

## UNITED STATES DEPARTMENT OF DEFENSE

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## JUDICIAL PROCEEDINGS PANEL

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## PUBLIC MEETING

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FRIDAY  
MARCH 13, 2015

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The Panel met in the U.S. District Court for the District of Columbia, Courtroom 20, 6th Floor, 333 Constitution Avenue, N.W., Washington, D.C., at 9:00 a.m., Hon. Barbara Jones, Acting Chair, presiding.

## PRESENT

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

## WITNESSES

Colonel John G. Baker  
Professor Julie Goldscheid  
Professor Njeri Mathis Rutledge  
Professor Courtney E. Lollar  
Dan Eddy  
Laura Banks Reed  
Gene McCleskey  
Lindsey E. Silverberg  
Nikki S. Charles  
Charles A. Cosgrove  
Major Mark D. Sameit  
Lieutenant Commander Patrick K. Korody  
Kathy Nelson\*  
Captain Joseph B. Ahlers  
Susan Smith Howley  
Bridgette Marie Harwood  
Colonel Michael Mulligan  
Teresa P. Scalzo  
Major Richard M. Cloninger  
Major Mary Ellen Payne

## STAFF:

Lieutenant Colonel Kyle W. Green, U.S. Air  
Force - Staff Director  
Maria Fried - Designated Federal Official

\*-present by telephone

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Adjournment

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

2 (9:01 a.m.)

3 MS. FRIED: This is the eighth meeting  
4 of the Judicial Proceedings Since FY 2012  
5 Amendments Panel, also known as the Judicial  
6 Proceedings Panel.

7 My name is Maria Fried and I'm the  
8 Designated Federal Official to the Panel. The  
9 JPP is congressionally mandated to conduct an  
10 independent review and assessment of judicial  
11 proceedings conducted under the Uniform Code of  
12 Military Justice involving sexual assault and  
13 related offenses, since amendments related to the  
14 UCMJ, Uniform Code of Military Justice, regarding  
15 those offenses by Section 541 of the National  
16 Defense Authorization Act for fiscal year 2012.

17 The JPP issued its first report on  
18 February 4th, 2015, and is currently -- and that  
19 report is available on the JPP website at  
20 [www.jpp.whs.mil](http://www.jpp.whs.mil). The distinguished members  
21 appointed to the Panel are the Honorable  
22 Elizabeth Holtzman, who is also the Chair of the

1 JPP; the Honorable Barbara S. Jones; Vice Admiral  
2 Retired Patricia Tracey; Professor Thomas W.  
3 Taylor and Mr. Victor Stone.

4 We have not received a request for  
5 public comment for today's session. Additional  
6 information on the establishment of the Panel,  
7 Panel membership and its charter is available at  
8 the JPP website. Now I'd like to turn the  
9 meeting over to the Honorable Barbara Jones.

10 JUDGE JONES: Thank you, Ms. Fried.  
11 Good morning, everyone. I'd like to also welcome  
12 you to the March meeting of the Judicial  
13 Proceedings Panel. As you can see, three members  
14 of the Panel are here in person today and,  
15 unfortunately, Ms. Holtzman and Admiral Tracey  
16 couldn't join us in person, but they will both be  
17 on the phone instead.

18 Ms. Holtzman asked me to fill in for  
19 her this morning and serve as acting chair today.  
20 Today's meeting is being transcribed and also  
21 video recorded by Army Television. The meeting  
22 transcript and link to the video proceeding, or

1 video recording, rather, will be posted on the  
2 JPP's website.

3 I think Maria told you most of this,  
4 but I'll repeat it. The Judicial Proceedings  
5 Panel was created by the National Defense  
6 Authorization Act for fiscal year 2013, as  
7 amended by the NDAA for fiscal year 2014. Our  
8 mandate is to conduct an independent review and  
9 assessment of judicial proceedings conducted  
10 under the Uniform Code of Military Justice  
11 involving adult sexual assault and related  
12 offenses since the most recent amendment to  
13 Article 120 of the UCMJ in 2012.

14 Today's meeting will focus on the  
15 tasking assigned to this panel to review and  
16 assess the adequacy of provisions for restitution  
17 and compensation for victims of offenses under  
18 the UCMJ. Specifically, Congress directed that  
19 we develop recommendations on expanding such  
20 restitution and compensation including  
21 consideration of three options.

22 One, providing the forfeited wages of

1       incarcerated members of the armed forces to  
2       victims of offenses as compensation, two,  
3       including bodily harm among the injuries meriting  
4       redress under Article 139 in the UCMJ, and  
5       lastly, requiring restitution by members of the  
6       armed forces to victims of their offenses upon  
7       the direction of a court-martial. Although not  
8       specifically stated in these tasks, the Panel's  
9       purpose is to assess judicial proceedings for  
10      adult sexual assault crimes.

11               Therefore, while the Panel will review  
12      provisions for restitution and compensation  
13      generally, we will focus our assessment, and any  
14      possible recommendations that may come from our  
15      review are in provisions for victims of adult  
16      sexual assault crimes. In this morning's first  
17      session we are pleased to hear again from Colonel  
18      John Baker, who serves as the chair of the Joint  
19      Service Committee.

20               Colonel Baker has prepared an overview  
21      for us to help us understand how restitution and  
22      compensation work in military judicial

1 proceedings. Following this introductory  
2 session, we will hear from a distinguished panel  
3 of law professors who have written articles on  
4 compensation and restitution issues. Their  
5 session will address the economic needs of sexual  
6 assault victims and the mechanisms available to  
7 them to seek compensation.

