best practices and
12 subject matter experts, such as those before
13 me today.

14 Already, there is evidence that
15 Victims' Counsel may have a very positive
16 impact in helping victims have a voice,
17 understand the military justice system, and
18 exercise their rights. The end result, we
19 believe, is a stronger, vibrant, and
20 integrated support service for all victims.

21 And I will be happy to take your
22 questions at the appropriate time. Thank you.

1 CHAIR HOLTZMAN: Thank you very
2 much, Lieutenant Colonel Oakley.

3 Next we hear from Meg Garvin.
4 Good morning, Ms. Garvin. Thank you very much
5 for coming.

6 MS. GARVIN: Good morning. Thank
7 you for having me. I'm very excited to be
8 here. I will keep my opening comments very
9 brief. As was already noted, I am the
10 Director for National Crime Victims' Law
11 Institute and also a Professor of Law at Lewis
12 & Clark Law School. Those positions I have
13 held since 2003.

14 And as the Chair noted, part of
15 today's discussion is a comparative moment
16 between the military and the civilian. I have
17 been doing the equivalent of SVC work in the
18 civilian world since 2003 when I moved to the
19 National Crime Victims' Law Institute and
20 helped launch what was known as the National
21 Demonstration Project of Legal Services for
22 Victim of Crime in the civilian system, in

1 which we were funded by the Department of
2 Justice to establish clinical programs, and we
3 established 12 clinics around the country to
4 provide legal services to victims of crime in
5 states and federal trial and appellate courts.

6 And that background, I believe,
7 is, in part, why I was invited back in 2011
8 and 2012 to participate with the Air Force as
9 they were first conceiving of the idea of
10 Special Victims' Counsel and was invited in to
11 train at the very first SVC training program
12 in December of -- at the very beginning, prior
13 to its launch in January.

14 And during that time, what I will
15 say is the training program between the first
16 training program of the SVCs and the training
17 programs now of the SVCs is light years apart.
18 I have had the privilege of continuing to work
19 with the Air Force, predominately the Air
20 Force, although I have now worked with every
21 branch of the military with their SVC or
22 equivalent program to train them. And the

1 light year of difference is both in content
2 and quality of the execution of those training
3 programs, as well as the lawyers themselves.

4 The lawyers who are standing in
5 the positions of SVCs in all the branches are
6 really quite astounding. I have worked with
7 Liz doing this work in civilian and military
8 capacities. And what I witness in the
9 military's SVC Program is top notch lawyering
10 that comes out of some very significant
11 training. Again, the experience I have is
12 predominately with the Air Force and what I
13 witness is generally a four- to five-day
14 training that is pretty intensive, both in
15 terms of process, learning the rules of how an
16 SVC program is supposed to operate, what their
17 ethics are, and then into the practical skills
18 of how to do it, including execution of
19 hypotheticals and role-playing.

20 And I understand that I am going
21 to have an opportunity to participate in a
22 child victim representation training that is

1 happening in January, but I have not yet
2 witnessed that. I will say that the trainings
3 that seem to be the best and execute the best
4 for the SVC Program, as I have witnessed it,
5 are those that are multi-day and include
6 practical skills and are very intensive from
7 a lawyer perspective.

8 I have participated in some
9 branches where it is a general victim
10 readiness training. That includes lawyers,
11 advocates, and investigative agencies. And I
12 think those are excellent also, but when you
13 are trying to train lawyers, I think having a
14 focused training on legal and litigation
15 skills is really critical.

16 What I have witnessed during those
17 trainings and in my experience working on
18 cases with SVC and with civilian lawyers
19 working on victims' rights issues is that
20 access to information is among the most
21 critical components of protecting victims'
22 rights that exist. Everyone in this system

1 has to have access to similar, if not
2 equivalent information throughout the criminal
3 investigation and prosecution, and then post-
4 conviction. And the reason that has to happen
5 is both the lawyer who is representing the
6 victim and the victim need to know what is
7 happening in the room that everyone else
8 knows. A lawyer simply cannot counsel a
9 victim on the best course of advocacy --
10 excuse me -- the best course of action if they
11 are denied access to information about what is
12 happening in proceedings.

13 And a victim cannot knowingly and
14 voluntarily assert or knowingly and
15 voluntarily waive rights if they don't know
16 the scope of what is being discussed in a
17 proceeding or is about to be discussed.

18 So, the right to information has
19 to be interpreted as something more than those
20 moments when it explicitly says right to
21 information. It has to be interpreted and
22 afforded to victims to know, basically, the

1 scope of what is happening in proceedings.
2 And in the civilian world, this is where we
3 have been moving. In the military world, I
4 see that at least a handful of the branches
5 have formally issued memos on how to ensure
6 that victims have access to information. I
7 haven't reviewed all of those and I would
8 defer. But I hope that is the direction we
9 are moving is to ensure that victims have
10 access to all of the information, unless there
11 is a reason not to give it, such the
12 presumption has shifted to give it unless you
13 can articulate a reason not to, rather than
14 the other way around, which is a burden on the
15 victim.

16 So, I will stop there. I am very,
17 very excited to be here today and I have to
18 say, as I said, I have been doing this work
19 since 2003 and three years ago when I started
20 to work with the military on this, I thought
21 I had a lot to share with the military. Now,
22 I will say the military has a lot to share

1 with the civilian world.

2 CHAIR HOLTZMAN: Thank you very
3 much, Ms. Garvin, for your testimony and for
4 your assistance to the government.

5 The third presenter will be Mr.
6 Michael Andrews. Mr. Andrews, sir, thank you
7 very much for coming.

8 MR. ANDREWS: Thank you very much.
9 Thank you to the panel, obviously very
10 distinguished panel before me. And like Meg,
11 I am going to try to keep my remarks short.

12 But by way of introduction, again,
13 my name is Mike Andrews and for the last five
14 years I have been the Program Manager for the
15 D.C. Crime Victims' Resource Center. The D.C.
16 Crime Victims' Resource Center is the only
17 pro-bono, non-profit clinic in D.C. that
18 provides effective pro-bono legal
19 representation and the assertion of crime
20 victims' rights for all victims.

21 By way of background, I have
22 handled hundreds of cases, both as a federal,

1 state, and tribal prosecutor, as well as a
2 criminal defense attorney in my previous
3 years, and also as a judge, a tribal court
4 judge in southern Arizona.

5 I would also want to just briefly
6 step back and obviously thank, not only your
7 panel, but also your support staff by the way.
8 I have been engaged with them for the last
9 couple of weeks and I would remiss if I didn't
10 at least thank them for their hard work for
11 this as well.

12 One thing I am honored to be part
13 of what I would probably characterize as
14 continuing dialogue regarding victims,
15 specifically, access to information. This
16 issue I am all too familiar with as my role as
17 Program Manager with the D.C. Crime Victims'
18 Resource Center and the importance of access
19 of information. And, as Meg mentioned, in
20 terms of representation, whether as an SVC or
21 a licensed practicing attorney representing
22 clients, you need to have that same access to

1 information to represent your client, as we
2 mentioned, zealously. How else are we going
3 to counsel our clients if we don't have the
4 same access to information as all of the
5 parties that have been licensed to practice
6 before the tribunal?

7 Other issues that are also
8 important that go along with that access to
9 information is privacy and transparency, which
10 is real crucial.

11 Let me just offer a couple issues
12 that I hope that we can continue to dialogue
13 this morning. As Meg mentioned earlier, the
14 same access to information, how crucial that
15 is.

16 The second, which corresponds with
17 that is information that is received should
18 not be filtered by a third party. That has
19 been one of my seminal arguments that I have
20 made in court successfully. And that is, that
21 information should not be watered down after
22 it has been looked at by three or four

1 different people. If you are a licensed
2 member of the bar, you have a client, you need
3 to have that same access to information as any
4 other licensed attorney, and that includes
5 defense attorneys as well.

6 Here are just a couple of issues
7 that I hope we continue to talk about this
8 morning. And again, I appreciate your
9 opportunity and I look forward to your
10 questions. Thank you.

11 CHAIR HOLTZMAN: Thank you very
12 much for your presentation.

13 We will begin with Mr. Taylor.

14 MR. TAYLOR: Good morning and
15 thanks to all of you for being here today. I
16 want to ask you first, Colonel Oakley, what
17 kind of mechanisms are in place within OSD for
18 the sharing of best practices regarding SVC
19 information?

20 LT. COL. OAKLEY: Yes, sir. As
21 far as best practices, there are several
22 different forms that can take place. First of

1 all you have, for military justice, there is
2 the Joint Service Committee on Military
3 Justice, or what we call the JSC, which can
4 share particularly more changes to the Manual
5 for Courts-Martial and the Rules for Court-
6 Martial. And there is an annual review that
7 is conducted by the committee and the
8 opportunity for public comment.

9 A new forum that was recently
10 established is the Department of Defense's
11 Victim Assistance Leadership Council. And
12 that actually brings together the general
13 officers and senior executive service members
14 from OSD, as well as the Services at National
15 Guard Bureau for the specific VWAP or Victim
16 Witness Assistance Programs, the Sexual
17 Assault Response Coordinator and the SAPR
18 Program, as well as Military Equal Opportunity
19 and the Family Advocacy Program, which
20 oversees domestic violence and child abuse and
21 neglect.

22 And so this new forum, which I

1 attended the very first meeting for, is
2 specifically that looks at, is looking at
3 ensuring victim assistance personnel meet
4 basic standards of competency, ethics, and
5 have foundational programs in place and, also,
6 that they can share best practices.

7 MR. TAYLOR: That is a very
8 impressive answer to a question that I really
9 was looking for more of a granular response
10 to. And that is, having been in the Pentagon
11 myself for 27 years, I know that if you have
12 periodic needs among SESS and general officer,
13 everybody gets ready for that need. But my
14 question is, is there some forum that convenes
15 on a quarterly, monthly, regular basis of the
16 service chiefs who are responsible for the SVC
17 program to really share on a real-time basis,
18 as opposed to a periodic basis what is
19 happening in their programs?

20 LT. COL. OAKLEY: Well, sir, I
21 think the program managers, who will be
22 speaking after me, will be able to provide

1 more granular detail. But what I can say is
2 I am well aware that the program chiefs do
3 meet frequently through Judge Effron's
4 Military Justice Review Group. There are
5 meetings that take place every six weeks and
6 they cover specific topics and they can share
7 practices and procedures.

8 Additionally, there are regular
9 informal and formal contacts that take place,
10 along with shared training and sharing of
11 subject matter experts. So, we believe that
12 the service-level, again, is particularly
13 ongoing and very impressive coordination.

14 MR. TAYLOR: Okay, thank you.

15 Ms. Garvin, I would be interested
16 to know what kinds of measures civilian
17 jurisdictions that have SVC programs have
18 adopted in order to gauge the effectiveness of
19 their individual programs?

20 MS. GARVIN: So, let me just
21 clarify a couple of things that are embedded
22 in your question.

1 So, no civilian, no states or
2 counties or governmental entities have put in
3 place the equivalent of an SVC program. They
4 have been stand-alone non-profits that have
5 been funded through federal grants to do legal
6 work. Those grants have generally come from
7 the Office for Victims of Crime, often through
8 my organization sub-granting, but some
9 directly through the Office for Victims of
10 Crime, and then some through the Office on
11 Violence Against Women, have had a component
12 of legal services in the criminal case.

13 Each of those grants comes with
14 evaluative mechanisms that you have to have to
15 report back to the funder, that is to the
16 Department of Justice, generally speaking
17 along the lines of client satisfaction. And
18 then there has been, there were two studies
19 done on the demonstration project, the project
20 I mentioned where the 12 entities were under,
21 done by the National Institute of Justice, two
22 parts of the same studies, to talk about their

1 effectiveness with regard to whether they were
2 having impact on the judiciaries and other
3 system actors' perception of victims,
4 perception of victims' rights, and impact of
5 the project as a whole.

6 NIJ issued the first of those a
7 couple of years ago. The second was issued,
8 I believe, just last year. And so, those
9 exist.

10 Other than that, I think data
11 collection in the civilian world has been less
12 than ideal, from an evaluative perspective of
13 the impact of these systems and we are left
14 with client satisfaction alone, which has been
15 equivalent to the military, which is quite
16 high client satisfaction. But beyond that,
17 the evaluative mechanisms haven't existed.

18 MR. TAYLOR: Well, if you were to
19 design a system that had more data collected,
20 what sort of data would you collect?

21 MS. GARVIN: Well, first the
22 apology to anyone in the back that has to

1 collect data for my answer --

2 (Laughter.)

3 MS. GARVIN: -- because I know
4 data collection can be quite burdensome.

5 And I do think, I know the
6 military, various branches have reached out to
7 us to see what tools we use and I know they
8 have solicited quite a bit of information from
9 expert evaluators on this, which I am
10 certainly not. But the starting point for any
11 evaluation is what are you trying to study.

12 And client satisfaction and victim
13 satisfaction certainly is one not simply to
14 see if victims are satisfied per say, but what
15 we know from trauma, from neurobiology of
16 trauma is that in the studies of systems and
17 participation of procedural justice is when
18 people see a system as transparent and see
19 themselves participating in it and having a
20 voice in it, they are more satisfied with a
21 system and will continue to participate in it
22 and transparency matters.

1 So, I would be doing some level of
2 client satisfaction with the victims. I would
3 also be looking at other system actors to see
4 what they are assessing. I, to be very blunt,
5 would not be assessing outcomes of cases. I
6 think that is irrelevant to an analysis of
7 whether the system is achieving procedural
8 justice.

9 MR. TAYLOR: Thank you. Madam
10 Chair, I am concluded.

11 CHAIR HOLTZMAN: Thank you. Judge
12 Jones?

13 JUDGE JONES: I wonder if either
14 you, Colonel Oakley, or maybe you, Ms. Garvin,
15 or Mr. Andrews, could explain to me how the
16 docketing is done in a military criminal
17 justice system. I mean in the civilian world,
18 when papers are provided to the judge, they go
19 on the record. Now, there may be some
20 occasional sealing but, generally speaking,
21 anyone can obtain access. And I don't know
22 how the military criminal justice system

1 works. Is there no docket that is available?

2 LT. COL. OAKLEY: I can say this
3 from the Air Force perspective, ma'am.

4 JUDGE JONES: Sure.

5 LT. COL. OAKLEY: We in fact have
6 a website where there is information about the
7 court-martial and the charges. Information
8 may be under the Privacy Act or if it mentions
9 a victim's name or things like that, will be
10 redacted from that information. But again,
11 and we also work with Public Affairs to
12 provide information as well.

13 But I think, I believe that there
14 may be some differences between the services,
15 so I would just speak to the Air Force.

16 JUDGE JONES: Well, I mean are
17 written motions not made, or if one was, would
18 it show up on the website?

19 LT. COL. OAKLEY: I'm not aware of
20 that, ma'am. I would have to check further.

21 MS. GARVIN: And if I may?

22 JUDGE JONES: Sure, thank you.

1 MS. GARVIN: I would defer to the
2 SVCs who speak later today and to the heads of
3 the programs. I do know that we can get
4 access to certain -- because my organization
5 has worked in some of the military cases, we
6 can get access to certain pleadings, if they
7 aren't redacted. The right to information
8 that at least I was referencing and the
9 experience that we have had in the civilian as
10 well as with some military cases is timeliness
11 of access to certain motions that are filed.
12 Are those automatically served on counsel for
13 the victim or do they have to wait until they
14 are provided through government, through trial
15 counsel? Because timeliness of receipt of
16 motion practice goes to your preparation for
17 hearings. So, even if you could pull it down
18 yourself, if you never knew it was filed, that
19 would be problematic or if you are waiting for
20 trial counsel to hand it to you in order to
21 prepare.

22 But then complementary and

1 supplemental to that, there is a lot of
2 information that is not in public filings?
3 So, for instance, the law enforcement reports
4 and other pieces of information like that.

5 JUDGE JONES: We don't have public
6 filings in the civilian world, either.

7 MS. GARVIN: Correct, so you have
8 to ask for them in the civilian world, which
9 is the practice that we do in the civilian
10 world. And then, depending on your
11 jurisdiction, you are either left at the whim
12 of the law enforcement agency that happens to
13 be there, your relationship with that agency,
14 are they going to turn it over or not. And
15 then in some jurisdictions, it is explicit
16 that you get it and in some we have had to
17 litigate to show that victims' rights allow
18 you to get it.

19 JUDGE JONES: Okay. Well, I can
20 certainly wait to hear from another panel with
21 respect to exactly if there is a docket and
22 how it works in the military justice system.

1 Thanks.

2 I guess the question I have for
3 you, Colonel, and you will tell me if you are
4 the wrong person to ask, but it does say under
5 Secretary of Defense for Personnel, this must
6 be another drain on the numbers of lawyers
7 available in the military justice system
8 creating this Special Victims' Counsel. Are
9 we going to be able to keep it going?

10 LT. COL. OAKLEY: Well, ma'am, as
11 the Services have the supervisory
12 relationships and oversee the Programs, I
13 would defer that specific answer. But I will
14 say what I see, from my perspective, as a net
15 positive, is the fact that we have and all of
16 the above approach for victims, rather than a
17 one-size-fits-all. And what that allows is
18 victims now have the opportunity, based on
19 their needs and based on the support that is
20 required, to consult with a victim advocate
21 and a legal assistance counsel, a victims'
22 counsel, also, to consult with the trial

1 counsel but to go ahead and they are not
2 limited in the services that they have.

3 So, the broader question of
4 support, again, I would defer that to the
5 Services because they are providing the boots-
6 on-the-ground support. But, again, in my
7 perspective, I view it as a positive that
8 victims have a broad range of services for a
9 lot of help.

10 JUDGE JONES: Thank you.

11 CHAIR HOLTZMAN: Mr. Stone.

12 MR. STONE: Thank you. First, I
13 would like to ask the panel members, starting
14 with Lieutenant Colonel Oakley, to comment on,
15 since this is one of the topics today, victim
16 access to information, specifically with
17 respect to why the Privacy Act keeps getting
18 mentioned? I didn't think in a criminal case,
19 anywhere in the country, the Privacy Act ever
20 required a document to be redacted. And yet,
21 I have repeatedly heard, as a justification
22 for not giving access to victims, the terms

1 about the Privacy Act.

2 Could you tell me, if you could,
3 what section of the Privacy Act you are
4 referring to and if you have some legal
5 opinion that you are relying on that says the
6 Privacy Act limits the military from giving
7 full access to their information to victims?

8 LT. COL. OAKLEY: Sir, I think
9 that, in this case, the release of information
10 requires, again, effective working
11 relationships between Military Justice Trial
12 Counsel and the Victims' Counsel.

13 On the particulars here, there is
14 a Department of Defense directive, which I can
15 get the exact number for you but I believe it
16 is 5400.07, but I will check on that, but
17 there are directives on both the Privacy Act
18 and the Freedom of Information Act Program.

19 My understanding is, again, if you
20 have information, if it -- because in some of
21 the paperwork you may have Social Security
22 numbers, you may have addresses, or other

1 information. So, I believe that is what that
2 is addressing.

3 Again, I am not handling these
4 cases at the installation level, so I would
5 defer to the practitioners on the specific
6 issues. But that is, typically, where there
7 is information that is redacted is my
8 understanding. It is of a third party and it
9 is that personal identifiable information.

10 MR. STONE: So, other than
11 redacting personal identifiable information,
12 you are telling me you don't think there is
13 any other separate Privacy or Freedom of
14 Information Act reason not to provide
15 documents to victims and victims' counsel?

16 LT. COL. OAKLEY: At this point, I
17 am happy to take any issues back further. The
18 Privacy Act and FOIA are not in my or within
19 our office's particular purview. But, and
20 again, I think the Service Panel Members can
21 address specific policies.

22 MR. STONE: Okay, then I

1 appreciate if it is anything beyond the, what
2 we call, the PII, personal identifying
3 information, I would appreciate if you would
4 supplement and get back to us with what those
5 exceptions are. Because I keep hearing, both
6 orally and in documents, the Privacy Act and
7 the Freedom of Information being referred to
8 as a reason not to distribute documents and,
9 frankly, I am somewhat puzzled.

10 The second question -- well, I
11 should ask if any of the other panel members
12 want to comment on that before I move on to
13 the second question I had.

14 MS. GARVIN: I will be interested
15 in the answer that is eventually submitted.

16 MR. STONE: The second question I
17 had really arises out of the, as was
18 mentioned, I was invited to attend training
19 for a new class of Special Victims' Counsel,
20 which I did attend, and it arises out of that
21 experience. And the question really is before
22 there was the amendment to Article 6(b) and

1 the decision by the Services to launch the
2 Special Victims' Counsel Programs in the
3 various services, if they don't call them SVC,
4 I understand that, there were Sexual Assault
5 Response Coordinators, there were Victim
6 Advocates, there were Legal Assistance
7 Attorneys and Special Victims' Prosecutors, as
8 you mentioned in your statement. And I
9 understood that those people were providing
10 legal advice to victims, explaining the
11 courtroom procedures to them, counseling them,
12 and in the 412 and 513 hearings, Article,
13 those hearings, the Special Victims'
14 Prosecutors were taking the position,
15 typically, of what the victims were interested
16 in seeing what they were having done as their
17 counsel.

18 So, what I am sort of, frankly,
19 vague on, is what exactly the Special Victims'
20 Counsel Program, all of these new attorneys
21 are adding to the mix and why -- and I guess
22 I have got to ask you. What is different that

1 is being provided to victims now, in fact,
2 than was provided before these changes?

3 Because I am having trouble knowing exactly
4 what it is.

5 LT. COL. OAKLEY: Yes, sir. The
6 key difference is the fact that with the
7 Victims' Counsel, there is an attorney-client
8 relationship with the judge advocate and with
9 the victim. There is just one client. And
10 for a trial counsel, your client is the United
11 States, it is the Government and the Service.

12 Many times, as you mentioned, sir,
13 there is an overlap there because, again, as
14 the prosecutor, you are seeking to accomplish
15 justice. But there could be privacy issues,
16 where the trial counsel wants to go forward on
17 a particular issue and the victim has privacy
18 interests. The victim may wish to participate
19 or may not wish to participate.

20 So, based on, again, in order to
21 provide independent zealous representation for
22 the victims, Special Victims' Counsel and

1 Victims' Legal Counsel can perform that role.

2 I think another important point that the
3 program managers can address as well is the
4 fact that it is not just military justice.

5 There are a range of issues, particularly with
6 legal assistance, in having someone that the
7 victim can rely on to help with those issues
8 and be their attorney, in addition to help
9 explaining the process and represent their
10 rights, personally, I believe is important.

11 MR. STONE: Well, explain them
12 their rights and help them with the process is
13 what the Victim Advocates certainly were
14 capable of doing. Legal Assistance Attorneys,
15 the role that you are outlining is different,
16 the fact that there is an attorney-client
17 privilege and that that is also an out of
18 court item. I am just wondering if there is
19 any in court role that you think is different
20 than the Special Victims' Counsel are
21 providing?

22 The reason I say that is, if you

1 look at the civilian world and I just say this
2 because I am not sure that that is your
3 expertise, the civilian world, 42 United
4 States Code 10607 for decades has provided
5 victims with legal services outside of the
6 courtroom.

7 In 2004, the Congress passed 18
8 United States Code 3771, which provided
9 victims with the right to be told that they
10 could have an attorney and that attorney could
11 provide services to them in the courtroom to
12 the judge.

13 Article 6(b), which was enacted
14 about a year ago, is very closely patterned on
15 18 USC 3771 because the services were already
16 providing victims' services outside the
17 courtroom, the way civilian victims had under
18 those other programs.

19 And I am trying to understand how
20 Article 6(b), which is patterned on the in-
21 court provision of services by victims'
22 attorneys to victims, how that is being

1 effectuated in court in the military services.
2 And I think that is part of where this issue
3 about access to information comes in. If
4 those Special Victims' Counsel aren't getting
5 to see the full docket, if they are not
6 getting services, pleadings on them, if they
7 are not being allowed by many military judges
8 to speak in the courtroom, then I don't
9 understand how the military is embracing the
10 courtroom role that Article 6(b) seems to have
11 provided just the way in the civilian world
12 3771. That is why I asked the question.

13 And so while I understand it may
14 provide an out of court attorney-client
15 privilege, it is the in-court role that I am
16 trying to hear about, so I can understand the
17 difference now in court. There were always
18 412 and 513 hearings. So, clearly, there were
19 attorneys who were defending the decision not
20 to release that material. I'm trying to see
21 what other, in addition to that, what other
22 new in-court role Special Victims' Counsel

1 have, if you can tell me what that is?

2 LT. COL. OAKLEY: I think in the
3 more granular detail, the program managers are
4 coming after will provide. But I am aware,
5 again, there has been an important end quote
6 role that in all the Services that victims'
7 counsel have portrayed.

8 And ultimately, I think the value
9 of victims' counsel is measured by the
10 feedback from victims. Just with the Air
11 Force program, 90 percent of victims were
12 extremely satisfied with the services that
13 were provided; 99 percent when you include
14 those that were satisfied; and 97 percent of
15 victims would recommend to another victim that
16 a victim counsel would assist them.

17 So, on the specifics, on in-court
18 representation, I would again, I think the
19 program managers can provide further
20 information but, again, I think we are seeing
21 the value and a unique role that is played
22 here by providing the attorney-client

1 representation.

2 MR. STONE: Do you know what those
3 statistics are or were before you had the
4 Special Victims' Counsel, in terms of whether
5 the victims were 99 and 97 percent happy with
6 victim assistance advocates, the Victim
7 Advocates and legal assistance services? Do
8 you have numbers to compare those with before
9 we had an SVC program?

10 LT. COL. OAKLEY: I do not, sir.

11 MS. GARVIN: Mr. Stone, I do
12 happen to know the in-court -- I echo asking
13 those subsequent panels will be very valuable.

14 There is motion practice and
15 argument happening by SVCs in the courtrooms.
16 So, there is a courtroom component. I won't
17 have the chance to be here later today, but I
18 would encourage this panel to ask some of the
19 practitioners what are the limitations on that
20 because I know that there are certain hearings
21 that there have been challenges with the SVC
22 being heard. They are being heard on motion

1 practice in court, as far as I know, but there
2 have been some limitations. And the details
3 of those limitations might be incredibly
4 informative because it is happening but not,
5 perhaps, as robustly or as often as at least
6 I, in the civilian world, would encourage.
7 But I don't know the details of the limits.

8 MR. STONE: Would you like to add
9 anything?

10 MR. ANDREWS: Well, like I said, I
11 think we are well representative here with the
12 panels that are coming after us to talk
13 specifically on the SVC's role in the
14 courtroom.

15 But I did want to mention just one
16 other thing in passing and that is, in the
17 federal court system in which I do practice,
18 there is a system already in place and that is
19 the ECF process. And I would ask that the
20 panel probably look towards that.

21 CHAIR HOLTZMAN: Would you please
22 explain what ECF is, for those of us who are

1 not familiar?

2 MR. ANDREWS: Sure, ECF is the
3 electronic filing system that is utilized in
4 federal court, where all the pleadings are
5 sent through, they are uploaded in an
6 electronic document and all the parties are
7 then notified.

8 So, in terms of filing motions,
9 getting served, it is a one-stop shop. And as
10 victims' rights attorney, there is never an
11 issue whether or not I am getting copied or
12 being served on any type of pleadings and
13 motions.

14 In terms of my criminal work, in
15 terms of getting my witness statements or
16 getting copies of police reports, that, too,
17 I routinely get access to.

18 And something Mr. Stone mentioned
19 about redacting of information, that is the
20 reason why I need to see that information, to
21 see if that information from my client is
22 redacted. I can tell you how many times that

1 you think that a simple police report with my
2 client's name, date of birth, address has been
3 written all over the police report and is
4 actually not redacted. And then we have a
5 right of privacy issue. That is the exact
6 reason why access to information is important
7 to victims' attorney, so we can obviously,
8 zealously represent our clients in that
9 capacity.

10 MR. STONE: Have Privacy Act or
11 Freedom of Information Act requirements, in
12 any way interfered with the electronic filing
13 system or have they been largely accommodated?

14 MR. ANDREWS: Largely
15 accommodated. And any Privacy Act or anything
16 in terms of a litigious nature, it is handled
17 in court. If there's some information that
18 someone does not want to be sent outside the
19 parties and want to be sealed, we will have a
20 motion to discuss what information is going to
21 be released and what information is not going
22 to be released. But it is done in a tribunal

1 manner, where everyone is going to have an
2 opportunity to be heard and it is not a third
3 party making an independent decision saying
4 you know what, you are not going to get it
5 this time or you are going to get it this
6 time.

7 CHAIR HOLTZMAN: May I just
8 interrupt for a second, Mr. Stone? I would
9 just like to understand. Are you speaking
10 from the point of view of the counsel for a
11 victim?

12 MR. STONE: I am.

13 CHAIR HOLTZMAN: Okay.

14 MR. STONE: I have no further
15 questions.

16 CHAIR HOLTZMAN: Okay, thank you
17 very much.

18 Just a few questions. In terms of
19 the numbers, Colonel Oakley, of Special
20 Victims' Counsel, are there sufficient numbers
21 of Special Victims' Counsel to handle the
22 need?

1 LT. COL. OAKLEY: Again, because
2 the Services have the supervisory
3 responsibility, I believe that would be, the
4 question would be appropriately addressed by
5 the next panel. As far as -- I think what I
6 have observed is that --

7 CHAIR HOLTZMAN: Does your office
8 have anything to do with determining the
9 number that is required?

10 LT. COL. OAKLEY: We do not set
11 the number, ma'am. The programs are overseen
12 by The Judge Advocates General and the Staff
13 Judge Advocates.

14 CHAIR HOLTZMAN: So, what is the
15 role of your office with regard to the
16 program?

17 LT. COL. OAKLEY: The role of our
18 office, ma'am, is we oversee the victim
19 witness assistance policy. And ensuring
20 victims understand their rights and have
21 access to information, one of those components
22 are SVC and VLCs.

1 And so in revamping a policy, we
2 want to be sure that that is comprehensive.
3 But as far as the day-to-day oversight, as far
4 as policy datas and that, we are providing a
5 very broad level and the supervision and,
6 particularly, in the military justice system
7 and legal assistance mission, that is the
8 province of the Services, ma'am.

9 CHAIR HOLTZMAN: Okay, so if I
10 wanted to find out who determines what number,
11 what the number of SVCs should be, and who
12 determines the number of -- and what the needs
13 are that have to be serviced, that is in the
14 Services. That is not centralized.

15 LT. COL. OAKLEY: Yes, ma'am,
16 because each Service has its own program and
17 that program --

18 CHAIR HOLTZMAN: So what you are
19 saying to me is that each Service determines
20 what the need is in its Service and there is
21 no general standard of what need is going to
22 be addressed.

1 LT. COL. OAKLEY: Yes, ma'am.

2 That is my understanding.

3 CHAIR HOLTZMAN: Okay, what about
4 the sharing of best practices? You mentioned
5 that you thought it was very broad but it
6 seemed to me that what you were talking about
7 was a system in which there would be a lot of
8 best practices, not just with regard to legal
9 counsel, victims' counsel. Is that correct or
10 is there a system? Is that something -- maybe
11 I should backtrack?

12 Is that something your office is
13 involved in determining whether there is a
14 proper sharing of best practices among the
15 Special Victims' Counsel?

16 LT. COL. OAKLEY: No, ma'am. We
17 are definitely part of the conversation and we
18 are glad to, again, provide any assistance
19 with the Services. But there is ongoing
20 communication --

21 CHAIR HOLTZMAN: Does your office
22 have anything to do with the evaluation of the

1 Special Victims' Program?

2 LT. COL. OAKLEY: No, ma'am.

3 CHAIR HOLTZMAN: Okay, thank you
4 very much for your presence here.

5 Ms. Garvin, from your experience
6 in the civilian sector and your experience so
7 far in the military sector, how would you
8 compare the two systems? Is there something
9 that you saw in practice in the civilian
10 system with regard to Special Victims' Counsel
11 that you are not seeing with regard to the
12 military?

13 MS. GARVIN: So, going in that
14 direction, what exists in the civilian system
15 that is not as clear yet in the military
16 system is appellate standing and the device by
17 which to challenge denial of a right or a
18 difference of interpretation of a right that
19 happens at the trial level. There have been
20 some cases that have gone up, Kastenberg being
21 the first one, which was a rape shield case
22 that went up prior to the NDAA extending the

1 rest of the rights to victims. That, I
2 understand, is being worked out right now.

3 The civilian system has, in the
4 federal system that Mr. Andrews works in has
5 very clear appellate guidance on how you seek
6 an appeal of victims' rights and it goes
7 through mandamus review, clear rules on how
8 the appellate court is supposed to look at it.

9 Several states have similar,
10 Oregon, California, Arizona, and Maryland all
11 have explicit appellate moments. Mr. Stone
12 could, of course, speak better to Maryland
13 than I could. That is not yet clear in the
14 military and I think that is, from an
15 outsider's perspective and the SVCs could say
16 differently, but I think that is a little
17 stifling to not know how, if you lose at the
18 lower level, to know what your path is so that
19 you can counsel effectively.

20 Similarly, in the civilian system,
21 several jurisdictions have what are ombudsmen,
22 which are where you complain, file a

1 complaint, like an administrative complaint,
2 if someone isn't abiding by victims' rights.
3 My understanding is that the military may be
4 moving in that direction. And I, personally,
5 would not be recommending that direction. I
6 think enforcement through appellate device is
7 a better route to go.

8 But that is the biggest
9 comparative moment to look at the appellate,
10 the true enforcement aspect of victims' rights
11 because otherwise, you are left kind of in an
12 ad hoc world of who are the players in any
13 particular court-martial.

14 And when you leave justice to be
15 at that level then you can't go above the
16 particular players in a court-martial, the
17 rights of everyone are diminished. So, that
18 would be the piece of the civilian that I
19 would recommend that the military continue to
20 look at and make sure to make explicit.

21 CHAIR HOLTZMAN: That was
22 something that the Response Panel recommended

1 as one of its recommendations. Isn't that
2 correct?

3 MS. GARVIN: That is correct.

4 CHAIR HOLTZMAN: From your
5 perspective, what can you say about the
6 quality of the training programs, if you have
7 an opinion about that for the Special Victims'
8 Counsel?

9 MS. GARVIN: As I said at the
10 beginning, I can speak most coherently, I
11 guess, well you can judge if it is coherent.
12 I can speak from a position of knowledge
13 mostly about the Air Force because I have been
14 wrapped into the Air Force, both curriculum
15 development to a small extent, but also I have
16 been at numerous other trainings and had a
17 chance to observe beyond when I present. For
18 the Air Force, I think they have an excellent
19 training program and I knew they invite in the
20 other branches whenever they have the capacity
21 to do so. It is a multi-day training, which
22 I think is critical because these SVCs need to

1 know each other, develop kind of a cohort so
2 they can start sharing best practices at the
3 ground level. You know, what are you
4 litigating? What am I litigating? What are
5 we doing?

6 So, it is a multi-day training
7 that includes neurobiology of trauma,
8 practical skills, what is your relationship
9 with trial counsel and defense counsel, what
10 are your ethics, and not let's go through some
11 scenarios.

12 That is an excellent training
13 methodology and I think they have executed on
14 it very well. Again, I can't speak as much to
15 the other branches.

16 CHAIR HOLTZMAN: But from your
17 perspective, as someone who is very
18 experienced in this area, you have no
19 criticism, adverse criticism of the Air Force
20 training program.

21 MS. GARVIN: I do not. Not a
22 criticism but a comment. I wish they would

1 have more of it and include more advanced
2 training for those SVCs that have been doing
3 it for a while. And they may be doing that
4 and I am unaware of it and that might be
5 something to ask subsequent panels. Because
6 one of the things I think as this area of law
7 evolves, you need constant training. You need
8 to -- I think you have to -- you know, this
9 isn't a stagnant area of law. You know
10 Kastenberg, the first case that went up,
11 changed the landscape for folks.

12 So, I think my only question -- it
13 is not a criticism or even a comment. It is
14 a question. What is the advanced level of
15 training for those SVCs continuing on this
16 path? And I would imagine later panels could
17 answer that. I have not been wrapped into
18 advanced training. Their basic training is
19 excellent.

20 CHAIR HOLTZMAN: And in terms of
21 sharing best practices, do you have any
22 familiarity with whatever systems that are in

1 place now or is this an informal system, or
2 what can you say about that issue?

3 MS. GARVIN: The pieces I know
4 about is that they do have, and I will get the
5 words wrong. Those in the military can
6 correct me. They have a shared drive of some
7 sort in which they can share pleadings and
8 have a conversation with each other. The SVCs
9 can share an --

10 CHAIR HOLTZMAN: Who is they? Is
11 that just in the Air Force or is that service-
12 wide or is that DoD wide?

13 MS. GARVIN: I do not know the
14 answer to that. So, that would be a question
15 for later panels.

16 I know that various SVCs also go
17 to external trainings together, meaning 50
18 SVCs from different branches, so SVCs and the
19 equivalents in other branches, came to our
20 training. NCBL is in Portland, Oregon. I
21 have been at trainings on violence against
22 women, international training in Seattle and

1 I believe there were 15 or 20 of them there.
2 And they routinely seem to have meetings at
3 those trainings. So, they are receiving
4 knowledge and then also needing to share, I
5 think, best practices because it is a time
6 when they are face-to-face. Those are some
7 informal mechanisms about. The formal
8 mechanisms, I am not sure of.

9 CHAIR HOLTZMAN: Okay. Well,
10 thank you very much really for your very
11 helpful testimony this morning. Thank you.

12 MS. GARVIN: Thank you.

13 CHAIR HOLTZMAN: Are we ready for
14 our next panel?

15 Are we ready to commence?

16 MR. SPRANCE: Good morning,
17 everyone. My name is Bill Sprance. I am the
18 Designated Federal Official and, as you will
19 note, this meeting is open.

20 CHAIR HOLTZMAN: Thank you. Our
21 next panel is on service perspectives on
22 Special Victims' Counsel Programs. We will

1 have Colonel James Robert McKee, U.S. Army,
2 Program Manager, Special Victims' Counsel
3 Program; Colonel Carol K. Joyce, U.S. Marine
4 Corps, Office in Charge, Victims' Legal
5 Counsel Organization; Captain Karen Fischer-
6 Anderson, U.S. Navy, Chief of Staff, Victims'
7 Legal Counsel; Lieutenant Colonel Andrea M.
8 deCamara, U.S. Air Force, Chief, Special
9 Victims' Counsel Division; and Commander Ted
10 Fowles, U.S. Coast Guard, Chief, Office of
11 Special Victims' Counsel.

12 Thank you very much, ladies and
13 gentlemen, for taking the time to share your
14 knowledge and expertise and experience with
15 us.

16 We will start with Colonel James
17 Robert McKee. Welcome, again, to this panel.

18 COL. MC KEE: Madam Chair, thank
19 you for allowing me to address you about the
20 Army's Special Victims' Program. I have been
21 honored to serve as Program Manager of the
22 Army's program for the past year. Since

1 addressing the RSP last year at this time, the
2 Army SVC Program has made tremendous advances
3 but we still have a long way to go.

4 When I was appointed to stand up
5 this program, TJAG told me, and it is worth
6 reemphasizing, "The crime of sexual assault in
7 my ranks is a threat to the Army's ability to
8 maintain readiness. Sexual assault is a crime
9 that degrades esprit de corps on the mind's
10 morale and destroys unit cohesion.

11 The Army is entrusted with the
12 sons and the daughters of our nation to lead,
13 care for, and mentor. We cannot allow the
14 poison of sexual assault to infect our ranks.
15 We must remember that the Army, we look out
16 for our fellow soldiers and families and we
17 take care of each other. When one of our
18 comrades is threatened or injured, it affects
19 us all.

20 With the work that we have
21 accomplished and continue to undertake, we can
22 make our Army even stronger."

1 I have served since August 2013 as
2 the Army's SVC Program Manager. As TJAG's
3 designee, I speak for the Army's SVC Program
4 and the officer primary responsible for its
5 policies and strategic operations.

6 The program resides in the Office
7 of the Judge Advocate General in cohesion with
8 the Legal Assistance Policy Division under Mr.
9 John Meixell, under the Director of Soldier
10 and Family Legal Services, Mr. Mortimer Shea.

11 We coordinate aspects of the
12 program with other divisions of OTJAG, the
13 Judge Advocate General's Legal Center and
14 School, Army G1, the SHARP program and
15 external government agencies. We are well
16 staffed and resourced. We allocate resources
17 to ensure that every victim of sexual assault
18 in the Army has access to an SVC and that we
19 have the flexibility to make adjustments to
20 ensure coverage as needed.

21 Our mission statement demands that
22 we provide exceptional legal representation

1 and advice to victims of sexual assault. We
2 empower victims by zealously advocating on
3 their behalf at administrative and judicial
4 proceedings. And we work with all the
5 stakeholders to ensure a comprehensive
6 representation of victims' interest.

7 Our goal is to deliver the finest
8 possible legal representation for special
9 victims. Let me update you on a progress
10 towards this goal.