8           Next, we will hear from  
9 representatives from national and state  
10 compensation organizations to help us understand  
11 how compensation programs function and how they  
12 may be used to provide assistance to victims  
13 involved in military judicial proceedings.

14 Following our lunch break, we will hear from  
15 representatives from the Military Services who  
16 will explain ways that victims can obtain  
17 restitution and compensation for crimes under the  
18 UCMJ.

19           Then, in our last session of the day  
20 we'll hear from civilian and military  
21 practitioners and experts who will provide their  
22 perspectives on the three options to expand

1 restitution and compensation programs that  
2 Congress directed us to consider. Although this  
3 final session is specifically focused on  
4 consideration of these options, we look forward  
5 to hearing the views and perspectives of all  
6 presenters today on these issues.

7 Each public meeting of the Judicial  
8 Proceedings Panel includes time to receive  
9 comments and input from the public. The panel  
10 received no requests, I believe. Is that right?  
11 Thank you. From the public to appear at today's  
12 meeting, but we received one written comment from  
13 Service Women's Action Network.

14 Additionally, since our last meeting  
15 in January, the Panel has received two other  
16 public comments not related to today's topic.  
17 All public comments were provided to the Panel  
18 members and posted to our website. All materials  
19 received by the Panel members for today's meeting  
20 and previous meetings are available on the JPP's  
21 website, which is [jpp.whs.mil](http://jpp.whs.mil). Thank you very  
22 much for your attention, and I think we are ready

1 to begin our first session. Good morning,  
2 Colonel Baker.

3 COL. BAKER: Good morning. Before I  
4 talk about the topic of restitution and  
5 compensation, I just want to address on behalf of  
6 the Joint Service Committee recommendation number  
7 one that came out of your 4 February --

8 JUDGE JONES: Can I ask you to bring  
9 that microphone a little closer? Great.

10 COL. BAKER: Is that better?

11 JUDGE JONES: Yes. Thank you.

12 COL. BAKER: Okay. Thank you. Before  
13 I begin talking about restitution and  
14 compensation, I would like to just briefly  
15 address recommendation number one from your 4  
16 February report, the -- I guess I just want to  
17 say the Joint Service Committee heard you all  
18 loud and clear.

19 We, at a meeting yesterday, some point  
20 earlier this week we specifically overhauled, or  
21 reviewed and I think enhanced some of our  
22 internal procedures as it relates to the way that

1 the Joint Service Committee conducts its business  
2 and reviews and proposes changes to the manual  
3 and to the Uniform Code of Military Justice. I  
4 think that process will help us a little bit. So  
5 I'll turn next to the topic at hand.

6 JUDGE JONES: Thank you. Thank you  
7 for your feedback on that, Colonel. It's very  
8 gratifying to us.

9 COL. BAKER: We're also going to --  
10 we're in the process of updating our website and  
11 our new procedures will be online for folks that  
12 want to review those. So --

13 JUDGE JONES: That all sounds great.  
14 Thank you.

15 COL. BAKER: What I'd like -- could  
16 you go to the next slide, please? What I'd like  
17 to do is provide you an overview this morning of,  
18 kind of, some of the rules and some of the  
19 procedures that we follow in the military justice  
20 process. I'm not an expert, really, in the way  
21 that the restitution and compensation is done  
22 currently by practitioners. It's been a little

1 bit of time since I've been a practitioner.

2 But you're going to have a panel of  
3 folks that will talk you through that. What I'm  
4 going to do is talk very briefly about one  
5 specific provision of the UCMJ. I'll walk you  
6 through the military justice process as it  
7 relates to restitution and compensation briefly,  
8 very, very briefly talk about the Military Claims  
9 and Foreign Claims Act.

10 I'll discuss some restitution-ish sort  
11 of claims that are provided by the military.  
12 We'll talk about compensation a little bit and  
13 then I'll discuss some additional areas of  
14 assistance that are provided to victims. So if  
15 you'd go to the next slide. Article 139 of  
16 Uniform Code of Military Justice provides an  
17 avenue for crime victims of property crimes to  
18 receive restitution.

19 This is limited to property crimes and  
20 it has a very narrow time period. The victim  
21 must file their report within 90 days of the  
22 incident and the practitioners report to me that

1 there's an issue of deconflicting the law  
2 enforcement aspect of an ongoing property crime  
3 and the Article 139 process.

4 As I look through all the data that we  
5 gathered or that have been gathered at the  
6 request of the Judicial Proceedings Panel as it  
7 relates to Article 139. Clearly, Article 139 is  
8 not used very often and it -- I can only speak  
9 for efforts that we've done in the Marine Corps.  
10 I suspect the other Services are doing similar  
11 things.

12 We really are making an effort to  
13 bring the concept and the idea of Article 139 to  
14 both victims of crimes and to commanders. We  
15 just last week taught our most recent commanders  
16 course in Article 139 and the concept of  
17 restitution was something that was specifically  
18 addressed to commanders that hadn't been before.

19 We're about to publish a new military  
20 justice regulation that specifically tasks legal  
21 officers with informing victims of the Article  
22 139 process. Each Service has implemented

1 Article 139 through Service regulation, but  
2 they're all essentially the same. The process  
3 puts a layman, for lack of a better term, in the  
4 position of making a determination of whether or  
5 not the victim should receive redress, for any  
6 groups. That's kind of an overview of Article  
7 139. Unless you have specific questions, I'll --

8 JUDGE JONES: Could I just ask you for  
9 clarification? When you talk about deconflicting  
10 of the Article 139 investigation with a criminal  
11 investigation, I gather the victim has to report  
12 within 90 days and I -- is this that you don't  
13 want any -- obviously, no one ever wants a  
14 conflict with a criminal investigation. But I'm  
15 not quite sure what you mean by that.

16 COL. BAKER: Well, it's -- when  
17 there's two groups of people -- when there's two  
18 bodies that are gathering facts, we want to make  
19 sure that they don't gather conflicting facts, or  
20 that the officer that's in charge of the 139  
21 process doesn't get in the way of the criminal  
22 investigation. We sometimes see this if you have

1 an aviation mishap, and there's a safety  
2 investigation. We just want to make sure that  
3 the parties involved -- we need to make sure that  
4 the 139 process does not cause harm to the  
5 investigatory process. Does that answer your  
6 question?

7 JUDGE JONES: Yes, but the victim, him  
8 or herself, can go in and make a report at any  
9 point --

10 COL. BAKER: Yes. Yes, ma'am.

11 JUDGE JONES: - right? Regardless of  
12 where they're at on their investigations?

13 COL. BAKER: Right.

14 JUDGE JONES: Okay. Thanks.

15 MR. STONE: Before you go on, I did  
16 have a question. Thank you. And you said this  
17 doesn't happen too often. Did you find any 139  
18 or 139 claims in sexual assault cases and if so  
19 what typically would they be that you saw there -  
20 - any?

21 COL. BAKER: I don't know if any of  
22 the cases that were specifically reported to you

1 all were sexual assault cases, but if they were  
2 there would have to be a property aspect of the  
3 crime. So the redress wouldn't be for the sexual  
4 assault. It would be for something that -- if a  
5 phone was broken, or -- it's limited to redress  
6 for damage to property.

7 MR. STONE: Okay. So -- but there's  
8 no typical -- in the sexual assault context I  
9 would think this is - if the claims aren't made  
10 very often, I would think they're almost never  
11 made in a sexual assault -- during a sexual  
12 assault crime except maybe like you're saying,  
13 somebody broke, you know, their portable phone  
14 but that wouldn't be part of the sexual assault  
15 anyway.

16 COL. BAKER: Right. Yes, sir. I  
17 mean, there is -- because this is so limited to  
18 loss of property, or injuries to property,  
19 there's no connection, really, to a sexual  
20 assault. There would be a sexual assault plus  
21 something that caused the loss of property. Is  
22 that responsive?

1 MR. STONE: I hear it, but I was -- if  
2 there's no real example that jumps to mind then  
3 it strikes me that Article 139 is really beside  
4 the point for sexual assault crimes.

5 COL. BAKER: I think that folks  
6 certainly have made that argument, yes, sir.  
7 It's aimed specifically at injuries to property,  
8 and sexual assault is not an injury to property.

9 LT. COL. GREEN: Mr. Stone, the  
10 Services -- the request for information -- the  
11 responses that we received from the Services for  
12 fiscal years 2012 to 2014 the services provided  
13 individual accountings for all Article 139  
14 claims. I just reviewed them. Those are in our  
15 RFI responses and there were none that were  
16 related to Article 120 allegations.

17 MR. STONE: Okay. That's what I was  
18 trying to find out.

19 COL. BAKER: Just providing you --  
20 it's the only place in the UCMJ where restitution  
21 is specifically discussed. So next slide,  
22 please.

1 MR. TAYLOR: Excuse me. Before you go  
2 on --

3 COL. BAKER: Yes, sir.

4 MR. TAYLOR: -- I have just a couple  
5 questions about Article 139. I noticed in the  
6 statistics that we got that the Army had reported  
7 receiving 200 of these, and the Air Force seven,  
8 the Marine Corps and Coast Guard one each, and  
9 the Navy none. Do you have any theory on why the  
10 Army has so many more of these claims compared to  
11 the other Services?

12 COL. BAKER: Speculation on my part,  
13 sir, is education and understanding that the  
14 process is out there, which is why I know that we  
15 are trying to improve the education campaign  
16 because it's a pretty simple process, and I was  
17 surprised that we had so few. Way back in the  
18 day when I was a practitioner we had more. But,  
19 again, this is information we need to bring to  
20 commanders' and victims' attention.

21 MR. TAYLOR: Yes, thank you. Just one  
22 other question, if I may. In the years that you

1 have been working on code revisions, has anyone  
2 suggested in the past that amending 139 to add  
3 bodily harm would be a good thing? Has it been  
4 considered and rejected, or not considered, to  
5 your knowledge?

6 COL. BAKER: I'll have to get back to  
7 you. I don't want to speculate. I'm sure the  
8 answer to your question is yes. It's been  
9 proposed in the past. Since I've joined the  
10 Joint Service Committee I don't recall that we've  
11 specifically looked at that. I know that. What  
12 I'd like to do is get you -- provide you a more  
13 informed response.

14 MR. TAYLOR: That would be helpful.  
15 Thank you very much. That's all I have, Madam  
16 Chair.

17 JUDGE JONES: Thank you.

18 COL. BAKER: Next slide, please. In  
19 the military justice system there are mechanisms  
20 that are currently in use to provide restitution  
21 to victims through the pretrial agreement process  
22 and these, again, are normally limited to

1 property crimes. The parties can agree that the  
2 accused will provide to the victim restitution.  
3 Generally speaking, restitution occurs prior to  
4 trial, but it doesn't always. It really kind of  
5 depends on how the pretrial agreement contract is  
6 written.

7           And in the past, the parties would  
8 often reach a post-trial agreement where the  
9 accused would make an agreement with the  
10 convening authority, particularly if the case was  
11 a -- perhaps it was a contested case where there  
12 -- as a means to make the victim whole, wholer,  
13 and also for the accused to gain a benefit, with  
14 the changes to Article -- with the changes to  
15 Article 60, I think, that this is going to become  
16 increasingly difficult to do in a post-trial  
17 agreement process.