11 A year ago, when we began the SVC
12 program, we had 53 trained SVCs located at 34
13 Army installations. Today we have over 300
14 Army counsel trained to serve as SVCs and 76
15 currently serve and support the active duty
16 force management requirements.

17 We have served 1,434 clients,
18 conducted 7,995 client consultations,
19 accompanied clients to 1,852 interviews and
20 pretrial meetings, made 304 court-martial
21 appearances, conducted 330 post-trial
22 counseling sessions, and filed three writs

1 with the Army Corps of Criminal Appeals.

2 Along with the JAG school, we have
3 developed three week-long courses of
4 instruction and have held five sessions,
5 through which have passed 366 trained and
6 certified potential SVCs not only from the
7 Army but from the sister services.

8 Our senior leaders continue to
9 demonstrate to our young judge advocates the
10 importance of this SVC program. At last
11 year's continuing CLE conference, our TJAG and
12 DJAG and our Sergeant Major of the Corps met
13 our SVCs in small group breakout sessions to
14 hear first-hand the practical aspects of
15 implementing the Program and to provide
16 valuable encouragement.

17 The SVC program managers have
18 conducted on-site visits to nine
19 installations, including Fort Drum, Fort
20 Bragg, Carson, and Bliss. Such oversight
21 ensures that the Program is fully functioning
22 at the installation level, that our SVCs are

1 building relationships with other
2 stakeholders, such as SHARP, FAC, medical and
3 investigative agencies that play such an
4 important role in taking care of victims.

5 Our primary goal is to ensure the
6 independence of the program. Accordingly, we
7 have fully integrated our operations at the
8 installation level within the legal system
9 structure. Our SVCs work under the direct
10 supervision of the Chief of Legal Assistance,
11 whose historical and cultural mission is to
12 help soldiers and family members resolve
13 personal legal problems, even when that means
14 taking a position contrary to the government's
15 position.

16 The Army believes that this is the
17 best organizational model for our program. We
18 are not a stovepipe organization in which the
19 SVC reports directly to me, to the Pentagon.
20 Rather, I provide oversight technically,
21 administrative, and for professional
22 responsibility purposes, together with the

1 Chief of Legal Assistance Policy Division.

2 But for day-to-day operations, we take
3 advantage of the resources legal assistance
4 and technical expertise, leadership, and
5 mentorship that our installation chiefs of
6 legal assistance provides. This model allows
7 our victim clients not only to receive SV
8 legal assistance at the military justice
9 process but also to rely on their attorney,
10 with whom the victim enjoys an attorney-client
11 relationship for assistance and appropriate
12 representation in the various legal matters
13 that sexual assault victims often confront.

14 As Legal Assistance Officers, our
15 SVCs have the expertise, local contacts, and
16 the face-to-face representation that our
17 clients prefer in an established support
18 structure to achieve optimal results for their
19 clients.

20 The SVC's primary duty is to
21 zealously represent the best interest of the
22 client. And in addition to requiring zealous

1 representation, we insist that representation
2 must remain independent. Depending on a
3 particular case, that interest of the client
4 may converge or diverge from the Army or the
5 U.S. Government but in every case, the SVC
6 advocates for a client without regard to any
7 particular interest.

8 We strive to give our attorneys a
9 broad range of tools, including the expertise
10 of other victim resources and stakeholders.
11 The SVC's special area of responsibility is
12 ensuring that victims understand his or her
13 rights and the duties within the military
14 justice system and is given the help and
15 advocacy necessary to advocate them. But the
16 SVC also coordinates with the Victim-Witness
17 Liaison and Victim Advocate to ensure that the
18 victim is informed and can access various
19 victim rights and services, including
20 reporting options, military VA benefits,
21 expedient transfers to other installations,
22 and military or civilian protective orders, to

1 name a few. We have built a healthy, robust
2 SVC program staffed with enthusiastic and
3 committed judge advocates. I am proud to
4 report that we are seeing the desired results
5 of the zealous representation of our clients.
6 We are building the necessary expertise in the
7 Army to combat sexual assault and we also are
8 supporting the efforts of the other services.

9 As mentioned, we have inaugurated
10 a comprehensive SVC certification course for
11 practitioners. It includes SVC and client
12 participation. Our next certification course
13 will be in May of 2015 and I would like to
14 invite you to attend and observe all of our
15 course for yourselves, to see for yourselves.

16 We also have stood up annual CLE
17 conferences for practitioners and for
18 supervisors and I am overwhelmed with the
19 success of these courses and the quality of
20 the students who attained the synergy being
21 built within our community.

22 We are proud to have launched in

1 September this year a course concentrating on
2 the representation of child victims. We have
3 developed the course in conjunction with the
4 JAG School in Charlottesville and in
5 participation with Gundersen Health Systems,
6 which presented this year's course.

7 We are launching another course in
8 February of 2015, an in-house course that
9 includes professional responsibility, forensic
10 interview techniques, preparing minors for
11 court and motions practice for minors.

12 Ensuring the SVC Program has the requisite
13 expertise and availability to perform
14 effective children advocacy is among my
15 highest priorities. We must expend every
16 resource necessary, every bit of compassion
17 and every ounce of concern to ensure that the
18 rights of children are protected and advanced
19 and that they have a chance to grow and thrive
20 free from the threat of use, violence, and
21 loss of innocence. In furtherance of this
22 charge, I am exploring expanding our

1 curriculum to include the development of an
2 advanced representation and advocacy course.

3 Throughout all of these efforts,
4 our academic resources, and our growing
5 expertise, I will continue to rely on my
6 colleagues from our sister services, as well
7 as the external expertise of seasoned
8 professionals from the civilian bar, medical,
9 and academic communities. We must ensure that
10 SVCs receive training that is current,
11 comprehensive, and of the highest quality.

12 We have developed programs and
13 management with the Army Reserve and the
14 National Guard. We have trained 81 Reserve
15 Component SVCs, 75 who currently serve as SVCs
16 now. The Reserve Component is managed by
17 full-time SVCs at their four Regional Support
18 Commands. The Chief Army Reserve directed the
19 RSCs to provide and synchronize the support of
20 the SVC Program and victim assistance on a
21 regional basis. In the Reserves, their SVC
22 functions is part of the OSJ offices or as

1 part of the Legal Operations Detachments.

2 We have learned a lot as a new
3 program in the first year of existence. My
4 staff and I are always in close contact with
5 the SVCs in the field, including monthly
6 regular webcasts between my office and all
7 those in our practicing community. This helps
8 us share best practices, raises issues for
9 discussions, and identifies problems. So,
10 lest you think we have solved our challenges,
11 let me address one.

12 The SVCs have done a good job of
13 developing strong relationships with the trial
14 judiciary. We still experience different
15 treatment by the individual judges in certain
16 situations, such as filing pre- or post-trial
17 motions in which the Government does not raise
18 or join us in court in filing or arguing
19 petitions in the appellate courts. These
20 areas need standardization rules of practice,
21 which at TJAG's directions, we are working to
22 develop and coordinate.

1 In the meantime, as issues have
2 arisen in individual courts-martial, our SVCs
3 have had occasion to file appeals, which have
4 been proved to be exciting in the practice of
5 law. The SVC Program recently had its first
6 successful position before the Army Corps of
7 Criminal Appeals in which the court ruled that
8 judges must conduct the proper MR 513 review
9 prior to requiring the production of a
10 victim's mental health records for an in-
11 camera review.

12 Perhaps equally important was that
13 ACCA accepted a petition directly from within
14 our community, thus recognizing the unique
15 role of the SVC as a representative of a non-
16 party victim.

17 In closing, I would like to stress
18 again that the SVC Program is just one aspect
19 of the Army's comprehensive program to combat
20 sexual assault, but it is an extremely
21 important one and one that I would like to say
22 (foreign language spoken). We are the wards

1 of victims.

2 Because of the empowerment of the
3 SVC Program, victims know that regardless of
4 the outcome that the judicial or
5 administrative process, our military justice
6 system, and administrative systems supports
7 them and gives them the opportunity to be
8 heard and obtain justice. Through this
9 essential program, our soldiers and family
10 members know that we take their struggles
11 seriously. We are providing them the tools to
12 be resilient and we will not leave our
13 brothers and sisters behind on the emotional
14 battlefield. Thank you.

15 CHAIR HOLTZMAN: Thank you very
16 much, Colonel.

17 And now we will hear from Colonel
18 Joyce. Thank you very much, Colonel for being
19 here.

20 COL. JOYCE: Thank you, Madam
21 Chair and distinguished panel members. My
22 name is Colonel Carol Joyce and I am the

1 officer in charge of the Marine Corps'
2 Victims' Legal Counsel Organization. And
3 thank you for this opportunity to appear
4 before you today and I look forward to the
5 questions.

6 Just a little bit about my
7 background. With regards to my military
8 justice experience, I have 33 years in the
9 Marine Corps and I started out as a supply
10 officer but I transferred into the law program
11 and was certified a judge advocate in 1989.

12 So, I have been a judge advocate for
13 approximately 25 years and I have had the
14 opportunity to serve in several different
15 positions dealing with the issues of military
16 justice matters and sex-related offenses.

17 I was a chief trial counsel. So,
18 I have had the experience as a prosecutor and
19 I have also had the opportunity to be a
20 defense counsel in representing individuals
21 accused of such crimes to also include being
22 the Regional Defense Counsel of the Pacific

1 Region, and then fleeting up to be the Chief
2 Defense Counsel of the Marine Corps. So, I am
3 not really a stranger to these types of
4 organizations.

5 I have also been the Deputy Chief
6 Prosecutor of Military Commissions involving
7 detainees at Guantanamo Bay.

8 I have also had the distinct
9 pleasure of also being an appellate court
10 judge for the Navy-Marine Corps Court of
11 Criminal Appeals. And I also had the
12 opportunity to serve as the Staff Judge
13 Advocate for three senior level commanders, a
14 four-star combatant commander, a three-star
15 commander for the II Marine Expeditionary
16 Force, and also one year in Afghanistan for
17 the Commander of Southwest Region in Helmand
18 Province, Afghanistan. I have also had the
19 opportunity to be a commanding officer for two
20 years for headquarters squadron.

21 So again, I have had a lot of
22 exposure on different levels with regard to

1 military justice matters and those matters
2 relating to sex-related offenses.

3 With that, I would like to tell
4 you a little bit about our Marine Corps
5 Victims' Legal Counsel Organization. On 1
6 November, as you know, 2013, just a year ago
7 this month, we stood up the Marine Corps
8 Victims' Legal Counsel Organization and it was
9 fully operational on 1 January 2014.

10 Now we refer to our counsels as
11 Victims' Legal Counsels, VLCs and not SVCs
12 because, at the time that we were planning
13 this, we knew that the NDAA for FY13 had
14 referred to SVCs in the context of Special
15 Victims' Capability. And so we were concerned
16 with the confusion there. But we also wanted
17 to ensure that it had a name that was clearly
18 identified as to what we would be doing and
19 not as being legal counsels for the victim
20 because there were a lot of documents and
21 regulations referring to legal assistance.
22 And for the Marine Corps, the traditional

1 legal assistance is read as wills, powers of
2 attorney, estate planning and taxes and so we
3 needed to change the paradigm. We needed to
4 make sure that the name clearly resonated with
5 what we planned to do.

6 So, Victims' Legal Counsel began
7 by providing confidential assistance to
8 eligible victims of, not only victims of
9 sexual assault but we started out with
10 representing victims of all crimes. And
11 again, that was, again, to clearly define that
12 we were taking care of all crime victims. And
13 we also included representing all dependents
14 at the outset.

15 So we, initially, we have already
16 started representing child victims on 1
17 November, even though later it changed for the
18 other services based on the way the NDAA for
19 FY14 had read.

20 So, the structure for the VLCO is
21 a separate and autonomous organization. It is
22 organized similar to what we refer to as our

1 defense services organization, in that we are
2 attorneys representing individuals. And so I
3 am the officer in charge and, therefore, I am
4 responsible for the supervision of all of the
5 Marine Corps Victims' Legal Counsels and the
6 delivery of these victims' legal counsel
7 services throughout the Marine Corps. I work
8 directly for Major General Ewers, who is now
9 the Staff Judge Advocate to the Commandant of
10 the Marine Corps and I am located here in
11 Arlington, Virginia.

12 There are 15 active duty judge
13 advocates in this program of which one
14 includes me and my deputy. We have one
15 Reservist who has been activated and put on
16 active duty orders and we have nine legal
17 support personnel.

18 The VLCs are assigned by region.
19 There are four regions in the Marine Corps in
20 which we set up our legal service support
21 sections. One region is on the east coast at
22 Camp Lejeune, the other region is on the west

1 coast at Camp Pendleton. Our other region is
2 overseas, at Camp Butler, Camp Foster,
3 Okinawa, Japan. And we have one region here
4 in the National Capital Region located at
5 Quantico. And you will hear from my attorney
6 that represents the National Capital Region
7 today in the next panel.

8 But in each of these regions,
9 there is a Regional Trial Counsel, a Regional
10 Defense Counsel, and now a Regional Victims'
11 Legal Counsel. Like their counterparts, the
12 Regional Victims' Legal Counsel are field
13 grade officers and they are all
14 administratively attached to these legal
15 service support sections at these major
16 installations but they are operationally under
17 my control as the OIC of the VLCO. They
18 oversee and supervise the Junior Victims'
19 Legal Counsel, of which are all the rank of
20 captain.

21 And we have our own supervisory
22 chain. They report on them and I report on my

1 RVLCS and the second reviewing officer for my
2 VLCs.

3 We have a total of 11 offices in
4 the Marine Corps, throughout the Marine Corps,
5 including my headquarters office in the four
6 I have mentioned in the major installations.
7 We have six other VLC offices -- commands
8 covering areas like Parris Island, Cherry
9 Point, Miramar, Twentynine Palms, Kaneohe Bay,
10 and Iwakuni, Japan. Most of the offices are
11 co-located with the legal service support
12 sections. Some of them are co-located with
13 the SAPR folks or with legal assistance folks
14 and even Family Readiness individuals.

15 As to victims' ease to access to a
16 VLC, every major installation has a VLCO
17 office and a VLC nearby in an outlying
18 installation. And if there is not a VLC at a
19 particular location, funds are made available
20 to ensure that they are able to meet in person
21 with a victim.

22 Also, based on the statutory

1 requirement under 10 US Code 1565(b), it is
2 also assisted with access for victims to be
3 able to see a VLC. Because under that
4 statute, it specifically requires SARCs,
5 Victim Advocates, Victim-Witness Liaisons,
6 Military Criminal Investigators and Trial
7 Counsels to ensure that they inform the victim
8 they have the right to consult with a counsel
9 prior to providing any assistance. And as a
10 result, they are usually the ones that are
11 referring the victim to the VLCs. So, there
12 is a coordination going on and relationships
13 established as a result of these requirements.

14 So, the Marine Corps VLC
15 experience and training is that my Regional
16 Victims' Legal Counsel must have two years
17 military justice experience and my VLCs, at
18 least six months military experience. And the
19 standard tour for a VLC is 18 months.

20 Because the Marine Corps does not
21 have its own legal schoolhouse, all of the
22 VLCs in the Marine Corps are trained by one of

1 the three service schools, SVC courses, at the
2 Air Force course or the Army, and even the
3 Navy have just had one this year in January.

4 Additionally, I have started
5 conducting an annual training program for
6 three VLCO and we had our first one in August
7 for all my counsel and support personnel in
8 San Diego.

9 And as you head from Ms. Meg
10 Garvin, we have also had the opportunity to
11 attend the National Crime Victims' Law
12 Institute Crime Victims' Law course last June
13 in Oregon, Portland, Oregon. And this program
14 proved to be invaluable, as it was probably
15 the first course that I believe really focused
16 on the law and the legal representation of
17 victims, at least from my perspective in the
18 Marine Corps.

19 So, all VLCs, at this time, are
20 certified by the Judge Advocate General of
21 Navy and have satisfied the sensitive
22 selection screening process, which is required

1 by Secretary of Defense. And this process
2 currently entails me reviewing, thoroughly
3 reviewing, the official military personnel
4 files of each of these individuals.

5 I have currently not seen any
6 concerns with the VLC's planned career path,
7 as a result of this program. While most of my
8 VLCs have been with me since the inception of
9 this program, several have recently been board
10 selected to attend schools next summer to
11 received advanced law degrees. So, I don't
12 see the military having any issue with their
13 assignment to these billets.

14 Our statistics are based on a
15 program that we have initiated early on, a
16 case management system, we refer to it. It is
17 an electronic database. And while it still
18 will always need some work in being able to
19 capture what kind of statistics we need, I
20 would be able to tell you that since
21 implementation of this program, the Marine
22 Corps has assisted with approximately 745

1 victims since 1 November 2013. And of these
2 745 cases, 57 percent, that is approximately
3 422 are sexual assault cases.

4 The majority of the remainder type
5 of crimes and offenses we see are domestic
6 violence, assault, and larceny. Also, of
7 these 745 cases or individuals, 565 were
8 female and 180 were male. And of that total
9 number of assisting, 31 were minors.

10 So, the percentage that we have
11 assisted with regards to the status of these
12 individuals is 71 percent of our clients are
13 active duty clients; 23 percent are adult
14 dependents; 4 percent are minor dependents;
15 and 2 percent are others.

16 And of our 422 sexual assault
17 cases, 78 percent have come in having filed
18 unrestricted reports; 8 percent restricted
19 reports; and the other percentage is either no
20 report or just not really clearly known, based
21 on the data. Then 29 clients have converted
22 to unrestricted reporting after VLC

1 consultation.

2 So, I will just close off a little
3 bit with two points. And that is, first of
4 all, when asked about some of the great
5 successes and then some of the challenges.

6 Well, first of all, when I started
7 out in this program, I remember being asked by
8 several individuals that already provided
9 assistance to sexual assault victims, what is
10 it that you are really going to do that we are
11 not already doing? And this came from
12 individuals like your SARCs and your Victim
13 Advocates, and your Victim-Witness Liaison
14 Officers, and even your Trial Counsel and
15 maybe even Legal Assistance Officers. And
16 clearly, having another organization added to
17 the mix was going to cause some confusion and
18 some friction. And so people were really
19 wondering what is we are going to do.

20 And I think that what this program
21 does is it provides the legal piece that has
22 been missing for quite some time. We are

1 talking about what Mr. Stone referred to
2 between the out of court and in-court. We are
3 the in-court representation. Legal Assistance
4 Officers only provided legal advice and
5 counseling. And with all those other
6 individuals I listed, they all have a key role
7 in the process. But at the end of the day,
8 nobody walks into the courtroom with the
9 victim, that forum, that environment that is
10 most intimidating to many individuals, and be
11 sure that their rights are protected and their
12 voices heard.

13 It is an indisputable fact that
14 over 700 crime victims came forward for VLC
15 services since we stood up in the Marine Corps
16 and this shows that there is a need for victim
17 legal services. Victims' Legal Counsel are
18 making a significant impact and difference to
19 these victims. They now have a voice in the
20 courtroom. And they are clearly, any person
21 empowered with their own attorney gives them
22 that sense of confidence in being able to go

1 forward and participate in the process such as
2 the military justice process.

3 So, while rights have been
4 enumerated in our Manual for Courts-Martial
5 for some time, the right to be heard, the
6 right to be present, the right to express your
7 views as to disposition, I believe these
8 rights are now increasingly being recognized
9 by all parties involved and I don't think it
10 has been the case for quite some time. And I
11 can say that from my own experience as a trial
12 counsel and defense counsel.

13 The Marine Corps doesn't have its
14 own survey system but it clearly has captured
15 several anecdotes in which VLCs have made a
16 difference and then regularly we see heart-
17 felt thank yous from their clients.

18 Now, with regard to just a few
19 challenges I would like to highlight, as my
20 colleague did with the Army side, of which I
21 mirror. I believe it is our responsibility,
22 as Program Managers, to be able to address the

1 challenges that our counsels face in the
2 courtroom or in these positions as Victims'
3 Legal Counsel or SVCs. They are the ones
4 doing the hard work. They are the ones in the
5 trenches. And it is us that have to be the
6 voice for them to make sure that they are
7 armed with what they need to be able to
8 zealously represent their client.

9 So, we are still encountering
10 issues with information sharing. We are not
11 getting everything that we need to be able to
12 make meaningful arguments on behalf of our
13 clients to properly represent them.

14 We also need, there is a need for
15 procedural guidance as to the role of these
16 SVC, VLCs in the courtroom. It isn't just
17 about being provided pleadings and being able
18 to respond to pleadings in writing. If they
19 are the moving or responding party at these
20 hearings, then they should have a right to
21 question the witnesses as they bring about
22 evidence as well and that is not happening.

1 But it is not just about the
2 motions hearings. It is about the Article 32
3 proceedings when the client is on the stand
4 and being provided documents to adopt and they
5 have not been made privy to those documents.
6 Or during the merits of the trial, maybe even
7 before members, when something comes up and
8 how is it that they are allowed to be heard
9 without being disrupted and a distraction to
10 the proceeding?

11 So, there needs to be some clear
12 guidance with regards to their role.

13 And the last thing I will just
14 highlight is clarification with regards to two
15 statutes that are out there. And that first
16 statute is 10 US Code 1565(b), as I mentioned
17 earlier. And that is, individuals informing
18 the victim that they have a right to consult
19 with an attorney prior to or before providing
20 any assistance. And so that should mean that
21 no victim should be asked to sign any document
22 or make any decision, should they elect to

1 want to talk to an SVC or VLC.

2 And so what does it mean for some
3 of these individuals that are required to
4 comply with the statute when it says before
5 providing any assistance?

6 And also, that goes into the other
7 statute, the new statute, 10 US Code 1044(e)
8 that says that the relationship between a VLC
9 or SVC and their client, the victim, is an
10 attorney-client relationship. And yet this
11 still seems to be lost on several individuals
12 when it comes to interviewing the victim
13 without the counsel there or scheduling court
14 appearances when the victim has the right to
15 be accompanied by this individual.

16 So without going into any more
17 detail, I just addressed those more broad-
18 spectrum issues that we face with regards to
19 being able to move forward.

20 I believe that VLCs and SVCs will
21 not always guarantee increased prosecution or
22 increased conviction. But what they do

1 guarantee is that the victims' rights will be
2 protected and respected in each phase of the
3 military justice process. So, thank you for
4 your time and I look forward to your
5 questions.

6 CHAIR HOLTZMAN: Thank you for
7 your time. We very much appreciate your
8 sharing that with us.

9 Next is Captain Karen Fischer-
10 Anderson. Captain, we look forward to your
11 testimony.

12 CAPT FISCHER-ANDERSON: Thank you.
13 Madam Chairman, distinguished panel members,
14 good morning. Thank you for the opportunity
15 to appear before you this morning.

16 I am Karen Fischer-Anderson. I am
17 the Chief of Staff for the Navy Victims' Legal
18 Counsel Program.

19 On August 15th of 2013, the Navy
20 established a Victims' Legal Counsel Program
21 and our mission was to provide independent
22 counsel to eligible sexual assault victims.

1 Victims' Legal Counsel complement the care and
2 support that victims already receive by
3 providing legal advice, representation, and,
4 as appropriate, advocacy on behalf of sexual
5 assault victims.

6 I lead the program as a Senior
7 Captain and I am assisted by a Senior
8 Commander who fills the role of Deputy Chief
9 of Staff.

10 In addition to 31 attorneys, the
11 VLC Program is supported by 10 active duty
12 yeomen assigned to significant case
13 concentration areas.

14 Our Navy VLCs are divided into
15 five regions. Each region is staffed with the
16 Supervising Attorney, akin to an Officer in
17 Charge. These Supervising Attorneys report
18 first to the Deputy Chief of Staff and then to
19 me as the program manager in my role as Chief
20 of Staff.

21 Supervising Attorneys monitor and
22 support the operations of their subordinates,

1 ensure standardized program policies are
2 followed and, most importantly, they guide,
3 mentor, and ensure a balance of client
4 caseloads among subordinate VLCs.

5 The Navy JAG Corps carefully
6 selected, vetted, trained, and certified those
7 29 Victim Legal Counsel. Each attorney had to
8 be approved by the Judge Advocate General of
9 the Navy.

10 Because of existing operational
11 assignments, the active component JAG Corps
12 did not have sufficient manpower to meet the
13 deadline for establishment of the Victims'
14 Legal Counsel Program. So as a result, a call
15 went out and 12 reserve attorneys stepped up
16 to the challenge and they augmented 19 active
17 duty judge advocates. This has proven to be
18 a tremendous example of successful reserve
19 integration.

20 In my position as the Chief of
21 Staff, I report directly to Admiral James
22 Crawford in his role as Commander Naval Legal

1 Service Command. My duties include the
2 supervision, mentoring, and evaluation of
3 Victim Legal Counsel Program personnel, as
4 well as overall management of the VLC Program
5 in 23 different fleet locations around the
6 globe.

7 The Navy VLC Program met initial
8 operation capability on the first day of
9 November, 2013 and full operational capability
10 on the first day of January of 2014.

11 Initially, eligibility for Navy
12 VLC services, whether not a victim filed an
13 unrestricted or a restricted report of the
14 sexual offense included Navy members on active
15 duty; reserve personnel on active duty or
16 inactive duty training at the time of the
17 assault; other DoD service personnel, when
18 assaulted by an active duty member; retirees,
19 when assaulted by an active duty member; adult
20 dependents, including spouses of active duty
21 Navy members, when assaulted by an active duty
22 Navy member, and some overseas Department of

1 Navy civilians.

2 Pursuant to the mandate of the
3 2014 National Defense Authorization Act, the
4 Navy VLC Program extended legal support to
5 child sexual assault victims on the 24th of
6 June 2014. As a result of this expanded
7 mission, child victim business roles, scope of
8 representation letters, and child competency
9 worksheets were developed in support of this
10 specialized practice.

11 Most important, though, Lieutenant
12 Commander Ann Lundwall, who is one of our Navy
13 VLCs stationed here in the Nation's Capital at
14 the Navy Yard, she developed an illustrated
15 handbook to assist child victims when
16 testifying in court.

17 If you haven't had a chance to
18 take a look at this document, panel members,
19 I would encourage you to do so. It is
20 extremely well done. It has received very
21 positive feedback and it is terrific example
22 of the dedication brought to our program by

1 Victims' Legal Counsel.

2 We currently have 20 minor
3 dependents in our practice. And, as you might
4 expect, these cases are often more challenging
5 and take more time than the sexual assault
6 cases do. In order to meet this expanded
7 mission, Navy Victim Legal Counsel receives
8 specialized training on developmentally
9 appropriate communication methods, child
10 development stages, assessing competency, and
11 representing child clients.

12 With regard to program and
13 performance assessment metrics, our program is
14 assessed weekly via a report to our JAG
15 leadership. Each of our VLCs complete a
16 report, then the data is compiled by the
17 Deputy Chief of Staff. I review it and then
18 I review it up to Commander Naval Legal
19 Service Command. Additionally, I meet in
20 person, at least quarterly, with Admiral
21 Crawford to assess program performance, policy
22 development, and review pending requirements.

1 During Fiscal Year '15, the VLC
2 Program will do a self-assessment and in
3 Fiscal Year '16, a Program will be inspected
4 by the JAG Corps' formal Article 6 inspection
5 team.

6 Allow me to end by telling you
7 that the Navy Victims' Legal Counsel Program
8 has been overwhelmingly successful. Since
9 opening our doors, we have assisted 829 sexual
10 assault victims. Ninety percent of our
11 clients have been unrestricted reporters and
12 eight-six percent have been active duty Navy.

13 Victims' Legal Counsel have
14 appeared at 118 Article 32 investigations, 111
15 pretrial motion hearings, 83 general courts-
16 martial, 63 pretrial conferences, and 20
17 special courts-martial.

18 One of our Programs' proudest
19 metrics of success is the fact that victims
20 have referred other victims. Client
21 satisfaction surveys indicate that victims
22 feel that their VLC is working for them, that

1 their attorney followed their wishes. They
2 were kept informed of the status of their case
3 and their VLC cared about them as a person.

4 Recently, I was asked by JAG
5 leadership what our Program's number one
6 accomplishment has been so far in 2014. And
7 I was able to proudly respond that the Navy
8 Victims' Legal Counsel have provided
9 independent, confidential legal advice
10 assistance and, in some cases, advocated on
11 behalf of 728 sexual assault victims around
12 the world.

13 Again, I really appreciate being
14 allowed to speak to you all today and I am
15 very excited and look forward to your
16 questions. Thank you.

17 CHAIR HOLTZMAN: Thank you very
18 much, Captain. And next we will hear from
19 Lieutenant Colonel Andrea M. deCamara. I hope
20 I have pronounced your name correctly.

21 LT. COL. DE CAMARA: Yes, you did.
22 Thank you.

1 Madam Chairwoman, members, thank
2 you very much for having me here today to
3 speak with you.

4 I am Lieutenant Colonel Andrea M.
5 deCamara, Chief of the Air Force's Special
6 Victims' Counsel Division. In that capacity,
7 I currently lead a team of 25 Special Victims'
8 Counsel and eight paralegals at 19 operating
9 locations worldwide. Our mission is to
10 provide victims of sexual assault with
11 independent attorney-client privileged
12 representation throughout investigation,
13 prosecution, and the post-trial process. I
14 have had the privilege of running this program
15 since September of this year.

16 Prior to this assignment, I was
17 the Executive Officer to the 9th Air Force
18 Commander and I have served in a variety of
19 positions as a judge, including as Staff Judge
20 Advocate, Deputy Staff Judge Advocate,
21 Appellate Defense Counsel, Trial Defense
22 Counsel, and Legal Assistance Attorney.

1 Since April of 2014, when the
2 report on implementation of Section 1716 of
3 the Fiscal Year '14 NDAA was published, the
4 Air Force Special Victims' Counsel Program has
5 advanced victims' rights in the Air Force and
6 has grown in the scope of the clients we
7 serve.

8 With the landmark decision of LRM
9 v Kastenberg solidifying the victim's right to
10 be heard through counsel, Military Rules of
11 Evidence 412 and 513, Air Force Special
12 Victims' Counsel now routinely advocate for
13 the rights afforded to their clients. Through
14 both written motions and oral argument,
15 Special Victims' Counsel give meaningful voice
16 throughout the court-martial process. They
17 have continued to fight for their clients'
18 rights, including the victim's right to be
19 reasonably heard during the sentencing portion
20 of the courts-martial in the form of an
21 unsigned statement, similar to that of the
22 accused, as well as advocate for the victim

1 under Article 6 and Military Rule of Evidence
2 615 not to be excluded from the proceeding and
3 requiring the military judge to appropriately
4 determine that the victim's testimony will be
5 materially altered before excluding the victim
6 from proceedings.

7 This advocacy has been helping
8 victims to exercise their rights throughout
9 the military justice process and the feedback
10 from our clients is overwhelmingly positive.
11 Ninety percent indicated that they were
12 extremely satisfied with the advice and
13 support that the SVC provided them throughout
14 the process and ninety-nine percent would
15 recommend that other victims request an SVC to
16 represent them.

17 We believe that strengthening
18 support to victims through the Special
19 Victims' Counsel Program has resulted in a
20 more robust opportunity for victims to be
21 heard, to retain and take advantage of their
22 rights, and has enhanced the military justice

1 system.

2 As mentioned previously, the scope
3 of the SVC representation has been since the
4 inception of the program. Since we began in
5 January of 2013, the Air Force's Special
6 Victim Counsel Program has assisted over 1,200
7 victims of sexual assault, provided legal
8 representation at 183 courts-martial and 220
9 Article 32 hearings.

10 Special Victims' Counsel have
11 participated in over 1,800 interviews with
12 investigators, trial counsel, and defense
13 counsel.

14 SVCs began representing eligible
15 child victims in June of 2014 and we currently
16 represent 22 minors.

17 While our program has implemented
18 rules of practice and procedure to
19 specifically account for child representation,
20 Special Victims' Counsel face challenges daily
21 in this expanded role, especially during in-
22 court representation and the tension caused by

1 Article 6(b) Subsection (c), which requires
2 the military judge to appoint a legal
3 guardian. In at least one case, a military
4 judge received a motion to exclude a child
5 victim from the courtroom during other
6 witness's testimony under Military Rule of
7 Evidence 615. The appointed legal guardian
8 took the position that exclusion was
9 appropriate. The child victim had a different
10 view and wanted to be present in court.

11 The SVC requested to be heard on
12 the issue but the military judge deferred the
13 decision to the appointed legal guardian as
14 that person assumed the child victim's Article
15 6(b) right, according to the statutory
16 language.

17 To address this issue, we
18 recommend a legislative change to Article 6(b)
19 subsection (c) to read that the military judge
20 may designate a legal guardian, rather than
21 the current language of "shall" designate a
22 legal guardian.

1 This legislative change would
2 bring Article 6(b)(c) in line with the Crime
3 Victims' Right Act under Title 18 USC 3771.
4 Section 3771(e) provides discussions to
5 presiding judge to appoint a guardian who may
6 or may not assume the child's crime victims'
7 rights.

8 SVCs also face challenges
9 regarding access to information be it pretrial
10 or post-trial. Frequently, the information is
11 inconsistent and can be a source of
12 frustration for SVCs and the victim.

13 According to Air Force OSI, their regulations
14 prohibit disclosure of reports of
15 investigation to Special Victims' Counsel.
16 Without information beyond just the victim's
17 statement, it is difficult, at best, to
18 meaningfully advise our clients regarding
19 their rights under Article 6(b) to confer with
20 the convening authority about the disposition
21 of their case.

22 Further, Special Victims' Counsel

1 are not parties to the court proceeding and as
2 such, we do not receive discovery and relevant
3 pleadings consistently, as an accused would.

4 Definitive guidance to
5 investigators, legal offices, and trial
6 counsel require disclosure of relevant
7 information, as necessary, in order to ensure
8 Special Victims' Counsel can properly advise
9 their client on their 6(b) rights.

10 At the post-trial stage, we
11 applaud the Fiscal Year '14 NDAA's requirement
12 to provide a victim with a record of trial,
13 which enables them to confirm their rights
14 have not been violated. That being said, we
15 would advocate that this needs to be taken a
16 step further in cases where the court-martial
17 resulted in an acquittal and the victim was
18 not present, usually under MRE 615.

19 In these cases, victims should be
20 provided with the opportunity to either listen
21 to the audiotapes of the court-martial or be
22 provided with a verbatim transcript.

1 Currently, records of trial and acquittal are
2 summarized and do not provide the victim with
3 the opportunity to hear the evidence or the
4 arguments presented in the court that resulted
5 in that acquittal.

6 To conclude and to save time for
7 questions, the success of our program is tied
8 to unwavering dedication of our Special
9 Victims' Counsel and paralegals who are in the
10 trenches daily providing robust representation
11 for their client in a variety of ways, both in
12 the legal assistance realm, as well as in the
13 courtroom.

14 I appreciate having the
15 opportunity come here today and I look forward
16 to your questions. Thank you.

17 CHAIR HOLTZMAN: Thank you very
18 much, Colonel. I appreciate your testimony.
19 And now we will hear from Commander Ted
20 Fowles.

21 CDR FOWLES: Good morning,
22 distinguished members of the panel. My name

1 is Commander Ted Fowles and I am currently the
2 Deputy Office Chief in the Office of Member
3 Advocacy and Legal Assistance and the Acting
4 Program Manager for the Coast Guard's Special
5 Victims' Counsel Program.

6 The Coast Guard established a
7 Special Victims' Counsel Program in July of
8 2013. Due to the relatively small size of our
9 service, the program started with one fulltime
10 Reserve 06 serving as the Program Director and
11 18 collateral duty judge advocates serving as
12 Special Victims' Counsel.

13 The Program Director was located
14 in Coast Guard Headquarters in Washington,
15 D.C. and then collateral duty SVCs are located
16 in various locations throughout the United
17 States.

18 The creation of the Coast Guard
19 Special Victims' Counsel Program was announced
20 to the entire service via a message on July
21 13, 2013. In addition, in order to educate
22 the workforce on the role of the SVC, we have

1 also provided training to our Sexual Assault
2 Response Coordinator and our Coast Guard
3 Investigative Service, regarding scope of
4 services that we have provided.

5 In January 2014, the Coast Guard
6 launched what we call the enhanced operational
7 capability phase of the SVC Program. Most
8 notably, this phase clearly authorized the
9 formation of attorney-client relationships and
10 the representation of victims of courts-
11 martial. This also included the addition of
12 our first fulltime SVC located in Ballston,
13 Virginia.

14 On July 21st of 2014, we opened an
15 SVC Office in Alameda, California. This
16 office is currently staffed by one fulltime 04
17 SVC. In December, we will add one additional
18 fulltime 03 to the Ballston office and two
19 additional fulltime SVCs to the Alameda office
20 in California.

21 On September 1, 2014, I assumed
22 responsibility for the program as the orders

1 for the Reserve 06 expired but were in the
2 final stages of hiring a fulltime GS15 program
3 manager. We expect to have that individual
4 onboard by the end of the year.

5 To date, we have trained over 30
6 collateral duty Special Victims' Counsel and
7 two fulltime SVCs. As previously mentioned,
8 we had an office in Ballston, Virginia, and we
9 still have an office in Alameda, California.

10 Our fulltime SVCs have a current
11 caseload of approximately 22 cases per
12 attorney and our collateral duty SVCs have an
13 average caseload of approximately four cases.

14 CHAIR HOLTZMAN: A piece, sir?

15 CDR FOWLES: Yes, ma'am.

16 CHAIR HOLTZMAN: Okay.

17 CDR FOWLES: In fiscal year 2014,
18 we assisted approximately 99 individuals. Of
19 those that we assisted, 81 percent were
20 enlisted members, 8 percent were officers, and
21 the rest were accommodation of cadets,
22 dependents, and one minor.

1 The majority of those cases that
2 we opened in fiscal year '14 are still open.
3 As such, we don't have good data upon which to
4 ascertain the duration of a typical case.

5 In FY14, the Coast Guard had a
6 total of 45 restricted reports. Of those 45,
7 12 elected to speak with an SVC and of those
8 12, seven then became an unrestricted report.
9 We are seeing an increase in use of SVCs with
10 services being requested at various phases
11 throughout the proceeding. More and more the
12 trend appears to be that SVCs are being
13 requested at the outset of the investigation.

14 Anecdotally, the effect of SVCs on
15 the victim has been significant. The majority
16 of responses from individual clients feels
17 that the SVCs give them a sense of
18 empowerment, they help making more informed
19 decisionmaking and, perhaps most importantly,
20 they make them feel that they are a valued
21 member of the process.

22 Being the smallest of the armed

1 forces, the Coast Guard has been forced to
2 rely on collateral duty attorneys to perform
3 the bulk of the SVC work, until we transition
4 to our office being fully staffed by five
5 permanent SVCs. Otherwise, the Coast Guard
6 has not picked any significant resource
7 constraints that can curtail our ability to
8 provide services.

9 With respect to officer
10 evaluations, we do not have a special process
11 for SVCs. Likewise, the Coast Guard does not
12 have a special career track for SVCs.
13 However, during the assignment process, the
14 career history of an individual is reviewed by
15 our Office of Program and Management before
16 assigning any individual to an SVC billet.

17 With only two offices, we
18 recognize that most victims are not co-located
19 at our SVCs. However, we do leverage
20 technology to ease issues created by
21 geographic separation and we currently enjoy
22 sufficient funding to permit SVCs to travel to

1 all necessary interviews in military justice
2 proceedings.

3 Some of the biggest future
4 challenges include ensuring our attorneys are
5 competent and properly trained to assist child
6 victims. Given the relatively short length of
7 tour, two to four years in duration, we have
8 to remain constantly tempered to ensure we
9 remain competent to assist minors. To
10 overcome this challenge, we do work closely
11 with our sister services who have more
12 experience representing child members and we
13 learn closely from their best practices.

14 We also remain concerned about the
15 development of procedural rules within the
16 court system. This includes not only the
17 process to follow when SVCs are making an
18 argument on behalf of a client but also how to
19 involve the SVC in the scheduling process to
20 ensure SVCs are aware of when and where a
21 proceeding will take place.

22 With that said, we are proud of

1 the work that our SVCs are doing. They give
2 choice and voice to the victims and the
3 evidence suggests that we are doing a good
4 job.

5 And with that, I thank you for
6 your time and consideration and look forward
7 to your questions.

8 CHAIR HOLTZMAN: Thank you very
9 much for your testimony. The SVC Program and
10 its various names is actually, in my opinion,
11 a major step forward on the part of the
12 military and an area in which it can show the
13 rest of the country in the civilian sector how
14 to move forward to protect all victims.

15 We will start with Mr. Stone this
16 time.

17 MR. STONE: Okay, thank you. Let
18 me ask Lieutenant Colonel deCamara first. You
19 mentioned that after the Kastenbergs decision
20 the counsel to the victims, you felt finally
21 had a clear role but that preceded Article
22 6(b). How do you feel that Article 6(b)

1 changed their role or do you feel it didn't at
2 all and you would be doing the same thing if
3 wasn't there?