18           After a court-martial findings and  
19 sentence have been adjudged, the pre-convening  
20 authority action process, which is the time  
21 between a court-martial sentence being announced  
22 and the convening authority taken action, the

1 accused can request to defer the automatic or  
2 adjudged forfeitures and those are paid to --  
3 they are paid to a dependent.

4 The issue at the pre-convening  
5 authority deferral is that requires the accused  
6 to ask that it happen, and then when the  
7 convening authority takes action on a sentence,  
8 the convening authority can direct the waiver for  
9 up to six months of adjudged or automatic  
10 forfeitures.

11 On the -- I don't want to insult your  
12 intelligence, but the difference between an  
13 adjudged and an automatic forfeiture is an  
14 adjudged forfeiture is what the court-martial  
15 sentences the accused to. Automatic forfeitures  
16 for a certain class of crime, the accused  
17 automatically forfeits, in a general court-  
18 martial, all pay and allowances and in a special  
19 court-martial two-thirds pay and allowances.

20 And so in - the pre-convening  
21 authority deferral process and post-action waiver  
22 process does provide a mechanism to provide those

1 pay and allowances to the dependent of the  
2 accused. Questions on that process?

3 JUDGE JONES: No, but it's very clear  
4 that a military judge cannot impose restitution.

5 COL. BAKER: Yes, ma'am. That is  
6 correct. I have seen where a judge recommends  
7 that if the accused does X, if the accused  
8 provides -- you know, submits a deferral that the  
9 convening authority may reduce the sentence. But  
10 that's solely a recommendation. It is not an  
11 authorized punishment.

12 CHAIR HOLTZMAN: May I ask a question?

13 JUDGE JONES: Yes. Yes, go ahead,  
14 Congresswoman.

15 CHAIR HOLTZMAN: The forfeiture that's  
16 ordered, that goes to the government, right? It  
17 doesn't go to any victim.

18 COL. BAKER: Yes, ma'am. And I will  
19 talk a little bit later about a mechanism where  
20 the forfeiture -- a mechanism that a victim can  
21 get compensation. But if that forfeiture is  
22 either deferred, which occurs between the

1 sentence and the convening authorities action, or  
2 waived for up to six months after the convening  
3 authority's action, if either of those processes  
4 occurs that would go to a dependent.

5 CHAIR HOLTZMAN: Right.

6 COL. BAKER: Does that answer your  
7 question?

8 CHAIR HOLTZMAN: Yes, sir.

9 COL. BAKER: Next. If there's no  
10 other questions on this I'll go to the next  
11 slide. And I'm just going to bring this -- the  
12 use of the Military Claims Act and Foreign Claims  
13 Act to your attention. Until yesterday, I didn't  
14 really realize folks were using this. The Army  
15 does this, I'm told, with some regularity.

16 Colonel Mike Mulligan is testifying  
17 later today, and it may be an area that Mike can  
18 talk to you about. But this is a process with  
19 which someone can file a claim, again, for  
20 property damage against the military. So if you  
21 ask me questions, I'm going to tell you to ask  
22 Colonel Mulligan. So I'm going to suggest we

1 move to the next slide.

2 So there are some things that kind of  
3 fall in the lane of compensation that are  
4 provided to victims, provided they meet certain  
5 criteria. The first is if you're on active duty,  
6 or a dependent you get medical care, provided  
7 that you still continue to rate it.

8 Active duty victims, obviously, have  
9 their salaries -- still continue to be paid by  
10 the military. But that's not because they're a  
11 victim of a crime but just, you know, through  
12 their service. And the VA has, you know, there's  
13 VA disability payments that are an option. You  
14 have to go through the VA process for that. And  
15 in most cases if the victim or a witness is  
16 ordered to appear, travels for a court-martial  
17 that cost is borne by the convening authority.

18 Next slide. Additionally, there's a  
19 mechanism to -- for military dependents to  
20 receive relocation expenses, even if the Service  
21 member is separated or incarcerated because of  
22 their crime. And there is a mechanism under the

1 joint travel regulations that if the dependent  
2 needs to move, kind of as a safety move, I recall  
3 the personal safety move, that there is a  
4 mechanism to pay for that to occur.

5 And then if there is military victims  
6 that need to do an expedited transfer, obviously  
7 the cost of that expedited transfer is borne by  
8 the military, and not by the victim.

9 Finally, as it relates to retirement,  
10 if you have a retirement-eligible service member  
11 that is going to lose their retired pay as --  
12 because of their misconduct, their dependent can  
13 receive a portion of that retirement pay, if it's  
14 part of a court ordered property settlement.

15 Next slide. Yes, sir.

16 MR. STONE: A question that I had was  
17 on the relocation costs, I don't think I quite  
18 understood the first bullet in the slide where  
19 you said their military dependents may be  
20 eligible even if they're -- I may have gotten  
21 this wrong -- even if they're separated due to  
22 the crime. I'm not sure what you meant by that.

1 Can you give me an example, please?

2 COL. BAKER: Okay. If an accused is  
3 convicted and sent to court, received a punitive  
4 discharge, or they're separated and getting an  
5 other than honorable discharge, normally they  
6 wouldn't rate some sort of -- they wouldn't rate  
7 a final PCS move. If they're the -- the  
8 dependents still can. So it's not for the  
9 service member. It would be for the dependent.

10 MR. STONE: I see. That's assuming  
11 that the dependent's the victim. That's only if  
12 the dependent is the victim? I mean, why would a  
13 victim otherwise -- I guess I didn't understand  
14 that -- be separated?