4 LT. COL. DE CAMARA: Sir, I think
5 6(b) gives you broader rights, more broad
6 rights throughout the entire process from the
7 beginning stages through the end stages and
8 does give you somewhat of a mechanism. I know
9 right now the Air Force is looking at how we
10 can create an enforcement mechanism of those
11 6(b) rights, not just through our motion
12 practice. Our motion practice is significant
13 and right now we are still, I would say,
14 developing it. When I say that we are
15 advocating under it, under the rubrics of LRM,
16 our counsel are still, it is not consistent
17 necessarily on how that is being applied at
18 the court-martial. Are they allowed oral
19 argument? Are they allowed just to submit a
20 motion? Who is the person that gets to
21 present the evidence and question the witness
22 to present the evidence?

1 So, while I think Kastenberg set a
2 foundation for us, I don't think it set -- I
3 think it sets the floor, in my opinion, not
4 the ceiling. And I think 6(b) just reinforces
5 those rights that LRM established.

6 MR. STONE: And do you think the
7 questions which a couple of the panel members
8 discussed here, that you just raised, do they
9 get to argue, do they get to address the court
10 in summation, where do you think those should
11 be, in the Manual for Court-Martial? And if
12 so, what parts of it? Where would you expect
13 to look for those rules?

14 LT. COL. DE CAMARA: That is a
15 great question, sir. You know I haven't
16 really considered exactly where you would put
17 it in the RCM and I don't know that it would
18 necessarily be RCM. We each have bench books,
19 where it talks about how the procedures are to
20 be laid out at each court-martial beyond the
21 bench book. I know we all have a little bit
22 of a variation on those bench books, which

1 will be our guide for how our courts-martial
2 are argued. And so, perhaps in the bench
3 books it could be laid out.

4 But I think you could also lay it
5 out in the RCM as to who the moving party is
6 and if that moving party is the Victims'
7 Counsel, then the Victims' Counsel is the
8 proponent of it and has the ability to provide
9 the evidence and make the argument.

10 MR. STONE: Have you been asked
11 for input about the necessity for those
12 guidelines by members of the Joint Service
13 Committee? I mean how does your views get to
14 get up? We see the Joint Service Committee
15 has a proposal out now in the Code of Federal
16 Regulations, but it doesn't include any of the
17 things you are talking about.

18 LT. COL. DE CAMARA: Yes, sir. We
19 were not specifically asked. Of course we
20 were invited to provide inputs to the JSC that
21 call for comments that came before I was in
22 the position. But we are not prohibited from

1 raising issues. And I think as our practice
2 develops and as we identify issues, you know
3 none of us knew how our programs would be
4 implemented and if it would be judge-specific.

5 And so as that is developing and
6 as we see that that becomes an issue, then we
7 can raise it through the JSC and through the
8 Executive Order, making comments to the
9 Executive Order that is currently outstanding
10 right now of places where we, as individuals,
11 as public citizens do have the right to make
12 comments there. Is that a perfect mechanism?
13 No, sir, but we would hope that those would be
14 venues that we could potentially raise the
15 ability there.

16 MR. STONE: I note that among the
17 numbers that the panel members gave, and you
18 can all feel free to comment on this but I
19 will start with you, --

20 LT. COL. DE CAMARA: Yes, sir.

21 MR. STONE: -- that the number of
22 victims interviewed or handled addressed is

1 way lower than the number of hearings that you
2 have been in, is way lower than the number of
3 courts-martial where you entered appearances.
4 And the numbers go down significantly so that
5 by 80, 90 percent. Is that because individual
6 judges in court-martial proceedings all come
7 up with their own rules and are not allowing
8 the counsel to enter an appearance?

9 LT. COL. DE CAMARA: Sir, I don't
10 think that -- when we say how many courts-
11 martial have they attended, that is not, we
12 don't -- from my understanding of how we have
13 told our counsel to input their data, is not
14 as to whether or not they were able to raise
15 a motion. It was whether or not they went and
16 attended it.

17 I think our numbers and interviews
18 are so high, sir, because we make an effort
19 for our counsel to be able to attend the OSI
20 interview, to attend a defense counsel
21 interview prior to the 32 or trial counsel
22 interview prior to the 32. Then there is

1 defense counsel and trial counsel interviews
2 prior to the court-martial.

3 And so those are each individually
4 being counted. So, you could have one court-
5 martial case that has been put in but the
6 counsel will have been with that victim at
7 five or six different interviews for that just
8 one court-martial. So, I think that is why
9 that number of interviews is so large that the
10 actual courts-martial and 32 numbers seemed
11 smaller.

12 MR. STONE: So then, based on your
13 last answer, you don't really have a number
14 for us, a number of Article 32 or 412, 513, or
15 court-martial proceedings where the Victims'
16 Counsel was actually recognized and spoke?

17 LT. COL. DE CAMARA: That number
18 that I gave you was not specific to if they
19 had raised a motion. We would not track that
20 number, sir. It is just, have they attended
21 a court-martial on behalf of the victim. We
22 do not then drill down to say, and how many

1 motions have you specifically -- we are not
2 tracking that number.

3 MR. STONE: And they may well have
4 been sitting in the back of the courtroom not
5 being vocal --

6 LT. COL. DE CAMARA: -- a courts-
7 martial 513 motion, exactly, sir.

8 MR. STONE: I have another
9 question, again, unless any of the other panel
10 members --

11 COL. JOYCE: If I could just make
12 comment, Mr. Stone, with regard to the first
13 part of your Article 6(b) question and
14 Kastenberg.

15 I think what is happening, too,
16 and we had some presentations by military
17 judges is that, clearly, everybody wants to
18 confine some of our input with regards to what
19 we can discuss before the court with regards
20 to what is in Kastenberg, 412 and 513 and 514
21 matters.

22 But I think that with the

1 enactment of Article 6(b) that it did make it
2 broader but I'm not quite sure they are there
3 yet. And I think Article 6(b) gave us some
4 things because a lot of Article 6(b), which is
5 the CVRA is post-trial matters. But in
6 particular, it gave us a little bit more
7 ability on the right to be present, with
8 regards to a state's clear and convincing
9 evidence. We didn't have that in our manual.
10 It never required the judge to make a decision
11 based on clear and convincing evidence but are
12 they still speculating, as compared to being
13 able to really determine that it will
14 materially alter a victim's statement?

15 And even the eighth prong of the
16 CVRA, that fairness provision, which opens the
17 door to so many different things for judges to
18 consider with regard to federal law, federal
19 case law. And so I think what really needs to
20 be educated out there, though, is that we are
21 not confined to 412, 513, and 514 because of
22 the enactment of Article 6(b) and the right to

1 confer with the government. And again, the
2 notice, the right to be notified of
3 proceedings.

4 So, I think that there is some
5 concern there because the Kastenberg is only
6 a small part now and it has been broadened as
7 a result of Article 6(b).

8 MR. STONE: And where does that
9 need to be incorporated? Because even looking
10 in the attachments we got for this meeting had
11 a memo dated October 1 of this year by the
12 TJAG, it talks about only getting, for
13 example, the Victims' Counsel only getting, if
14 I can read it, "...a copy of a motion or
15 responsive pleading that may limit a victim's
16 ability to participate in the court-martial,
17 affecting the victim's possessory rights in
18 any property or concern the victim's
19 privileged communication." In other words, it
20 is not a copy of all motions and responsive
21 pleadings. It is not giving the victim access
22 to what is going on. It is very limited. And

1 then it says request for information, further
2 information, that will be processed under the
3 appropriate procedure of the Freedom of
4 Information or Privacy Act, which is why I
5 brought those up before. So even as of
6 October 1, 2014, we are seeing that there
7 isn't a view that you should get all of the
8 information.

9 So, I guess I am going to ask you
10 the same question I asked a minute ago. Where
11 does the decision need to be made, the
12 guidance given so that like attorneys in every
13 one of the 50 states and the District of
14 Columbia, you have access to the public
15 pleadings in a public trial in a timely
16 fashion? It seems to me it is entirely
17 possible during a trial that, even without
18 meaning to, a trial counsel or defense counsel
19 may ask the question that could cause a
20 witness on the stand or the defendant to start
21 to give an answer that might violate the 412
22 or 513 ruling that the judge already made.

1 And somebody needs to stand up and say excuse
2 me, Your Honor, and interrupt the witness
3 before they say it so that the court's ruling
4 can be enforced. And I, myself, don't
5 understand how that can happen, unless
6 somebody is there to keep an eye on it and in
7 that sense, protect the victim's rights.

8 Certainly in any civil case, if an
9 officer of a large corporation is going to be
10 witness, you can bet his lawyer is sitting in
11 the back of the courtroom to make sure that
12 the court's pretrial rulings are followed.

13 Because it is very easy, during the course of
14 an answer for a witness to stray and give the
15 answer that, as a legal matter, everybody said
16 we are not getting into that but it comes out.

17 And so I am just wondering where
18 that guidance needs to be so you can have that
19 kind of presence.

20 COL. JOYCE: It needs to be in the
21 Manual for Courts-Martial and the Rules for
22 Court-Martial, as well as the MRE provisions

1 that give some sense of procedure to the
2 various different Military Rules of Evidence.
3 Because if it is not in the Manual for Courts-
4 Martial than we still have the issue of what
5 will military judges follow. And so, it can't
6 just be in DoD directives and orders, and
7 Secretary of the Navy directives and orders
8 for the Marine Corps and the Navy. It has to
9 be in the manual.

10 And it may not necessarily be
11 necessary to have a whole section pertaining
12 to Victims' Legal Counsel or Special Victims'
13 Counsel because there are sections already
14 established in the manual that need to be
15 refined to establish these procedures because
16 everything they are saying is correct.

17 If you don't have a process in
18 place when 412 is being addressed or 513, that
19 also acknowledges now that a victim may have
20 an attorney present, then we are going to
21 continue to have these issues of being able to
22 be heard before the court.

1 And even, yes, there is the Joint
2 Services Committee. We have not been heard
3 as panel before the JSC. We did get an
4 invitation by the Military Justice Review
5 Group and expressed a lot of the details that
6 we think need to be incorporated in the Manual
7 for Courts-Martial.

8 So, these are definitely issues.
9 When you asked about counsels and the number
10 of times they do a motion or submit a motion
11 or address an issue before the court, it is
12 very dispersed among the services. And yet,
13 there is one piece of it, too. We have trial
14 counsels. And trial counsels may be moving on
15 the particular issues in these motions. And
16 so, you can't always give a number and make
17 sense of what is really going on because,
18 again, the end state is the same between what
19 a prosecutor is doing and what the victim
20 through VLC or SVC wants to do, and that is to
21 convict the alleged perpetrator.

22 But each case is differently of

1 whether or not a VLC has to be a lead, moving
2 party because the government is not taking the
3 initiative. So, this is why our counsels are
4 in court and other times the issue is being
5 raised by trial counsel.

6 MR. STONE: As long as I have you
7 here, let me ask you a couple of questions
8 that I noticed from your testimony. One was
9 I thought you said that your victims counsel
10 have at least six months' experience in
11 getting an 18-month tour. My personal
12 experience leads me to believe that if you are
13 going to be a victim's counsel in court, you
14 need to have previously spent some amount of
15 time as a prosecutor or defense counsel so you
16 understand the criminal process and you have
17 a feeling for where this could go, if it goes
18 wrong.

19 And I don't, myself, have a lot of
20 confidence that a person who has not been in
21 a courtroom before is going to be able to do
22 as good, even after a month of training, no

1 less a week of training because some of those
2 things, it is just hard to guess. But when
3 you have seen it go wrong before, you
4 understand exactly where it is going.

5 And so I just wonder if you feel
6 like perhaps the prerequisite should be some
7 period of time as a criminal court prosecutor,
8 trial counsel, or defense counsel before you
9 can be a victim's counsel. Do you have any
10 thoughts on that?

11 COL. JOYCE: Yes, sir. I think
12 that we definitely would like counsel to have
13 as much experience as possible. Because I
14 think there is heightened requirement here and
15 that is to be going into a courtroom where you
16 are pretty much perceived as an unwelcomed
17 guest. So, it takes a certain type of
18 litigator to do this job.

19 And so yes, I think six months is
20 probably the low end of the threshold here and
21 probably about that time, you are just getting
22 your stride as a litigator, if even then.

1 So, the thing is in the Marine
2 Corps, we pretty much put a lot of burden and
3 challenge on our judge advocates early on at
4 the outset in litigating court-martial cases
5 that are procyclical speed. So, we sometimes
6 believe that six months could answer the mail.
7 I'm not saying it works for everybody and that
8 is why my Regional Victims' Legal Counsel need
9 to have that two years of combined military
10 justice experience. But we gauge it. We look
11 to see if they are the right litigator for
12 this type of program because it really is
13 different and it is a different type of
14 litigation, I think.

15 MR. STONE: So in that six months
16 they have all had some criminal court
17 experience?

18 COL. JOYCE: Yes, sir.

19 MR. STONE: Is that true for the
20 other services?

21 CDR FOWLES: No.

22 CAPT FISCHER-ANDERSON: Mr. Stone,

1 from the Navy perspective, what we are looking
2 for is usually somebody who is at the end of
3 their third tour in the Navy and maybe even a
4 very senior Lieutenant who has had experience
5 on both the defense counsel side, the trial
6 counsel side, and perhaps even advise the line
7 commander, so they would have been it on a
8 review of things as well. And that is part of
9 our vetting, when we look at somebody to see
10 if they are the right fit for our program. We
11 are looking for someone who has pretty, not
12 extensive, but has had some litigation
13 experience on both sides.

14 MR. STONE: Well, I guess I am
15 asking what you are getting, not what you are
16 looking for. I thought that everybody was
17 very short on not having available people and
18 that is why they are having to grab anybody
19 they can.

20 CAPT FISCHER-ANDERSON: No, sir.
21 I will tell you we have had more people apply
22 to the program than we have taken.

1 I will tell you when the call went
2 out for the reservists to supplement our
3 program, every single one of them, we had more
4 than the 11 people apply and the same for
5 active duty.

6 I can tell you we have at least
7 two attorneys who came to us at the beginning
8 of their second tour. So, they would have
9 completed 24 months. Both of them had been in
10 the courtroom the entire time there. So, we
11 are getting, you know they don't have
12 extensive litigation experience. We don't
13 want to put them in there and set them up for
14 failure.

15 COL. MC KEE: For the Army, when
16 we first started, most of our SVCs did not
17 have military justice experience. Since our
18 couple of rotations about 50 percent have
19 military justice experience. Now that is
20 great but also, we really base it on
21 personality. You have to have maturity. You
22 have to have good judgment. You have to be a

1 good listener. And you also have to have a
2 lot of personal courage because you have to go
3 into a courtroom and maybe stand up from
4 behind the bar and make an objection when 412
5 or 513 comes out. So, we are looking for a
6 person with characteristics that can advocate
7 zealously for a victim and be on grade. And
8 so really, that is what we think, that is what
9 we look for.

10 MR. STONE: Do you think that it
11 would help you to have a requirement that they
12 have some time in a criminal court before they
13 enter this program?

14 COL. MC KEE: I think, based on
15 the Army's footprint and our needs and the
16 fact that our clients like the face-to-face
17 representation, I don't think that would be
18 possible for the Army to meet the needs of the
19 client in the way that we are set up now.

20 MR. STONE: That is at the
21 practical level. But at a philosophical
22 level?

1 COL. MC KEE: Yes, I think that
2 would be good, yes.

3 LT. COL. DE CAMARA: On the Air
4 Force side, sir, we have a nomination process
5 that we have put in place at the inception of
6 our program. This set of SVCs that are coming
7 in in January, which would bring our total
8 number up to 33 in January, we use the
9 nomination process where the SVC had to be
10 nominated by their local installation SJA, as
11 well as the nomination had to go up through
12 their major command SJAs, so the commanders to
13 the four-stars, to endorse that
14 recommendation. We have about eight selection
15 criteria in there. Our number one selection
16 criteria is that they have military justice
17 experience in courts-martial. We look at the
18 number of courts-martial tried as well as
19 other types of advocacy roles, such as
20 discharge boards. And they also have to be
21 certified by the Judge Advocate General as a
22 JAG who can practice in front of courts.

1 So, in the Air Force, a Judge
2 Advocate who comes out of the basic training
3 course, we call it JSOC, our basic training
4 course are not qualified and certified to go
5 and try a courts-martial alone. They have to
6 have a seasoned attorney who works, a seasoned
7 JAG who tries courts with them and they are
8 evaluated by a military judge and by their SJA
9 to say that they are qualified to even be in
10 a court-martial and to participate in a court-
11 martial on their own.

12 So, SVCs are not eligible to be--
13 a JAG is not eligible to be an SVC until they
14 have that certification by the Judge Advocate
15 General.

16 MR. STONE: Are they eligible
17 before they have gone to one of the training
18 courses?

19 LT. COL. DE CAMARA: We do not, as
20 a matter of practice, assign cases to them or
21 we try not to until they have been to the SVC
22 course.

1 MR. STONE: I think that was one
2 of the questions I had for all the panel
3 members. I know that people get assigned,
4 people leave the service, they join the
5 service, at all kinds of different times but
6 you only give these courses once, twice a
7 year, I gather.

8 So, the question I had is do you
9 not start their tours in SVC until it
10 coordinates with a course they can take? What
11 do they do? Or do you do it before? And what
12 happens in the period of time, the two months,
13 three months, four months or more until they
14 can get one of those courses?

15 CAPT FISCHER-ANDERSON: Yes, sir.
16 We actually have selected an attorney who will
17 report this summer for duty overseas. And
18 though he won't be reporting until the early
19 summer time frame, he will be attending the
20 January course for the Air Force.

21 So, we try to pick our folks early
22 enough that we can put them through the

1 training pipeline.

2 MR. STONE: All right. I have one
3 final question.

4 CHAIR HOLTZMAN: Make it, brief,
5 please.

6 MR. STONE: Okay. This has to do
7 with eligibility. I have repeatedly been
8 contacted by victims who are not represented
9 in sexual assault cases because they are now
10 ex-wives of the person who sexually assaulted
11 them or raped them, or sexually assaulted
12 somebody in the family or whatever.

13 And in all the services, they
14 basically said to me, well, we are not
15 eligible for representation by the service
16 because we are no longer a service member or
17 dependent. And I just wondered if each of you
18 can tell me what you are doing for ex-wives in
19 that situation, if you are doing anything for
20 them?

21 COL. MC KEE: Well, for the Army,
22 if the offense happened at the time they were

1 eligible for legal assistance, they are
2 entitled to an SVC. That is our policy and we
3 have multiple clients who have SVCs.

4 COL. JOYCE: For the Marine Corps,
5 we have to take each case individually because
6 if I just give a little background, as you
7 know, our eligibility criteria is based on 10
8 US Code 1044 and also 1565(b) which just
9 refers to 1044 and now 1044 (e), which
10 addresses the military justice nexus.

11 But what our challenge is is the
12 eligibility issue because while we have this
13 defined requirement with regards to
14 eligibility, the definition of the victim in
15 the NDAA is any individual who was offered
16 direct physical, emotional, pecuniary harm
17 with regards to a UCMJ offense.

18 So, for those individuals who
19 don't fall within our criteria of eligibility
20 may still be a victim by definition and we are
21 not able to represent them. We know that we
22 are going to be expanding beyond our current

1 eligibility criteria to include reservists.
2 There is legislative proposal out there. But
3 there are individuals who have dropped out of
4 the service during the course of an
5 investigation or process, as well as indicated
6 ex-spouses.

7 We sort of look at it the same way
8 as the Army stated. We look to see when the
9 offense occurred. Was it during the time that
10 investigation was going on? Because people
11 move on. Either they get out or, for the case
12 of dependent spouses, they need to divorce and
13 move on and get on with their life, based on
14 the amount of time it may take to look into a
15 matter.

16 But the thing is, is that we do
17 have these civilian attorneys out there that
18 want to assist, as you heard Ms. Meg Garvin
19 mention, or excuse, Mr. Andrews, they do pro
20 bono work but they get their money through
21 grants. And so without some financial
22 funding, assistance to fill the gap on those

1 other individuals how are affected by UCMJ
2 offenders, we can't help them with regards to
3 the money piece. There are regulations with
4 regard to who we can fund. And so this has
5 been an issue with regard to pro bono
6 attorneys assisting victims out there in order
7 to help fill that gap.

8 MR. STONE: Does the Air Force
9 want to --

10 CHAIR HOLTZMAN: Excuse me. We
11 have to move on. We have some other people.
12 If you want to talk afterwards or we can get
13 some additional questions, we can do that.

14 Judge Jones.

15 JUDGE JONES: A couple of quick
16 questions. You may not have the answers.

17 Each of you has given us a
18 statistic of how many victim witnesses you are
19 taking care of in your fiscal year. Do you
20 have any sense of what percentage that is of
21 new victims coming into the system, for lack
22 of a better way to put it? Is it just

1 impossible?

2 CAPT FISCHER-ANDERSON: We don't
3 track that statistic, ma'am.

4 JUDGE JONES: You don't know?

5 CAPT FISCHER-ANDERSON: No.

6 CDR FOWLES: We do, ma'am. In the
7 Coast Guard, we had 209 new victims in FY14.
8 And so we are just under 50 percent.

9 JUDGE JONES: And you would have
10 how many per counsel?

11 CDR FOWLES: Ninety-nine, ma'am.

12 JUDGE JONES: Okay, but no one
13 else is tracking that or maybe you can't track
14 it. It is hard.

15 COL. JOYCE: I just don't have the
16 stats in front of me. Our SAPR folks may have
17 a figure that might be comparable to a number
18 of individuals that come see us.

19 CAPT FISCHER-ANDERSON: I may have
20 misunderstood your question. Is that the
21 number of victims who elect to take an SVC --

22 JUDGE JONES: Yes, who ask for

1 SVC.

2 CAPT FISCHER-ANDERSON: I

3 apologize.

4 JUDGE JONES: I wasn't clear.

5 CAPT FISCHER-ANDERSON: No, ma'am,
6 my problem. On the restricted reports that we
7 have had, approximately seven percent of
8 restricted reporters have asked for VLC. On
9 the unrestricted reporters, 70 percent have
10 asked for VLC.

11 COL. MC KEE: For the Army, we
12 have 130 new clients per month, ma'am.

13 JUDGE JONES: One hundred and
14 thirty per month?

15 COL. MC KEE: Per month, yes,
16 ma'am. That is our average.

17 JUDGE JONES: Right. But you
18 couldn't give me the proportion of people,
19 victims, the proportion of victims that is
20 asking for counsel.

21 COL. MC KEE: No, ma'am.

22 JUDGE JONES: Okay. Does anyone

1 know, and again you may be the wrong panel to
2 ask the question. You have said everyone is
3 experiencing the fact that victims are
4 recommending this new Victims' Legal Counsel,
5 Special Victims' Counsel to other victims.

6 Have you seen any increase in
7 reporting? It was something that we -- again,
8 any RSP is a Special Victims' Counsel Program
9 that may well relate to encouraging more
10 victims to report. But you don't have that
11 statistic.

12 CAPT FISCHER-ANDERSON: Our SAPR
13 program would be --

14 JUDGE JONES: They probably would,
15 yes.

16 CAPT FISCHER-ANDERSON: -- the best
17 one.

18 JUDGE JONES: Am I correct that
19 most courts-martial are not -- when you talk
20 about summaries, does that mean there is no
21 transcript of a court-martial?

22 LT. COL. DE CAMARA: Well for an

1 acquittal, ma'am, the record of trial, at
2 least in the Air Force, is a summarized record
3 of trial.

4 JUDGE JONES: So, there is no
5 stenographic recording?

6 LT. COL. DE CAMARA: The way the
7 Air Force records court-martial is that it is
8 an audio recording that the court reporter
9 then goes back and transcribes. Sometimes it
10 is simultaneous but typically, you go back and
11 transcribe it.

12 JUDGE JONES: I assume that every
13 service has a transcript or could produce one,
14 right, of a court-martial?

15 LT. COL. DE CAMARA: Yes, ma'am.

16 JUDGE JONES: And with respect to
17 dockets, I gather that is different. There
18 isn't a docket that can be accessed widely,
19 such as in most civilian systems, I guess?

20 COL. MC KEE: The Army has an
21 electronic docking service that the SVC enters
22 through that center, through the trial

1 counsel. And that is how you know about all
2 the schedules and the motions. But there is
3 no -- motions are not uploaded into that
4 docket request. It is just informational
5 matter that is --

6 JUDGE JONES: So, the actual
7 pleadings, written motions that then may be
8 made, orders of the court that may be written,
9 they are not automatically uploaded into that
10 electronic system?

11 COL. MC KEE: Not that I am aware
12 of, ma'am.

13 JUDGE JONES: Is it different in
14 any of the other services?

15 COL. MC KEE: No, ma'am.

16 COL. JOYCE: No, ma'am.

17 JUDGE JONES: All right, so all
18 information then Special Victims' Counsel have
19 to rely on the trial counsel. Is that pretty
20 fair to say?

21 COL. JOYCE: Yes, ma'am.

22 COL. MC KEE: Yes, ma'am.

1 CDR FOWLES: Yes, ma'am.

2 JUDGE JONES: All right. Well,
3 the only other thing I want to say, it is more
4 of a statement is that the Victims' Rights Act
5 has been around a long time in the civilian
6 world and what I have heard here today about
7 the kinds of issues you have spotted and the
8 energy with which you want to go forward and
9 try to get these things streamlined, taken
10 care of the Manual for Court-Martial, get them
11 into the bench book, so that your Special
12 Victims' Counsel and Naval Victims' Counsel
13 can actually -- Victims' Legal Counsel can
14 actually do their job is great. You are
15 jumping off ahead of the game, I think.

16 MR. TAYLOR: So, I certainly echo
17 Judge Jones' comments. And I want to thank
18 all of you not only for your comments today,
19 very insightful, but also belated happy
20 Veterans' Day.

21 I suppose that one thing that I
22 was left a little confused about in reading

1 the Services' input and then listening to what
2 you had to say about who is entitled to these
3 kind of services is that the list was
4 characterized differently by each of the
5 Services. I am not going to ask you to
6 remember but I am going to ask you, please
7 Captain Fischer-Anderson, to repeat that list
8 that you said were entitled in the Navy.

9 And listen carefully, please.

10 This is a test. I am going to ask you to tell
11 us whether the same list would be entitled
12 under your Service to victims' services
13 rights. Would you please do that?

14 CAPT FISCHER-ANDERSON: Yes, sir.

15 And again, this is the list when we first
16 opened our door. So, it did expand a little
17 since then but when we initially opened our
18 door, and again, whether they filed restricted
19 or unrestricted, we had Navy members on active
20 duty. We had reserve personnel on active duty
21 or inactive duty training at the time of the
22 assault. That has subsequently been broadened

1 such that reservists are treated similarly to
2 active duty personnel. There is no longer a
3 military nexus required nor do they have to be
4 on orders.

5 We have other DoD service
6 personnel, when assaulted by an active duty
7 member; retirees; adult dependents, including
8 spouses of active duty Navy members; and some
9 overseas Department of Navy civilians. And
10 all of those three have the nexus that the
11 perpetrator has to be active duty Navy.

12 MR. TAYLOR: So, to the other
13 members of the panel, would these same
14 individuals in your Service receive the same
15 kind of services from SVC program?

16 COL. MC KEE: They would be the
17 same except for the Guard and Reserve. We do
18 have a requirement for a military nexus. Now
19 that would be if they were going to a drill or
20 going to duty, that is the time it would take
21 over, they are traveling or they would be
22 staying over somewhere in preparation of

1 going. So, there is a military nexus
2 requirement there, sir. That would be our
3 difference.

4 MR. TAYLOR: Colonel Joyce?

5 COL. JOYCE: Because we fall under
6 the Navy, what Captain Fischer-Anderson
7 mentioned, again under 1044, you have your
8 active duty; you have your reservists on
9 active duty; you have your retirees; and the
10 dependence of all of those three.

11 What we also have under the Navy
12 Marine Corps is the second act, the JAG,
13 ma'am, the JAG Manual. And what it brings out
14 is the overseas individuals. DoD civilians,
15 non-DoD civilians who are U.S. citizens and
16 contractors who are in support of forces over
17 there. So, there are some additional things
18 in the JAG manual that have allowed us to open
19 the door to eligibility a little bit more and
20 not stay within the four corners of the 1044
21 statute.

22 MR. TAYLOR: Air Force?

1 LT. COL. DE CAMARA: We are like
2 the Army in that currently there requires to
3 be a military nexus for the reservists but we
4 do represent the dependents of active duty and
5 retirees, as well as those active duty
6 personnel.

7 MR. TAYLOR: I notice and I would
8 congratulate the Coast Guard and Navy in the
9 eligibility gaps. So, you have already
10 identified this as an issue.

11 CDR FOWLES: Yes, sir. We can go
12 with the Air Force position. We do provide
13 services to Reservists, so long as you are in
14 a drilling status at the time of the offense,
15 it is a military-related offense. But
16 otherwise, yes, sir.

17 MR. TAYLOR: So, how much of a
18 strain would be it on your resources if they
19 were to extend this --

20 (Simultaneous speaking.)

21 LT. COL. DE CAMARA: Right now,
22 sir, to address the eligibility issue, we have

1 actually started requesting we track -- I have
2 requested that the paralegals -- we are set up
3 similar to the Navy, in that we have Regions.
4 And in each of our Regions we have paralegals
5 and they are the ones who report to me to do
6 the detailing.

7 I have now requested that they
8 begin to track, when we have denied
9 eligibility to someone who has requested to
10 see exactly is that a problem. Because I
11 can't make a determination as to whether or
12 not I think we need to expand it if we aren't
13 really denying anybody who may need that
14 service.

15 The question, though, is, I can't
16 require the SARCs, I can't require the Victim
17 Advocates. I can't require the SJAs. I can't
18 require OSI to track that number for me.

19 So, unless they come to us to ask
20 for an SVC and don't have OSI making a
21 determination of eligibility or having the
22 SARC make a determination of eligibility based

1 upon what we published as our eligibility
2 criteria, those requests that are being denied
3 might be denied before that request gets to
4 me. Somebody else is making that
5 determination.

6 So, without knowing what type of
7 strain that would be on our resources, it is
8 very difficult for me to answer that question
9 with an answer well, we could handle it or we
10 couldn't handle it.

11 MR. TAYLOR: So, in the interest
12 of time, I did have other questions, but I
13 will ask the staff to get back with you on
14 those other questions.

15 Madam Chair.

16 CHAIR HOLTZMAN: Thank you very
17 much. Let me just ask a few questions.

18 Has anybody done, any of you or
19 any of your Services done any inquiry into the
20 disparity between the number of victims and
21 the number of people requesting Special
22 Victims' Counsel. In other words, do we

1 understand why people aren't asking for the
2 services of Special Victims' Counsel? What
3 are we doing to understand that problem, if it
4 is a problem?

5 CDR FOWLES: Ma'am, we do have a
6 survey but the results, so far, I don't think
7 we have significant results to answer that
8 question for you. But I would be happy to
9 follow-up with our investigative service and
10 our SAPR Program.

11 CHAIR HOLTZMAN: Thank you. So,
12 you are looking into that. Any of the other
13 Services looking into that question?

14 CAPT FISCHER-ANDERSON: Ma'am what
15 we have learned recently is you think you
16 communicate your program well and you only
17 learn that you still need to communicate
18 better. We have a JAG website. We have
19 brochures. We have posters. I can tell you
20 that maybe Victims' Legal Counsel have done
21 960 out briefs to over 27,000 Navy personnel
22 but we still will come across audiences where

1 the question is asked have you heard of the
2 Navy Victims' Legal Counsel Program and some
3 people will raise their hand and say no. We
4 even had an ALNAV.

5 So, it is just the continued push
6 to being sure that the information is getting
7 out.

8 CHAIR HOLTZMAN: But the question
9 really is you are assuming, your answer
10 assumes that people aren't taking advantage of
11 the Special Victims' Counsel Program because
12 they don't know about it. Maybe there are
13 other reasons that they are not taking
14 advantage of it. And that is what I am trying
15 to get at.

16 I mean one is, what are you doing
17 to ensure greater outreach? Can the materials
18 be made prior -- I mean people are -- they
19 should be told at the outset of their
20 connection with the military that there is
21 this program.

22 But if we don't know, going back

1 to the point that others have made, if we
2 don't know why they are not accessing legal
3 services, we don't know what to do about that
4 problem.

5 So, I don't know who would be
6 responsible. Is that your job or is it some
7 other person's job to take a look at why there
8 is this disparity between the number of
9 reports of crime or the number of victims, and
10 the utilization of Special Victims' Counsel?

11 COL. MC KEE: For us, for the
12 Army, ma'am, what I can go back and ask RSVCs
13 is not every single client takes on the
14 representation of an SVC after the program is
15 explained to them. They may decline the
16 attorney-client privilege. In those
17 instances, I can ask RSVCs why they didn't
18 take advantage of that.

19 CHAIR HOLTZMAN: So, you are
20 saying that the recent experience of the Army,
21 what you are saying is that every single
22 victim is told about the Special Victims'

1 Counsel Program when they report. Is that
2 correct?

3 COL. MC KEE: Yes, it is a
4 requirement that they are told about the
5 Program.

6 LT. COL. DE CAMARA: Ma'am, DD
7 Form 2910 actually is the SAPR intake form
8 that is a Department of Defense form. And on
9 that form itself, it actually has a block
10 where the victim, it says -- it doesn't
11 distinguish between an eligible victim versus
12 not -- I have been told of the Special
13 Victims' Counsel.

14 So, when the SAPR has met with
15 them, that is actually on the form.

16 CHAIR HOLTZMAN: Okay. That's
17 great. So, when people go through the SAPR,
18 who report to the SAPR Program are told about
19 this.

20 But what I am trying to get at is
21 why are people rejecting this and who is
22 looking at that question? That's all.

1 COL. JOYCE: If I could just say

2 --

3 CHAIR HOLTZMAN: Is that in your
4 bailiwick? Is that something you should put
5 on your agenda?

6 Excuse me. I am trying to recover
7 from a cold. So, I apologize for my voice.
8 I'm sorry, Colonel.

9 COL. JOYCE: It goes back to,
10 ma'am, again, that statutory requirement that
11 came out in December 2011 that I think we
12 heightened awareness of, and that is those
13 five individuals have a statutory requirement
14 to tell the victim that they have a right to
15 consult with a counselor. I think that is
16 making a difference and one is the SARC and
17 the VA, the Military Criminal Investigators,
18 Victim-witness Liaison, and even the Trial
19 Counsel. And clearly, that was a paradigm
20 change for trial counsel prosecutors to have
21 to tell a victim they have a right to consult
22 with an attorney, as well as with military

1 criminal investigators to do that as well.

2 But I think, I feel pretty
3 confident, honestly, that these victims are
4 being told and they have that right to elect
5 to see a VLC or not and some of the
6 calculation could come from those five
7 individuals as to what they know from their
8 end. Because you are right, if they don't
9 come to us, we don't know what we don't know
10 with regards to the consultation they had.

11 CHAIR HOLTZMAN: I just wanted to
12 go into another area we talked about briefly,
13 you alluded to briefly. And that is 412 and
14 513. Is somebody monitoring or discussing
15 with Special Victims' Counsel the kinds of
16 problems they are confronting in the practice
17 with regard to these two statutes? And what
18 are you doing about that, if anything?

19 COL. MC KEE: For the Army, ma'am,
20 we actually had a CLE where we actually, we
21 have a block of instruction on 412 and 513 for
22 taking our course. On our CLE, we followed

1 that up, talking about those two specific
2 rules. Then in our child's course, we took
3 some time and had another block of instruction
4 on 513 and 412.

5 And the other thing that we do,
6 like I said, we file the ACCA writ on that
7 issue, forcing the judge to the in-camera
8 review. But then we also have a MilSim blog
9 on the blackboard where we talk about that
10 issue. And then we have monthly DCLS where
11 that comes up. So, we do have robust
12 discussions about that.

13 CAPT FISCHER-ANDERSON: The Navy
14 is the same way. We have a very extensive
15 SharePoint site, where the attorneys can get
16 onto the site and they can post motions. They
17 share lessons learned. And in the different
18 regions, they talk on the phone fairly
19 regularly amongst themselves on what has come
20 up recently and they share best practices.

21 CHAIR HOLTZMAN: So, if we were to
22 understand what kinds of problems are being

1 encountered with regard to the operation of
2 412 and 513, you would have a way of getting
3 that information to us in a fairly concise
4 form?

5 CAPT FISCHER-ANDERSON: Yes,
6 ma'am, and I am sure that the next panel of
7 presenters will be able to give you the real
8 insight because they are in the courtroom
9 practicing.

10 COL. MC KEE: And ma'am, for every
11 court-martial that we do, we do a memorandum
12 for record. And so that discusses all the
13 issues at court-martial. Those come to myself
14 and then they go, they are sanitized and then
15 they go to the schoolhouse, where we
16 incorporate all those lessons learned and TTPs
17 into the next course, about advocating in the
18 courtroom.

19 LT. COL. DE CAMARA: And the Air
20 Force would also, after each Article 32 and
21 each court-martial, the SVC is required to
22 submit a report back to myself, to my

1 associate chief as well, plus to review and to
2 provide lessons learned. But we specifically
3 ask the counsel did you raise, was there any
4 412 issues? Are there any 513 issues? We
5 even are asking if there any 615 issues on the
6 right to be present and getting feedback there
7 to see is there a systemic issue that is going
8 on. Is there a particular military judge that
9 we are having an issue with, to see if there
10 are engagement areas that we should take up.

11 CHAIR HOLTZMAN: Is it your job to
12 do evaluations of the Special Victims' Counsel
13 Program?

14 LT. COL. DE CAMARA: Ma'am,
15 currently, I do rate all of the Special
16 Victims' Counsel.

17 CHAIR HOLTZMAN: No, I am not
18 talking about the counsel. The people. I am
19 talking about the program and how it is
20 working. Is that your job?

21 LT. COL. DE CAMARA: It is our
22 job, yes, ma'am.

1 CHAIR HOLTZMAN: And how are you
2 evaluating the program?

3 LT. COL. DE CAMARA: We have
4 several mechanisms. We look at our victim
5 impact surveys, which is a completely
6 voluntary survey that we ask our victims to,
7 at the end of representation, a determination
8 of representation, we ask them to fill out.
9 We have had about 168 fill out surveys to this
10 point. And so we look at what their comments
11 are. It is not just a yes, I agree, no, I
12 don't agree, I am very satisfied or not, but
13 they have an opportunity to opine on what was
14 good about the program. What needs to be
15 improved? What do they want the Program
16 Managers to know about?

17 Also, I don't think it should be
18 looked at in a vacuum but we do look at how
19 many victims who are restricted reports come
20 to us and then convert to unrestricted
21 reports. I don't think that should be the
22 only measure of success but I think that if a

1 victim does convert, that might show a
2 confidence in the system, empowerment that the
3 SVC has provided to that person. Certainly,
4 there are a lot of reasons why people would
5 not convert and so that is why we don't want
6 that to be the only measure of the program's
7 success.

8 And I think the fact that as the
9 program goes and more people are requesting
10 SVCs, again, we don't track number of victims
11 versus number of victims who are represented.
12 But do see a fairly decent number of victims
13 come in our program each week.

14 So, I think as the program grows,
15 those are all of the indications that we have
16 been using thus far. But I don't know that,
17 at least from the Air Force perspective, that
18 we have a perfect recipe for what would show
19 a program's success.

20 CHAIR HOLTZMAN: Anybody, are you
21 using evaluators, people who are in the
22 business of doing evaluation of programs to

1 help you structure your evaluation of the
2 Special Victims' Program?

3 LT. COL. DE CAMARA: We did. I
4 believe and this has been established before
5 I got here, our victim impact survey. But my
6 feeling is, is that Ms. Garvin actually helped
7 us when some of the NCVLI assessment criteria
8 was incorporated into our survey.

9 But I can get back to you on that
10 one definitive, since it was in place before
11 I got here.

12 CHAIR HOLTZMAN: Anybody else want
13 to answer that?

14 CAPT FISCHER-ANDERSON: We will do
15 a self-assessment of the entire program within
16 the program this year. And it is not just on
17 the victims themselves. It is the overall
18 administration of the program.

19 CHAIR HOLTZMAN: Good.

20 CAPT FISCHER-ANDERSON: We thought
21 about it last year but it was such a new
22 program we wanted to give it an entire year to

1 get through. We are not on the formal
2 inspection for this year but we will be for
3 FY16.

4 CHAIR HOLTZMAN: But when you do
5 your assessment, are you using any people who
6 are experienced in developing these estimates
7 or is this just an ad hoc?

8 CAPT FISCHER-ANDERSON: No, ma'am,
9 what we will likely do, we will obviously take
10 a look at the surveys that we conduct but we
11 will also put together a team within the
12 program to come up with the areas we want to
13 rate ourselves on. And then every single VLC
14 in the program, all 31 of us will go ahead and
15 answer that survey.

16 COL. MC KEE: The Army had
17 feedback and they had their own corporation
18 come in, when I talked about the TJAG and the
19 DJAG coming in and talking to all the SVCs.
20 So, they looked at our program. They looked
21 at it structurally and also some other things
22 but they didn't look in terms of client

1 satisfaction and how they are doing and things
2 like that.

3 We have thought about having them
4 come back in and do it but first, they looked
5 at the structure, and how many, and do we need
6 the numbers, and things like that.

7 And then they talked to each
8 individual SVC at that time and made some
9 recommendations to us.

10 COL. JOYCE: And as for the Marine
11 Corps, the Marine Corps SAPR Program has a
12 survey. In order to avoid survey fatigue, we
13 were trying to figure out how we would do it
14 without another survey in the mix because DoD
15 was also putting together a survey. And we
16 worked with DoD on their survey. While the
17 Marine Corps one is out there, I think the DoD
18 survey will answer a lot more specific
19 questions for us.

20 So we, within the program did not
21 do our own survey.

22 CHAIR HOLTZMAN: Okay. Well, I'm

1 sure we could go on and on with a lot of
2 questions. It is a very important program.
3 We really, really appreciate your help and we
4 may have some additional questions to ask you.

5 Thank you, again, to the panel.

6 And I think we will take about a ten-minute
7 break at this point.

8 (Whereupon, the above-entitled
9 matter went off the record at 11:24 a.m. and
10 resumed at 11:34 a.m.)

11 CHAIR HOLTZMAN: I think we are
12 ready to start our third panel. Sorry that we
13 are running a little bit over but we really
14 had a lot of questions for the other panel,
15 which was really an important panel.

16 Okay, this is the perspectives
17 from Special Victims' Counsel and these are
18 the people who are on the firing line, so to
19 speak. We will be hearing from Commander
20 Colleen Shook, U.S. Navy, Office in Charge,
21 Victims' Legal Program Mid-Atlantic, Naval
22 Station Norfolk Virginia; from Lieutenant

1 Commander Kismet Wunder, U.S. Coast Guard,
2 Special Victims' Counsel, Cleveland, Ohio;
3 Major Marc Tilney, U.S. Marine Corps, Regional
4 Victims' Legal Counsel, National Capital
5 Region, Captain Jesse Sommer, U.S. Army,
6 Chief, 82nd Airborne Division, Legal
7 Assistance Office and Division Special
8 Victims' Counsel, Fort Bragg, North Carolina;
9 Captain Aaron Kirk, U.S. Air Force, Special
10 Victims' Counsel, Air Force Legal Operations
11 Agency, Joint Base San Antonio-Lackland,
12 Texas.

13 Thank you very much for taking the
14 time from your important work to share your
15 understanding and experience with us. And we
16 will start with Commander Colleen Shook.

17 CDR SHOOK: Madam Chair and
18 distinguished panel members, thank you for
19 having me. I am Colleen Shook, and I am the
20 supervisory attorney for our Navy Region Mid-
21 Atlantic Office. I am based out of Norfolk,
22 Virginia. Two of my subordinate attorneys

1 work in the same building with me in Norfolk.
2 I have another VLC that is assigned to Naval
3 Air Station Oceana and splits his time between
4 Oceana and Joint Expeditionary Base Little
5 Creek. And then I have another VLC up on
6 Groton.

7 So, between the five of us, we
8 cover the Navy Region Mid-Atlantic, which
9 covers 20 states and has 14 Naval
10 installations that we cover victims for.

11 Since my boss, Captain Fischer-
12 Anderson did such a great job during her
13 opening presentation, I don't have any remarks
14 today. I am just going to stand by for your
15 questions.

16 CHAIR HOLTZMAN: Thank you. Our
17 next presenter is Lieutenant Commander Kismet
18 Wunder of the U.S. Coast Guard.

19 LCDR WUNDER: Thank you, ma'am and
20 thank you for the opportunity to participate
21 in this hearing. My name is Lieutenant
22 Commander Kismet Wunder and I am a U.S. Coast

1 Guard Special Victims' Counsel. I was one of
2 the first Coast Guard attorneys selected for
3 this duty in July of 2013. My duties are
4 collateral to my regularly assigned position
5 and I expect to continue serving as a Special
6 Victims Counsel until the summer of 2015.

7 I have more than five years of
8 military justice experience as trial and
9 defense counsel in both the Army and the Coast
10 Guard. I have attended Navy and Air Force SVC
11 training and Coast Guard Victim Advocate
12 training, which I believe prepared me to be an
13 SVC. Prior to receiving this training, I did
14 represent victims but I believe my prior
15 experience allowed me to competently represent
16 these victims.

17 Because I was one of the first
18 SVCs, there was little in the way of policy or
19 procedures. Consequently, I was concerned
20 about the scope of my role as an SVC.
21 However, in my opinion, the Program got up to
22 speed quickly and the initial SVCs did a good

1 job of collaborating and sharing best
2 practices. I also routinely reached out to
3 other SVCs in the Navy and the Air Force.

4 Having worked with a number of
5 victims, the SVC Program is a valuable
6 component to the Sexual Assault Response
7 Program that gives victims a voice and a
8 choice in this very difficult time.

9 I would definitely recommend my
10 fellow JAGs take the opportunity to serve as
11 an SVC. I have not experienced any negative
12 reaction or retaliation because of my role as
13 an SVC. The attention given to the problem of
14 sexual assault in the military has energized
15 the Coast Guard to eliminate this problem.
16 And I believe SVCs are seen as a valuable
17 piece of this solution.

18 With the exception of the recently
19 assigned fulltime SVCs, all collateral duty
20 SVC work at their individual offices. In my
21 particular circumstances, there is one other
22 SVC in the Cleveland area.

1 The biggest challenge with the
2 location of SVCs is that nearly all of the
3 parties involved in a sexual assault
4 investigation and prosecution are not
5 geographically close to the SVC.

6 Ideally, the SVC would be closer
7 to the parties. But given the relative size,
8 geographic dispersion, and number of cases in
9 the Coast Guard, I do not think it is
10 practical to have a dedicated SVC at each
11 Coast Guard District.

12 My average caseload has been six
13 to eight cases. These cases have been at
14 different stages of investigation and
15 prosecution, so I have not been overwhelmed by
16 my caseload. Nonetheless, as a collateral
17 duty SVC, there have been times when I have
18 had to carefully balance or shuffle my duties
19 to ensure my SVC clients' rights and interests
20 were protected.

21 I have had three cases that went
22 from restricted to unrestricted reporting.

1 And the average representation has been six to
2 nine months in length. I generally meet with
3 my clients in conjunction with court
4 appearances. Otherwise, I communicate with my
5 clients via phone and electronic means.
6 Again, this is because of the geographic
7 distance between me and my clients.

8 Recently, the majority of my cases
9 have been assigned during the investigative
10 stage. I attribute this to the promotion of
11 the SVC Program and as a recognized value by
12 all of the involved parties.

13 Outside of actual trial, I spend
14 the majority of my time educating the victim
15 on the military justice process and working
16 with other counsel to ensure my client's
17 wishes are known and protected.

18 I have filed MRE 412 and 513
19 motions in my cases. And in any of the cases
20 where the motion was denied, I have attempted
21 to secure a protective order to limit the
22 disclosure of the information. I have not,

1 however, filed any extraordinary writs in my
2 cases.

3 I have not had any negative
4 interactions with investigators, commands,
5 counsel, or military justice in my cases.
6 Without exception, everyone has been
7 professional in the execution of their duties,
8 even if you may not have all had the same
9 interests.

10 As a collateral duty SVC, I am not
11 specifically rated on my SVC duties. I track
12 my SVC activities and report them to the
13 Office of Special Victims' Counsel. I also
14 routinely appraise the SVC office of any
15 updates or significant activities in my cases.

16 I work closely with SARCs, victim
17 advocates, and other local resources to
18 respond to the victim's needs. I always tell
19 the victim that there is a team of people
20 there to support them through the process and
21 if I am not able to help them with a
22 particular issue, I will get the right person

1 to assist. I have found SARCs and victim
2 advocates very receptive to the Special
3 Victims' Program.

4 I do not believe that the changes
5 to the Article 32 rule will have much an
6 effect on SVC duties because of the loophole
7 in RCM 702, which provides good cause to
8 depose essential witnesses who are not present
9 for the Article 32 hearing, which will likely
10 just move the work from the Article 32 to
11 deposition preparations.

12 If there is a change to RCM 702 to
13 close this loophole, then I believe the work
14 will shift to advocating to the command on the
15 merits of the case and working with the victim
16 to be prepared to testify at trial.

17 I have not had any issues
18 accessing information necessary to represent
19 my clients. Generally, I do not request the
20 entire investigation file. I do routinely ask
21 for any pleadings involved with my client and
22 my client's statements. If I need additional

1 information, I work with the trial counsel,
2 who has been very accommodating to my
3 requests.

4 The biggest challenge I have dealt
5 with is working with clients with collateral
6 misconduct issues. In the current personnel
7 environment, the Coast Guard is very
8 unforgiving when it comes to misconduct.
9 Specifically, substance abuse is usually a
10 career-ender. Consequently, I have had
11 victims who have been faced with a very
12 difficult decision of seeking justice for what
13 has happened to them or preserving their
14 careers. Additionally, investigators and
15 trial counsel have become frustrated with
16 victims who appear to be less than forthcoming
17 because they did not want to admit to
18 collateral misconduct.

19 In my opinion, unless there is a
20 clear policy protecting victims who come
21 forward and admit to collateral misconduct in
22 the course of a sexual assault report, this

1 problem will continue to persist.

2 Additionally, as I noted earlier,
3 the disconnect between RCM 405 and 702 is a
4 major obstacle to prevent re-victimization.
5 If a victim is going to be forced to testify
6 in a pretrial deposition, then the reasoning
7 for revising RCM 405 is, in my opinion,
8 eviscerated.

9 Thank you for this opportunity and
10 I welcome any questions that you may have.

11 CHAIR HOLTZMAN: Thank you very
12 much. And our next witness will be Major Marc
13 R. Tilney, U.S. Marine Corps.

14 MAJ. TILNEY: Thank you, Madam
15 Chair and distinguished panel members.

16 My name is Major Marc Tilney. I
17 am a Regional Victims' Legal Counsel for the
18 National Capital Region, U.S. Marine Corps.
19 I am based on Marine Corps base Quantico in
20 Virginia, just down the road.

21 Currently in my office, I have one
22 other attorney. By assisting National Capital

1 Region, our main customer is Marine Corps Base
2 Quantico but we also have tenant commands of
3 our training command. So, we have all the
4 training installations within the continental
5 United States. We also have Marine Forces
6 Reserve. Obviously, all of the Reservists are
7 stationed all over the country as well. So,
8 geographically, we are really dispersed.

9 In addition to that, we also have
10 MARFOREUROPE in our area of responsibility.
11 So, we do have the potential of having clients
12 out in Europe as well from our small station
13 in Quantico.

14 To give you a little background on
15 myself, I have had about three years of
16 military justice experience as a trial
17 counsel, defense counsel, and Special
18 Assistant United States Attorney. I've also
19 thought was very beneficial, I had multiple
20 years of experience in legal assistance. I
21 thought legal assistance was a great primer
22 for this job, especially dealing with clients,

1 especially setting reasonable expectations for
2 your clients and explaining the process.

3 Going into our working
4 environment, we have had multiple challenges
5 before us. Our biggest challenge right now,
6 I think in front of us right now, is working
7 military, the judiciary system. There is no
8 clear cut rules for us in how we operate
9 within the courts. Every single time we step
10 into a court to approach the military judge,
11 it is almost as, "Hi, Your Honor." This is
12 who I am. This is our role. How do we
13 participate effectively without being a
14 disruption in your courtroom? Let it be known
15 that we might have to stand up and interrupt
16 their key points in order to protect our
17 client's rights. And sometimes military
18 judges are very receptive of this. Other
19 times, they will direct me to the bailiff and
20 make me aware of that position.

21 (Laughter.)

22 MAJ. TILNEY: So, we also have a

1 heavy component, we deal with Reservist judges
2 as well, that are not as up to speed as our
3 normal judiciary is. But we are also
4 fortunate in our area, we also have the Chief
5 Judge of the Navy-Marine Corps Trial Judiciary
6 who has stated that they already put some
7 rules in place in kind of recognizing our
8 role. But until those rules are coming out
9 and promulgated, we are flying at 20,000 feet
10 and also putting the wings on. So, we are at
11 a bit of a disadvantage.

12 Regarding information sharing is
13 another key component that we are constantly
14 struggling toward. Our ability to effectively
15 represent our clients is solely dependent upon
16 our personal relationships that I maintain
17 with trial counsel, that the attorney in my
18 office maintains with trial counsel, defense
19 counsel, and the military criminal
20 investigators.

21 That's it. We don't rely on the
22 rules because the rules are vague. They are

1 not interpreted or if they are out there, we
2 have statutes but they haven't even funneled
3 down to people in the trenches. So, that is
4 where our concerns are. Our rules should not
5 be dependent upon our personal relationships.
6 Our success should not be dependent on that,
7 especially dealing with victims' rights. They
8 should be more clear. They should be
9 understood by all parties in place.

10 And I also I want to reserve some
11 comments because I look forward to your
12 questions because I want to try to be as
13 helpful as possible with the process, to
14 improve it for our victims of crime.

15 And that's all I have. So, I look
16 forward to your questions.

17 CHAIR HOLTZMAN: Thank you very
18 much, Major. Our next presenter will be
19 Captain Jesse Sommer, of the U.S Army.

20 CAPT. SOMMER: Thank you, Madam
21 Chair, good morning. I appreciate this
22 opportunity to discuss my past 12 months of

1 service in the United States Army JAG Corps.

2 My name is Captain Jesse Sommer
3 and I am a Special Victim Counsel at the 82nd
4 Airborne Division at Fort Bragg in North
5 Carolina. In that capacity, I provide legal
6 representation to victims of rape and sexual
7 assault both to soldiers and dependents, to
8 advocate for their rights and ensure that
9 their legal interests are paramount in
10 military justice proceedings.

11 On November 1st of this year, I
12 celebrated the first anniversary of my
13 appointment as an SVC. So this morning, I
14 will be speaking about the Army's SVC Program,
15 as well as my perspective on the effectiveness
16 of the military's response to sexual violence
17 within its ranks. That perspective is
18 informed by my own experience working with 35
19 victims and on the narratives, needs, and
20 anxieties that these individuals have shared
21 with me in the course of attorney-client
22 relationship.

1 I have been instructed not to hold
2 back. I am going to share with this panel the
3 problems or programmatic deficiencies I have
4 encountered as the SVC Program stood up. So,
5 I have identified a few of those but I want to
6 make clear that I am not parroting the party
7 line when I deliver this generally positive
8 assessment of the SVC Program that I would not
9 have expected to give a year ago. Because in
10 a year, I have watched the creation and
11 evolution of an SVC handbook that now guides
12 much of my practice, as well as the
13 development of an active and connected SVC
14 colleague community that routinely assists me
15 in research, support, and the execution of my
16 duties when I bump up against my, at times,
17 limited expertise.

18 In a year, I have gone from being
19 a mysterious presence in our unit's Legal
20 Assistance Office to be embraced by commanders
21 at all levels in the 82nd Airborne Division
22 and throughout Fort Bragg. Within the first

1 few months of the program's inauguration, I
2 had already been invited to join a newly
3 created post-wide Sexual Assault Response
4 Team, comprised of sexual assault nurse
5 examiners, agents with the Criminal
6 Investigation Division's Special Victims'
7 Unit, special victim prosecutors, a therapist,
8 detectives at police departments in
9 surrounding townships and, of course, a legion
10 of professional victim advocates. In short,
11 I am part of a network designed to facilitate
12 communication among responders, share best
13 practices, educate one another on the value we
14 offer victims, and track through military
15 justice and administrative channels those who
16 have been victimized.

17 I explain all this so that you can
18 better understand the context within which I
19 provide legal guidance and representation to
20 the often vulnerable people who require so
21 much more than that. I provide the legal
22 piece of the support but I routinely call upon

1 specialized resources from an
2 interdisciplinary team of caring professionals
3 to meet my clients' needs. The seriousness
4 with which sexual violence has been
5 confronted, and the emphasis placed on
6 stamping it out is palpable at Fort Bragg.

7 And as emotionally draining as it
8 could be for me, personally, I am proud to be
9 serving in this role at this time. Rape and
10 sexual assaults are culture-wide pathologies
11 that have plagued the military and society at
12 large. But as in the past, and despite often
13 deserved criticism, the Army is leading the
14 way.

15 So, as I hope to discuss, an SVC
16 is routinely required to perform a vast array
17 of legal tasks to meet the needs of clients
18 who often find themselves in situations that
19 present challenges beyond just preparing to
20 testify.

21 Given the expansiveness of what an
22 SVC will do for a victim, it is just as

1 productive to define this program by
2 describing what it is not. It is not an
3 impediment to the protection of an accused's
4 Constitutional rights. It is not an obstacle
5 to an inquiry into the factual circumstance of
6 an allegation of sexual assault. It is not a
7 disruption of trial proceedings. And it is
8 not a transfer of power away from defense or
9 government counsel to this strange new entity
10 in the courtroom.

11 Rather, the SVC Program is a
12 mechanism to enhance a victim's privacy,
13 dignity, understanding military justice, and
14 a means to providing victims a sense of
15 security within a process that some of my
16 clients genuinely feel can be as traumatizing
17 as the sexual assault itself.

18 One of my early clients didn't
19 know who I was or why she had been advised to
20 consult with me. What she did know was that
21 the prosecutor or the trial counsel had urged
22 her to speak with an SVC after their initial

1 meeting. This was because the trial counsel
2 suspected that the victim might have engage in
3 some potentially relevant misconduct that he
4 could be obligated to report to her command or
5 to defense, actually.

6 The reality of the human
7 experience is that so-called collateral
8 misconduct on both sides will often be present
9 when dealing with cases of sexual assault. It
10 could be that underage drinking is involved.
11 It could be that the victim was engaged in an
12 adulterous affair with an otherwise unrelated
13 third party. But the present of collateral
14 misconduct doesn't minimize the insidiousness
15 of rape or the degree of its criminality. It
16 goes without saying, no one deserves to be
17 sexually assaulted and no one asks for it.

18 In serving as a victim's private
19 attorney, the Army has provided victims one of
20 the most powerful resources it can offer, an
21 individual with whom a victim can honestly
22 discuss his or her trauma or anxieties about

1 a prosecution, without fear of retribution.
2 And in those cases where the existence of
3 misconduct or embarrassing facts might make a
4 victim hesitant to fully participate in the
5 case, I can identify the need for testimony or
6 transactional immunity, work to obtain it, and
7 ultimately restore the confidence of a victim,
8 whose testimony is necessary to bring justice
9 to an alleged offender.

10 The confidentiality that I offer a
11 victim as her SVC is unique and superior to
12 what a trial counsel could provide as an agent
13 of the government. Confidentiality may be the
14 keystone of the SVC Program's value but the
15 gratitude I usually receive from my victim
16 clients often results from my simple act,
17 frequently calling them with case updates.

18 From the perspective of victims,
19 military justice is an intimidating,
20 confusing, and opaque process that runs the
21 risk of alienating those courageous
22 individuals who come forward and report their

1 assailants. Simply by explaining a process,
2 apprising clients of projected deadlines, and
3 just generally keeping them informed,
4 answering questions that may arise throughout
5 the process, I keep victims engaged. These
6 victims are key witnesses to crimes committed
7 against them. And the justice process is best
8 served when a victim is more willing to
9 furnish testimony about the trauma they
10 endure.

11 So, Madam Chair, and honorable
12 members of the panel, I prepared a much longer
13 statement. But out of respect for my fellow
14 panel members, as I have already been self-
15 indulgent enough, I ask to submit my entire
16 written statements to the record and provide
17 fuller details regarding my tenure as an SVC
18 in response to the questions.

19 To that end, I invite you to
20 specifically ask me about my value as a
21 private legal advisor who exists outside of
22 command influence or interference from my tech

1 chain and who provides guidance regarding
2 issues such as so-called collateral misconduct
3 that may have been confidential, and
4 explicitly in the service of the victim's
5 interests.

6 I also invite you to ask me about
7 a few of the obstacles I have encountered,
8 specifically with regard to my experience
9 before military judges.

10 I hope to have a chance to discuss
11 my personal opinion regarding whether or not
12 the SVC Program should exist structurally as
13 a stovepipe organization. I strongly believe
14 it should not so exist.

15 And lastly, where appropriate, I
16 wish to provide a few concrete examples of the
17 way in which the SVC Program and my
18 representation, specifically, has benefited
19 victims of rape and sexual assault.

20 So, depending on your questions,
21 airborne all the way.

22 CHAIR HOLTZMAN: Well, you have

1 left us in such suspense.

2 (Laughter.)

3 CHAIR HOLTZMAN: Anyway, thank you
4 for your testimony. We will be happy to
5 receive the balance of your testimony and look
6 forward to the opportunity to elicit those
7 answers that you have left us in suspense
8 about.

9 Our next presenter will be Captain
10 Aaron Kirk, U.S. Air Force. Welcome.

11 CAPT KIRK: Thank you, Madam Chair
12 and distinguished members of the panel for the
13 opportunity to speak.

14 I am from Joint Base San Antonio,
15 where I currently represent 23 clients
16 actively. I have represented 45 clients
17 during the course of my time as an SVC.

18 I started in SVC when the Air
19 Force launched the program in January of 2013.
20 So, I was part of that initial cadre that was
21 trained and I have been an SVC since that
22 time.

1 Currently I represent, like I
2 said, out at the Joint Base San Antonio
3 region, which is one of the largest and
4 busiest regions in the Air Force. We cover 14
5 bases. We have, at this time, 176 clients
6 that we are serving. That is spread out with
7 myself and four other SVCs. We are full-time
8 SVCs, in addition to several SVCs who have
9 moved out of the position but are still
10 wrapping up previous cases. We also have a
11 paralegal supporting.

12 I work with a full range of
13 clients, including trainees to officers,
14 enlisted members. I have provided the
15 complete spectrum of legal services to my
16 clients during the course of my time as an
17 SVC, to include in-court representation. I
18 have filed motions under 412, 513, 502, 504,
19 various privileges. I have also filed motions
20 regarding some of the rights encapsulated in
21 Article 6b.

22 Just earlier this week, I filed a

1 motion under Article 6(b)(4), the right to be
2 heard during sentencing. So, that has been a
3 landmark shift in what we have been able to
4 accomplish in court, as well as out of court.
5 We have also been engaged, like I said, in
6 legal assistance services outside the court
7 and engaging with prosecutors, investigative
8 agencies, other agencies outside of the
9 military system and help victims in that way
10 as well.

11 So, at this time, I am going to
12 keep my comments as short as possible and I am
13 going to take your questions.

14 CHAIR HOLTZMAN: Okay, thank you
15 very much. Judge Jones?

16 JUDGE JONES: Sure. I'm almost
17 afraid to ask you, Captain Sommer, but --

18 (Laughter.)

19 JUDGE JONES: -- I am very
20 interested actually in the collateral estoppel
21 issue because it's something that, I don't
22 mean estoppel, I mean collateral conduct

1 issue. And you mentioned that you have been
2 able to negotiate immunity. Could you expand
3 on that? Like when are you able to do it and
4 how quickly do you have to do it? What is the
5 mechanism?

6 CAPT. SOMMER: If I may, ma'am, I
7 will give you two examples, one specifically
8 about immunity, one regarding alternative
9 dispositions in the context of collateral
10 misconduct.

11 The first in regards to
12 testimonial immunity, I won't describe the
13 underlying collateral misconduct. But in
14 terms of the process, at the 82nd Airborne,
15 where this program is operating flawlessly, I
16 can't say it is as rosy in working with other
17 installations as yet, but it is partially
18 because I haven't established as close
19 connections with the trial counsel, obviously,
20 as I have at the 82nd Airborne Division. The
21 82nd, and thanks so much to the support of our
22 leadership, which has basically ensured that

1 trial counsel is receptive to my exchanges
2 with them, when I am told of collateral
3 misconduct, something that I early on work to
4 establish is a possibility with victims, who
5 understandably may not understand what an
6 attorney is or what confidentiality means,
7 once that threshold is reached and I am able
8 to convince them of speaking with me about
9 collateral misconduct, my first stop is to the
10 trial counsel. I don't tell them what the
11 misconduct was. I tell them that my
12 perception is that there could be a need for
13 them to explore the possibility of testimonial
14 immunity. At that point, there are
15 conversations that rope in usually our Staff
16 Judge Advocate. And before anything is
17 revealed, we look at the possibility of
18 whether testimonial immunity, admittedly
19 transactional immunity I have not achieved
20 that, I haven't necessarily had a need to, but
21 as far as testimonial immunity is concerned,
22 I have been successful in that.

1 A drawback, obviously, concerns
2 those issues wherein we have an adulterous
3 affair and someone wants to protect a third
4 party who wouldn't otherwise be entitled to
5 testimonial immunity. We are working through
6 those types of things.

7 JUDGE JONES: Who has the
8 authority to say, to grant testimonial
9 immunity, which would be used immunity. In
10 other words, their own statements couldn't be
11 used against them.

12 CAPT. SOMMER: Roger, ma'am, and
13 only because I have not actually served
14 previously on trial counsel capacity, the
15 mechanics of how that works, I don't want to
16 step out over my skis in answering that.

17 JUDGE JONES: Okay.

18 CAPT. SOMMER: All I know is that
19 I haven't had to worry about it. Trial
20 counsel is receptive. Something happens in
21 the abyss and there has been --

22 JUDGE JONES: Understanding that

1 your client has testimonial immunity?

2 CAPT. SOMMER: And that has been
3 granted. And I will get it in a signed
4 memorandum and then I will discuss with my
5 client what the testimonial immunity
6 specifically covers.

7 If I may, also, just because I
8 think this is equally as important. I worked
9 with a victim who, following a sexual assault
10 committed by a superior, experienced a sudden
11 downward spiral into drug usage. And the
12 nuance of that case aside, my client was
13 ultimately separated for the misconduct
14 stemming from that drug usage,
15 administratively separated. But in a last
16 minute appeal on my client's behalf, the
17 Brigade Commander, who ultimately obtained the
18 support of the Commanding General, my client
19 was granted an honorable discharge.

20 And I bring that up because this
21 was something where there was not a full
22 appreciation of the nature of the situation

1 because of how it had been reported. And I
2 can't get into the specifics too much of that
3 but suffice it to say that despite what is
4 called a 14-12(c) misconduct separation, this
5 soldier was granted an honorable discharge.
6 I recently spoke with this former client. He
7 is employed full time. He is proud of his
8 honorable service and he and his wife are
9 expecting their first child early next year.
10 At a time when a different decision could have
11 set this young man on a very different path,
12 the Army took care of one of its own and that
13 was something that was facilitated through the
14 SVC Program and the advice that I received
15 from leadership regarding the different ways
16 that I could handle it.

17 I bring that up only to talk about
18 the way in which I work with the government to
19 ensure that there are other possibilities when
20 collateral misconduct is involved.

21 JUDGE JONES: You know because
22 collateral misconduct seems to be such a

1 deterrent for reporting, I am wondering if any
2 of the rest of you have had any experiencing
3 negotiating for immunity. Captain Kirk?

4 CAPT KIRK: Yes, ma'am, I have.

5 It works in a similar manner to what Captain
6 Sommer described in the Air Force. We also
7 have had, in one situation I know of get
8 immunity and work with local prosecutors as
9 well because the conduct occurred off base and
10 the military didn't have jurisdiction over the
11 member.

12 But yes, in those situations where
13 we are able to get immunity, it makes a huge
14 difference in terms of their willingness to
15 come forward and their ability to be candid
16 with trial counsel, which I think is really
17 what is lacking prior to that immunity. Even
18 if they are reporting a crime, a lot of times
19 they are leaving gaps in their statements, the
20 testimony. A lot of time trial counsel and
21 investigators will look to that as some
22 exception or signs that they are perhaps not

1 being forthcoming. They may even prejudge the
2 actual occurrence of the assault, at that
3 point, based on this kind of broken testimony
4 that may be coming out, because they are
5 concerned about disclosing something that is
6 going to incriminate them.

7 JUDGE JONES: Right.

8 CAPT KIRK: So certainly, this is
9 an area I think that we could benefit from
10 changes in, even if the rules were made just
11 more clear in how we could engage or perhaps
12 -- I know during negotiations for Defense
13 Counsel, when they are seeking immunity for
14 certain things for their client, oftentimes
15 those negotiations are protected and can't be
16 used against their client.

17 I don't know that similar
18 provisions would cover our own negotiations,
19 which is why I think Captain Sommer described
20 it in this dance, where he is kind of saying,
21 well, there is something out there.

22 JUDGE JONES: Right. In regular,

1 in the civilian system we use a proffer which
2 couldn't be used against a person, whether it
3 is a defendant or a victim.

4 CAPT KIRK: I think we could
5 benefit from some clarification in that area.

6 JUDGE JONES: Thanks. Have any of
7 the rest of you had any experience with this?

8 MAJ. TILNEY: Yes, ma'am. We have
9 done both things. We have sought out the
10 immunity, the testimonial immunity. But at
11 the same time, we have also used that junior
12 Marine that comes into our office and the
13 collateral misconduct is the underage
14 drinking. I mean that is the common thing
15 that we see. Commanders are receptive to
16 this. I mean, they are not ignorant. They
17 know these young Marines drink.

18 And when a Marine usually comes
19 in, they think it is the end of the world.
20 Many Marines have gone before and have
21 accepted lower form type punishments. These
22 Marines sometimes will admit to the

1 misconduct. After sitting down with us, we
2 know the commanders that we are dealing with.
3 We know the SJAs that we are going before.
4 They know there is a pending court-martial
5 possibly for the crux of the reason why this
6 information is coming out.

7 So yes, sometimes they will just
8 accept punishment up front, so that way, when
9 they are in trial, they are not getting bashed
10 by the defense counsel at the same time,
11 saying, "You took immunity. You are doing
12 this because of the immunity? You know you
13 got in trouble."

14 So, it goes both ways. So, some
15 cases are going to need that testimonial
16 immunity. The other time you are going to be
17 there for them at the same time, explain the
18 real process of you might get a ding. And
19 that is very well possible. But they will go
20 in knowing the consequences of that as well.
21 And just being able to have that knowledge,
22 saying these are the consequences for choosing

1 this course of action, it might give them
2 enough courage to go forward as well.

3 So, we don't automatically seek
4 the immunity at first. We try to explain
5 process to the victim. And then also, just
6 have them weigh the decision they are making
7 because at the end of the day we want them
8 making that decision. And we are just going
9 to advocate like crazy for it.

10 JUDGE JONES: I just have a
11 different area. How soon are you actually
12 meeting with, for the first time, sexual
13 assault victims? Is it, in your experience,
14 all of your experiences, early enough or has
15 there been incidents where it has been later
16 in the day and maybe not early enough?

17 CDR SHOOK: Ma'am?

18 JUDGE JONES: Yes, Commander
19 Shook.

20 CDR SHOOK: I feel like I should
21 read you my opening.

22 (Laughter.)

1 JUDGE JONES: We can write
2 something up later.

3 CDR SHOOK: So, when we started
4 the program last November, we were getting
5 clients well into the process. So, most of
6 them were right before trial. They had
7 already been interviewed by NCIS, at some
8 level. They have already had their statement
9 exam. So, I think that now that the program
10 has progressed, we are getting clients right
11 at the reporting stage. Right? And so I have
12 got the SARCs and the victim advocates, and
13 our medical folks are informing victims upon
14 the report of our services.

15 So, I would say early, like 20
16 percent of my victims were brand new, upon
17 report. Now, it is about 85 percent I am
18 getting them right after they have made the
19 report. And it is a lot more helpful for me
20 to advocate on their behalf if I get in there
21 right away.

22 JUDGE JONES: So, you are talking

1 within a few hours, certainly within 24 hours?

2 CDR SHOOK: Yes, ma'am. I have
3 had a couple of calls from the hospital. And
4 we actually talked about whether we were going
5 to set up a 24/7 duty response but we decided
6 not to in our region because we have so many
7 other team members that can do that and then
8 we are available the next working day.

9 So, we don't respond at 2:00 in
10 the morning but I will go to the hospital if
11 it is 2:00 in the afternoon.

12 JUDGE JONES: Anyone else with any
13 particular issues with this or is it working?

14 CAPT KIRK: I find that I am
15 usually receiving clients after they have done
16 their initial interview with OSI. Usually,
17 they will make a report. They are taken over
18 to OSI. That is where they provide their
19 statement. And then after that point is when
20 a lot of times they will be informed of the
21 Program and referred to us.

22 Sometimes that is inconsistent.

1 It varies across base but I would say that is
2 the general practice that I am seeing.

3 JUDGE JONES: Is that an issue?

4 CAPT KIRK: It can be. In certain
5 circumstances, absolutely. If the client has
6 legal issues, they may consent to certain
7 things. We can sometimes work to get that
8 retracted but that can be difficult.

9 And they have run into legal
10 issues with turning over their phone or
11 providing certain evidence that may have,
12 going back to this, collateral misconduct
13 issues associated with it that has
14 consequences that they are not aware of. All
15 of that can take place, of course, within the
16 initial investigative interview without their
17 advice of legal counsel.

18 So, it can be an issue. It is not
19 always, certainly but certainly it does have
20 a potential.

21 MAJ. TILNEY: One of the benefits
22 that we have, we are co-located with our SAPR

1 folks. We share the same floor as them in our
2 office building that we are currently residing
3 in. We are detached from the other services,
4 the trial counsel, the prosecutor, the SJAs
5 and whatnot.

6 But it serves two purposes. One,
7 we are co-located with them so we immediately
8 get referrals from them. And also is the
9 attorneys, I mean we stay in the realm, in the
10 Marine Corps, we stay on the legal aspect. We
11 are not doing other legal assistance. We are
12 sticking to the military justice process for
13 the most part, or the administrative
14 separation processes that are involved with
15 that.

16 But we also, when we get the other
17 clients that come in with other issues, we are
18 seeing the stress. We are seeing, we have
19 enough training, we are seeing the indicators
20 that the client might not be mentally sound at
21 this moment in time and we can go right next
22 door to the victim advocates, the SAPR folks

1 and say, "Hey, can you just talk to this
2 person? Just give me a sanity check and make
3 sure I'm observing this correctly."

4 So, we refer them back and forth.
5 So, there is a good communication between the
6 SAPR folks and us.

7 The same, our NCIS offices are
8 doing a good job. They are requesting it and,
9 if the victim says -- NCIS has been saying you
10 have the right to counsel. Clients are
11 saying, "Okay, I want to talk to them right
12 now." And the NCIS will pause. and they will
13 stop, and they will wait for us to come
14 onboard. But we usually are contacted, with
15 us being notified, we make contact with them
16 within 24 hours.

17 JUDGE JONES: Thank you. Thanks,
18 Madam Chair.

19 CHAIR HOLTZMAN: Mr. Taylor.

20 MR. TAYLOR: Thank you. I thank
21 you all for your testimony.

22 Has anyone had to deny services to

1 anyone because your Service did not have
2 eligibility requirements that fit this victim?
3 Have you ever had to say no?

4 CDR SHOOK: Yes, sir. I had one
5 of the Reservists that was not assaulted while
6 she was on active duty. And, unfortunately
7 for me, it was her second assault. So, I
8 represented her for her first assault and then
9 she reported a second assault but that did not
10 happen while she was on active duty and I had
11 to turn her away. And I called my boss, of
12 course, and then we decided we were going to
13 make an exception to policy to represent her.

14 It is very difficult to turn
15 someone away and that was a very painful day
16 for me. So, I was very happy to call her back
17 and tell her she could come back in.

18 MR. TAYLOR: Captain Kirk?

19 CAPT KIRK: Yes, sir. Over the
20 course of about two years now, we have had to
21 deny several individuals. Usually when that
22 happens, we work with local legal assistance

1 capabilities. We have a contact at the local
2 rape crisis center, for example, and they have
3 legal aide clinics that they can get these
4 people in touch with.

5 So, we normally don't leave them
6 in a lurch. We don't just say sorry, goodbye.
7 We do try to get them a warm handoff to
8 another legal assistance agency that maybe can
9 help them locally. But that is not 100
10 percent. And that is not always, it is just
11 accessible.

12 MR. TAYLOR: Yes, that sounds like
13 that is a pretty good model. So, that lack
14 for legal assistance, sometimes you have
15 attorneys in the community who are willing to
16 do legal assistance services that otherwise
17 would not be provided.

18 The second question goes to the
19 question of whether you are a full-time SVC
20 lawyer or whether you are a part-time. And
21 maybe I could start with you and just ask you,
22 Commander Wunder, have you had situations

1 where your other duties, your collateral
2 duties interfered with your ability to be the
3 kind of SVC you want to be?

4 LCDR WUNDER: Sir, I would say
5 they haven't interfered with my ability to
6 represent my clients. I take the collateral
7 duty as a very serious one. And if there is
8 a situation where my regularly assigned duties
9 are interfering or conflicting, I try and de-
10 conflict those and put my SVC clients ahead of
11 them. And my chain of command currently is
12 very accommodating to that.

13 But I could see circumstances
14 where regularly assigned duties could
15 interfere with SVC duties.

16 MR. TAYLOR: Anyone else have a
17 comment on that? Captain Sommer?

18 CAPT. SOMMER: Sir, I think the
19 trend is to have full-time SVCs or not serving
20 in collateral duties. I currently am both the
21 Chief of our Legal Assistance Office and our
22 Senior Special Victim Counsel. But in my

1 capacity as the Chief of Legal Assistance, I
2 am generally performing administrative work.
3 We have had the luxury of having support of
4 legal assistance attorneys who are, in our
5 office, fantastic. And so we have generally
6 been able to move me away from seeing legal
7 assistance clients and I, in that capacity,
8 then am kind of finishing out my tenure there.
9 And going forward, I think the trend will be
10 go have a full-time SVC, who does not have
11 collateral duties.

12 The one thing I would say is that
13 that may be specific to each installation.
14 So, at Fort Bragg, which is a very large
15 installation and we have post-wide
16 jurisdiction, there is a sufficient number of
17 cases to occupy someone who is serving
18 exclusively in a Special Victim Counsel
19 capacity. That may not be the case at every
20 Army installation. So, I think it is going to
21 be dictated by the needs of the client demand
22 and probably up to each Staff Judge Advocate

1 to determine how they allocate resources.

2 MR. TAYLOR: Thank you very much,
3 Madam Chair.

4 CHAIR HOLTZMAN: Thank you. I
5 guess I will pick up at this point. Okay.

6 Captain Sommer, just to take you
7 up on your offer, what are the major obstacles
8 that you see in the proper and complete and
9 robust execution of the program, SVC program?

10 CAPT. SOMMER: Madam Chair, with
11 caution and respect --

12 CHAIR HOLTZMAN: You can be
13 completely candid with us.

14 (Laughter.)

15 CHAIR HOLTZMAN: There is nobody
16 behind you.

17 CAPT. SOMMER: I think to be
18 honest, Major Tilney actually articulated it
19 very well. The protocol dictating my
20 appearance in a court has not yet been
21 standardized and practiced. So going on the
22 record, for example, finds me often dancing

1 around the court as to whether I will be doing
2 so from the gallery or behind a podium. I
3 just don't always know if, how, and when I am
4 going to object during proceedings.

5 Now, I will concede during courts-
6 martial, that has not yet been an issue.
7 Mostly when it comes to issues in which I have
8 standing, the trial counsel, the interest is
9 aligned such that I don't need to make an
10 objection regarding 412 or 513 issues.

11 There was a situation in which the
12 government declined to enforce a 513 matter
13 and in one of those cases, it was just the
14 leniency of the judge that allowed me to kind
15 of figure out what is the best mechanism for
16 where you will be when you argue this motion.

17 So, there just has not been
18 standardization and that is one of the
19 obstacles. I will point out stemming from
20 that in this particular oral argument, one of
21 the things that has been exposed just in some
22 of the questions that Mr. Stone, you have

1 asked, unlike the Crime Victims' Rights Act,
2 Article 6(b) does not have the language of the
3 enforcement mechanism, which specifically
4 grants the victims a right of standing, either
5 through counsel or otherwise.

6 So in this particular case,
7 although I was granted standing on the 513
8 issue and it was on that basis that the issue
9 was resolved, when I invoked the newly
10 established Article 6(b) rights, it was
11 determined that there was no standing on that.
12 And, therefore, broadly, we were not able to
13 advocate for the victims' privacy or respect
14 in the proceedings.

15 The other thing I will say and
16 most recently, and perhaps most troubling, is
17 a military judge refused to take into account
18 the victim's schedule when docketing a court-
19 martial. And practically speaking, what I
20 really mean is that the military judge
21 declined to grant a delay in a case to
22 accommodate the victim's Special Victim

1 Counsel. By nature, an SVC may be involved in
2 multiple courts-martial at multiple
3 installations, and that is a reality that
4 results from the fact of expedited transfers,
5 for example.

6 So, there are times when I, as an
7 SVC, am just not able to appear with my
8 client. And in those cases, unless the court-
9 martial can be delayed, I would submit that
10 that deprives my client the right to be heard
11 through her counsel.

12 So, there is a couple resolutions
13 to that. Those are being explored right now.
14 At the moment, you would expect the government
15 counsel would be willing to accommodate you.
16 They are not always willing to ask for a
17 continuance. But the bigger issue is that is
18 already required under the Rules of Practice
19 before Courts-Martial. I believe it is
20 2.3.1. The SVC is supposed to be consulted
21 when it comes to docketing decisions. Judges
22 are not doing that. Uniformly, they are not

1 doing that.