15 COL. BAKER: I think I'm not being  
16 clear. The victim wouldn't be separated, but if  
17 the service member is separated their dependents  
18 will receive a final -- basically, a move to  
19 their home of record. So they're not -- if they  
20 move from Alaska to Washington State as part of  
21 their military, you know, with their military  
22 service member, relocation back to their home of

1 record would be provided.

2 MR. STONE: Okay. I gather that the  
3 military does provide some benefits for the  
4 dependents of accused throughout this process. I  
5 guess I would just ask when you're talking about  
6 a benefit that's not going to a victim, could you  
7 try and identify that for us? Because, frankly,  
8 that's not the -- I don't think that's the  
9 primary focus of restitution and compensation.  
10 It's interesting, but that's not -- they're not  
11 the person who was the target of the sexual  
12 assault.

13 So I'd sort of like, at least in my  
14 own mind when we go over this, to be able to  
15 understand that's not really the ballpark of the  
16 focus of what we're worried about. I mean, that  
17 individual is still responsible for his family  
18 members, whether he's in the military or he's  
19 discharged. I guess I'm more concerned with the  
20 person who was sexually assaulted. So it's  
21 confusing to me when we're having those lumped  
22 together. I don't know if it's confusing for

1 other people. But that's what I was trying to  
2 establish.

3 COL. BAKER: Okay. Go ahead.

4 CHAIR HOLTZMAN: Can I ask a question?

5 JUDGE JONES: Yes, go ahead, Ms.

6 Holtzman.

7 CHAIR HOLTZMAN: Thank you. I simply  
8 have two areas. One is you mentioned VA. I  
9 guess I'm just trying to understand this myself.  
10 Forgive me, because you said you don't want to  
11 insult our intelligence, and mine can be easily  
12 insulted here. I don't know very much about  
13 this. But if a victim of a rape needs  
14 psychological, psychiatric or medical help, they  
15 automatically get that. Is that correct? From  
16 the -- from the military?

17 COL. BAKER: Active -- a victim that  
18 is on active duty --

19 CHAIR HOLTZMAN: Correct.

20 COL. BAKER: -- or a dependent or --

21 CHAIR HOLTZMAN: No, no. Let's just  
22 say active duty.

1 COL. BAKER: If it's -- yes.

2 CHAIR HOLTZMAN: Okay. Now, that  
3 person goes -- leaves the military and you  
4 mentioned that the VA kind of picks up from where  
5 the military left off. What is that handoff  
6 like? Does the VA make a whole new determination  
7 as to whether or not the injury, whether it's  
8 physical or mental, is sufficient to warrant  
9 their intervention? I mean, what's the process  
10 there? In other words, the people, do they fall  
11 through the cracks? Do the victims fall through  
12 the cracks in that circumstance?

13 COL. BAKER: To be completely frank  
14 with you, ma'am, I think that I'm probably not  
15 the best person to answer the -- to talk to the  
16 handoff between the DoD and the VA. I mean, I  
17 think we can find somebody that can provide an  
18 answer to that. That's a great question and we  
19 can look to get an answer to that. I don't -- I  
20 only want to provide information I'm comfortable  
21 talking about.

22 CHAIR HOLTZMAN: Okay. I get that.

1 And the second area that I wanted to ask about a  
2 -- civilian victims of military sexual assault,  
3 whether it's within the DoD, or whether it's  
4 outside DoD. What kind of -- are you going to  
5 address whatever benefits there are for those  
6 people?

7 COL. BAKER: For military victims that  
8 are outside of the DoD, they get compensation  
9 through state and federal victims compensation  
10 funds.

11 CHAIR HOLTZMAN: I see. But there's  
12 nothing for the -- that they get directly from  
13 the military? If you don't have an answer,  
14 that's -- you can get back to me about that.  
15 That would be fine.

16 COL. BAKER: Okay. If you'd go to the  
17 next slide. We do have, as directed by 10 U.S.C.  
18 1059, a process with which to provide victims of  
19 dependent abuse transitional compensation. That  
20 goes for up to 36 months, provided that the  
21 accused Service member has 36 months or more left  
22 on their contract. But this provides for some

1 compensation to victims of dependent abuse for  
2 following either a conviction at a court-martial,  
3 or separation under other than honorable  
4 conditions.

5           There are some restrictions placed  
6 upon the family member. They can't reside with  
7 the abusive family member. They can't have been  
8 a participant in the abuse. And, again, as I  
9 just discussed, we also direct victims or refer  
10 victims to federal and state compensation  
11 programs and I know that I read -- you know, some  
12 of the panel members that are going to come  
13 testify today are going to talk about their  
14 experience with military victims in receiving --  
15 utilizing the state compensation program.

16           MR. STONE: What did you mean by they  
17 can't participate in the abuse? I would presume  
18 if there's dependent abuse, that's typically a  
19 situation between a parent and a child, and  
20 usually the child is participating, in the sense  
21 that they're ashamed and they're not immediately  
22 reporting it, and it may go on for some time.

1       What participation definition were you referring  
2       to?

3                   COL. BAKER:  If you'd give me a --  
4       I'll just read to you from the DoD instructions,  
5       sir.  It says that if the victim was a dependent  
6       child, and the spouse had been found by competent  
7       authority designated by the secretary concerned  
8       to have been an active participant in the conduct  
9       constituting the criminal offense, or to have  
10      actively aided or abetted the member in such  
11      conduct against that dependent child, the spouse  
12      or dependent child living with the spouse shall  
13      not be paid transitional compensation.

14                   So if you have a husband, wife, one's  
15      active duty, one's not, and they're both abusing  
16      the child, the non-active duty abuser is not  
17      going to get transitional compensation.

18                   CHAIR HOLTZMAN:  But what happens --  
19      what happens to the child?

20                   COL. BAKER:  There's a mechanism to  
21      pay the benefits to the child, but they're not  
22      going to pay the benefits to the abuser.

1 MR. STONE: Can the child be  
2 disqualified for being -- for participating for  
3 six months or a year or two years before they  
4 report it?

5 COL. BAKER: I'm sorry. Could you  
6 repeat the question, sir?

7 MR. STONE: Yes. If the child is  
8 being abused but the child does not report it for  
9 a long period of time are they disqualified as  
10 being a participant?

11 COL. BAKER: I would certainly hope  
12 not. Being the subject of a -- yes, I certainly  
13 would hope not. Next slide, please. Finally,  
14 there are a number of areas where the lawyers are  
15 involved in the process. The victim witness  
16 liaison officers kind of provide information, and  
17 direct victims to a whole host of agencies that  
18 are available to assist victims.

19 Again, the UCMJ really only discusses  
20 restitution in Article 139, and that discussion  
21 is specifically to property crimes. There are a  
22 number of agencies available to assist victims

1 with restitution and compensation issues but  
2 they're not, beyond Article 139, they're not  
3 specifically addressed to the Uniform Code of  
4 Military Justice. Do you have other questions  
5 for me?

6 MR. TAYLOR: Yes. Thank you. I'd  
7 like to go back to Ms. Holtzman's question a  
8 moment ago regarding civilian victims. If I  
9 understand what you say and the materials that we  
10 were provided in the advance, it seems that there  
11 is not much of a safety net here for civilian  
12 victims of military assault and unless you fall  
13 into one of several categories that I will list  
14 here, and I will ask you to correct me if I'm  
15 wrong, you probably are not going to get any  
16 compensation.

17 One would be if there's a pretrial  
18 agreement that requires some sort of restitution  
19 to be made. A second would be if you can get  
20 some sort of state compensation, funneling the  
21 federal money that's available. The third would  
22 be if you file an Article 139 complaint, but

1 that's only good for property only. And the  
2 fourth would be if you actually file a civil  
3 action using the Federal Tort Claims Act, or one  
4 of the claims acts that you just mentioned.

5 So as far as I can see, that's about  
6 it. Is there more? Is there something that I  
7 had missed here?

8 COL. BAKER: The -- I mean, there's  
9 the federal and state crime victims compensation  
10 funds, but they're not run or overseen by the  
11 military, if that is your question. Yes, sir.

12 MR. TAYLOR: Right.

13 COL. BAKER: And, again, I do want to  
14 preface any and all of my comments that there's a  
15 whole host of folks that have more experience in  
16 this area than I. They're going to come and talk  
17 with you.

18 MR. TAYLOR: Thank you. I understand  
19 that. I understand that you're trying to pull  
20 together a lot of information that other people  
21 own as the primary source. Another question,  
22 though, suggested by your last comments regarding

1 the additional assistance, when we had hearings  
2 on the SVC, Special Victims Counsel, we talked  
3 about requirements that law enforcement, that  
4 others had to notify people of the programs that  
5 were available.

6 Do you know whether there are any  
7 requirements in any of the Service regulations  
8 that anybody is truly responsible for letting the  
9 victim know about the possibilities of any of  
10 these options regarding restitution and  
11 compensation?

12 COL. BAKER: Yes. The short answer is  
13 yes, people are responsible for providing that  
14 information to the victims. That's one of the  
15 specified duties of the victim witness liaison  
16 officer. That's - I don't know if it's a  
17 specified duty. I know that the Special Victims'  
18 Counsel, Victims Legal Counsel spend a  
19 considerable amount -- spend some time training  
20 on it so that they understand the process.

21 So yes, there are people that - I know  
22 the victim witness liaison officer has the

1 specified duty of doing it but there's a lot of  
2 other people that provide that information to  
3 them. But to be completely frank, like the  
4 Article 139, if people don't know about it,  
5 they're not going to use it.

6 MR. TAYLOR: Right.

7 COL. BAKER: I think that the  
8 attention that this entire topic has gotten has  
9 caused a lot of people to provide much more  
10 information than they have in the past.

11 MR. TAYLOR: Right. Well, it seems to  
12 me that one of the things that one can do is to  
13 have this on the checklist, whatever the  
14 checklist is for the person who's providing the  
15 service, to be sure that this is one thing that  
16 people not only know about, but understand how to  
17 follow up with.

18 COL. BAKER: Yes, sir. I would agree  
19 with that.

20 JUDGE JONES: Go ahead, Mr. Stone.

21 MR. STONE: I'd like to go back and  
22 see if I understand for a moment what you said

1 about pretrial agreements. If the victim is a  
2 civilian victim, they won't have any input. They  
3 won't even know about the, ahead of time, any  
4 negotiation of a pretrial agreement, right? I  
5 mean, that's going to be done by the prosecutor?  
6 And they won't have an SVC appointed.

7 COL. BAKER: They won't have an SVC  
8 appointed, but the convening authority is  
9 required to consider the views of the victim  
10 prior to reaching a pretrial agreement. That  
11 victim, if the victim doesn't have a special  
12 victim counsel, or a victim's legal counsel it's  
13 one of the responsibilities of the prosecutor to  
14 gather that information. That's a --

15 MR. STONE: But the victim -- let's  
16 take both circumstances for a moment. If the  
17 prosecutor doesn't think that restitution is  
18 appropriate, the victim doesn't get it. Isn't  
19 that right? In other words, the SVC, if there is  
20 one, can't independently say we disagree with you  
21 and the victim wants restitution.