2 So, in the situation where
3 schedules conflict, multiple courts-martial
4 conflict, it could be resolved by just having
5 me explain what my multi-installation court-
6 martial schedule will be, so we can avoid
7 those conflicts.

8 Can I seek hijacking this ma'am,
9 or is that sufficient?

10 CHAIR HOLTZMAN: No, no, that is
11 fine. You can go, I mean continue.

12 CAPT. SOMMER: The other thing I
13 would say is that I am heading off, I don't
14 know necessarily if the Army is pursuing this,
15 but I think in other branches there is more of
16 a stovepipe organization for the SVC Program,
17 that they have a specific mission when it
18 comes to how they represent their clients.

19 I am, personally, adamantly
20 opposed to that for the Army. I can't speak
21 to the effectiveness in other branches but in
22 the Army, I think that that would deny the

1 underlying rationale for the Special Victim
2 Counsel, which is to be a trusted face,
3 someone who can provide guidance and a
4 dependable outlet for questions on all legal
5 matters with which the SVC is approached by a
6 victim.

7 As you can imagine, there are
8 situations, I will just list a few offhand, in
9 the context of domestic violence. I was able
10 to assist in helping the individual break a
11 lease. I was able to walk this individual
12 through the process of securing or at least
13 beginning the process of a marital divorce.
14 There are situations, in one particular case,
15 a victim believed that an officer evaluation
16 report was changed to negatively evaluate her
17 performance based on the conduct stemming from
18 the trauma she endured. So, I worked with
19 this individual to appeal the OER.

20 What ends up happening is there is
21 such a range of legal issues that victims
22 often bring, as kind of collateral to the

1 primary assault, that it would be perhaps a
2 little weird for me, I feel a little weird
3 about having to stand down and directing them
4 to another attorney.

5 Similarly, appearing before the
6 Brigade Commander, I referenced that example
7 previously. That is not necessarily what a
8 Special Victim Counsel had previously been
9 designed to do. And yet when the victim is
10 able to hear me say and I am able to say
11 honestly, I am your attorney and I will be
12 advocate on behalf of your interests in any
13 context, that instantly creates an established
14 connection that will allow them to open up to
15 me, which is necessary for me to be able to
16 provide the best guidance I can for them in
17 the context of the military justice component
18 in locating the SVC within the Legal
19 Assistance Office provide individuals with
20 immediate access to other legal assistance
21 attorneys who can assist me in the effort to
22 resolve their issues.

1 I also would point out that it
2 enables a good degree of freedom of maneuver,
3 that being in the Legal Assistance Office,
4 underneath my chain, which knows that they are
5 not entitled to be intimately involved with my
6 relationship with my client, permits me to
7 have this fantastic mentor that I can contact.
8 I, obviously, have to be somewhat cognizant
9 that they are an agent of the government and
10 there are some things I can't discuss but
11 right now, at least at the 82nd, the Program
12 operates flawlessly because they trust me and
13 because Colonel James McKee, from whom you
14 heard earlier, has been extremely responsive,
15 involved in all of my representations, to the
16 extent that I require his assistance, and that
17 lack of stove piping, that lack of
18 centralizing what I can or cannot do and who
19 I can or cannot talk to, has given me a degree
20 of adaptive flexibility that really serves my
21 clients' interests.

22 CHAIR HOLTZMAN: So one quick

1 question, although I have many more, maybe we
2 can submit them to you.

3 Major Tilney, you referenced
4 changes are needed in rules. I can't quite
5 remember what you were referring to but would
6 you have a suggestion as to what those changes
7 should be?

8 MAJ. TILNEY: Ma'am, not so much
9 as changes in the rules. I am asking for
10 rules.

11 CHAIR HOLTZMAN: Okay.

12 MAJ. TILNEY: I am asking for
13 procedure. And that is what is lacking. We
14 have different circuits that are approaching
15 victims differently. What I do in front of
16 one judge is going to be completely different
17 than what my counterpart or what my
18 subordinate attorney does to a different judge
19 the next day in that same exact courtroom.

20 And that lack of predictability,
21 that lack of standardization is a huge concern
22 for us. Because we are trying to explain and

1 assess a case or assess our client's wishes
2 and how things are going to pan out and I
3 can't give them a straight answer and need to
4 tell them if I could stand up at the right
5 time, as an attorney in the courtroom. And it
6 is not good practice for the attorneys,
7 especially if we have more junior counsel
8 coming into this program.

9 Luckily, I have senior subordinate
10 attorney next to me who has done three years
11 as a defense counsel and I have done enough
12 military justice work. You know we are not
13 afraid to get yelled at by judges, which is
14 nuts. Which is nuts going into a courtroom
15 okay, we are going to get yelled at because we
16 are going to step on some toes.

17 But at the same time, we should
18 have some predictability and standardization
19 for how you practice in front of the judges.

20 CHAIR HOLTZMAN: Well that is what
21 I am asking you. If you have some suggestions
22 about what the shape of those rules or the

1 content of those rules should be, we would
2 appreciate that. At least I would.

3 MAJ. TILNEY: I will definitely
4 get with my counterparts and with my OIC
5 Colonel Joyce and we would be more than happy
6 to try to submit them.

7 CHAIR HOLTZMAN: And if any of
8 your colleagues want to participate in that,
9 we would welcome that as well.

10 I'm sorry, Mr. Stone.

11 MR. STONE: I have a couple of
12 quick questions. One has to do with the
13 geographic issue that was brought up by
14 Commander Wunder. Do you think that having to
15 communicate often with victims by telephone or
16 video tel or whatever you are doing because
17 you can't always be there, except maybe for
18 the actual proceeding, do you think that can
19 hurt the quality of what you need to do or
20 have you been able to work with it and it
21 hasn't really hurt your appearances in most
22 cases?

1 LCDR WUNDER: One practical issue
2 that I have run into sir is that my
3 communications with my client are protected
4 under attorney-client privilege. However,
5 there have been instances where government
6 counsel had sought to obtain my client's
7 telephone for evidence purposes. And that
8 phone sometimes contains communications
9 between me and my client.

10 So, I have had to work with the
11 government counsel in order to wall off those
12 communications. And that came up because I
13 wasn't able to have direct face-to-face
14 communications with my clients.

15 MR. STONE: You are talking about
16 text messages?

17 LCDR WUNDER: Yes, sir. And I try
18 to limit those text messages to scheduling
19 phone conversations. But at the same time, I
20 felt it important to go through the process of
21 walling off that information from anybody
22 looking at the situation.

1 MR. STONE: Is government counsel
2 also requiring you to turn over email
3 messages?

4 LCDR WUNDER: They have sought
5 email messages from my clients, if there is a
6 case where there is a communication between
7 the victim and the subject of the
8 investigation. What normally will happen is
9 that the trial counsel will seek the entire
10 profile of the victim and the subject, in
11 order to capture that information. And
12 sometimes within that capture is
13 communications between me and my client.

14 MR. STONE: And do they routinely
15 understand they can't have those or do they
16 fight for them?

17 LCDR WUNDER: Generally speaking,
18 they recognize that right between my client
19 and I. I have not had any instances where I
20 had not been able to protect that.

21 MR. STONE: Captain Sommer, I
22 noticed you had spoke about the case where you

1 couldn't get a continuance. Was there a
2 reason you couldn't get another counsel in
3 long distance from another facility to help
4 you out on that case or was that even tried?

5 CAPT. SOMMER: Well, suffice it to
6 say, sir, that that specific case is actually
7 the subject of a slightly larger dispute and
8 has not, in effect, been resolved. So, what
9 you proposed may in fact be what is required.

10 I just want to point out, sir,
11 that that is not a solution. That is not the
12 best implementation of the rationale for the
13 SVC program. So, this is an individual with
14 whom I have developed a personal relationship
15 in a legal capacity and I feel sorry for her,
16 that absent the relatively quick resolution,
17 she will feel abandoned by the individual who
18 has said I am your legal representative. This
19 is also an overseas context. We will be able
20 to find someone but --

21 MR. STONE: Okay, let's go to the
22 collateral misconduct subject for a while. As

1 a prosecutor, which I was for quite a while,
2 immunity was the hardest thing to get. But
3 much more often, we would see the counsel for
4 the witness and ask him to make a proffer.
5 And we would negotiate a proffer and that
6 person would, if they liked it, plead guilty
7 to whatever the charge was, understanding that
8 that was a plea, before they ever testified.
9 So, when they got on the stand, they were
10 actually more credible because they have taken
11 responsibility for their actions and someone
12 didn't say, "Oh, they got a free pass. Don't
13 believe them. They will say anything because
14 they want their free pass."

15 I didn't hear much -- I have heard
16 a little bit of discussion but not that much
17 about your ability as a group to negotiate
18 with a proffer and take care of collateral
19 misconduct in that fashion. Do you guys feel
20 that is within the scope of your portfolio as
21 victim's counsel or do you think that that is
22 a problem because then you have to bring in a

1 military defense counsel?

2 MAJ. TILNEY: Sir, on our part, if
3 there is a direct nexus and it is what we kind
4 of consider minor misconduct, if it is the
5 underage drinking or if it is restriction
6 breaking or other minor issues, we take care
7 of that, sir. Because that is usually a
8 simple phone call to the SJA or working with
9 the trial counsel.

10 In our practice, we would like to
11 get that done up front for the victim.
12 Because they had that hanging over their head
13 too. Because even if they don't want to
14 participate through the other witnesses, it is
15 going to come out that that victim was
16 drinking under age. I mean, that is hard to
17 dispute with some of the facts of our cases
18 that we work with.

19 So, we do like to attack that
20 first and put that issue to bed where the
21 victim will go through that process.

22 MR. STONE: Suppose it is drug

1 use, though, it is serious drug use. What do
2 you do?

3 MAJ. TILNEY: I haven't had an
4 issue with serious drug use yet, sir. But
5 obviously, I would be calling up higher for
6 that one. It depends. If it is the marijuana
7 use, I think we could probably tie that in
8 with a representation. But if we are talking
9 about other drugs, more serious consequences,
10 we would want to consult possibly with the
11 defense counsel because now we are also
12 interfering, we are stepping in their lane of
13 responsibility to their clients and their
14 jobs.

15 MR. STONE: So, Commander Wunder,
16 you brought it up. So, that is why I want to
17 know what you think about why aren't these
18 just getting negotiated out ahead of time?

19 LCDR WUNDER: Here is the issue,
20 sir, and this is the difference between the
21 civilian context and the military context is
22 you certainly, absolutely, that is the way you

1 can address the issue through negotiating a
2 guilty plea or an immunity issue. But the
3 administrative consequences that come with
4 admitting to some kind of misconduct normally
5 results in either problems with your career or
6 losing your job.

7 And the victim has to decide, "Is
8 this important enough for me to come forward,
9 knowing that I am going to get fired from my
10 job, have a mark on my record, and have
11 difficulty getting a job in the future?" And
12 to be honest with you, the slap on the wrist
13 that normally comes with the collateral
14 misconduct is secondary to the administrative
15 consequences that are going to come down the
16 line. And so that is the biggest problem that
17 I see is trying to negotiate that. And
18 particularly in the Coast Guard, the Convening
19 Authority that grants the immunity is not the
20 same person that is the Separation Authority
21 in our organization. And so I can't bind the
22 Separation Authority and the Convening

1 Authority to the same immunity deal. And so
2 my clients risk those separate administrative
3 consequences and trauma both.

4 MR. STONE: Commander?

5 CDR SHOOK: Sir, I just want to
6 say the Navy, in my year, I have never had to
7 negotiate for testimonial immunity. The
8 commanders in Navy Region Mid-Atlantic are all
9 encouraged to defer, taking action of course,
10 on any collateral misconduct. And they do.
11 So, it is not even something that we have to
12 address.

13 I have only had one client where
14 post-trial we had to address any collateral
15 misconduct and I referred him to a defense
16 counsel.

17 So, it is something I discuss with
18 my clients but it is not something that is
19 preventing them from participating in the
20 process fully at all. They are not concerned
21 at all about it in my region. So, I guess I
22 am lucky that way.

1 MR. STONE: The last question I
2 have is I don't think I understand, and maybe
3 you have had it articulated to you, either why
4 trial counsel don't simply forward all the
5 pleadings to Victims' Counsel as they get them
6 or why judges, military judges aren't just
7 saying sure, take a seat in front of the bench
8 back there. And if there is an issue you
9 have, raise your hand or stand up and I will
10 recognize you.

11 I am not sure I agree with Captain
12 Sommer's statement before when he said having
13 Special Victims' Counsel is not a loss of
14 power and control by the trial counsel. I
15 absolutely think it is. There is another
16 party in there and even if it just means it is
17 going to take up some time, and they are
18 trying to push this case through by the end of
19 the day. So, I don't agree with you that it
20 is not a loss of power.

21 But has anybody articulated to you
22 why you don't get the courtesy that I would

1 expect any person who is a JAG and who your
2 military organization, your Secretary has
3 appointed you to be in that role and represent
4 someone isn't getting that recognition that I
5 think is ordinarily expected by a military
6 lawyer in a military courtroom. Can somebody
7 enlighten me?

8 MAJ. TILNEY: Sir, I think from
9 our practice, what we have seen, is there a
10 rule saying no? They are looking for a rule
11 that says yes, you could disclose this. It is
12 like fiscal law for us, if you can't commit
13 the money, if it is not in black and white,
14 then we are not giving it out. It is the same
15 thing I think for getting disclosure,
16 discovery documents, investigations.

17 MR. STONE: Why do they think you
18 are there?

19 MAJ. TILNEY: That is a good
20 question, sir. I mean we would like to have
21 the answer, too. But it is the same thing.
22 If I need an investigation report from an

1 Article 32 investigation or an NCIS
2 investigation, they are like, "FOIA it." And
3 I am a member of the government. I am member
4 of the court. I still have my own rules of
5 professional conduct in front of this court
6 and I have to do a FOIA request.

7 And not to mention the time that
8 goes into a FOIA request to actually get it
9 processed and receive the documents, you
10 finally get it, the issue is moot. The Court-
11 martial is over. Where we can make our impact
12 is done.

13 And that is part of the problem
14 with some of our caseload is we spend more
15 time trying to get documents than actually
16 analyzing our case. Because we can't analyze
17 our case completely without having the
18 necessary documents. So, it is a circular
19 fight that we are kind of losing at this
20 moment.

21 And again, based on the personal
22 relationships you had, some trial counsel will

1 give me a lot, others will not. Some judges
2 are very receptive, making me a part of all
3 their docketing decisions, some are clearly
4 absent. I am not on the email chain. So
5 again, it goes down to personal relationships
6 where we need the rules that I will be
7 advocating with our other counterparts. So,
8 we do ask for, and we are being told they are
9 going to come out but we are kind of left
10 waiting and wanting.

11 CDR SHOOK: And I think the
12 reason, the fact that we don't get the
13 information sometimes that we would like to
14 get, stems from the fact that there is not an
15 official recognition, just the right to
16 counsel advocating.

17 So, for instance, if there is a
18 conflict, which I have had, or that one case
19 in North Carolina going the same day that a
20 court-martial is going in Norfolk, I can't be
21 in two places at one time. I submit motions
22 to delay and they say, "No, who are you? No,

1 we are going forward." And I said either way,
2 I won't be with a client whom I am
3 representing.

4 So, I don't know what the answer
5 is but I think they don't -- there is nothing
6 in writing that tells them I have to be there.
7 Unless there is a 513 or 514 or a 412 issue
8 that is coming up right then, they don't even
9 recognize the right of the victim to have me
10 present. And I think that is the bottom line
11 for all of these issues we are having.

12 CAPT. SOMMER: Sir, only because I
13 want to go on the record first as saying that
14 at least my experience has been that trial
15 counsel increasingly are -- I just have to
16 have a problem. They have been willing to
17 give me, largely the documents that I would
18 request.

19 I think Major Tilney's point is
20 certainly well taken, that it is based on
21 personal relationships. And the closer the
22 relationship, the easier the access is. But

1 at least I would just, so that we are not
2 sending cross-messages, so far, it has worked
3 in my experience.

4 And the only other thing I will
5 say as far as the balance of power regarding
6 this new entity in the proceedings, also keep
7 in mind that I think you may even hear today,
8 some defense counsel or trial counsel will
9 tell you that their power has been enhanced by
10 the personal relationship that I facilitate
11 between them and the victim. So, within the
12 context of just needing to speak with the
13 victim in order to ask questions, defense
14 counsel will often come to me and will thank
15 me for making it easier when the witness would
16 otherwise be hesitant, recalcitrant, or wary,
17 trial counsel has repeatedly thanked me for
18 making sure that witnesses who are not
19 otherwise interested in participating
20 understand more fully the benefit to them and
21 will, therefore show up.

22 And within the context of, for

1 example, a Chapter 10 administrative discharge
2 in lieu of court-martial, which is an
3 administrative proceeding, that may be one of
4 those things where the client, before they
5 even understand that a Chapter 10 request has
6 been submitted by an accused, will say my
7 objectives are X, Y, and Z and those X, Y, and
8 Z mirror the elements of the Chapter 10
9 perfectly. And in working with defense
10 counsel, I can, perhaps give some, there may
11 be instances in which the accused interests,
12 who incidentally aligned with what the
13 victim's interests are. So, there is no
14 question that the power dynamics may shift a
15 little bit. But I think where there may be
16 the sense that the power has been lost in
17 other areas, it has absolutely been enhanced
18 on behalf of the government's interest and the
19 accused's interests respectively.

20 CAPT KIRK: So, for the access to
21 information in the Air Force, there is recent
22 changes that allowed us to obtain, SVC to

1 obtain information in an official capacity.
2 What that means is we cannot provide it to our
3 clients but we can use it to shape our
4 behavior in court or our assessment of the
5 case.

6 This is, like I said, a change but
7 it has allowed SVCs to obtain access to more
8 information to get entire OIS reports in some
9 circumstances. I say some circumstances
10 because it is very uneven in the application
11 and we have to articulate an official reason
12 why we need it. A lot of times OSI may come
13 back and say are you just asking for this for
14 the curiosity of the victim? If it is going
15 to go to them, we are not going to provide it
16 to you.

17 So like I said, this is still
18 being worked out. It is a relatively new
19 change but it has improved things, at least in
20 some respects.

21 Previously, our situation was very
22 much like what was being described by the

1 other branches, where it was based on
2 primarily personal relationships. Usually, we
3 can get the statement of the victim or a copy
4 of the charge sheet but more than that became
5 a real challenge.

6 The reason this is an issue is
7 because sometimes evidence that affects our
8 client's rights are contained in other
9 statements. For example, 412 information may
10 be brought in by another witness entirely.
11 They are not willing to release that to us.
12 This is an issue that we have dealt with in
13 the past. Like I said, it is improving within
14 the Air Force with this new official use
15 request mechanism but that is a relatively
16 recent change that is still being implemented,
17 I think, across the board.

18 MR. STONE: So, there is not a
19 document that memorializes what you are
20 talking about yet?

21 CAPT KIRK: I believe there
22 probably are internal opinions as far as the

1 official use request and what entails.

2 MR. STONE: If it is a document
3 that can be forwarded to us, that would be
4 nice.

5 CHAIR HOLTZMAN: I just have one
6 quick question. We were told at a prior panel
7 hearing that judges routinely requested 513
8 hospital records before determining that they
9 were necessary. Is that an accurate statement
10 of the procedures, in your experience? I see
11 everybody nodding their head. But I would
12 like --

13 CAPT KIRK: Yes, ma'am.

14 CHAIR HOLTZMAN: Is there anyone
15 for whom that is not the standard experience?

16 CDR SHOOK: Yes, ma'am. And I can
17 say that when I started to practice, the
18 standard practice in our region was for
19 defense to make a motion for 513, trial
20 counsel would oppose it, generally. "But if
21 you are going to produce them, Your Honor, we
22 request an in-camera review." And that is

1 sort of the standard, where the judge is like,
2 "Okay, I am going to do an in-camera review."

3 When I came onboard, I found my
4 clients, it was chilling their desire to even
5 go to counseling after that. Even having just
6 the judge pierce the privilege itself was
7 enough to defer them.

8 So, I started filing motions on
9 513 and they are starting to be -- I'm
10 starting to win on those. They are holding
11 the defense to the clinic standard, which
12 wasn't happening before. So, now it is. And
13 I am finding unless they know of something
14 that is Constitutionally required to be given
15 to defense, and it is hard for them to know
16 that, unless they know there is something in
17 those records, we have been pretty successful
18 at keeping them protected.

19 CHAIR HOLTZMAN: Anybody have
20 anything else to add or subtract from that?

21 CAPT KIRK: I wholeheartedly agree
22 that I have witnessed the chilling effect

1 based on those requests and the fact that they
2 may be entered. My clients will often either
3 seek services elsewhere to a chaplain or some
4 other mechanism, knowing that the mental
5 health may be ultimately pierced.

6 I do agree that that the current
7 standard, even in the Air Force now, it is a
8 Navy case but it is being applied routinely,
9 I think in the Air Force as well. And that
10 has been helpful in preventing the in-camera
11 review. But the records are still actually
12 requested. I don't know if that is maybe
13 parsing that question a little too much.

14 CHAIR HOLTZMAN: That's fine.

15 CAPT KIRK: But they actually do
16 get the records sealed and bring them to
17 court. And then whether the judge will
18 actually look at them or not, usually we have
19 the motions hearing prior to that.

20 CHAIR HOLTZMAN: Okay, well, I
21 have no further questions and thank you all
22 for your very important testimony. We really

1 appreciate the time spent. Thank you.

2 And we will adjourn for lunch.

3 (Whereupon, the above-entitled
4 matter went off the record at 12:41 p.m. and
5 resumed at 1:20 p.m.)

6 CHAIR HOLTZMAN: The panel is next
7 going to hear from one of its own members, Mr.
8 Victor Stone, about his trip report from
9 August 18th through 22nd, 2014 to the Special
10 Victims' Counsel Course at the Judge Advocate
11 General's Legal Center and School in
12 Charlottesville, Virginia.

13 Mr. Stone, we are very pleased to
14 hear from you.

15 MR. STONE: Thank you. A written
16 trip report was prepared by a staff member who
17 accompanied me and it lists all the different
18 training that occurred and individuals who
19 gave the training. It is a very thorough
20 report and it also reflects what, to me, was
21 very evident that this was a very good course.
22 It was thought out in advance. They had

1 excellent instructors and the students were
2 engaged and, I think, got a lot out of it both
3 from the lectures and the small group
4 exercises.

5 So, I am not going to go over the
6 substantive lecture as we heard. Some of that
7 was summarized in the first panel this morning
8 by Colonel McKee. But I did come away with
9 several impressions which I memorialized in my
10 supplement to the trip report, which most of
11 us actually heard repeated here this morning.
12 When I heard them at the training as something
13 for the new victim counsel to be prepared for,
14 I was kind of shocked at the number of
15 difficult issues they were going to face. But
16 I see from having heard today that every one
17 of the Services, not just the Army training
18 that I went to, faces those issues. So, I
19 listed them and I will very quickly run them
20 down.

21 They were that Military CID
22 investigators do not always inform sexual

1 assault victims from the very outset, or if
2 they do, give them the time to get a Victim's
3 Counsel because they are busy trying to get
4 their report in within 24 hours and they know
5 that is not going to happen once they start
6 telling the victim, "Yes, you can go get
7 counsel." And then counsel is going to want
8 to talk to them.

9 So, there are many times that
10 victims speak without counsel to the chagrin
11 of counsel later. Whether that is because of
12 collateral misconduct and them not being
13 totally forthcoming with the investigator or
14 having them change their story and, therefore,
15 look not credible, there is all kinds of
16 reasons. But the fact is, the CID
17 investigators see their job as getting a
18 statement within 24 hours. And that,
19 basically, cuts out a Victim's Counsel.

20 The second issue was this
21 electronic docketing system that the Army has
22 that doesn't include uploaded documents and

1 the fact that documents in a case, which in
2 any jurisdiction other than the military in
3 the United States, in every jurisdiction would
4 be available for a lawyer, even a lawyer not
5 in the case to go to the court and look at,
6 unless they are sealed, unless it is a
7 particularly sealed document, they are not
8 available to Victims' Counsel. So, they have
9 to beg for the documents they want, which
10 sounds crazy to me. I also want to know what
11 is going on. It may mean that I am not going
12 to get involved. But how can I explain to my
13 client why this thing is going on that we
14 shouldn't be involved in, if I haven't seen
15 the pleadings?

16 A third thing, which is related to
17 that, would be RCM, the Rules of Court-
18 Martial, 802 pretrial conferences. Again, the
19 Victims' Counsel don't get routine notice.
20 They don't get an invitation to attend. They
21 don't get copies of what the pretrial
22 conference is going to be about and many

1 judges don't allow them to participate.
2 Again, unheard of that they wouldn't get the
3 opportunity, at least, to sit in an open
4 courtroom in a normal civil trial on behalf of
5 the victim.

6 That the Victims' Counsel are
7 having to basically plead for a place to sit
8 in the courtroom either when a jury panel, the
9 military jury members are not in the box or
10 are in the box and they don't know how it is
11 they are supposed to relate and each judge is
12 doing this individually is, to me, an insult
13 to the fairness and dignity which the statute
14 said victims get. At least set the rules out
15 ahead of time.

16 Frankly, if I had a judge tell me
17 in a case that I was not permitted to come to
18 the front of the bar to represent my victim
19 and when there is no jury in the case, I would
20 say to the judge fine, "Judge, hold me in
21 contempt and we will see what the Court of
22 Appeals says about that."

1 It is absolutely improper behavior
2 when you have something to say to the court
3 and there is no jury there and you are a
4 member of that bar, in my view, for the court
5 to say "I don't know if you can come in front
6 of the bar." Maybe for a person who is not a
7 member of the bar but the trial counsel are,
8 by definition, military lawyers who the
9 Secretary of Defense assigned to this job.
10 So, I don't understand how they are supposed
11 to do their job if, on these issues, they
12 don't get to understand where they are
13 supposed to stand and what they do to get
14 recognized.

15 I didn't understand that there is
16 a new court-martial proceedings coming -- I'm
17 sorry, new Article 32 proceedings that are not
18 going to allow victims, in the future, to be
19 mandatorily required to be cross-examined an
20 additional time at that proceeding which, of
21 course, does not happen in any civil
22 jurisdiction and that the defense bar as

1 decided, as we just heard hey, there is a
2 giant loophole. Oh, they will just depose
3 them under Rule 702.

4 I would have thought that was just
5 a defense tactic and one that I thought
6 completely misinterpreted what was going on,
7 except that as of October 2nd, the Joint
8 Services Committee in the Federal Register
9 printed what their first proposal for the
10 President to sign as new court-martial rules.
11 And at the very last paragraph of that,
12 talking about the rules that will continue to
13 apply to offenses committed before December
14 26th of this year, they specifically say and
15 if the victim doesn't want to show up, then
16 the defense counsel, in lieu of -- in order to
17 get discovery, can depose them under Rule 702.

18 So, I just don't understand how we
19 can be going in two directions at once.

20 Let's see, I heard that in trial
21 proceedings, the Victims' Counsel were being
22 challenged other than in an MRE 412 or 513

1 hearing, on speaking on behalf of their
2 client. I guess I don't understand. Do these
3 military judges expect that the client is
4 going to get up and argue legal points on
5 their own or do they expect they are just
6 going to be waived? I don't get it.

7 I heard as we heard here this
8 morning that everybody runs around and grabs
9 somebody's medical records, including mental
10 health records and takes them from hospitals
11 without getting a release from the client,
12 which HIPAA absolutely prohibits, in my view.
13 I don't care if they are military hospitals.
14 It doesn't make a difference. They are
15 hospitals. I couldn't believe that was true
16 but I heard it again today here. The records
17 come out, and they are sealed, and they are
18 brought to the judge. I want to know whether
19 you think it is more likely that seeing a
20 package of wrapped materials over there a
21 judge is going to say, no, I am not going to
22 look at them and see whether they have to be

1 turned over, when they are in front of him,
2 sitting on the desk or whether they are still
3 in the hospital and haven't decided if they
4 have to get them.

5 And you heard, and I think it is
6 clearly true, that the it is going to chill an
7 individual to know that their records are
8 sitting right there.

9 Let's see. I heard that military
10 judges are not routinely allowing victims to
11 submit written victim impact statements at the
12 time of sentencing or to have counsel, their
13 counsel read their statement or speak for them
14 when the emotional trauma is too much for them
15 to go give a statement. Instead, they want
16 the witness to take the stand again, and again
17 submit to cross-examination by defense
18 counsel. That to me is something that I think
19 that considering they let the defendant
20 allocute without being cross-examined or
21 sworn, I really don't understand why that is
22 not extended to the victim.

1 I didn't see any procedure about
2 restitution in the course that I took. And I
3 can't understand why it is not there because
4 restitution, I believe, is mentioned -- it is
5 mentioned in Article 6(b).

6 In the post-trial and pre-appeal
7 commutation process, they want the victims to
8 write a statement. They don't want to hear
9 them orally. But what is worse is that there
10 is no central victim registry maintained. So,
11 if the victims move around, they have no place
12 where they can update their address and people
13 have to go finding an old victim assistance
14 person who might know where the person moved,
15 if they are no longer in the service or if
16 they have been transferred.

17 Almost every state has some kind
18 of a process that a victim can register so
19 when a person comes up for some kind of post-
20 conviction release, the body that is going to
21 release them can find them and ask if they
22 have something to say.

1 Let's see. I heard that most of
2 the investigating officers of Article 32 will
3 be administrative law JAG officers. I don't
4 know for sure what their background is but I
5 know that those, as we heard here, are civil
6 JAG officers, who are writing wills and doing
7 taxes and I forgot what the third major
8 project was. But it was not that they have
9 experience in criminal law proceedings with
10 what exact kind of rulings they will need to
11 make in a criminal case. So, I think that
12 that is a problem.

13 I also noticed that at no point --
14 and this came up as the panel tried to figure
15 out what the mandate is, they were supposed to
16 look at reporting what is going on. And just
17 this week, the FBI Uniformed Crime Statistics
18 came out, the 2013. They list every state.
19 They list the federal government. They have
20 a category for federal agencies with the
21 National Institute of Health, Department of
22 Interior, Park Service, different people

1 listed. Some of the offenses they list
2 include rape, two kinds, penetrative and non-
3 penetrative. The military services are the
4 only organization that I am aware of that is
5 prosecuting felonies in the United States that
6 doesn't report its statistics to the FBI. I
7 don't really understand why.

8 And one issue that I thought was
9 particularly interesting was that, and you
10 heard the discussion here about the trainings,
11 try and explain to these counsel the kind of
12 trauma and the emotional and psychological
13 issues that the victims are having. And one
14 that came out very clearly, there was a whole
15 block devoted to it at the training, was that
16 a lot of these victims, in order to survive
17 the experience, they block out a lot of short-
18 term memory. They just don't want to think
19 about it. And we were told that as a result,
20 if you try and interview them within the first
21 24 hours, and this was a quote from one of the
22 instructors, it is the worst thing you can do

1 because they are really not either comfortable
2 on a conscious level or on a subconscious
3 level yet from telling you what happened. And
4 it takes them some time. And sometimes you
5 have to, they were saying they have to put
6 themselves back in the situation of where was
7 the room, and what was happening, what was I
8 wearing. It takes some time for them even to
9 bring back some of those memories.

10 So, that basically said to me that
11 an immediate investigative statement from them
12 is certainly going to be full of holes. And
13 not to recognize that and do something about
14 it is just ignoring the reality of the
15 situation.

16 So, just to sum up, it seems to me
17 that what is going on, based on that training,
18 is business as usual. On a theoretical level,
19 it seems to me that the process is ignoring
20 the changes in the law. On a practical level,
21 it sounds to me like they are trying to ignore
22 the whole new branches that have established.

1 They are trying to ignore the people who are
2 military lawyers charged with doing a job in
3 court. And, basically, I don't understand why
4 they think that the government and the
5 military, in particular, is investing all of
6 this money in people and slots and training,
7 if it is not supposed to make a difference.

8 So, that side of it was new to me
9 but you all heard it here today. That is my
10 report.

11 CHAIRPERSON HOLTZMAN: Thank you
12 very much for the report. Was there any
13 questions? We'll proceed to the next panel.

14 We very much appreciate Mr. Stone,
15 your sharing your experience with us, but of
16 having taken the time to attend the panel.
17 And thank you very, very much for that.

18 Our next panel will be Military
19 Criminal Investigation Organization
20 Perspectives on SVC Programs. Mr. James W.
21 Boerner, Special Agent. And the rest -- Mr.
22 Mark Walker and Mr. Mike Defamio. Please come

1 up. Thank you.

2 Okay. We'll commence with Mr.
3 Boerner, Special Agent, Army Criminal
4 Investigative Command, CID, Fort Bragg, North
5 Carolina. Sir?

6 MR. BOERNER: Thank you very much.
7 Good afternoon Honorable --

8 CHAIRPERSON HOLTZMAN: Thank you
9 for coming.

10 MR. BOERNER: Thank you, I'm
11 sorry. Ma'am, I would like to address a few
12 areas pertaining to my experience with the
13 Special Victims' Counsel Program.

14 Over the course of the past year,
15 U.S. Army Criminal Investigation Command
16 provided training and guidance pertaining to
17 the Special Victim Counsel Program to all CID
18 agents in the field, whereby CID command
19 requires its agents to inform victims of
20 sexual assault of the SVC Program if not
21 already informed by victim advocates or the
22 first responsible party to make contact with

1 the victim.

2 When a victim reports a sexual
3 assault directly to a CID field element, the
4 victim is informed about their right to an SVC
5 prior to the interview being conducted.

6 Victims are provided a brief description of
7 the role of the SVC and an explanation that
8 the SVC may be requested at any time
9 throughout the duration of the military
10 justice process.

11 In many cases the SVC Program has
12 been beneficial to assist our victims with
13 legal questions and the judicial process after
14 the interview by CID agents. After the
15 interview, SVCs play a critical role in
16 representing and keeping the victims informed
17 of the legal process.

18 The SVCs and CID agents routinely
19 meet to discuss the investigation, to keep our
20 victims informed and obtain additional
21 testimony and physical evidence if required.

22 CID policy requires agents to

1 routinely brief the victim on the status of
2 the investigation. Many SVCs request to
3 receive this briefing and then in turn brief
4 the victim on the status of the investigation.

5 However, the Program is not
6 perfect and I have personally experienced
7 instances where the SVC Program could be
8 improved, as well as I've consulted with a
9 number of my colleagues in the field about
10 these particular topics.

11 I think there could be
12 improvements such as more timely response of
13 SVCs to victims for interviews and
14 investigative action such as pretext
15 communications, more training on evidence
16 collection needs of CID agents and the options
17 available in the case of collection of digital
18 evidence from victims, resolution on
19 collateral misconduct issues on the part of
20 victims and more attorneys, especially those
21 with more experience to serve as SVCs. And
22 more guidance or policy on roles and

1 permissible actions on the part of SVCs
2 distinguishing those differences between them
3 and trial defense services.

4 Thank you for the opportunity to
5 testify before this panel. And I look forward
6 to any questions you may have.

7 CHAIRPERSON HOLTZMAN: Thank you.
8 Our next presenter is Mr. Mark Walker, Special
9 Agent IOC to the SAPR Office, Air Force Office
10 of Special Investigations, Joint Base Andrews,
11 Maryland. Thank you Mr. Walker very much for
12 coming today.

13 MR. WALKER: My name is Mark
14 Walker. I'm the Special -- the Sexual Assault
15 Investigation Operations Consultant, Second
16 Field Investigative Squadron at Andrews Air
17 Force Base. In my introductory comments I'll
18 briefly highlight my role in relationship to
19 the Special Victims' Counsel and briefly
20 address issues that may be of interest to this
21 panel.

22 I've been a Special Agent for 18

1 years in a variety of positions, includes
2 street investigator, leadership, and currently
3 in this position. I've also served a couple
4 of tours at our headquarters to include
5 oversight of sexual assault investigations
6 throughout the world.

7 In this position -- this position
8 was created after the Secretary of the Air
9 Force approved the hiring of 24 additional
10 special agents specifically to work sexual
11 assault cases. Of these 23 -- of these
12 remaining 23 positions, one of them is
13 assigned at the Air Force Special
14 Investigative Academy down at Glynco, Georgia.
15 And the other 22 are assigned at 16 Air Force
16 bases around the world where we have the
17 highest number of reported sexual offenses.

18 As the Sexual Assault
19 Investigations Operations Consultant, the bulk
20 of my time is spent reviewing sexual assault
21 investigations and providing operational
22 guidance to both street investigator and their

1 leadership chain to the proper investigative
2 scope of each investigation. I also conduct
3 interviews of victims in the field in complex
4 investigations.

5 This position was created prior to
6 the requirement for a special victims'
7 investigation and prosecution capability,
8 formerly known as a special victims'
9 capability. And it was a natural fit to team
10 a senior trial counsel representative to
11 provide a reach-back capability to address
12 policy and coordination issues and to assist
13 investigative Judge Advocates working sexual
14 assault cases in the field.

15 In addition to collaboration on
16 sexual assault cases, special victims'
17 investigations prosecution capability,
18 provides joint training at the sex crimes
19 investigations training program, Glynco,
20 Georgia, and the advanced sexual assault
21 litigations course at Maxwell Air Force Base,
22 Alabama.

1 Shortly after this capability was
2 created, the Air Force set up the Special
3 Victims' Counsel Program and the decision was
4 made for my position to be the liaison for
5 operational matters. I've presented at every
6 major SVC training course to include the
7 initial, where I attended the entire course.
8 I also provide similar training to the Air
9 Force SARC training program.

10 The common thread in both these
11 presentations is the need to build
12 relationships to facilitate effective
13 communication prior to the need arising. A
14 representative from the SVC program also
15 presents a two-hour block of instruction at
16 the OSI sex crimes investigative training
17 program.

18 One of the more notable changes in
19 the investigative process was the notification
20 to a qualified victim of the availability of
21 SVC. The instructions that guide our
22 investigations were amended to ensure we

1 notify the victim of the availability if we
2 are the first to encounter the victim.

3 Investigators are also to
4 determine whether the victim wants an SVC
5 immediately or in the process -- or throughout
6 the process. Once obtained, the investigator
7 is required to maintain at least monthly
8 contact with the SVC for the duration of the
9 investigation. Typically notification of the
10 SVC of the representation is in writing and
11 immediate.

12 SVCs have been present during my
13 interviews with victims and I have never
14 experienced an SVC interrupt an interview. I
15 use the cognitive interview process which
16 empowers the victim to provide more of a
17 narrative than answer direct who, what, when
18 where and why questions. A best practice is
19 the investigator and the SVC to have a
20 conversation prior to the interview to address
21 roles and limitations to limit negative impact
22 on memory recall.

1 Disagreements that cannot be
2 handled at a unit level are communicated to me
3 through the use of the SVC and the oversight
4 chain of command, and I will work to resolve
5 the issue with the senior trial counsel, SVC
6 or through OSI policy. It is OSI's policy
7 that only written statements can be released
8 to witnesses, this includes providing the
9 victim a copy of their statement made to
10 investigators.

11 As the investigation unfolds,
12 information is provided to the SJA as the
13 single point for dissemination to the defense.
14 And there is a for official use only request
15 process that the SVC may follow to obtain
16 additional information concerning the
17 investigation.

18 This concludes my opening
19 statement. I'm prepared to answer any
20 questions you have.

21 CHAIRPERSON HOLTZMAN: Thank you
22 very much. Our next presenter is Mr. Mike

1 Defamio, Supervisory Special Agent, U.S. Navy
2 Criminal Investigative Service. Thank you Mr.
3 Defamio.

4 MR. DEFAMIO: Good afternoon.

5 Thank you for the opportunity to speak today.

6 In my role as a Supervisory
7 Special Agent for the Family and Sexual
8 Violence Unit at the NCIS headquarters in
9 Quantico, Virginia, I provide oversight and
10 guidance to our field units, specifically our
11 family and sexual violence units, in dealing
12 with sexual assault cases, and in integrating
13 the victim legal counsel into the team,
14 typically we like to take that approach, of
15 the process of investigating our sexual
16 assault allegations.

17 I'd like to highlight several
18 areas today that I've seen from the field on
19 issues as we attempt to build our teamwork
20 with the VLCs in enhancing our investigations.
21 Major policy and training shifts NCIS wide, as
22 we've tried to take a more focused approach on

1 when it comes to interviewing the victims
2 initially and obtaining those initial crucial
3 details.

4 That I've noticed the VLC program
5 has been a great enhancement to as what was
6 alluded to earlier, is allowing the victim to
7 come forward, initially, and present the key
8 details that we need to initiate our
9 investigation as to the who and what of the
10 allegation, but then allowing that victim
11 several days to process what happened, survive
12 the initial trauma, before we take the first
13 statement.

14 We're trying to balance that
15 against some unnecessary delays that we've
16 seen in some cases, where it's taking several
17 weeks to be able to get the initial victim
18 statement. And has caused the potential loss
19 of important physical evidence.

20 Also, as we try to deal with some
21 of the more frequent conflicts with our NCIS
22 policy, NCIS policy dictates that we take a

1 written statement from the victims, the
2 initial interview. As we implement the VLC
3 program agency wide, we've seen more refusals
4 from victims to submit to the written
5 statement or even to a video or audio recorded
6 statement, forcing the agents to have to give
7 a synopsis report for their initial statement
8 from the victim.

9 Also, we've had in some instances
10 where the VLCs have requested to step out of
11 the interview to speak with their client
12 during the initial statement taking or have
13 done complete interviews of their client prior
14 to the MCIO investigator having a chance to
15 take our initial statement.

16 A good side that we've seen from
17 the VLC program is less emphasis on the minor
18 collateral misconduct. Emphasis from
19 commands, as that has not been the focus as
20 we've allowed, to being able to focus on the
21 more major issue of the sexual assault that's
22 under investigation.

1 Also, we've had the gray area that
2 we've encountered recently has been the
3 implementation of child victims, child/
4 dependent victims of sexual assault/sexual
5 abuse that are entitled to the VLC
6 representation. Since they are given -- if a
7 child is too young to speak on their own
8 behalf, the non-offending parent or guardian
9 is appointed a VLC.

10 Recently we ran into some issues
11 where that non-offending parent is the primary
12 witness to the actual allegations and has been
13 treated as the victim, limiting some of our
14 access to them initially for very important
15 witness statements.

16 Overall, I think our program has
17 been very receptive of the VLC. We see them
18 as an integral part of the process. And the
19 field I think has benefitted greatly from the
20 VLC being implemented into the overall
21 process.

22 This concludes my initial

1 statement. I stand by for any questions you
2 may have.

3 CHAIRPERSON HOLTZMAN: Thank you
4 very much. Mr. Taylor please?

5 MR. TAYLOR: Thank you for being
6 here this afternoon and sharing your views.
7 Mr. Boerner, I'd like to start with you by
8 asking, do you advise victims up front of
9 their right to consult with SVCs before you
10 begin your interview with them?

11 MR. BOERNER: Yes sir. We're
12 required to in CID command.

13 MR. TAYLOR: Okay. Is that true
14 for the other services as well?

15 MR. DEFAMIO: Yes it is sir.

16 MR. WALKER: Sir, we're not
17 required to do it up front. We are required
18 to inform them during the interview of that.
19 It really depends on the flow.

20 In cases where I've done the
21 victim interview, I've informed them up front.

22 MR. TAYLOR: What would be a

1 possible rationale for not informing them up
2 front?

3 MR. WALKER: It would really be
4 based on the issues in how it came to us, the
5 flow of information, the structure of the how
6 that occurred. So it would just be on a case
7 by case basis really.

8 MR. TAYLOR: Well, what's been
9 your collective experience in advising victims
10 of their rights in terms of how they react?
11 Do they typically ask questions about this
12 right? Or do they immediately say yes there
13 is, and move on?

14 Or what's been your experience?
15 We'll start with you Mr. Boerner.

16 MR. BOERNER: Sir, we utilize a
17 written form to advise the victims. And we
18 generally ask them to initial some places and
19 sign in that form, or on that form rather.

20 And they do ask questions. They
21 ask - some of the time it's about collateral
22 misconduct. But they do ask a lot of

1 generalized questions about how the SVC will
2 represent them. You know, what will be their
3 relationship with the SVC as opposed to the
4 trial defense relationship with you know, the
5 offender.

6 So they do ask some generalized
7 questions, yes sir. It's not just kind of a
8 nodding of the head. Normally they do probe
9 a little bit and ask if they need it. Do you
10 think I need this type of thing? So yes sir,
11 they do ask a few questions.

12 MR. TAYLOR: So if someone were to
13 ask you that question, do you think I need
14 this type of thing, what would a response be
15 typically?

16 MR. BOERNER: Generally just in
17 the same way that you would you know, advise
18 a suspect of their rights. It's really, it's
19 up to them if they would like it. It's always
20 available to them throughout the course of the
21 entire investigation.

22 We don't recommend that they get

1 an SVC or not get an SVC. We tell them
2 there's no harm in it. It's free of charge,
3 it won't cost you any money. They'll
4 represent you and your interest throughout the
5 course of the entire investigation.

6 So we give them the positives of
7 that, a piece of it up front. But in terms
8 of, if they ask us what is your personnel
9 recommendation, I just tell them you know,
10 really it's an individual choice. And it
11 won't cost you any money and you can ask for
12 it today, and you can bow out of it tomorrow
13 if you want. Or you can say you don't want it
14 today and tomorrow you can let me know you
15 want it and we'll put that in place.

16 MR. TAYLOR: Thank you. Mr.
17 Walker, what's been your experience?

18 MR. WALKER: Yes sir. So we do
19 not have a form that we go by. It is
20 something that we discuss during the
21 interview. And we saw that as it's available
22 and not necessarily a right. It's available

1 services to that victim.

2 I've had mixed reception to this.
3 I've had victims that, in one case, in a very
4 traumatic experience, the victim told me that
5 she didn't want anybody else involved in the
6 process. And no matter how I explained it to
7 her, she refused to do that. And she also
8 refused services of the SARC as well.

9 She wanted this information to
10 stay within this room as much as possible.
11 She did have a victim advocate that was in the
12 room. But she didn't want any other services
13 of any kind. And even weeks after we had
14 talked about it and I had further contact with
15 the victim, did not want those services.

16 So I think mixed, really. There's
17 a lot of times I will tell you that we'll have
18 a third party reporting, and the victim will
19 initially say they don't want to support the
20 investigation whatsoever.

21 And I'll have the agents go back
22 and explain in much more detail, of what the

1 program is about to try to gain some of that
2 support back. And maybe they will contact an
3 SVC and we'll get that letter -- either that
4 letter that says I really don't want to do
5 this. Or they'll get onboard and actually
6 support the investigation.

7 MR. TAYLOR: Mr. Defamio, NCIS?

8 MR. DEFAMIO: Yes, in my
9 experience what I've seen both personally and
10 through consultation with the field, the VLCs
11 are usually present from the beginning. Now
12 NCIS policy we do at the beginning of each
13 victim interview, inform them that a VLC is
14 available for them not only in this interview,
15 but throughout the duration of the
16 investigation.

17 In the majority of cases the VLC
18 is already there. They elect to consult with
19 them. In fact most of our cases come to us
20 via the victim advocate or the VLC.

21 In fact before we had implemented
22 the VLC program, I would say probably over 90

1 percent of the cases I personally worked, the
2 victim already had a victim advocate with them
3 through the initial interview. It was a rare
4 time that a victim would waive their right to
5 have that victim advocate present in the
6 initial interview with them.

7 MR. TAYLOR: So each of you
8 alluded in your opening statements to
9 something about how their presence had
10 impacted your ability to do your job. So I'd
11 like for each of you to address that question.

12 How does having the SVC program
13 impacted your ability to do your job of
14 conducting law enforcement investigations?
15 Mr. Boerner?

16 MR. BOERNER: Sir in CID's
17 perspective, it normally is associated with
18 collateral misconduct. When there's the
19 absence of collateral misconduct or misconduct
20 on the part of the victim, we generally don't
21 see a disruption in terms of information or
22 collection of physical or testimonial

1 evidence.

2 It is the case, when we have some
3 collateral misconduct, generally speaking,
4 like we talked about earlier this morning,
5 either underage drinking, fraternization,
6 adultery, some military specific crimes, but
7 generally misdemeanor crimes.

8 In almost all cases, these are
9 very minor misdemeanor crimes. Especially
10 comparing that to the overreaching,
11 overarching crime of rape and sexual assault.
12 In those cases, victims are many times advised
13 by the SVC to either not answer the question.
14 And sometimes, I have had some similar
15 experiences as NCIS talked, where the SVC will
16 actually take a break, they take the victim
17 out of the interview room or may excuse the
18 CID agents from the interview room. Discuss
19 with the victim kind of the question that was
20 asked.

21 And then we do come back in, we
22 either may get "I'm not going to answer that

1 question" or the question may be answered in
2 a different way then it was about to be
3 answered if you will.

4 So it's the ability for us to
5 obtain pretext, text messages, Facebook
6 messages, examination of cell phones. Because
7 many times there is good evidence to prove the
8 sexual assault on that victim's phone.

9 And many times the victim
10 confronts the perpetrator through a phone call
11 or a pretext -- or a text message or a
12 Facebook message. And they'll ask the subject
13 why did you do this to me. And the subject
14 many times will give incriminating statements
15 back to that victim. And so we want those to
16 help build a good case.

17 But when that relationship might
18 have been a fraternization type relationship
19 or an adulterous relationship, that's also
20 incriminating to the victim on a misdemeanor
21 level. But nonetheless, the SVC may feel
22 compelled to protect them in the best way they

1 can.

2 And so sometimes we can lose that
3 physical evidence or that digital evidence, if
4 you will sir. And then that's also sometimes
5 the case with the underage drinking.

6 That underage drinking sir, if the
7 victim is substantially incapacitated, is
8 directly related and may be an element of
9 proof of the sexual offense. But if we can't
10 get blood alcohol content or if we can't
11 determine the level of the intoxication of the
12 victim because he or she was under the age of
13 21 that can present a problem. Because we can
14 actually miss now the element of proof. If we
15 can't prove that they were intoxicated.

16 There are just so many scenarios.
17 But generally sir, I would say with the SVCs,
18 it's not like there's some type of collateral
19 misconduct, they feel that there is, or there
20 may be some type of collateral misconduct.
21 But in almost every case, it's a misdemeanor
22 type offense.

1 And our overreaching goal is to
2 determine what happened. But we're trying to
3 work the felony crime, the rape or the sexual
4 assault on CID's perspective, sir.

5 MR. TAYLOR: But under the law and
6 policies is, even if you think it's a non-
7 felony offense, under Article 31(b), you would
8 have to stop and advise them of their rights
9 anyway to seek counsel, would you not?

10 MR. BOERNER: That's absolutely
11 correct. Even without the SVC present, we
12 would absolutely have to do that, sir.

13 MR. TAYLOR: That's my point, yes
14 sir. Mr. Walker?

15 MR. WALKER: So, a couple of
16 things. On the negative side, is sometimes
17 our access to the victim can be extended. So
18 we'll have a victim that obtains SVC, they are
19 notified from the SARC or from their chain of
20 command of the availability of an SVC. And it
21 may be a delayed report.

22 And so we'll -- in cases that I

1 know have been extended up to two weeks, three
2 weeks before we could be able to talk to the
3 victim to obtain the initial information.

4 That's okay in a situation where we don't have
5 any perishable evidence or anything that we
6 could potentially lose.

7 But in a situation where we have a
8 relatively fresh attack, you know we certainly
9 want to be able to obtain information to prove
10 or disprove that allegation. We do have
11 policy in OSI that we will obtain the initial
12 allegation, the who, what, when, where, why,
13 real brief.

14 You know, is there a crime scene
15 out there? Is there somebody that -- is there
16 a predator out there that we need to go out
17 there and put hands on?

18 Is there something that we can do
19 to obtain witness information in a situation
20 where it's relatively a new report? But our
21 instructions also provide latitude where we
22 will allow a sleep cycle or two sleep cycles

1 to be able to wait and do that in depth
2 interview as well.

3 So a couple of other things that I
4 think are actually more of a positive side in
5 the involvement would be the -- really the
6 narrowing of the focus of the scope of some of
7 these things. We have some pretty interesting
8 tools out there. The cell bite where we can
9 pull the entire phone down.

10 But I'll tell you that also
11 provides a lot of information that isn't
12 necessarily relevant to the sexual assault
13 itself. And will lead us down the wrong path
14 and provide fodder for an ADC certainly in a
15 courtroom.

16 And things that have nothing to do
17 with it whatsoever may do with, you know, a
18 victim's sexual behavior prior to and not
19 relative to the subject in this case at all.
20 And those types of things are hurtful to an
21 investigation.

22 So I see those narrowing of the

1 scope to actually assist in the investigation.
2 Because now we are focused specifically, in
3 the case of the cell phone, conversations
4 between the subject or a specific individual
5 and that victim.

6 Same thing with the medical
7 records. You know, we're looking at whether
8 the medical records are relevant, then we
9 certainly want what is relevant and not the
10 entire record.

11 MR. TAYLOR: Thank you. Mr.
12 Defamio?

13 MR. DEFAMIO: Thank you. I think
14 the vast majority of our cases from the
15 feedback I've gotten, that our field offices
16 have a positive experience with the VLC. And
17 there is no impeding of the investigations due
18 to VLCs' involvement.

19 I would say the areas that I do
20 mainly see any kind of problem is like with
21 the other services is also the timeliness. In
22 a few cases of being able to get to the

1 physical evidence. And that's mainly due to
2 delays in access to the victim. Where we can
3 collect pertinent data that we need to proceed
4 with the investigation.

5 And issues surrounding the
6 collateral misconduct also. Where we've had
7 things that might not necessarily come up in
8 the investigative phase, but later on in the
9 trial phase, where the victim is, as I said
10 before, pulled out of an interview. Or where
11 the victim has had an extensive interview done
12 with their VLC prior to giving their
13 statements to investigative agency. That may
14 make it look later that they were perhaps
15 coached into what they should be saying to us.

16 So those are the biggest feedback
17 of issues we get. But I would say that's in
18 a small amount of the cases. In most of our
19 cases, the VLCs are actually an enhancement in
20 moving forward in collecting the data.

21 They haven't interfered as far as
22 like with the cell phones. The main thing

1 they want is that their client has their cell
2 phone back. But it hasn't been any kind of
3 impediment for us to actually gather the
4 information off of that device.

5 MR. TAYLOR: Thank you for your
6 time. Madam Chair?

7 CHAIRPERSON HOLTZMAN: Judge
8 Jones?

9 JUDGE JONES: Mr. Defamio, did you
10 say that now with VLC you're not getting
11 written statements as frequently?

12 MR. DEFAMIO: Yes, receiving in --
13 I would have to say across the board, I don't
14 see any area where it's more than any other.
15 But victims' are declining to provide a
16 written statement. Where before, the written
17 statement from the victim was kind of the
18 initiation of our investigation.

19 And our policy does say we should
20 be taking a written statement from the
21 complaining witness to begin the
22 investigation. But it has become more

1 frequent in cases I've been reviewing that the
2 victim has declined that initial statement.

3 JUDGE JONES: And then are you
4 turning to tape recorder or videotape, is that
5 what you said?

6 MR. DEFAMIO: Yes, and then they
7 will make an effort to videotape and a lot of
8 times those are also declined to be
9 videotaped.

10 JUDGE JONES: Is it your practice
11 as well, Mr. Walker, to try to get a written
12 statement out of the victim?

13 MR. WALKER: Yes ma'am. It is OSI
14 policy that we attempt to obtain that
15 statement. It is not anything that is
16 mandatory.

17 But we also attempt to video
18 record. It is something that's catching
19 ground that our detachments are seeking that,
20 because a lot of times as with NCIS, that our
21 victims are not -- based on you know,
22 discussion with counsel that they don't

1 provide a written statement.

2 And really, that -- we're finding
3 out that the taped interview, videotape, is
4 much better information than what we would get
5 in a statement. And so a lot of our
6 detachments will videotape an interview and
7 not seek a statement afterwards.

8 JUDGE JONES: And you have the
9 same experience though that special victims'
10 counsel coming in has reduced the number of
11 victims who are willing to either give a
12 written statement or a taped, or no?

13 MR. WALKER: I would not say that
14 it's reduced. They will ask if we can get it
15 videotaped, because there's some great
16 research out there on how well that benefits
17 an investigation.

18 And if we do get a videotape, the
19 SVCs will ask, and I've seen this, and I don't
20 know if it's across the board, but I've seen
21 it recently within the last week, that the SVC
22 will say we're not going to provide a written

1 statement. You have it on video, that's good
2 enough.

3 And it really, that meets our
4 intent for our policies as well because it is
5 a statement.

6 JUDGE JONES: How about you Mr.
7 Boerner?

8 MR. BOERNER: Yes ma'am. Pretty
9 much the same as the other services. Our
10 agency does require that we attempt to get a
11 sworn statement, a 2823 or a written
12 statement.

13 The video and audio recorded
14 statement, we do try to use that when the
15 victim allows. And many of them do like that.
16 It's really kind of combination. Sometimes
17 they like to do the written, sometimes they
18 like to do the video and audio recorded.

19 And then a lot of other times
20 where the victim just wants to provide a
21 narrative interview where we document that.
22 Kind of like an FBI 302 in our agent's

1 investigation report.

2 We have had a few cases where the
3 SVC has advised the victim not to provide a
4 written or video and audio recorded statement.
5 But has allowed the victim to complete just a
6 narrative interview, just a verbal interview
7 where we document that.

8 In one case at Fort Bragg, the SVC
9 actually wanted to review our write up of that
10 narrative interview prior to it being
11 essentially being published if you will. But
12 we do see, similar to the other services that.

13 JUDGE JONES: Did you permit that?

14 MR. BOERNER: Absolutely, yes
15 ma'am.

16 JUDGE JONES: I'm more used to a
17 situation where a victim is interviewed, the
18 investigator would write up his own, like you
19 suggested, an FBI 302. What is the thinking
20 behind getting a written sworn statement from
21 the -- is it just for sexual assault victims?
22 Is it all victims?

1 MR. BOERNER: All victims, yes
2 ma'am.

3 JUDGE JONES: And how did that
4 policy grow up?

5 MR. BOERNER: I first got into
6 military law enforcement in 1987, so it's
7 really been with me since the beginning of
8 that. In the Army it has always been the
9 preferred method to document it in a written
10 sworn statement.

11 We just recently in the last few
12 years have gone to the video and audio
13 recorded type of interview. So that's kind of
14 -- I think it's because it's always been that
15 way, in terms of the written statement.

16 JUDGE JONES: Well I think it is
17 more akin to what most police forces would do
18 when a witness to a crime, or the victim comes
19 in.

20 MR. BOERNER: Yes ma'am.

21 JUDGE JONES: So did you get any
22 explanation from the special victim counsel as

1 to why he or she did not want the victim to
2 either sign a sworn statement or be
3 videotaped?

4 MR. BOERNER: No ma'am, not
5 normally. But just kind of reading between
6 the lines, again, it's generally because
7 they're afraid that another slice of
8 information is going to come out. And that
9 could come out in the verbal video/audio
10 recorded interview, that they might not be
11 able to kind of control that information if
12 you will.

13 And so I think that is -- it's --
14 to me in my experience in talking to my
15 colleagues in the field, that is generally the
16 overreaching issue is, is there some type of
17 other misconduct. And in this case, this was
18 actually a dependant spouse who was sexually
19 assaulted by another -- or by a soldier.

20 So she may not be necessarily
21 worried about some of these collateral
22 misconducts. And she herself was over 21.

1 And there wasn't issues there. But I think
2 there were some other issues because she was
3 married to someone else.

4 And I think there might have been
5 some concerns that some of that information
6 might come out eventually. Her current
7 husband would have found out. So although not
8 necessarily collateral misconduct,
9 embarrassing things may have come out of that,
10 ma'am. And that might have been part of it.

11 With respect to your question
12 about is it preferred or not. One of the
13 things that we've seen in court martials over
14 the last few years with the video and audio
15 recorded interviews, is some of these
16 interviews may last a bit of time.

17 And so the trial defense or the
18 trial counsels may pull up a certain sliver of
19 that video recorded interview to show their
20 point. When actually there's maybe several
21 other hours of video there that show different
22 points.

1 But in a handwritten 2823 or
2 statement rather, a handwritten statement,
3 it's much easier to discuss what happens,
4 memorialize that on a document. And then the
5 attorney will then get that document added as
6 an exhibit to the record at trial.

7 And then it can kind of be
8 examined I think in an easier way than with
9 the Judge or the jury taking long breaks and
10 pulling up different pieces of the video. And
11 so I think it's cumbersome a little bit for
12 the court system the way we're doing it with
13 the video and audio recorded interviews,
14 ma'am.

15 JUDGE JONES: Yes, I think
16 generally prosecutors want short statements
17 from their witnesses and long statements from
18 the defendants.

19 MR. BOERNER: Yes ma'am.

20 JUDGE JONES: Mr. Stone alluded to
21 the problems in the first 24 hours that can
22 occur with a victim/witness and their

1 recollection. And I think you talked about
2 your awareness of that Mr. Walker.

3 And would you just remind me what
4 it is that you do? Do you try to still get a
5 written sworn statement that night? How
6 flexible are you?

7 MR. WALKER: Well I can go back to
8 a situation where we had recently, where we
9 had a local law enforcement agency do the
10 interview, tape an interview in an emergency
11 room during -- right after a sexual assault
12 examination had occurred. And when we found
13 out about it, it was a couple of days later.
14 It was a joint investigation.

15 We went back and did a cognitive
16 interview on the victim and we videotaped that
17 interview. And at the end of it, my advice to
18 the agents were not to seek a statement.
19 Because now we have an audio, now we have a
20 video, and potentially a third piece of
21 information that could conflict with all of
22 that.

1 And those conflicts are normal.
2 This isn't something that we're trying to
3 catch somebody up on. This is just normal
4 memory recall. We do that. The more times we
5 think about something, the more you know,
6 things that we recall.

7 So we did that. Sleep pattern --
8 she was able to recall much more information.
9 We obtained everything on video. The video
10 was then given back to the SJA who went
11 through a transcription process, had it
12 transcribed.

13 And now you have a written form
14 that will go inside into the courtroom. He
15 pled to 20 years because the information was
16 so good. So, that's how we do it.

17 We initially will do a quick you
18 know, assessment of do we have somebody that
19 -- do we have a crime scene that we need to go
20 search? Is there somebody that we need to go
21 talk to right now? And let's get a sleep
22 cycle or two, and then do the better

1 interview.

2 JUDGE JONES: Mr. Defamio, did you
3 have anything different or additional to these
4 comments?

5 MR. DEFAMIO: I think our
6 procedures are pretty much in line with that.
7 Get the initial. Obviously we're looking for
8 safety, evidence collection that we can
9 initially do in the first 24 hours.

10 Without locking a victim into
11 giving a statement, to you know, signing their
12 name to something when they're still in a very
13 -- the very beginnings of a traumatic -- the
14 aftermath of a very traumatic event where the
15 memory recall is just not going to be close to
16 what it will be in a few days time.

17 And we've found you know, waiting
18 the sleep cycle or two to take that statement
19 has been very beneficial.

20 JUDGE JONES: So this -- what is
21 actually required within the first 24 hours?
22 Is it the taking of the statement? Is it a

1 report? What is it?

2 MR. DEFAMIO: As far as
3 interaction with the victim?

4 JUDGE JONES: I don't know, Mr.
5 Stone you were talking about something being
6 required within 24 hours. And maybe it was
7 the -- is there anything? Do you have to do
8 a report or do you have to take a victim
9 statement? Let me put it that way.

10 MR. DEFAMIO: No. We don't have
11 to have any -- a report done or a victim
12 statement in 24 hours. What we'd like I mean
13 ideally, is enough information from the victim
14 that we can preserve any evidence that would
15 be lost if too much time elapsed.

16 You know, DNA evidence. On a
17 longer scale, maybe surveillance video,
18 witnesses that were in the area. So minimal
19 information without retraumatizing the victim
20 that night in the initial stages that we can
21 be working things as far as the evidence
22 collection goes and preserving that for later.

1 JUDGE JONES: Is there any 24 hour
2 requirement with either of your services Mr.
3 Boerner?

4 MR. BOERNER: Yes ma'am, we do.
5 We have a requirement to attempt to interview
6 the victim within the first 24 hours. Most
7 offices have a policy of two to four hours to
8 attempt the interview. And that's --
9 essentially that's a response time ma'am.

10 And that's our initial contact
11 with the victim to give them the opportunity
12 to make a statement. And by make a statement,
13 what I mean by that is, any statement. It can
14 be verbal, it can be a written statement,
15 ma'am. Or it can be video/audio recorded.
16 It's really up to the victim.

17 And if it's a fresh case as was
18 discussed earlier, we really just try to get
19 who was involved, the location, kind of
20 physical evidence that we may be looking for,
21 who we may need to go try to apprehend or
22 arrest as quickly as possible.

1 And then we do the same and write
2 all that up, down the way days and even
3 sometimes weeks later depending on the
4 injuries and severity with additional follow
5 up interview, only if necessary though. Only
6 if it's not other information we found through
7 other corroborating sources.

8 JUDGE JONES: Thank you.

9 MS. BOERNER: Yes ma'am.

10 JUDGE JONES: Mr. Walker?

11 MR. WALKER: No, ma'am, there is
12 not a 24 hour requirement. Any requirements
13 that we have are internal metrics that have to
14 do with when we open an investigation to what
15 the next thing that has to do. So it really
16 drives it.

17 But as my colleagues said, it's
18 really perishable evidence. How quickly can
19 we do these things to be able to obtain that?
20 Whether it be urine, blood, those types of
21 things. How quickly can we get them into be
22 SANE to do the exam.

1 JUDGE JONES: Thank you Madam
2 Chair.

3 CHAIRPERSON HOLTZMAN: Mr. Stone?

4 MR. STONE: Well I'll just pick up
5 on that one. Don't the victim assistance
6 responders tell the victim that they think
7 they ought to get a sexual assault
8 examination? That's before you've seen them
9 even, right?

10 MR. WALKER: Well sir, potentially
11 it is before we see them. But we still have
12 victims that come to us immediately. We may
13 get notification from the locals downtown.
14 And so it's outside of a victim advocate or a
15 SARC role.

16 And so we're notified right away.
17 The avenues that that information can come to
18 us are endless.

19 MR. STONE: In a sexual assault
20 training that I went to, I heard that the vast
21 majority, I don't remember the number, it
22 might have been 90 percent or higher of the

1 sexual assaults are not stranger sexual
2 assaults. They're sexual assaults by other
3 people on base.

4 And as a result they do not result
5 virtually ever in the officer or the target,
6 the defendant, being detained. They may be
7 limited to base, but they're virtually never
8 detained. Does that comport with your
9 experience?

10 MR. WALKER: I think it depends
11 on, once again, how that information comes to
12 us. A lot of times we'll see where our
13 security forces will obtain the information
14 first and they'll obtain a report of a rape.
15 And so before we're notified they may go
16 apprehend the subject before we're involved.

17 MR. STONE: But I mean, does that
18 comport with your experience, that 95 percent
19 of the time it's somebody on base who is known
20 to the person who's the victim?

21 MR. WALKER: I would say -- sir, I
22 would say the majority of our cases that we

1 run are known to the victim. Whether or not
2 it happened on the installation or not, I
3 couldn't tell you the percentage. But
4 certainly.

5 MR. STONE: But so unlike other
6 cases, you're not looking at somebody who's
7 going to take off. If you arrest them today
8 or you arrest them in three weeks, that's not
9 going to make any difference, isn't that the
10 case?

11 MR. WALKER: It depends on whether
12 or not we need to obtain a sexual assault
13 examination from them. It depends on how in
14 the course of the events we've been notified
15 of that.

16 So again, we're looking at
17 perishable evidence. Is there a cell phone
18 that we need to get to? Do we need to seize
19 that subject's cell phone before they destroy
20 it? Is there other evidence that they're
21 going to get rid of?

22 So it really, you know a case by

1 case basis of how we need to approach that.

2 MR. STONE: You said in your
3 statement before that you thought that
4 building relationships was crucial in the way
5 these cases are ultimately handled. If I
6 correctly heard you.

7 But at least I think from the
8 victims' point of view, the victims want to
9 know that the way this case is handled
10 judicially and investigated, the rule of law
11 is not going to be dependent on who their
12 victim counsel or the investigator happens to
13 know. It's going to be handled impartially
14 regardless of whether socially somebody's
15 brand new or has a long standing relationship
16 with you or the IO or the defense counsel.
17 Don't you agree?

18 MR. WALKER: Yes, I would agree
19 with that. But I would also say that that
20 relationship between the lawyers and the
21 investigators and the victim advocates is
22 crucial to you know, the sharing of

1 information and the coordination of the
2 process.

3 MR. STONE: Well, and maybe this
4 goes down that road. We heard from the, I
5 think it was the NCIS investigator, that
6 sometimes there's an official use only process
7 that information gets to victims' counsel.
8 Could you tell me what that means? I don't
9 think I understand.

10 Is that your investigation report?
11 Or what would get to the special victims'
12 counsel? And for official use only means he
13 can use it any way he wants or only he can
14 look at it? For his eyes only?

15 MR. DEFAMIO: I'm sorry, I'm not -
16 - that wasn't from NCIS.

17 MR. STONE: Oh, I'm sorry, that
18 wasn't?

19 MR. WALKER: Sir, that was us. So
20 there is -- OSI's policy, DOD's policy that we
21 can provide statements to witnesses of any
22 crime. That goes along whether it's a victim

1 of a crime or a subject of a crime.

2 So we can provide that statement
3 because that person owns that statement. We
4 can provide that. Outside of that, we cannot
5 provide any information outside of an official
6 use only or a FOIA request.

7 Our investigations are open until
8 prosecution, declination, until the resolution
9 of the case. And once that resolution of the
10 case is done, it is -- our case is now closed.
11 And that case is now available for Freedom of
12 Information Act requests.

13 Prior to that, we provide all of
14 our information to the Staff Judge Advocate's
15 office for dissemination to the defense. And
16 since the Special Victims' Counsel Program,
17 there is an avenue for official use only
18 request, which is basically -- and I don't
19 know how that process works, I just know that
20 it exists.

21 That a for official use only
22 request is made to the SJA from the SVC and

1 they obtain additional information. And I
2 can't tell you what that is, because I don't
3 know.

4 MR. STONE: So you don't know if
5 that goes beyond their client's statement?

6 MR. WALKER: I don't know exactly
7 what they are given outside of that. I would
8 assume that it does, because we can obtain --
9 we can provide that statement from the victim
10 to SVC to the victim themselves.

11 MR. STONE: And you don't know if
12 official use only means they can share it with
13 their client or not?

14 MR. WALKER: I don't know the
15 process.

16 MR. STONE: You don't know the
17 answer to that? Okay. I don't frankly
18 understand how you can share something with a
19 lawyer and expect him not to share it with his
20 client, especially if for example, he thinks
21 that raises a defense or a collateral problem
22 or any number of things with his client that

1 his client needs to know. So I'm a little
2 confused about that. Hopefully some other
3 witness will tell us about that.

4 I guess the question I had is
5 twice I heard Mr. Defamio tell us about
6 victim's counsel pulling a victim out of an
7 interview or speaking to them at length about
8 their going over the statement with them
9 before they came in. From a context in the
10 way you mentioned it, I gather you don't like
11 that process, either one of those options?

12 MR. DEFAMIO: Well, the concern
13 that we have with that process is not so much
14 in our information gathering, as it causes
15 very -- in most instances, it does not cause
16 a significant delay in us being able to gather
17 the information. It's more down as we get to
18 the actually prosecuting trial phase of the
19 investigation, the perception that it's not
20 the actual victim's statement, but it's events
21 as coming from their attorney that they're
22 giving to us.

1 So when we're doing an interview
2 and you know, all of a sudden it's stopped and
3 they step out and there's a discussion that
4 the agent doesn't have any idea of what's
5 going on. And then they come back in and
6 continue the statement, the perception that
7 the victim is now saying something different
8 then they would have before they stepped out
9 of the room.

10 MR. STONE: So your investigators
11 don't want them speaking to their counsel
12 before they give a statement to you then?

13 MR. DEFAMIO: It's not --
14 consulting with their counsel is fine. It's
15 doing -- actually going through everything and
16 deciding what exactly would be said.

17 Obviously our goal is to get an unbiased
18 presentation of the facts to move forward with
19 the investigation.

20 So we want to be able to look at
21 all facets. Because most of this information
22 is going to come out through additional

1 witness interviews. And everything is going
2 to be admitted. It boils down to the actual
3 credibility of the victim, of the complaining
4 witness, who's making that initial statement.

5 So if things are omitted from
6 their initial statement that's later coming
7 out from other witness interviews, it comes
8 down to the credibility of that victim, which
9 is in most of our cases a very important
10 component.

11 MR. STONE: So what exactly do you
12 mean you don't object to them consulting with
13 their client. You only object if they talk
14 about the crime?

15 MR. DEFAMIO: No, we only -- well,
16 I don't want to say object. But our only
17 concern is that if the information is being
18 processed or being discussed before being
19 given to us, for us to do the investigation,
20 that perhaps not all the information, or it's
21 being slanted in a particular way, the
22 perception of course.

1 And that we're not getting all of
2 the relevant facts of the allegation of the
3 investigation is going into our investigation
4 or that victim's statement.

5 MR. STONE: Whenever you talk to a
6 person who's represented by a counsel,
7 including a defendant, don't you assume
8 they've already talked about their
9 circumstances to their lawyer?

10 MR. DEFAMIO: Well, correct. And
11 talked to their circumstances with their
12 lawyer. But in our investigations where we
13 are talking to a defendant through their
14 counsel on their statement. And again, when
15 I was talking about the perception, the
16 perception of that course that that defendant
17 is only going to give information to make
18 themselves look better and not guilty in their
19 statement.

20 And that's the perception we don't
21 want of the victim coming forward. We want
22 the perception that this is everything that

1 happened. This is the truth of the matter.
2 This is all the facts that are being presented
3 for your investigation in this statement.

4 MR. STONE: So what I'm hearing is
5 you'd like the victims to speak to you before
6 they speak to their counsel.

7 MR. DEFAMIO: No, I would like the
8 victims to actually speak with the victim
9 advocate so they know exactly all the services
10 that are available to them. So that they
11 understand the process from someone who is on
12 their side and will represent them. So they
13 know what's -- what to expect going forward.
14 And that they're prepared for when they come
15 in and talk to us they know, you know what
16 this process is about. What our role is as
17 investigators and what they can expect going
18 forward from here.

19 I think it's a very valuable
20 service and they should have access to it from
21 the beginning.

22 MR. STONE: But they have --

1 CHAIRPERSON HOLTZMAN: Excuse me
2 Mr. Stone, you have gone over the subject now.
3 So you are there or -- okay. I just have a
4 quick question.

5 One of you talked about how the
6 victim service counsel delay -- it appears the
7 victim service counsel somehow delays the
8 matter for two weeks or whatever. Do you have
9 a way of resolving any delay issues?

10 Is this because the counsel has
11 other matters? Or is geographically called
12 away from duty? What's the problem here and
13 why is it an issue?

14 MR. WALKER: So in the case that I
15 talked about, we had a situation where it is
16 -- it was an older report. There was some
17 collateral misconduct. And we had a meeting
18 scheduled with the victim in one week.

19 The senior -- or the special
20 victim counsel had been obtained. And we had
21 the meeting that was set. This special victim
22 counsel was called away. Had a different

1 matter they had to attend to. And so it was
2 delayed.

3 The next one, delayed as well
4 because the individual went on leave. And so
5 that was a matter of just multiple things
6 stacking up, pushing that interview down the
7 road at least two week. It was little bit --
8 actually a little bit longer than that.

9 But that is not unheard of, that
10 we push those things. There are only so many
11 SVCs. And you know, scheduling issues, people
12 going on leave, it pushes it down the road.
13 So it makes it difficult.

14 CHAIRPERSON HOLTZMAN: Can you
15 quantify the number. I mean you gave me one
16 case. And presumably there are quite a few
17 cases that you're investigating. I mean can
18 you give me some indication of how prag --
19 what the problem with this is? I mean does
20 this happen 10 percent of the time? 50
21 percent of the time? 1 percent of the time?
22 99 percent of the time? What are we talking

1 about?

2 MS. WALKER: Ma'am, I couldn't
3 give you a percentage like that. So a lot of
4 the times --

5 CHAIRPERSON HOLTZMAN: Is it a
6 significant problem or is it a minor problem?

7 MR. WALKER: I would say it's a
8 minor problem. You know, and my perception of
9 that may be a little bit different from the
10 individual that is having to run that case at
11 that time because then obviously it's most
12 important to them.

13 But I see it overall you know,
14 across the world of our interaction with SVCs
15 and I would say that is much more minor than
16 what they would feel.

17 CHAIRPERSON HOLTZMAN: But do you
18 feel you have enough communication ability
19 with the SVCs to try to resolve scheduling
20 issues like this? Or is that also an issue?

21 MR. WALKER: No ma'am. I think
22 it's a -- I think we do. And as I spoke

1 about, we have a chain of command where this
2 information will flow up to the SVC program.
3 They'll call me or I will get notified from
4 the OSI agents that we have an issue and I'll
5 go across and we'll talk about it.

6 And a lot of times it is well, it
7 is a scheduling problem. And we'll work the
8 best we can. But it's not anyone wanting to
9 delay this for any other reason.

10 CHAIRPERSON HOLTZMAN: I get that.
11 One other point, if it was made earlier that
12 one of the challenges with the SVC -- yes, the
13 SVCs don't seem to have digital -- sufficient
14 digital experience. Is that a point that you
15 made sir, Mr. Boerner?

16 MR. BOERNER: Just slightly ma'am.
17 And that goes back kind of to what we talked
18 about, about preserving and obtaining evidence
19 of the crime. So it's just generally an issue
20 where a young SVC with no criminal law
21 background, an administrative attorney if you
22 will, that kind of gets forced into this

1 position, may not understand some of the
2 things we can do either with, or by pretext
3 phone calls, Facebook and things like that
4 ma'am.

5 So it's really more of just an
6 evidence collection process, digital media is
7 one piece of that ma'am.

8 CHAIRPERSON HOLTZMAN: So their
9 unfamiliarity with your expertise in this
10 area, what does that do, slow the process
11 down? You have to kind of hold their hand and
12 tell them why you're doing this and so forth?
13 Or what's the problem that's caused by that?

14 MR. BOERNER: So it does slow the
15 process down. But in some cases, it stops
16 that piece of collection when we're told it's
17 not going to happen until I return from my
18 other duties, et cetera.

19 So it does slow the process down.
20 And sometimes those things ma'am, are
21 fungible. And they go away. And once they're
22 -- sometimes once they're gone, they can be

1 gone forever.

2 CHAIRPERSON HOLTZMAN: Oh, so is
3 this a training issue do you think?

4 MR. BOERNER: I think it's a
5 training issue. I think it's a staffing, of
6 how we select the SVC. What type of
7 credentials that they would have before being
8 selected. Maybe some experience in criminal
9 law.

10 Being the perfect world ma'am, I
11 would love them to be a prosecutor first and
12 understand what they're advocating for.
13 Understand that the evidentiary process and
14 the legal process that way. And then I think
15 training as well, even after being a
16 prosecutor, training in the SVC.

17 CHAIRPERSON HOLTZMAN: And how
18 would you characterize that process you've
19 encountered? Is that a significant obstacle
20 that you're dealing with or is that a minor
21 obstacle?

22 MR. BOERNER: In terms of the

1 sheer numbers, so we work roughly 2300 sexual
2 assaults last year in CID command. My guess
3 ma'am, is it would probably be 20 or 30 or so.
4 So you're looking at maybe a couple of
5 percentages.

6 But I would say, although it's not
7 a ton of cases, each one of those cases are so
8 important to the victim and to us on the side
9 of trying to figure out what happened. So
10 it's kind of cliché, but one's too many. But
11 it can be devastating to the process.

12 CHAIRPERSON HOLTZMAN: And do you
13 have a way of resolving these issue promptly?

14 MR. BOERNER: I think staffing/
15 manning is a huge piece of it ma'am. For
16 example, most of our large bases like Bragg,
17 Lewis and Hood, we have generally about four
18 SVCs for the entire installation.

19 We run about 120 open cases at any
20 given time at Fort Bragg. Fort Hood's running
21 about 110, 120 cases. At any given time those
22 are open sexual assault investigations. Fort

1 Lewis roughly has about 100 or so open at any
2 given time.

3 And with only four SVCs ma'am,
4 that puts a strain on them. Especially if
5 they have extra duties. And when we get to
6 this -- oh, I'm sorry.

7 CHAIRPERSON HOLTZMAN: Oh no. I
8 was just going to ask you though, but if you
9 encounter this problem where you have
10 perishable evidence and you're not getting a
11 response from the SVC, do you have a way to
12 resolve that?

13 MR. BOERNER: Yes ma'am. We do.
14 We certainly do. We get a hold of the chief
15 of justice, the senior trial counsel. We try
16 to get a hold of the SVC's supervisor to fix
17 it. Yes, ma'am.

18 CHAIRPERSON HOLTZMAN: Okay.
19 Thanks very much. I have no further
20 questions. Thank you very much for your
21 testimony. I appreciate your presence here.
22 Our next panel is going to be the

1 Defense Counsel, who will provide perspectives
2 -- their perspectives on the SVC Programs.

3 Sorry, I'm running a little bit behind time.

4 Thank you very much ladies and
5 gentlemen for coming. We're going to hear
6 from Major William Babor, I'm hope I
7 pronounced the name correctly.