22 COL. BAKER: The convening -- the

1 ultimate decider is the convening authority. The  
2 convening authority is required to consider the  
3 views of the victim before reaching a pretrial  
4 agreement. So the trial counsel may say -- in  
5 your hypothetical where the trial counsel doesn't  
6 think restitution is appropriate and the victim  
7 does, the convening -- we are required to provide  
8 that information to the convening authority. The  
9 convening authority is required to consider the  
10 views of the victim.

11 MR. STONE: I guess I'm asking how  
12 those views are going to get there if the  
13 prosecutor -- these pretrial agreements have to  
14 be voluntary, am I right?

15 COL. BAKER: Yes, sir.

16 MR. STONE: All right. Let me just  
17 say in the civil system, to be perfectly frank  
18 with you, there's an awful lot of prosecutors who  
19 don't want to hear about restitution, because  
20 then they won't get a plea, because the defense  
21 attorneys are looking out for their clients, and  
22 they typically do not want to include

1 restitution.

2           So very often the prosecutors, in  
3 order to move on to the next case, don't  
4 independently bring the topic up, and the only  
5 reason that restitution gets raised is because  
6 the victim themselves, or their counsel raises it  
7 at sentencing. And I'm trying to figure out, in  
8 a very busy military prosecution office, where  
9 the defense counsel may be, again, not interested  
10 in restitution because they're defending their  
11 client and it doesn't come up.

12           How is this going to come up in a  
13 voluntary plea negotiation? Who is going to  
14 bring it up if the victim is not actually at the  
15 negotiation?

16           JUDGE JONES: Maybe I could jump in  
17 here for a minute. We talked about this on the  
18 Response Panel a great deal and I think we even  
19 have a recommendation. But it is clearly  
20 established that the victim's views are to get to  
21 the convening authority with respect to  
22 everything, including restitution, and I believe

1 the way we left our recommendation was to the  
2 Services to figure out whether they wanted  
3 specific procedures like it must be in writing or  
4 it can be -- or it, I don't think anybody said it  
5 had to be oral, as a suggestion, a real  
6 appearance.

7 But that might be a procedure. There  
8 are no procedures yet, but the right is  
9 completely clear that the convening authority has  
10 the - the victim has the right to get their  
11 opinion to the convening authority. And I would  
12 suspect that it will turn out to be mostly  
13 written, but I don't know that. I don't know if  
14 you've had any experience one way or the other,  
15 Colonel Baker.

16 COL. BAKER: We are, and, again, I'll  
17 use my service as an example: we are in the  
18 process, we're about to republish an update to  
19 our military justice practice, and in it we  
20 specifically require the convening authority to  
21 consider the views of the victim. In the Marine  
22 Corps, the legal advice to a convening authority

1 is ultimately provided by the SJA.

2 One of the things that the SJA is  
3 required to ensure the convening authority  
4 considers is the views of the victim. That is a  
5 requirement -- our commanders will follow that.  
6 It's part of the instruction that they receive at  
7 the commanders course. It's part of the  
8 instruction that staff judge advocates receive at  
9 their annual training events, things that the  
10 trial counsel talked about.

11 So there's a mechanism for it to  
12 occur. I don't think our lawyers follow our  
13 rules. I mean, I'm not concerned that we're --  
14 frankly, I'm not concerned if there's a practice  
15 in the civilian side where, you know, we just  
16 don't bring that up, well, we don't -- that  
17 option of not bringing it up doesn't exist. The  
18 convening authority must consider the views of  
19 the victim.

20 MR. STONE: I guess my problem is that  
21 the prosecutor, military or civilian, does not  
22 speak for the victim. That is why you have --

1                   JUDGE JONES: Which, Mr. Stone, is the  
2 -- right, is the reason why it's such a good and  
3 important new step to have an SVC or LVC, and the  
4 bottom line is it's really, it seems to me, a  
5 key, you know, a key and very important -- you  
6 know, thing that should occur here is training of  
7 them. They have to know that, obviously, this is  
8 really important and they should get their  
9 victims' views to the convening authority. Am I  
10 missing something, Mr. Stone?

11                   MR. STONE: Yes. I'm trying to find  
12 out whether the SVC gets to present directly to  
13 the convening authority. That's what I want to  
14 know. Or whether the SVC is done, and it's only  
15 the words of the SJA or whomever get to the  
16 convening authority.

17                   COL. BAKER: It depends. Is there --  
18 is there a hard and fast rule that says that the  
19 SVC gets to walk in and talk to the convening  
20 authority? No. Does it happen in practice?  
21 Usually. Are there times when it doesn't? Yes.  
22 But always the views -- the convening authority

1 is told the views of the victim, and when there's  
2 a disagreement between what the prosecutor wants  
3 and what the victim wants, that information is  
4 provided to the convening authority.

5 CHAIR HOLTZMAN: Madam Chair, may I  
6 ask a question about this?

7 JUDGE JONES: Yes, Ms. Holtzman.

8 CHAIR HOLTZMAN: It's a little bit of  
9 a tangent. But what happens in the situation --  
10 I thought that's where we were starting -- with a  
11 non-military victim? How do the views of the  
12 non-military victim get to the convening  
13 authority?

14 COL. BAKER: The -- normally, the  
15 trial counsel obtains that information and  
16 provides that information either directly to the  
17 convening authority or to the convening authority  
18 through the staff judge advocate.

19 CHAIR HOLTZMAN: Okay. And you're  
20 saying that the check on -- to ensure that that  
21 happens is that the convening authority, and the  
22 SJA should be requesting of the trial counsel

1 that information?