8 MAJOR BABOR: Perfect ma'am,
9 thanks.

10 CHAIRPERSON HOLTZMAN: U.S. Air
11 Force Senior Defense Counsel, Joint Base
12 Andrews, Maryland. Secondly from Lieutenant
13 Commander Nate Gross, U.S. Navy, Senior
14 Defense Counsel, Naval Air Station
15 Jacksonville, Naval Station Mayport, Florida.

16 Major Kyle Kilian, U.S. Marine
17 Corps, Senior Defense Counsel, Marine Corp
18 Base Lejeune, North Carolina. And Captain
19 Sarah Robbins, U.S. Army Trial Defense
20 Counsel, Fort Lee, Virginia.

21 Thank you so much for coming today
22 to share your expertise and your perspective

1 on this problem. We'll start with you Mr.
2 Babor -- Sergeant Major Babor.

3 MAJOR BABOR: Thank you ma'am,
4 thank you member. I am Major Will Babor. I'm
5 the Senior Defense Counsel for the northeast
6 region for the Air Force. In my capacity, I
7 supervise trial defense counsel and represent
8 airmen accused of serious crimes including
9 sexual assault.

10 Before starting my statement, I
11 would like to say that all the opinions that
12 I express here today are my own and not that
13 of the Air Force's Judge Advocate General. Or
14 the Air Force Trial Defense Division.

15 With respect to the focus of this
16 session here today, in my capacity as a trial
17 defense counsel, I've interacted with Air
18 Force special victims' counsel on over ten
19 occasions in all aspects of trial, pretrial
20 investigations, at trial and in the post trial
21 process. My interactions with the special
22 victims' counsel has been overwhelmingly

1 positive.

2 They have been professional. And
3 while we are at odds, typically when it comes
4 to the outcome of the case, they maintain high
5 levels of professionalism and have always
6 looked in the best interest of their clients.

7 With that being said, the SVC and
8 that program as it is currently constructed,
9 do pose some issues for the trial defense
10 counsel. Inherently the SVC is at an adverse
11 position to the military accused and the
12 defense counsel. And those positions of the
13 SVC and their client are more closely aligned
14 with that of the prosecutor.

15 As such, some SVCs could appear to
16 become defacto members of the prosecution.
17 And the various issues that we see is when it
18 comes to their attendance and defense counsel
19 interviews.

20 What happened in the pre-SVC
21 program would be the victim would come to a
22 defense interview with either a victim

1 advocate or a member of the sex assault
2 response coordinator's team. And those
3 members would attend the defense interviews.
4 Now that role is being filled by typically the
5 SVC and it shifts the balance of fairness when
6 it comes to defense interviews of victims.

7 The second and more troubling
8 issue which I've experienced has been SVCs
9 engaging in active participation and coaching
10 of the victim during defense interviews.
11 Trial defense counsel can appreciate the SVC's
12 role in representing their client and
13 protecting sensitive information such as those
14 governed by Military Rules of Evidence 412 and
15 513.

16 However, the SVC has sometimes
17 placed superficial limitation on the length of
18 defense interviews. And sometimes has totally
19 disallowed defense interviews of victims while
20 allowing the prosecutors sometimes multiple
21 interviews of the victim.

22 Additionally and even more

1 troubling, is that SVCs have during the
2 interview limited relevant discussions
3 regarding the victim's bias, prejudice and
4 motive to misrepresent through active
5 coaching. Or stopping interviews in which the
6 defense counsel has asked questions about
7 these topics.

8 Again, in closing, I and my peers
9 do actively support the Air Force SVC program.
10 There are issues and I do look forward to your
11 questions. Thank you.

12 CHAIRPERSON HOLTZMAN: Thank you
13 very much sir. Lieutenant Commander Nate
14 Gross?

15 LT. COMMANDER GROSS: Yes ma'am.
16 Thank you Madam Chair and members of the Joint
17 Judicial Proceedings Panel for the opportunity
18 to testify before you today.

19 I currently, as the Senior Defense
20 Counsel at the Defense Service Southeast
21 Detachment, Mayport Branch Office,
22 Jacksonville, supervise four judge advocates

1 and carry an active case load that averages
2 about eight general court martials at any
3 given time. Of these cases, approximately 60
4 percent will involve allegations of sexual
5 assault in general.

6 Prior to reporting to my current
7 billet, I was the Deputy Director of the
8 Navy's Defense Counsel Assistance Program
9 where I provided training, guidance and advise
10 to trial defense counsel around the globe and
11 fielded numerous calls relating to the role of
12 victims legal counsel in the court martial
13 process.

14 I'd like to begin by noting that
15 Captain Jesse Sommer's testimony previously to
16 you regarding the tools available to the
17 Government and the complaining witness stands
18 in stark contrast to that available to me and
19 my colleagues.

20 While the Government has an array
21 of investigators, advocates, special
22 prosecutors, command representatives, victim

1 advocates and so forth, and you've heard here,
2 unprecedented efforts to integrate the
3 complaining witness into the process, my
4 clients lack access to investigative support,
5 administrative support, and must request any
6 additional support, including experts, from
7 the very officer who has referred charges
8 against him, often through the prosecutor who
9 is seeking to take away his liberty.

10 Also as you have previously heard
11 a VLC is made available to a complaining
12 witness often even prior to an official report
13 being made. By regulation, these attorneys
14 are authorized to enter into an
15 attorney/client relationship at the outset.

16 In contrast, defense counsel
17 generally are not assigned until preferral of
18 charges unless the accused is placed in
19 pretrial confinement. As such the VLC will be
20 able to advocate for actions including some
21 which will impact to an accused such as
22 involuntary transfer to a different position

1 or even duty station long before the accused
2 service member is granted access to an
3 attorney.

4 I would like to state that I do
5 not believe that the concept of the VLC is
6 antithetical either to the fair administration
7 of justice or to the constitutional rights of
8 my clients. Certainly the issue of third
9 party standing is something that is not
10 foreign to our military -- not only our
11 military criminal courts, but also to our
12 civilian courts as well.

13 That being said, we have noted
14 several areas where we believe that the
15 presence of the VLCs has the potential to
16 impact our client's liberty and their
17 constitutional rights. One of the areas is
18 just an issue of fundamental fairness.

19 The VLCs in the Navy are far less
20 burdened fiscally than are members of the
21 defense service office. While the VLC program
22 has its own line of accounting for VLC travel,

1 particularly to meet with clients, members of
2 the DSO remain bound to request such funding
3 through the convening authority.

4 In the Navy we also represent
5 Coast Guard members who are often stationed
6 far away from our offices. In those
7 situations, there may be a point where a
8 counsel will meet their client face to face
9 the day before the Article 32, or the day
10 before arraignment in a special court martial.
11 All of the defense counsel's travel requests
12 must go through the convening authority.

13 Additionally, we have noted as
14 areas where the VLC process has impacted the
15 prosecutorial discretion of the convening
16 authorities. I have been witness to cases
17 that have had minimal prosecutorial merit.
18 However the Government in today's day and age,
19 often defers to the wishes of the complaining
20 witness in whether to expend the time and
21 resources into the prosecution of a case.

22 Additionally, this victims legal

1 counsel have been able to impact the convening
2 authority's decision on what charges to
3 pursue. And whether to enter into a pretrial
4 agreement as we saw in United States versus
5 Sinclair.

6 Although I know that the services
7 do review cases for prosecutorial merit prior
8 to preferral of charges, it appears that once
9 preferred, the default position appears to be
10 referral unless and until the complaining
11 witness says otherwise. This issue is further
12 exacerbated by the fact that Congress in
13 enacting Article 6(b) of the UCMJ, while
14 essentially copying the Crime Victim's Rights
15 Act, left out the language from Section (d)(6)
16 of that Statute which states that nothing in
17 this chapter shall be construed to impair the
18 prosecutorial discretion of the Attorney
19 General or any officer under his discretion --
20 or his direction.

21 No such language appears within
22 Article 6(b). While I trust that there was no

1 intention to remove the concept of
2 prosecutorial discretion from the United
3 States Government in conducting courts
4 martial, the absence of such language gives
5 rise to further potential abuses.

6 Additionally as indicated by
7 Lieutenant -- or by Major Babor, we have seen
8 situations where victim's legal counsel have
9 gone out and sought to perfect the
10 Government's case against our clients. And
11 the reason that this is an issue, is that
12 while a trial counsel or even a member of a
13 military criminal investigation organization
14 has an obligation to turn over any exculpatory
15 material to the defense, the victim's legal
16 counsel has no such obligation.

17 And indeed has an argument that
18 such material may be protected by the work
19 product privilege. This creates an issue with
20 respect to fundamental fairness and whether
21 material is being filtered through the
22 victim's legal counsel organization.

1 Finally, with respect to access to
2 information in the court-martial proceeding,
3 I in my personal capacity believe in an
4 electronic filing system akin to PACER, is
5 something that should exist. I believe that
6 it would be beneficial for all members of the
7 court martial proceeding as well as for the
8 public.

9 But with respect to non-public
10 material such as records of investigation,
11 Brady disclosures, et cetera, I believe that
12 the VLCs' unfettered access to this
13 information creates the very real possibility
14 of unintentional witness coaching of the
15 complaining witness.

16 As mentioned, I do not believe
17 that the victim's legal counsel or service --
18 or Special Victims' Counsel Programs are
19 antithetical to our system. And I believe
20 that they have many things that can offer our
21 system.

22 However, as I go about my duties

1 of defending my clients and their
2 constitutional rights, it is my hope that the
3 benefits of due process and prosecutorial
4 discretion remain alive and well within the
5 halls of military justice. Thank you. I look
6 forward to your questions.

7 CHAIRPERSON HOLTZMAN: Thank you
8 very much sir. We'll next hear from Major
9 Kyle Kilian, U.S. Marine Corps.

10 MAJOR KILIAN: Good afternoon
11 ma'am and panel members. Thank you for the
12 opportunity to be here today. I'll try to
13 avoid the things just brought up by my fellow
14 panel members and just focus on a couple of
15 points that I've gathered by listening today
16 and in the reading materials that I've you
17 know, have been provided beforehand.

18 You know, you asked about how was
19 notice being given? How are the VLC finding
20 out about things, et cetera? At least in my
21 -- where I'm at, you know the -- excuse me,
22 the United States Marine Corp just published

1 a practice advisory where it tells trial
2 counsel exactly what to give to VLCs.

3 That came out this month in
4 November. And that is just standard things,
5 the statements by the victim, charge sheet,
6 notice of when the hearings are going, and
7 copies of the court martial order.

8 So that's what happens where I'm
9 at is a court-martial order is produced by a
10 military judge and ordered those dates.
11 Here's your motion's hearing date. Here is
12 your trial date. Various discovery time
13 lines, witness requests, all that type of
14 stuff. That is provided per the military
15 justice practice to the VLCs.

16 So there is notice being given to
17 VLCs. And obviously I'm using the term VLC
18 because it's what I'm most used to being in
19 the Marine Corp. But beyond that, even prior
20 to the court-martial or you know, actual court
21 proceedings, at the Article 32 investigation,
22 I can't think of a case where the VLC wasn't

1 at the Article 32.

2 That is routine where I'm at. If
3 there's a sexual assault case or as stated by
4 Colonel Joyce earlier, even non-sexual assault
5 cases, because VLCs do represent all victims
6 of various crimes in the United States Marine
7 Corp, VLCs are there.

8 They're there to hear what's going
9 on, see what's going on, learn what's going on
10 and I will say, I don't think there is a
11 uniformity out there, but IOs take -- many IOs
12 consider everything that the VLC wants to put
13 forward. And they'll listen to them. Let
14 them present argument on you know, 412 matters
15 or whatever the case may be, mental health
16 records, at the Article 32 hearing.

17 In regards to pretrial agreements,
18 the military justice practice advisory also
19 discussed notice of PTA negotiations. So per
20 the UCM -- or per the Mil Jus practice
21 advisory guidance, they must be given notice
22 of PTA negotiations.

1 And I'm here to tell you, I
2 haven't seen a case go down whether to a lower
3 forum, be withdrawn, without a letter from the
4 VLC saying yes, we agree to that. I am not
5 aware of any convening authority who is going
6 to withdraw a case or do something at a lower
7 forum without -- and especially in a sexual
8 assault scenario, without the VLC being
9 involved in that decision.

10 Or at least the right to be heard
11 going towards that decision. So I would argue
12 in at least the pretrial beginnings of the
13 case and the pretrial negotiations states, the
14 strongest voice in the room is the VLC's.

15 Amnesty, that was brought up
16 today. You know amnesty in collateral
17 misconduct issues, et cetera. I am not a
18 proponent of the amnesty. I don't believe
19 that works.

20 I believe in the exact opposite.
21 That creates more victims. Because -- and
22 here's a case in example, and we do have a

1 very good, I would say generally, a very good
2 relationship with the VLC in my area of
3 operations. Of course there are disagreements
4 and arguments about various issues. But
5 generally very good.

6 The VLC has brought the clients to
7 us who are their clients, victims of sexual
8 assault or some other crime. And then they're
9 also being maybe prosecuted, let's say they're
10 not prosecuted, but taken to an administrative
11 separation board or some other issue in which
12 they're going to need a defense counsel. And
13 they call me up and they walk them right over
14 to our offices.

15 And we set up an appointed time to
16 meet with the defense counsel. But you know,
17 case in point, it just happened recently. You
18 know, there as an adultery, a long term
19 adultery between one senior Marine and a lower
20 ranking Marine that resulted in now a sexual
21 abuse charge.

22 So that person is the victim for

1 the sexual abuse charge. But being the senior
2 Marine, is also going to be subject to some
3 collateral misconduct. To say that we get rid
4 of that, and I know there's differences
5 between underage drinking and adultery and
6 various different levels there.

7 But say we just ignore that and
8 get rid of that. Well, that just gives that
9 victim all the more reason to come forward and
10 claim sexual assault. When you know, the
11 adulterous relationships now been found out.

12 And the last thing I wanted to
13 touch on before I just open up for questions
14 is the guardian's issue. I don't think much
15 has come out about this. The legal guardian's
16 now being provided.

17 The way it's worked in my
18 jurisdiction is the judges -- the eastern
19 judicial circuit held a meeting with myself,
20 the regional defense, or the regional trial
21 counsel, regional defense counsel. And we all
22 discuss how to handle this issue. I have a

1 lot of -- not a lot of, but a few child victim
2 cases coming through the pipe right now where
3 there's going to be guardian issues going on
4 as to who's going to be appointed to the
5 guardian.

6 And the way we've been handling it
7 is essentially the trial counsel puts a motion
8 in with the court martial order at arraignment
9 saying this is who we want to be appointed as
10 the guardian for this case. Whether it be
11 child victim or incapacity, whatever the case
12 may be.

13 The defense counsel then has the
14 opportunity to object and a hearing is held.
15 Now I'm not aware of what other jurisdictions
16 are doing, but that's the way we're handling
17 it now. I think there could be more guidance
18 out there about the guardian issue.

19 And specifically the biggest
20 concern for the defense is the likely person
21 who is going to be say for instance a child
22 abuse case, it's going to be the opposite --

1 you know, if it's the father that's accused,
2 the mother is probably going to be the
3 guardian.

4 Well, if the defense's theory of
5 the case is that the mother was actually
6 involved in the same abuse. And the mother is
7 now coaching the child, you know, all those
8 protections that are given to the child are
9 now going to the mother.

10 So we have the same problem you
11 know, can we interview that mother? Can we --
12 most likely not. I mean that's the general
13 practice that goes around right now is no you
14 cannot. Most of the VLCs will probably deny
15 me. Not in every case. There are some where
16 the VLC brings the you know, victim down and
17 answers all the questions.

18 So it's a case by case analysis.
19 Case by case basis. What's in the best
20 interest of your client. But I do think
21 that's an area that really to me has been
22 unexplored. I'm not, I don't think, I'm not

1 aware of too many guardians.

2 I don't think there is a guardian
3 that has been appointed in a case before at
4 Camp Lejeune that I'm aware of. Maybe there
5 has and I'm just forgetting it. But I think
6 that's an interesting area that is going to
7 come up with a lot of tension at least in the
8 coming months.

9 So thank you.

10 CHAIRPERSON HOLTZMAN: Thank you
11 very much. I just want to point out, I know
12 a couple of witnesses have raised this point
13 about cases involving sexual abuse of
14 children. While that's a really important
15 issue, it's not I believe within the
16 jurisdiction of this panel. Am I correct?

17 MR. SPRANCE: Yes ma'am.

18 CHAIRPERSON HOLTZMAN: So you can
19 tell us the concerns, but I don't know that
20 there's much we can do about that.

21 MAJOR KILIAN: I understand ma'am.

22 CHAIRPERSON HOLTZMAN: Thank you.

1 Captain Sarah Robbins.

2 CAPTAIN ROBBINS: Yes ma'am.

3 Madam Chair and distinguished members of the
4 panel. I am Captain Sarah Robbins. I am a
5 defense counsel with the United States Army,
6 Trial Defense Service, otherwise known as TDS.

7 I represented over 130 clients.

8 The following statements and examples are from
9 my experience or my colleagues' experiences
10 and not the official TDS opinions. The
11 majority of my court-martial clients, meaning
12 all but one of my cases, have been clients
13 facing some version of a 120 offense.

14 Since the summer of 2013, I have
15 worked with four different SVCs. Most
16 frequently I interact with the SVCs during
17 court martial preparation. Frankly, knowledge
18 of SVC representation does not even occur --
19 is not even given to TDS counsel until after
20 preferral of charges.

21 The most common interaction I have
22 with SVCs is usually to coordinate an

1 interview of their client during motions
2 preparation or trial preparation in general.
3 Specifically during motions practice, I will
4 generally contact the SVC usually
5 telephonically, because I'm typically not
6 collocated where they actually are located, to
7 interview their client on the specific matters
8 pertaining to the preparation of the motions.

9 If there's any discussions on
10 potential alternate dispositions, there is
11 always extensive interaction between defense
12 counsel and SVCs as the victim now has to
13 support any proposed alternate disposition or
14 offer to plead guilty. This is an additional
15 approval requirement that was not present
16 prior to the implementation of the SVC
17 program.

18 Typically, the SVC will convey to
19 the defense in as clearest terms as possible,
20 what their client wants from the process. Be
21 it conviction at a contested trial or
22 something much less.

1 In trial practice, it varies by
2 military judge, what type of recognition and
3 say at a trial that an SVC has. It is still
4 clearly a two party system, but military
5 judges allow certain allowances for a third
6 voice at times in either MRE 412 hearings or
7 513 motions practice. Typically, I have seen
8 SVCs be present at all Article 32 hearings and
9 at applicable motions hearings as well.

10 Recently I worked with two SVCs
11 extensively during a recent court martial
12 practice. These SVCs did not have any prior
13 military justice experience. This lack of
14 experience caused unnecessary delays.

15 SVCs lacking the military justice
16 experience do not understand the fundamentals
17 of trial practice and client representation.
18 In my experience, the Government had not done
19 a thorough job in notifying the SVC of major
20 trial deadlines or events such as motion
21 hearings and accompanying deadlines.

22 This inevitably slows the case's

1 progress towards trial. All of the SVCs I
2 have worked with generally, genuinely want to
3 do a good job for their clients.

4 Alternatively, the lack of their
5 military justice experience and understanding
6 of trial practice, has allowed me as a defense
7 counsel to educate some of these SVCs on case
8 law, rules of practice before courts-martial
9 and other military justice standards. I have
10 found that this helpful educational
11 relationship between the defense counsel and
12 the SVC has garnered much more trust and
13 effective working relationships between the
14 SVCs and the defense counsel.

15 Additionally, I have encountered
16 SVCs that will not divulge what discussions
17 their clients have had with Government
18 counsel. I've had to gently remind them that
19 there is no applicable privilege or other
20 confidentiality requirement that would prevent
21 such disclosure. I attribute this to the lack
22 of understanding once again of trial practice

1 and military justice experience.

2 The two SVCs that I work with who
3 have had military justice experience seem to
4 have a much better understanding of the roles
5 each side plays during the representation of
6 our respective clients. These interactions
7 with the more experienced SVCs have been much
8 more productive.

9 The lack of understanding of
10 confidential client representation is also
11 problematic with newly minted JAGs who are
12 serving as SVCs. These inexperienced SVCs do
13 not understand the boundaries of professional
14 and personal conflicts of interest that affect
15 their representation of their clients.

16 Inexperienced SVCs often do not
17 understand that while we the defense try to
18 maintain a collegial working relationship with
19 fellow practitioners, there are distinct
20 relationships that cannot be had between
21 defense counsel and other counsel representing
22 other parties to the litigation.

1 Appearance of professionalism and
2 loyalty to your client is paramount to any
3 client representation. It is unfortunately
4 common for young SVCs to reveal client
5 confidences to other counsel during casual
6 conversations.

7 TDS is a stovepipe organization
8 that aggressively trains defense counsel on
9 the professionalism -- professional
10 requirements of client representation. Client
11 representation is extremely complex.

12 Currently there is no incentive
13 for seasoned Army litigators to be special
14 victims' counsel. The clients of the SVC
15 program are some of the most vulnerable and
16 needy clients that exist. Thus, appropriate
17 counsel with the requisite education and
18 experience should be provided to these
19 clients.

20 Pending your questions, ma'am,
21 that's all I have.

22 CHAIRPERSON HOLTZMAN: Thank you

1 again very much everyone. Judge Jones?

2 JUDGE JONES: When does a victim/
3 witness or any witness have to speak to the
4 defense? Is there any compulsion at all?
5 None, right?

6 MAJOR BABOR: Article 46 of the
7 Uniform Code of Military Justice authorizes
8 equal access to witnesses generally. In
9 practice they don't though.

10 JUDGE JONES: Well equal access
11 means maybe you have to show up, but if your
12 SVC basically says we're not going to submit
13 to this interview, is there any redress?

14 MAJOR BABOR: Arguably, if they
15 provided a pretrial interview to the
16 prosecutors, you can go to the judge for
17 relief. That relief most of the time is not
18 going to be a private interview. It could be
19 an interview pursuant to a 39(a) session.

20 JUDGE JONES: I'm sorry, what's
21 that?

22 MAJOR BABOR: A session not in

1 front of the members. So a trial session not
2 in front of the members. Or a deposition,
3 depending on how that judge might act.

4 JUDGE JONES: Leaving aside the 32
5 hearing where I guess now they can be called
6 or in the future maybe they can be deposed,
7 victim/witnesses. I mean in the civil world,
8 there's no right for a defense counsel to
9 interview any witness.

10 But I gather there's more of a
11 culture in the military? Or I mean is there
12 really any right? Is anyone else?

13 MAJOR BABOR: There is no right
14 ma'am. But that's because you know, there are
15 certain rights that a civil member has decided
16 he's going to have in civilian courts. This
17 is one of those balancing factors, access to
18 the witnesses.

19 And with the implementation of the
20 SVC program, you know necessarily there will
21 have to be other rebalancing factors for the
22 military accused.

1 JUDGE JONES: So I guess what I'm
2 hearing is, there's been a sea change with the
3 SVC coming in, even though you may not have
4 the classic rights to interview. You're
5 getting less from these interviews or maybe
6 nothing, in comparison before SVCs? I mean is
7 that somewhere in the ballpark of what you're
8 saying, Commander Gross?

9 LT. COMMANDER GROSS: Yes ma'am.
10 With respect to the VLC -- the implementation
11 of the VLC, obviously because they are
12 represented persons, we cannot even attempt to
13 contact them without going through their VLC.

14 And in my experience the VLC has
15 in general gone to their client and said hey
16 do you want to talk to the defense counsel.
17 And I'm sure that it doesn't quite go like
18 that.

19 I'm sure it's hey, the defense
20 counsel wants to interview you, I think that's
21 a really bad idea. You probably shouldn't do
22 it. Do you agree? And then the complaining

1 witness says yes. I agree, I don't want to
2 speak with you.

3 So, it certainly is the situation
4 where the VLCs have in practice limited our
5 ability to conduct a pretrial interview of the
6 complaining witness, yes ma'am.

7 JUDGE JONES: And without really
8 having an opinion on this, I don't know
9 whether this is good, bad or indifferent, the
10 defense -- if a counsel for a victim/witness
11 in a civilian world said sorry, we're not even
12 walking through your door, there would be no
13 recourse. So this is just a little different,
14 your expectation. That's all I'm saying.

15 LT. COMMANDER GROSS: Our
16 expectations are different ma'am. And part of
17 that is the culture in which we've grown up.
18 Part of it also though has to do with the fact
19 that Article 46 was enacted because of the
20 potential for abuse by the Government within
21 the military system.

22 As I mentioned briefly in my

1 remarks, we don't have access to subpoenas.
2 If we want information, we have to tell the
3 trial counsel what we want and why we want it.
4 Which means that our cards are on the table
5 whenever we're going in to do litigation.
6 Which is different than our civilian
7 counterparts.

8 So that is one of the reasons that
9 Article 46 I believe looking at the
10 legislative history, was enacted.

11 JUDGE JONES: And 46 is what?

12 Sort of a --

13 LT. COMMANDER GROSS: Equal
14 access, yes ma'am.

15 JUDGE JONES: And has it been
16 defined equal access?

17 LT. COMMANDER GROSS: The CAFF has
18 looked at the issue with respect to what equal
19 access means. And has had some decisions on
20 that. Certainly though, any witness that
21 chooses not to be interviewed by any person,
22 that they have that right.

1 JUDGE JONES: Thank you. Did
2 anyone else have any different take on that?

3 I mean I think Captain Robbins,
4 you could not have been louder or clearer
5 about the need for military justice experience
6 with -- in the SVC ranks. Do the rest of you
7 feel that way? Major Kilian?

8 MAJOR KILIAN: Well I definitely
9 think it's certainly helpful. You know,
10 anytime -- and I'm just speaking for defense
11 counsel.

12 You know, most of the defense
13 counsel who work for me are first tour
14 Captains. They have zero experience as a
15 litigator. And now they're representing the
16 rights of an accused who may be going to jail
17 for life for you know, sexual assault or you
18 know who's been accused of many other things.

19 So while I feel for the SV -- or
20 feel for the VLCs, I also, looking at my own
21 people, what about me? You know, I don't have
22 the experience to represent many of the

1 clients that we are, I mean we are dealing
2 with murderers, rape, all that type of stuff,
3 and you know, public defenders, most of them
4 are doing you know, some are. But most you
5 know, in the civilian world, you have a few
6 years of experience before you ever get a
7 murder case. Not in our world.

8 JUDGE JONES: Well I think I heard
9 from possibly Commander Gross and Major Babor
10 that there can be a great value for the
11 defense if there's an experience SVC who has
12 some military justice you know, background.
13 Would you care to comment on that?

14 LT. COMMANDER GROSS: Ma'am, with
15 respect to the VLCs that are in the Navy's
16 program, as Captain Fischer-Anderson
17 indicated, we're not looking at first tours.
18 We're also not looking at first tours trying
19 to --

20 JUDGE JONES: I'm sorry, you're
21 not looking at what?

22 LT. COMMANDER GROSS: First tour

1 marines.

2 JUDGE JONES: All right.

3 LT. COMMANDER GROSS: So our first
4 tour program has been changed. And I won't --
5 don't want to belabor the point in front of
6 this panel. But our VLCs are generally going
7 to have at least two years and generally more
8 like four years of experience within the
9 military.

10 The same goes for our defense
11 counsel. That most of our defense counsel are
12 going to have at least two years of
13 experience.

14 JUDGE JONES: So that's a
15 different situation than the other service.

16 LT. COMMANDER GROSS: It is a
17 different situation. Yes ma'am.

18 JUDGE JONES: How is it in the Air
19 Force?

20 MAJOR BABOR: Generally speaking,
21 we'll have more experience than our Army
22 counterparts. But I would have to agree with

1 Major Kilian.

2 You know, there's a false truth
3 that all of us here sitting at this table,
4 while we're called senior defense counsel, are
5 woefully under experienced compared to those
6 people that have significant defense
7 experience on the outside. So in a broad
8 spectrum sure, the SVCs are slightly you know,
9 under seasoned.

10 But as a whole, the military
11 justice system is full of practitioners who
12 are you know unexperienced.

13 JUDGE JONES: Thank you Madam
14 Chair.

15 CHAIRPERSON HOLTZMAN: Mr. Stone?

16 MR. STONE: Yes. I thought I
17 heard Major Kilian say that the strongest
18 voice in the pretrial negotiations is often
19 the VLC. And that the VLCs are in all the
20 Article 32 proceedings. Is that right?

21 MAJOR KILIAN: Yes sir.

22 MR. STONE: The reason I'm asking

1 is because within the past two weeks, I was
2 notified of a case out of Camp Lejeune where
3 the Marine defense counsel asked the IO, made
4 a motion to have the VLC excluded from the
5 Article 32. There was a big argument about it
6 between the VLC and the defense counsel.

7 MAJOR KILIAN: Right.

8 MR. STONE: The IO ruled in favor
9 of allowing the VLC to stay in. At the
10 conclusion of the Article 32, the judge said
11 I want all the objections to be made in
12 writing. You have so many days to do it. The
13 -- whatever the objections were the trial
14 counsel submitted. And then he said send them
15 all by email.

16 Trial counsel submitted them all
17 by email. And the defense counsel -- I mean
18 the VLC submitted them all by email, copying
19 everybody. And the defense counsel submitted
20 them by email, but deleted distribution to the
21 VLC who only finds out about it because the
22 tri -- when he asks the trial counsel and he

1 says how come there were no objections. Oh
2 there were. You were deleted from the
3 distribution list by the defense counsel.

4 And the understanding we got back
5 was oh, that's the policy at Camp Lejeune.
6 And do you want to comment on that? Because
7 I really didn't understand that.

8 MAJOR KILIAN: Yes, that is the
9 policy sir. There are just like in the 412
10 motion, the 513 motion, the 514 motion, there
11 is no requirement to serve the VLC with a
12 pleading.

13 Now, an Article 32 comment is you
14 know, they're comments on the investigation of
15 what happened, right? So this was the
16 position or this was not we should consider
17 this evidence, this is not strong, this is
18 not.

19 So that's what those are. Those
20 are 32 comments going to the investigating
21 officer. Defense counsel in that particular
22 case, which I know you didn't -- then called

1 the trial counsel about, did not serve them on
2 you because there is no requirement in which
3 to service them on you.

4 So you know, it comes back to
5 what's in our client's best interest. And
6 that's what we do. We represent clients as
7 you do. And we represent what's in their best
8 interest.

9 So maybe it is in our best
10 interest to give them to the VLC too. Or
11 maybe there is -- it's in our best interest to
12 have an open dialog with the VLC. Maybe it's
13 not.

14 So on a case by case basis, you
15 have to make a determination of what to do is
16 most important for your client. And I believe
17 that's what happened sir.

18 MR. STONE: So if I understand
19 what you're saying, when there's an argument
20 about whether the VLC should be present, and
21 the presiding officer rules against the
22 defense counsel. And then he says he wants

1 all the objections and comments to be put in
2 writing.

3 And it's put in writing at the
4 conclusion of the proceeding by the trial
5 counsel and the VLC, the defense counsel
6 doesn't think he needs to serve the other
7 counsel who's presence he objected to and that
8 objection was one of the issues litigated that
9 he lost in front of that judge. He did not
10 serve another lawyer?

11 MAJOR KILIAN: Oh he can sir. He
12 didn't. As I just stated, he gives it to the
13 trial counsel, he serves it on the IO.
14 Because those are the parties. The trial
15 counsel is the party to the case. The IO is
16 obviously the investigating officer for the
17 case who wanted the comments.

18 He submitted them to the IO and
19 the trial counsel. Now is the trial counsel
20 free to give those to the VLC? Absolutely.
21 Go for it. That's what the rules state. And
22 --

1 MR. STONE: No, what rule states
2 that you don't have to serve a counsel that
3 you've just argued against in a hearing and
4 lost. And asked to submit their arguments in
5 writing. I want to know what rule that is?

6 MAJOR KILIAN: Sir, I'm not aware
7 of what rule that says you have to. Look at
8 Article 6(b). You know, it's right to
9 reasonable and accurate notice. There is not
10 right to service of every pleading that goes
11 forth in a case.

12 This is the argument that we're
13 talking about in this whole thing. This
14 information. What information is required to
15 be given to the VLC.

16 MR. STONE: This is a pleading,
17 not an information. This is a pleading.

18 MAJOR KILIAN: Right. And again,
19 there's nothing in here in Article 6(b) that
20 says a pleading must be served on a VLC. So
21 we're following the rules.

22 Now if trial counsel wants to give

1 it to you, which is the standard way we do
2 this, and the same thing with 412, serve it on
3 the trial counsel. Notice is given to the
4 VLC. Trial counsel makes available the
5 documents to the VLC. And you go forward to
6 the motion or whatever the case may be.

7 MR. STONE: Do you suggest then
8 that the VLC when they file their comments
9 shouldn't serve it on the defense counsel?

10 MAJOR KILIAN: Well, that's the --
11 well, I believe there's also very different
12 rights involved there. One is going to jail,
13 potentially. One who has constitutional
14 rights. The other who is falling under
15 Article 6. Well, I don't believe anything was
16 done improperly when the comments were given
17 to the IO.

18 MR. STONE: I see. Again, and you
19 don't think that it's Article 6(b) specific
20 state a promulgation that says victims are to
21 be treated with dignity and fairness. If you
22 can argue against them and then not serve them

1 with the argument when the judge asks you do
2 to do that.

3 MAJOR KILIAN: Well we also assume
4 that everything in that Article 32 conference
5 was against the VLC or against that particular
6 motion when it wasn't. So there is obviously
7 a lot of other materials, about evidence, et
8 cetera, that was in that comments that had
9 nothing to do with the VLC.

10 MR. STONE: I have nothing
11 further.

12 CHAIRPERSON HOLTZMAN: Mr. Taylor?

13 MR. TAYLOR: Thank you. First of
14 all thank you. Thank you very much for your
15 testimony this afternoon. It's been very
16 interesting.

17 A couple of you in particular made
18 the point that you thought that the balance
19 had shifted in a way that was not good. Maybe
20 not good for justice. Certainly not good for
21 your clients.

22 So I guess my question is, how

1 would you change things in order to shift the
2 balance in a way that you think would be
3 better for the justice system? And
4 specifically, would you propose to limit the
5 current rules of SVCs and VLCs? Major Babor?

6 MAJOR BABOR: Yes. Thank you Mr.
7 Taylor. I don't think that necessarily
8 limiting SVCs is going to be the way to go.
9 But if you're going to have kind of the shift
10 of balance one way, then perhaps some counter-
11 shifts to be more like you know, the SVCs are
12 a lot like those victim advocate guarantees or
13 at least in some part guaranteed by the CVRA.

14 Let's do something like add
15 unanimous juries be required. A unanimous
16 finding of guilt in order to convict a person
17 of a crime. Let's have jurors who are in fact
18 peers of the accused. Let's have jurors who
19 are selected by somebody besides the
20 commanding officer who you know, inherently
21 has authority over the accused.

22 I appreciate and my peers in the

1 defense community appreciate the need for the
2 SVC program. We enjoy working with other
3 advocates. But this shift in balance has got
4 to be met by some counter-shifts. Something
5 that will ensure fairness under the 5th and
6 6th Amendments.

7 MR. TAYLOR: Commander?

8 LT. COMMANDER GROSS: Yes sir,
9 thank you. I believe that one of the biggest
10 issues is going to be just with respect to
11 what information goes to whom and how. When
12 you have a VLC who is out taking a sworn
13 statement from a witness and providing that to
14 the Government to be used against -- to be
15 used and against an accused.

16 In a case that I mentioned during
17 my comments, the question then becomes well,
18 is this going to be standard practice? Is
19 this going to be something that we believe is
20 the way that we should go forward with it?

21 And if it is, then how do we
22 ensure that that VLC you know, deals with

1 those competition notions that a prosecutor
2 has, first of all with respect to their case.
3 But also, the prosecutor represents the
4 entirety of society, including the accused.

5 Which is why they have the Brady
6 requirements. So when you introduce a third
7 party into that situation, when you introduce
8 another person who has the same interest of
9 seeking justice and retribution for a public
10 wrong, that's where the issue comes about.

11 So I -- one of my concerns sir, is
12 with respect to how are we going to make sure
13 that that information that would be
14 disclosable under Brady versus Maryland, still
15 gets to the defense counsel? And then the
16 other issue is going to be with respect to the
17 prosecutorial discretion.

18 And I believe that the issue of
19 prosecutorial discretion needs to remain with
20 the prosecutors. And it needs to be explicit.
21 So I do believe that Article 6(b) should be
22 amended to specifically written notice that

1 there is prosecutorial discretion within the
2 military justice system. Thank you sir.

3 MR. TAYLOR: Well, but do you
4 assert that that is no longer the case? Or
5 just that the current climate is such that
6 it's amounted to a shift?

7 LT. COMMANDER GROSS: I believe
8 that the current climate has amounted to
9 somewhat of a shift sir. I'm not prepared to
10 go out and say that the entire system is
11 broken. I don't believe that it is.

12 But I believe that if we are going
13 to maintain the faith in the system, that we
14 need to have, to have a functioning justice
15 system that everyone, from victim to accused,
16 to member of the public, believes in and has
17 faith in. Then we need to make sure that
18 we're saying that yes, this still is something
19 that is driven not completely by the rights --
20 or by the wishes of the complaining witness or
21 victim, but that it's driven by the interests
22 of the United States. Because this is a

1 criminal proceeding, not a civil proceeding,
2 sir.

3 MR. TAYLOR: So Captain Robbins,
4 as Judge Jones said, you believe your job and
5 articulated what you think some of the
6 problems are with the current training of
7 SVCs. But are there other things that you
8 would recommend in terms of balancing the
9 shift?

10 CAPTAIN ROBBINS: Yes sir. I
11 support what my fellow colleagues from the
12 defense bar have stated. I think we all
13 struggle within trial practice currently, the
14 lack of clarity as to the standing that these
15 third entities may have and items like that.

16 Because it really affects our
17 ability to advise our clients, especially in
18 any alternate dispositions or even in a
19 potential offer to pled guilty. If I do not
20 -- if the SVC and his client do not want to
21 discuss it with us, I have no ability to
22 clearly articulate to my client, the

1 likelihood of proffering an offer to pled
2 guilty.

3 Even if the Government
4 theoretically between our plea negotiations
5 supports it, there is this third party that
6 has to support it. And if that doesn't
7 happen, there's no chance that the convening
8 authority will approve it. And that can shift
9 on a daily basis.

10 And it's just -- it puts us in a
11 very difficult position to advise our clients
12 that are making life and liberty decisions
13 without having all of those facts available to
14 us.

15 MR. TAYLOR: Major Kilian, would
16 you like to add anything?

17 MAJOR KILIAN: I'll echo exactly
18 what was said already. I mean when you talk
19 about prosecutorial discretion. I mean really
20 there is none for trial counsel.

21 Trial counsel don't decide whether
22 or not there's a case going to court-martial.

1 The convening authority decides whether or not
2 this is going to court-martial.

3 So even though the trial counsel
4 says you know, this is -- why are we doing
5 that? This is a waste of time. That doesn't
6 -- I mean that's considered. But that is not
7 the end all, be all. The convening authority
8 at the end of the day is going to make that
9 call with his SJA.

10 And you know, one of the things
11 that has happened to my counsel, you know,
12 they talk about the CNN effect. Well, what's
13 this going to look like on CNN tomorrow if I
14 withdraw this case and the victim's going to
15 go forward.

16 Well, that's not really
17 discretion. So that is I think one of my
18 biggest concerns.

19 MR. TAYLOR: Thank you. Madam
20 Chair.

21 CHAIRPERSON HOLTZMAN: Well, thank
22 you for raising some of the -- thank you first

1 of all for your testimony. And thank you for
2 raising some of the points that the response
3 panel addressed and its recommendations not
4 too long ago when it reviewed the whole
5 question of sexual assault in the military.

6 And one of the concerns that we
7 had was the thumb on the scale issue. One for
8 example as you pointed out Major, you have to
9 rely on the trial counsel, the prosecution,
10 basically to get the information that you
11 need.

12 And we thought that that system
13 should be changed. That it wasn't really a
14 fair system. And I think some of the other
15 suggestions you made are important, not just
16 from a substantive point of view, but from an
17 optics point of view.

18 But I think particularly when
19 you're talking about how the balance in some
20 ways has shifted, what can be done to ensure
21 fairness. Because the perception of justice
22 to the victim is very important in terms of

1 assuring people in the armed services that
2 they all count.

3 But similarly assuring fairness to
4 the defendant also is a way of assuring that
5 everyone in the armed services counts. And
6 that our system of justice is going to work
7 regardless of CNN or NBC or Fox News. It
8 can't function on that level.

9 So we very much appreciate the
10 suggestions you've made and the issues you
11 pointed out. Because they are very serious.
12 And even though they not be the most popular
13 issues, that's not your job. Your job is to
14 do what's right by your client. And in that
15 end, advance the cause of justice.

16 So I just want to say thank you
17 for the job you're doing. If you have any
18 other suggestions to make to us, we would be
19 happy to receive them. Thanks very much.

20 Let's take a -- yes, we'll take a
21 little ten minute now. Thank you.

22 (Whereupon, the above-entitled

1 matter went off the record at 3:21
2 p.m. and resumed at 3:32 p.m.)

3 CHAIRPERSON HOLTZMAN: We're going
4 to hear our last panel, which is Trial Counsel
5 Perspectives on the SVC Programs. And
6 actually we're on time for this panel.

7 So thank you for your patience. I
8 know you've had to spend a lot of time getting
9 to this point.

10 We're going to be hearing from
11 Lieutenant Colonel Scott Hutmacher, U.S. Army
12 -- did I pronounce your name correctly, sir?

13 LT. COLONEL HUTMACHER: Close
14 enough ma'am.

15 CHAIRPERSON HOLTZMAN: Well I
16 tried. Especially when you're as crowded here
17 on today's list. Well okay.

18 Joint Base Lewis-McChord,
19 Washington. Second from Lieutenant Commander,
20 Philip J. Hamon, U.S. Navy Senior Trial
21 Counsel, region Legal Service Office, Naval
22 District, Washington. Third from Major

1 Douglas C. Hatch, U.S. Marine Corp, Senior
2 Complex Trial Counsel, Legal Support Section
3 West, Camp Pendleton, California.

4 Fourth is Major Brent Jones, U.S.
5 Air Force, Senior Trial Counsel, Air Force
6 Legal Operations Agency, Joint Base Andrews,
7 Maryland. And finally, from Lieutenant
8 Jeffrey C. Barnum, U.S. Coast Guard, Trial
9 Counsel, based in Portsmouth, Virginia.

10 So we'll start first with
11 Lieutenant Colonel Scott. I'm not going to
12 make the mistake a second time. You didn't
13 tell me how to pronounce your name.

14 LT. COLONEL HUTMACHER: Yes ma'am.
15 It's Hutmacher.

16 CHAIRPERSON HOLTZMAN: Oh, okay.
17 Hutmacher. Thank you so much, sir, for
18 coming.

19 LT. COLONEL HUTMACHER: Madam
20 Chair, distinguished panel members. As you've
21 just heard, I'm Lieutenant Colonel Scott
22 Hutmacher. I'm the Special Victim Prosecutor

1 at Joint Base Lewis-McChord with an area of
2 jurisdiction essentially, which takes me into
3 the western states.

4 Now as I understand it, you were
5 previously provided a bio as it relates to my
6 military career, so I'm not going to go into
7 that. What I do want to focus on are
8 essentially three areas, and it's based upon
9 topics that have been covered by the panel so
10 far and in the information that was provided
11 to me.

12 The first being experience and
13 essentially my interaction with the SVC
14 program. Second being the impact on
15 alternative dispositions or cooperation or
16 non-cooperation by victims as it relates to
17 the interaction with their SVCs. And then
18 third, would be information sharing. I'm sure
19 it's going to come up at some point.

20 But going to the first. The
21 question was presented whether it has changed
22 my practice, the SVC program generally, and I

1 would say no. My experience with the SVCs,
2 and it is limited to my jurisdiction and folks
3 that I have known through the JAG Corps who
4 have become SVCs and we have talked about it,
5 has been positive.

6 It is not without the fact that it
7 was introduced and it was a change for us. A
8 change from our prior practice. So at that
9 point it was something that yes, we had to
10 adapt to and we had to include somebody else
11 in our communication chain and reach out to
12 those folks, which we normally did on our own.

13 But as it relates to commanders
14 and the commanders's experience with that
15 program, it's been my experience that command
16 has embraced the program. I attend a training
17 for incoming commanders and their first
18 sergeants -- first sergeants in the Army.

19 And I am there and the SVC is
20 there. CID is there, as well as mental health
21 folks who work within that process. And often
22 times there is a senior commander, an O6 level

1 commander there, advocating for that program
2 and the interaction of those new company
3 commanders and first sergeants to identify
4 with that program as their soldiers who have
5 been victimized come forward.

6 For two reasons. It helps them
7 relate to the soldier who has been victimized
8 in their ranks. As well as it helps that
9 command team kind of understand what their
10 role is and where they fit within this
11 structure.

12 Positive experiences and
13 challenges. The positive experience has been
14 numerous. The experiences have allowed -- the
15 SVCs who are in place have allowed those
16 victims to not only have a voice, but to
17 inform them on the process. Come back to the
18 prosecutors when they do have questions.

19 One of the first things that I --
20 when I talk to victims, and when I'm
21 interviewing them, is you may have questions.
22 You may not have questions right now, okay.

1 But as they come forward you now have your SVC
2 there to reach out to us, and one of us should
3 be able to answer.

4 So the program itself has, I
5 believe, opened up that line of communication.
6 Because now they have somebody who has the
7 ability to advise them of their legal rights
8 as well as just to talk about the process.
9 Versus talking to a prosecutor whose interest
10 not only is with the victim as a human being,
11 but also is responsible for prosecuting that
12 case. So I think in that portion, it has been
13 greatly helpful to these soldiers.

14 Challenges. You've heard
15 throughout the day that, at least in the Army,
16 there may not be the level of experience in
17 every jurisdiction that everybody would hope
18 that there would be. And I would say that
19 that's a true statement in my experience.

20 I have dealt with SVCs who have
21 just come from prosecuting cases and are very
22 good at it, and were very good in that job.

1 And then when they become an SVC, they take
2 all of that experience with them and are able
3 to relate that to their clients.

4 So that's, extremely helpful, but
5 as it relates to the challenges, the -- for
6 those individuals that don't have that
7 experience of being in the courtroom and
8 dealing with the rules, that makes it tough.

9 And it's more a perspective of
10 fighting a battle versus the war, as I would
11 like to refer to the actual entire trial. If
12 you're fighting individual battles and you're
13 not really aware of the issues at hand and
14 those long term effects of some of the fights
15 that you're making, you know, in the
16 immediate.

17 I've had to, you know, pull folks
18 off to the side and just kind of have that
19 discussion that okay, here's one, you need to
20 identify if your client's privacy interests
21 are at stake and if they want to assert that.
22 And if not, you know, that's a different

1 issue. But we need to at least describe to
2 them and explain to them the whole process as
3 it is factored in your 412 or whatever it may
4 be. So they have a complete understanding.

5 Military judges. In my
6 experience, in my jurisdiction, the military
7 judges include the SVCs in the planning
8 process, the scheduling, they take it into
9 consideration. I know that there is something
10 not hard and fast currently as it relates to
11 allow them standing to use their schedule or
12 calendar as a hard and fast way to docket
13 cases.

14 And I know that the -- it's my
15 perception that that's a frustrating piece for
16 the judges as well. They don't have something
17 you know, concrete to them where they can rely
18 on any authority or law, et cetera.

19 But as it relates to the SVCs
20 arguing in front of the bar, absolutely. For
21 those instances where 412, 513 matters, et
22 cetera. Those 802 sessions, they come back.

1 They are part of the discussion. They are
2 absolutely included.

3 And like I said, the -- this is my
4 experience within my own jurisdiction. I am
5 aware that it may not be the same in every
6 other jurisdiction and every other military
7 judge, you know, with his discretion -- his or
8 her discretion, may handle it differently.

9 Impact on alternative
10 dispositions. Cooperation, non-cooperation.
11 I think it's been very helpful because it
12 provides clarity. When they have a counsel
13 that they can rely on and that counsel can be
14 their voice, it allows feedback back to the
15 Government that is decisive.

16 You know exactly where you stand
17 and you can start making the decisions as it
18 relates to the negotiations. Or whether you
19 move forward with the case or not. You just
20 have some clarity.

21 And then as it relates to
22 information sharing. We -- in my

1 jurisdiction, you know, share the charge
2 sheet. All the scheduling stuff is pushed out
3 because it's in the interest of all parties to
4 prevent any delay to ensure that one, that the
5 -- everybody is informed, their calendars are
6 informed. But that it's a predictability, an
7 expectation management tool.

8 So, I'll leave it at that. And I
9 look forward to any questions you may have.

10 CHAIRPERSON HOLTZMAN: Thank you.
11 We'll next hear from Lieutenant Commander
12 Philip Hamon.

13 LT. COMMANDER HAMON: Thank you
14 ma'am. Good afternoon Madam Chair,
15 distinguished members of the panel. My name
16 is Lieutenant Commander Phil Hamon. I'm
17 currently serving as the Senior Trial Counsel
18 at the Region Legal Service Office, Navy
19 District, Washington, here in Washington, D.C.
20 at the Navy Yard.

21 I've had the opportunity to
22 litigate sexual assault and other special

1 victims' cases as both a defense counsel and
2 a prosecutor, as well as in the role of an
3 Article 32 investigating officer. I've also
4 assessed and advised on sexual assault and
5 other special victims' cases in the role of a
6 Staff Judge Advocate.

7 I've litigated cases both before
8 and after the implementation of the Victim
9 Legal Counsel Program. And in cases with and
10 without legal counsel involvement.

11 As a prosecutor I've had varied
12 experiences with different VLC, just like I've
13 had varied experiences with different defense
14 counsel. Each victim legal counsel, whether
15 they be military or civilian, is unique in the
16 way that they approach their cases, their
17 clients and their relationship with the
18 prosecutors.

19 I've had the opportunity to work
20 with private civilian victim legal counsel, as
21 well as with various military counsel. The
22 vast majority of my interactions with VLC,

1 victim legal counsel, have been positive.
2 They're highly professional and dedicated to
3 their role as VLC.

4 However, the introduction of VLC
5 has brought some new challenges to the
6 prosecution. For example, once VLC is
7 assigned in a case and my office is notified
8 of that representation, we no longer will ever
9 directly contact the victim. We view them as
10 a represented party.

11 So all meetings and discussions,
12 all phone calls are arranged through the VLC.
13 In my experience, victims, once assigned a
14 VLC, have a very good handle on their rights
15 as well as on the process before the
16 prosecutor has even met with them. Although,
17 from the victim's perspective, information
18 received in the process about the process is
19 a positive thing regardless, theoretically, of
20 who's providing that information.

21 In my opinion, one detriment or
22 consequence to the victim receiving that

1 process information, that basic information
2 from the VLC as opposed to the prosecutor, is
3 the prosecutor loses what was a very powerful
4 rapport building tool. Getting that victim
5 comfortable with the process and having that
6 victim trust the prosecutor.

7 Prior to the implementation of the
8 VLC program, my routine and what I believe was
9 the routine and protocol of many Navy
10 prosecutors was to discuss almost nothing
11 substantive in the initial meeting with the
12 victim. Instead I would introduce myself. I
13 would explain my role. I would explain the
14 process from beginning to end. And I would
15 discuss victim's rights and answer any
16 questions that the victim had about the way
17 ahead.

18 Now, as a perhaps unintended
19 consequence of the presence of VLC, a lot of
20 that rapport building is taken away and not
21 available to the prosecutor. There was a
22 natural trust that was formed between the

1 victim and the prosecutor when the prosecutor
2 was that answer source. And naturally as the
3 victim relies on and trusts the VLC, they rely
4 less on the prosecutor.

5 We've heard testimony through the
6 day about minor delays in process as a result
7 to the -- process times as a result of the
8 VLC. I would note that that is a minor side
9 effect, simply because coordinating the
10 schedule of yet one more attorney does slow
11 down the processing.

12 And during the initial screening
13 of the case, our interviews with victim need
14 to be coordinated with the VLC and all trial
15 proceedings are scheduled with, not only the
16 VLC, but the VLC's schedule in mind. And that
17 came up in earlier panels.

18 In my experience, we do -- the
19 trial schedule is -- the trial counsel will
20 consult with the VLC before proposing a trial
21 schedule to the court. So we, at least in my
22 experience, we heavily consult the VLC to make

1 sure that they are available for all dates.

2 And my observation has been that
3 the VLC that I have worked with have been
4 tremendously flexible. But despite their best
5 efforts sometimes, they will have these limits
6 and thus meetings and hearings and interviews
7 can sometimes be delayed.

8 Regarding a victim's access to
9 information. As a matter of practice, in my
10 practice we provide the victim and the VLC
11 with all scheduling orders, the charge sheet
12 and any statements made by the victim to
13 include any summaries of interviews that were
14 summarized by investigators.

15 We also provide all 412, 414 and
16 513 motions, along with any enclosures that
17 were attached, both through the filings by
18 defense counsel as well as our responses. And
19 we have, depending on circumstances, provided
20 additional information on a case by case
21 basis, depending on the circumstances.

22 In closing, the purpose of VLC, in

1 my opinion, is not to assist the prosecution.
2 Sometimes VLC can and does assist when the
3 interests are aligned, and sometimes
4 protecting the victim's rights has the
5 collateral benefit of assisting the
6 prosecution.

7 But this is not always the case.

8 Regarding VLC and victim access to information
9 and the role of VLC in the court, my personal
10 concern that it is that we may be shifting
11 along the spectrum from the victim being -- of
12 the spectrum of the witness to party. From
13 the victim becoming less of a witness and more
14 of a party.

15 And that could create the
16 perception -- a perception that could be
17 exploited by the defense to attack the
18 credibility of the victim as an inherently
19 biased party. Additionally, access to too
20 much information could be perceived as an
21 inappropriate coaching of a witness or
22 prepping.

1 In my personal experience, Navy
2 prosecutors are flexible and able to adjust to
3 change. We have adjusted and are continuing
4 to work with VLC to make the program as
5 successful as possible while not losing sight
6 of our ultimate goal, which is obtaining
7 justice in every case, whatever that may be.

8 I look forward to answering any
9 questions you may have. Thank you.

10 CHAIRPERSON HOLTZMAN: Thank you
11 very much. We'll next hear from Major Douglas
12 C. Hatch, U.S. Marine Corps.

13 MAJOR HATCH: Good afternoon Madam
14 Chair and distinguished panel members. Thank
15 you for the opportunity to speak here today.

16 Again, my name is Major Doug
17 Hatch. I'm the Senior Complex Trial Counsel
18 at -- I work the board at Camp Pendleton,
19 California. I'm a member of LSSS West, which
20 is a regional organization, so I actually
21 litigate cases throughout the region, which
22 would include Camp Pendleton, NCRD San Diego,

1 Marine Corps Station Miramar, Twentynine Palms
2 as well as Yuma. So in that regard I'm a
3 regional asset and I've worked with multiple
4 VLCs as we call them.

5 A little bit about my experience,
6 and I think it puts some of my comments in
7 perspective. For the past two and half years
8 I have litigated exclusively special victims'
9 cases. Prior to that, I had five to six years
10 experience as a trial counsel throughout my
11 career and had the opportunity and privilege
12 to prosecute multiple special victims' cases
13 in the past as well.

14 Regarding the VLC program in
15 particular, much to my surprise, it has been
16 extremely positive in my opinion. The
17 Armageddon that the prosecutors in my region
18 predicted when we heard about this program,
19 did not come to pass thankfully. And we had
20 to eat some crow, because we were predicting
21 that this would be essentially an Armageddon,
22 as I said.

1 And I'll get into some of those
2 positives here in a moment. In my experience,
3 and this might be just personal to me, most
4 victims that I meet with initially do not have
5 a VLC. I do encourage that and I do know that
6 in my region, at least NCIS investigators are
7 required to provide them with information
8 about VLC -- the VLC program.

9 I do encourage that. Not all of
10 my victims do avail themselves of the VLC
11 program and that might be an appropriate
12 question. My personal opinion on as to why
13 that is, I don't have anything other than
14 anecdotal data to provide to you.

15 Before I get into some of the
16 positives of the programs. Some of the
17 drawbacks -- I'll keep these short because
18 Lieutenant Commander Hamon actually covered
19 most of what I was going to say, but the
20 communication piece can be a problem.

21 Especially with my bar and with
22 our rules of professional conduct. Once

1 somebody is represented, I cannot, I cannot
2 talk to them until I talk to their counsel.
3 And that can -- you know, if I have a quick
4 question, something that I need to quickly
5 pass on to victim. In the past, was a matter
6 of quick phone call and that was it. But now
7 I have to go through another party and,
8 practically speaking, that can be a burden.
9 In addition, I'm not always entirely sure that
10 what I want to convey is being conveyed the
11 way I want it to be conveyed.

12 And that's something, again,
13 that's surmountable. I can take care of that
14 by ensuring that I do spend some time with the
15 victim in the presence of their VLC and convey
16 things the way that I think they need to be
17 conveyed from the perspective of a prosecutor.

18 Scheduling again, I won't belabor
19 that point, we've gone over that quite a bit
20 throughout the day.

21 A potential problem that I
22 personally have not witnessed yet, but one

1 that does concern me, and I think is on the
2 horizon that, you know, depending on the
3 nature of the case and the nature of the VLC
4 I might be dealing with is disagreements over
5 prosecution strategy. And if that comes to
6 pass, then that can -- I see the potential of
7 creating friction between the victim in the
8 case, who I have many duties to as a
9 prosecutor, and myself.

10 And based on a disagreement over
11 strategy and ultimately as the prosecutor,
12 that's going to be my call, not the VLC's.
13 Again, I haven't seen that yet thankfully.
14 And I think that, again, is something that's
15 surmountable as long as you build the right
16 relationships and you have the right sort of
17 skills dealing with other advocates.

18 In my jurisdiction information
19 sharing has not proved to be a problem yet,
20 but I do concur with comments earlier today
21 that we certainly need uniform rules and
22 regulations in that regard. So that there

1 aren't questions about that and that it
2 doesn't rely, as it does in my jurisdiction,
3 almost entirely on personal relationships.

4 So again, the drawbacks that I've
5 cited are all surmountable. Some things we
6 can't ever tell will come up, have come up.

7 The VLC -- the term I would call
8 it is the VLC in our system is a force
9 multiplier. The VLC helps to explain to the
10 victims legal concepts and machinations of the
11 legal system -- the justice system that maybe
12 I've explained to them already or you know, I
13 repeat. But what I'm saying is not going to
14 be heard in the same way as the victim hears
15 it from their own counsel.

16 And that's a good thing that
17 they're hearing it from their own counsel
18 because, as a prosecutor, my client is the
19 United States. My duty is to do justice. And
20 I have duties to the victim. I have
21 obligations to the victim. But because of the
22 nature of my position and the nature of my

1 duties, I, by necessity, have to keep the
2 victim at somewhat of an arm's length. That's
3 just the nature of the beast.

4 And it's a good thing that we have
5 a lawyer that does not have those same
6 concerns that can stand up for that victim and
7 protect their rights. Again, thank you for
8 the opportunity to speak here today and I look
9 forward to your questions.

10 CHAIRPERSON HOLTZMAN: Thank you
11 very much. We'll next hear from Major Brent
12 Jones, U.S. Air Force.

13 MAJOR JONES: Thank you ma'am.

14 CHAIRPERSON HOLTZMAN: Welcome
15 Major. Thank you.

16 MAJOR JONES: Madam Chair,
17 distinguished members of the panel, good
18 afternoon. I'm Major Brent Jones. I'm a
19 Senior Trial Counsel stationed here in the
20 local area at Joint Base Andrews, Maryland.

21 I've currently served in the job
22 as Senior Trial Counsel for almost two years.

1 Prior to that I was a defense counsel out at
2 Travis Air Force Base. In these past two
3 years, I'm a special victims' unit prosecutor
4 as well.

5 I know over the course of the past
6 several months you folks have talked to
7 numerous folks from the Air Force. You know
8 there's 18 senior trial counsel. The way the
9 Air Force works, we essentially are stationed
10 all over the world and we roll into the trial
11 as lead trial counsel.

12 In most of my cases that I do, I
13 am the -- it involves sexual assault, some
14 type of sexual assault case. Over the past --
15 over the past two years, I've tried
16 approximately 40 courts martial and most of
17 which involve sexual assault cases. And over
18 those last two years, I work on almost every
19 case with a special victims' counsel.

20 So these days, when I'm trying
21 these cases, we work hand in hand. The Air
22 Force has been leading the way -- or led the

1 way in the Special Victims' Counsel Program.

2 And I think we're doing an excellent job.

3 Our working relationship with the
4 special victims' counsel is extremely
5 positive. Essentially at the end of the
6 trial, I provide my leadership with feedback
7 on all parties from the case, including the
8 special victims' counsel. And we have a great
9 relationship with the special victims' counsel
10 headquarters as well, and so my leadership
11 talks with them about issues that we see at
12 trial.

13 Now one positive change -- and
14 again, I see the SVC program as positive,
15 overwhelmingly positive. But the biggest
16 change that I've seen in the SVC program in my
17 eight years now of litigation experience in
18 the Air Force is every single case that I see
19 that involves sexual assault that has a
20 victim, the effect on the victim of the
21 justice process, is extremely great.

22 CHAIRPERSON HOLTZMAN: Is

1 extremely what?

2 MAJOR JONES: It's extremely
3 great, the effect that the judicial process
4 has on the victim. It has a great effect on
5 them.

6 Where the SVC program has helped
7 is it's helped that person to understand the
8 process, get comfortable with the process,
9 understand the legal issues in the process.
10 The SVC provides that person with an attorney
11 to help them get through the process, and we
12 didn't have that before. Like Major Hatch
13 said, we're dual hatted. We're a prosecutor,
14 we're prosecuting the case, but we're also --
15 we do have a victim there and this way we have
16 a counsel, this victim has a counsel to stick
17 up for them and be there for them.

18 And of course, I do want to say
19 that the -- there's a great difference I see
20 in the victims -- our Air Force SVCs do an
21 excellent job of preparing their client for
22 the process so that we can limit the negative

1 impact the justice process has on the victim.

2 So I'll be -- I welcome any
3 questions that you have.

4 CHAIRPERSON HOLTZMAN: Thank you
5 very much. Our last presenter will be
6 Lieutenant Jeffery C. Barnum. Lieutenant,
7 thank you for coming.

8 LT. BARNUM: Thank you Madam
9 Chair, distinguished panel members. Thank you
10 for the opportunity to present today.

11 My name is Lieutenant Jeff Barnum.
12 I'm with the Coast Guard. I'm Trial Counsel
13 with the Coast Guard Fifth District, which has
14 responsibility for the mid-Atlantic states.
15 Prior to that I was at the Legal Service
16 Command, we supported all of the support
17 commands east of the Rocky Mountains.

18 With the introduction of another
19 lawyer into a court martial, the process of
20 prosecuting sexual assaults cannot and did not
21 remain static. In some ways and in fact many
22 ways, it was a positive impact. The SVC has

1 had a positive impact. In other ways there
2 have been come challenges and maybe some
3 detriments.

4 From the single perspective of
5 this trial counsel, an effective SVC
6 understands the goals of his or her client,
7 military justice process and the SVC's role in
8 that process. Conversely, if the SVC fails to
9 understand his or her client's goals, or fails
10 to advise on the impact of the client's
11 actions on the outcome of the case, the SVC's
12 actions can be detrimental.

13 I'd like to expand on some of
14 these themes by relating many of the -- some
15 of the positive interactions. I won't relate
16 them all because there are too many. At the
17 base level, an SVC relieves the trial counsel
18 of the need to provide minute to minute
19 support of the victim/witness.

20 During the trial of an Article 32,
21 an SVC can ensure the victim is present,
22 properly attired, prepared and is available to

1 answer any questions that come up throughout
2 the process. And of course that frees the
3 trial counsel to focus on prosecuting the
4 case.

5 It's also a huge benefit to be
6 able to speak frankly with another attorney
7 about the strengths or weaknesses of a case.
8 And have that other attorney explain in a very
9 confidential fashion to their client about the
10 strengths and weaknesses of the case, without
11 having the specter of the Government trying to
12 persuade or dissuade the victim from
13 proceeding one way or the other.

14 Of course there also have been
15 some times where SVCs have set back
16 prosecutions, either by failing to understand
17 their client's goals or the military justice
18 process. In my opinion, the SVC does not need
19 to zealously assert every single one of his or
20 her client's rights. Especially when
21 asserting that right hampers the overall goal
22 of a successful prosecution.

1 And I'd like to refer to Major
2 Tilney's testimony earlier today about the
3 issue of immunity for underage drinking. As
4 Mr. Stone noted, the issue of immunity can
5 come up and damage the victim's credibility on
6 the larger case of rape or sexual assault as
7 opposed to dealing with the relatively minor
8 situation of underage drinking.

9 A good SVC will understand and
10 explain the benefits and costs of a particular
11 path of action to their client. And in some
12 cases, a poor SVC will just blindly assert the
13 right.

14 I would also be remiss if I did
15 not mention the SVC's impact on the trial
16 counsel/victim relationship. Fortunately,
17 Lieutenant Commander Hamon handled it very
18 ably, so I will just stand by and I look
19 forward to answering the panel's questions.
20 Thank you Madam Chair.

21 CHAIRPERSON HOLTZMAN: You're very
22 welcome. Thanks to all of you again. Let's

1 start with Mr. Taylor.

2 MR. TAYLOR: First of all, thank
3 you all very much for your testimony today.
4 I'll start with you, if I may, Colonel
5 Hutmacher and ask you how concerned you are,
6 as Captain Robbins said earlier today, that
7 too many SVCs don't really have the
8 professional experience as the trial counsel
9 or the defense counsel to do the jobs?

10 LT. COLONEL HUTMACHER: Sir, the
11 one, the individuals who are placed into
12 those positions are smart and have the ability
13 to adapt. They have the ability to reach out
14 to a technical chain to get some advice.

15 But to answer your question how
16 concerned I am, my level of concern does not
17 rise to the level of Captain Robbins. What I
18 have -- what my experience has been is that,
19 although their particular experience in
20 military justice may be limited, they still
21 are attorneys asserting the rights of their
22 client.

1 Just because the prosecution's
2 case may be affected or impacted at the
3 sentencing portion of the case because of a
4 successful 513 motion, which precludes the
5 Government from speaking on mental health-
6 related impact, I don't think that it
7 completely hampers the prosecution. It may
8 hamper the intent of their client wanting to
9 voice how it has impacted on them, the
10 violation of them, et cetera. But as it
11 relates to the impact on prosecution and the
12 process itself, I'm not as concerned I would
13 say.

14 MR. TAYLOR: So to the other
15 members of the panel, let me just ask you
16 generally, does the presence of inexperienced
17 SVCs make it harder for you to do your job?
18 Anyone like to comment on that?

19 LT. BARNUM: Yes sir. I'll agree
20 with that comment and, in speaking with my
21 trial counsel around the country, that that
22 has been raised as an issue.

1 It's not -- and I would agree with
2 Lieutenant Colonel Hutmacher that I think it's
3 not an insurmountable issue, but it does
4 present some problems.

5 MR. TAYLOR: So on balance -- and
6 this is a question to the entire panel. On
7 balance, are you better off or worse off with
8 the SVC, LVC program -- VLC programs, excuse
9 me. In terms of doing your job as a
10 prosecutor, as you said, to obtain justice?

11 MAJOR HATCH: Sir, I'd say it's
12 about a balance. And you know, in the end it
13 just doesn't really matter whether it makes
14 our job easy or not. The fact of the matter
15 is, our job is made easier in some respects
16 and more difficult in some respects. It
17 balances itself out and in the end, you have
18 a victim that's better taken care of through
19 the system and I think that's really the take
20 away.

21 MR. TAYLOR: I see at least three
22 heads nodding. Anyone else want to comment on

1 that in particular?

2 LT. COLONEL HUTMACHER: Yes sir,
3 if I might. Harder to do the job, I think
4 it's a matter of being relieved of some of the
5 control that we previously had.

6 Personalities at play, it's been
7 my experience that the personalities, if
8 everybody is acting in a collegial manner with
9 the same intent and recognition of the
10 process, then we're good. So I wouldn't say
11 that it makes the job harder.

12 MR. TAYLOR: Well thank you all
13 for being here on a Friday afternoon.

14 CHAIRPERSON HOLTZMAN: Mr. Taylor,
15 I think Major -- did someone else want to
16 respond to that question?

17 MAJOR JONES: No ma'am.

18 CHAIRPERSON HOLTZMAN: Oh, as long
19 as you're -- okay, thanks. Judge Jones?

20 JUDGE JONES: Yes. Could I go
21 back, Commander Hamon, to you? You were
22 talking about the many things that you turn

1 over as trial counsel. Could you read that
2 list again?

3 I think what you said is certainly
4 the notions of notice of hearings and
5 pleadings and that sort of thing. Generally
6 go over?

7 LT. COMMANDER HAMON: Yes ma'am.
8 So generally what we turn over are the charge
9 sheet, any statements that were made by the
10 victim, whether they be a summary of the
11 statement that they made to the --

12 JUDGE JONES: So the statements of
13 the victim go to the victim, right?

14 LT. COMMANDER HAMON: Yes ma'am.
15 As well as any scheduling orders ordered by
16 the court. And sometimes informal scheduling
17 orders, emails and such, modifications in the
18 schedule, we'll also provide to them.

19 JUDGE JONES: All right. But you
20 would distinguish, what I would call
21 discovery, from what you give over, correct?

22 LT. COMMANDER HAMON: That's

1 correct.

2 JUDGE JONES: So you're not, I
3 guess routinely, and there's no rule requiring
4 you, right? To give over the reports of the
5 investigation, the statements of other
6 witnesses in the normal course, is that right?

7 LT. COMMANDER HAMON: That is
8 correct. There's no rule requiring me to turn
9 them over and there's no rule forbidding me
10 from turning certain pieces of evidence over
11 as well.

12 JUDGE JONES: Okay. So what's
13 your personal practice? And you can tell me
14 it's case by case, but what is your personal
15 practice?

16 LT. COMMANDER HAMON: It is case
17 by case ma'am. My personal practice is that
18 we will -- obviously any statements and
19 anything that we think that the VLC should
20 know.

21 For example, the cable record came
22 up in an earlier panel. If there's

1 potentially 412 material, or something that
2 may come up as 412 material that another
3 witness said, we may provide that information
4 to the VLC or warn them of that.

5 JUDGE JONES: Would you provide
6 the actual statement if you had one or would
7 you just provide the information?

8 LT. COMMANDER HAMON: It would
9 depend ma'am. And the balance is -- in my
10 practice more likely we would just provide the
11 information and then discuss that with the VLC
12 because often the statement includes far more
13 than that one piece of information.

14 JUDGE JONES: Aha.

15 MAJOR JONES: Ma'am, if I may?

16 JUDGE JONES: Yes.

17 MAJOR JONES: As far -- usually
18 that comes in the form of, in a 412 motion, as
19 an attachment to the 412 motion. So typically
20 we will provide the entire 412 motion and the
21 attachments to the motion and our response to
22 the motion --

1 JUDGE JONES: The defendants
2 and you're saying the defense counsel will
3 have submitted the statements that support the
4 412 information?

5 MAJOR JONES: Yes, ma'am.

6 JUDGE JONES: So generally
7 speaking, or almost always, the victim/witness
8 will get that?

9 MAJOR JONES: Yes ma'am, but the
10 concern is also though, blocking out a
11 witness. If you're providing other witness
12 statements to -- if witnesses are seeing other
13 witnesses' statements, it could affect their
14 testimony. I'm not saying they would make
15 something up, but it could affect their
16 testimony because they have that other
17 document.

18 JUDGE JONES: Well, let me just
19 ask this. As a general rule, would any of you
20 routinely provide investigation reports or
21 other witnesses' testimony or statements to
22 the victim/witness or any other witness?

1 Okay. Thanks.

2 CHAIRPERSON HOLTZMAN: Mr. Stone.

3 MR. STONE: Thank you. On that
4 same topic, I gather, at least from all the
5 cases that I've seen, there's always some kind
6 of a defense motion. What about the defense
7 motions? What if it's called a motion to
8 suppress, do you supply those to the victim
9 the victim counsel?

10 LT. COMMANDER HAMON: Sir, in our
11 practice, we'd supply all motions and
12 enclosures regarding MRE 513 and 412 and 414,
13 but not in general all motions. We do not
14 provide all motions to victim legal counsel.

15 MR. STONE: Right. So, and I
16 guess my question then is, why don't you
17 provide that motion to suppress? What's the
18 reason for it? I was trying to find that out
19 earlier today.

20 LT. COMMANDER HAMON: Sir, there's
21 no particular reason. There's no reason why
22 we there's no rule that says we can't,

1 there's no rule that we can. It's just been
2 our practice that we don't.

3 Same reason as -- same discussion
4 that we had earlier about whether we have an
5 open docket and then provide all filings to
6 everyone. It's just been our practice that we
7 don't and that the new change is that we
8 provide 412 and 513 motions to the VLC where
9 no motions before were provided at all. So
10 it's a new addition.

11 MR. STONE: Well, I guess, this
12 then -- just to play this out, and I welcome
13 anybody's thought on this. There was a
14 tremendous amount of media coverage of the
15 sexual assault cases. The one a year ago at
16 the Naval Academy but people, including
17 lawyers like myself, had no way of seeing the
18 actual pleadings.

19 Should we require that you have an
20 electronic docket where all pleadings, not
21 discovery, but pleadings are uploaded to the
22 docket, just like they are in every other

1 case? So that if people want to see the
2 pleading, they don't have to rely upon what
3 the media says about the case, but they can
4 look at the pleading. Particularly in a case
5 like that of wide interest that results in no
6 convictions?

7 LT. COMMANDER HAMON: Sir, my
8 personal opinion is that I, as a prosecutor,
9 wouldn't object to that. I wouldn't have any
10 problem with having them provided and
11 uploaded, it's just not a practice that we're
12 currently set up to do.

13 LT. COLONEL HUTMACHER: Sir, I
14 think what you're getting at is transparency.
15 Or at least that's the way I read it. And as
16 has been stated, just what is our normal
17 practice, we're probably a little behind the
18 power curve as it relates to Federal filings
19 and all of that, but I don't think that there
20 is anything that prevents it.

21 It's just we operate pretty much
22 just like any other agency, institution, et

1 cetera, that you're governed by rules and you
2 follow those rules and if there is something
3 more that you -- if you don't have to do it,
4 then why would you?

5 So I -- and I see your eyebrows
6 kind of go up, but it relates to what you're
7 used to and what you're familiar with versus
8 the folks on this panel and what we're used to
9 and familiar with.

10 So the responses that we will give
11 you or provide you is that we are familiar
12 with this particular practice that doesn't
13 disclose all of our pleadings. Now reference
14 uploading it so that it can be viewed by those
15 individuals outside of that particular case,
16 may that be beneficial to the public at large
17 or CNN, if you will?

18 I don't know that I'm that person
19 to make that call. I personally don't have an
20 interest in it, even outside of my cases. But
21 as it relates to my cases, and I'm assuming
22 it's the same for the gentlemen currently

1 sitting before you, we operate within the
2 confines that we are presented and how we are
3 -- how we grew up as has been stated earlier.

4 MR. STONE: As I mentioned
5 earlier, but you might not have been here for
6 it, one of the attachments we got in our
7 packet for today was an October 1, 2014
8 directive from the TJAG that said that if
9 victim counsel wanted additional documents,
10 they were going to have to ask for them by
11 means of the Freedom of Information Act and
12 according to what's allowed by the Privacy
13 Act.

14 But I didn't hear any of you five
15 say that that's what keeps you from
16 distributing those documents. You don't have
17 to comment on it, but I'm curious to know,
18 have any of you ever had a Freedom of
19 Information Act or Privacy Act objections to
20 distributing a pleading? Because I don't
21 really understand those as limitations on
22 legal documents, so I didn't quite understand

1 why it's listed that way.

2 LT. COMMANDER HAMON: As it
3 relates to that particular administrative law
4 determination of how the documents will be
5 disclosed, no, I don't have a specific comment
6 on that. I have had people ask me for
7 documents, you know, during an ongoing
8 investigation or even after the conclusion of
9 a trial and that has been the response that I
10 have given.

11 MR. STONE: The other question I
12 have, which maybe we start with Lieutenant
13 Commander Hamon because he was talking about
14 the -- well a couple of you were, sometimes
15 it's a problem working with victim's counsel.
16 It's not always perfect, nor should it be.

17 On the last panel we heard a
18 suggestion that maybe would help you if there
19 was an amendment to Article 6(b) that
20 specifically said you retain prosecutorial
21 discretion. And I wondered whether any of you
22 felt you needed that? Or because you

1 prosecutorial discretion has been impaired by
2 what's happened? Or whether that is not a
3 priority for you? So I would kind of like
4 your comments on that.

5 LT. COMMANDER HAMON: Sir, I
6 haven't found that the presence of the VLC has
7 affected my perception of my prosecutorial
8 discretion.

9 We have a different system as you
10 know, sir, that I don't have entire -- I don't
11 have prosecutorial discretion really in that
12 I will make a recommendation to convening
13 authority, discuss the merits of the case with
14 the convening authority and they will make
15 that decision. And now there's the added
16 piece of the VLC who also will give their
17 position, provide their position to the
18 convening authority as well. So it doesn't --
19 it's one more voice for the convening
20 authority. But I don't view it as affecting
21 my discretion.

22 MAJOR HATCH: Yes sir, I think

1 just inherent in the ability of the prosecutor
2 and the ability of the VLC has understood. I
3 don't think it would be necessary to make an
4 amendment. I mean it's -- it already exists.

5 We make the prosecutorial
6 decisions, I think is really what it's getting
7 down to how the case is going to be
8 prosecuted. The VLC can provide their input,
9 but they're not representing the United States
10 and they don't make the decision and that's
11 just the way it is, an amendment won't change
12 that.

13 CHAIRPERSON HOLTZMAN: Okay.

14 Thanks very much. One of you suggested that
15 if you were asked about why some victims
16 reject the special victims' counsel, that you
17 would tell us so?

18 MAJOR HATCH: Yes ma'am, that was
19 me, and this is just anecdotal.

20 CHAIRPERSON HOLTZMAN: Okay.

21 MAJOR HATCH: I mean I've had two
22 victims that have -- I wouldn't characterize

1 it as rejecting it. Just not availing
2 themselves of it.

3 CHAIRPERSON HOLTZMAN: Okay.

4 MAJOR HATCH: And this is my
5 personal opinion based on my interactions with
6 these victims. They were both lance
7 corporals, E3s in the Marine Corp, first tour.
8 Both of them aren't 21. Both very serious
9 cases.

10 One was a rape and an attempted
11 murder. And the other was a sexual assault.
12 And in particular, they were provided with the
13 normal, you know, panacea of services that are
14 provided to them and available to them, which
15 you're all familiar with.

16 And I think with both of these
17 young women in particular, the thought of
18 talking to one more commissioned officer, no
19 matter how much anybody tried to encourage
20 that, it was just overwhelming to them. And
21 it just is what it is.

22 And I tried to encourage that they

1 go ahead and avail themselves of the program
2 and both of them were adamant that they
3 didn't. I think, you know, a lot of that was
4 just their personalities as well.

5 I don't think that that's any sort
6 of comment on the program or the efficacy of
7 the program or the, you know, VLC concept.
8 But that was just my personal observations
9 ma'am and that hadn't been provided before, so
10 I thought it might be good for the panel.

11 CHAIRPERSON HOLTZMAN: Anybody
12 else have any anecdotes they want to share?
13 Or anecdotal experience about any rejections
14 or refusal to avail themselves of special
15 victims' counsel? Do you have any explanation
16 for that from your experience?

17 LT. COMMANDER HAMON: Ma'am, I
18 have seen a case where I believe the victim
19 didn't really ever intend to elevate a report
20 from restricted to unrestricted and never
21 really wanted to go forward and then was kind
22 of bombarded with all these different

1 services. And really didn't want anything to
2 do with any of them because they didn't want
3 to go forward at all. So I've had one case
4 where that -- where I saw that, where they
5 declined to have a VLC.

6 CHAIRPERSON HOLTZMAN: Anybody
7 else have a comment on that?

8 LT. BARNUM: I would echo Major
9 Hatch's comment. In my case it was they just
10 didn't want to talk to yet another lawyer. So
11 they were -- and they felt that my -- the
12 trial team would adequately represent their
13 interest.

14 We again encouraged them to avail
15 themselves of the program, but that was their
16 decision.

17 CHAIRMAN HOLTZMAN: Okay, and sort
18 of in line with what Mr. Stone said, one of
19 the concerns that we heard in the last panel
20 was something called the CNN effect with
21 regard to alternative dispositions and plea
22 bargains. What's your experience in the sense

1 of that that's something that affects the
2 decision to go forward in cases that you've
3 handled?

4 MAJOR HATCH: Ma'am, I think it's
5 certainly there. In the Marine Corps we have
6 reorganized, I'm sure you've heard about this
7 in depth in the past panel proceedings, but
8 we've reorganized. We have a much more robust
9 prosecution shop now.

10 What we try to do is educate
11 convening authorities and to have them look at
12 these cases from the perspective of justice,
13 what's right for the victim, and not worry
14 about the media at all.

15 I think it's still out there.
16 It's something that's just unavoidable. But
17 I think, you know, it's getting better
18 depending on the personalities involved.

19 CHAIRPERSON HOLTZMAN: Anybody
20 else have any comment? Okay. Well I have no
21 further questions.

22 I think that concludes. Thank you

1 very much again for coming forward and
2 testifying. Thanks to everybody else who's
3 still here who was on prior panels. We really
4 appreciate that.

5 And thanks to all the panel
6 members. Thank you all very much. This
7 hearing is concluded.

8 MR. SPRANCE: Meeting is closed.

9 (Whereupon, the above-entitled matter
10 went off the record at 4:20 p.m.)

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