2 COL. BAKER: Yes, and I know that in  
3 our -- again, in the Marine Corps' disposition  
4 reports, one of the boxes that is checked is  
5 whether the convening authority considered the  
6 views of the victim or not. The convening  
7 authority is required to check off if they have  
8 considered the views of the victim. Commanders  
9 are trained on this. Staff judge advocates are  
10 trained on this. Trial counsel are trained on  
11 this.

12 Can I say that in 100 percent of the  
13 time that that happens? I hope I can say that,  
14 but it's a requirement that it occur, and with  
15 commanders that's always -- the trainers all talk  
16 that it's always the first thing they want to  
17 know: what does the victim want to do? It  
18 matters a lot to the commander what and how  
19 they're going to dispose of a case, what the  
20 views of the victim are.

21 CHAIR HOLTZMAN: Thank you.

22 JUDGE JONES: Mr. Taylor, anything

1 further?

2 MR. TAYLOR: No, thank you.

3 JUDGE JONES: Mr. Stone?

4 MR. STONE: I guess I'm still -- and  
5 I see this as a thread running through some of  
6 this -- I'm still a little surprised that there  
7 is no opportunity for the victim's counsel -- not  
8 the trial counsel but the victim's counsel to be  
9 able to make an oral presentation to the people  
10 from whom restitution is being asked.

11 Legal proceedings change constantly  
12 and the nature of the crime and how the convening  
13 authority feels about it and what aspects matter  
14 and even what the victim wants depends on what  
15 the victim hears.

16 Some victims will say if they hear  
17 acceptance of responsibility or if they feel they  
18 want to get beyond the event they may decide at  
19 the last minute you know what, I don't want  
20 restitution -- I never want anything to do with  
21 that person again.

22 Other victims who may have not really

1       cared about restitution may hear a victim get up  
2       who they think is still so -- still with, you  
3       know, making a plea but still really not showing  
4       any acceptance of responsibility, even in a  
5       presentation that's presented at the next level.  
6       They see such reluctance and for the first time  
7       they decide at the last minute, hearing what's  
8       going on, that they want restitution.

9               And when you do not allow an oral  
10       presentation you freeze the proceeding way back  
11       at a stage when somebody put it down in writing  
12       rather than making it contemporary before the  
13       decision maker.

14               That actually runs through the thread.  
15       That thread is in the Supreme Court's decision in  
16       Goldberg v. Kelly, a 1960 Supreme Court case that  
17       -- to make a position meaningful you have to give  
18       people a chance to speak about it when it's  
19       brought up and not just say oh, submit something  
20       in writing, which they had to prepare beforehand  
21       and it doesn't have the -- it doesn't give them  
22       the ability to respond to -- maybe the convening

1 authority has a question. It can't be responded  
2 to.

3 And so I would certainly hope that the  
4 procedures that are evolved are not procedures  
5 that say oh, this is a written frozen procedure  
6 and you get to talk to the victim sometime before  
7 this and that's all that gets sent up.

8 I don't think that means that the  
9 victim is actually getting to ask for  
10 restitution. Their prior thoughts are being  
11 passed along but that's not quite the same thing.

12 I was in a civilian proceeding  
13 yesterday and not until the last minute was the  
14 victim able to decide whether they wanted to walk  
15 away from this whole thing or yes, they did want  
16 some restitution. So I think that, you know,  
17 freezing this process and just making it written  
18 I think is, to me, not sufficient.

19 COL. BAKER: Well, I will just tell  
20 you that the process complies with Article 6b's  
21 requirement and I'll leave it at that.

22 JUDGE JONES: Okay. Just one point

1 to clarify. At least in the federal system  
2 prosecutors do not bargain over restitution. The  
3 judge must order restitution if there is economic  
4 harm or other injury and there's a pretrial  
5 service probation office report which comes after  
6 an examination of everything -- the finances of  
7 the defendants as well as, to the extent they  
8 can, investigation of the crime itself. All  
9 right. Colonel Baker, anything else?

10 COL. BAKER: No. I just appreciate  
11 the time and attention today.

12 JUDGE JONES: Thank you so much. All  
13 right.

14 We'll now move on to our panel of law  
15 school -- legal experts, rather, on the economic  
16 needs of sexual assault victims and barriers to  
17 compensation.

18 PROF. GOLDSCHIED: Good morning,  
19 everyone.

20 JUDGE JONES: Good morning. Professor  
21 Goldscheid, is that the correct pronunciation of  
22 your name? Then perhaps we'll begin with you.

1 Thank you.

2 PROF. GOLDSCHIED: Sure. Good morning.  
3 I want to thank the Panel for providing me the  
4 opportunity to testify today.

5 My name is Julie Goldscheid. I'm a  
6 professor at CUNY Law School, which is the only  
7 public law school in New York City and one of the  
8 most diverse law schools in the country.

9 CUNY Law School was founded in 1985  
10 with the mission of training public interest  
11 lawyers. But the views expressed here are my own  
12 and not the views of the law school.

13 For over 30 years I have advocated on  
14 behalf of survivors of gender-based violence  
15 including intimate partner and sexual violence.  
16 I commend efforts to enhance survivors' access to  
17 the services and assistance they need to recover  
18 from abuse.

19 I'm particularly pleased that the  
20 Panel is charged with assessing the adequacy of  
21 compensation and restitution under the Uniform  
22 Code of Military Justice, since economic and

1 practical needs are so critical to survivors'  
2 wellbeing.

3 In conducting this assessment, I urge  
4 the Panel to take into account the range of  
5 financial needs -- unmet financial needs that  
6 survivors face including those arising from  
7 bodily harm and to consider the difficulty  
8 survivors often face recovering through standard  
9 channels.

10 As we know, gender violence, including  
11 intimate partner violence and sexual assault,  
12 exacts a stark economic toll on its victims as  
13 well as on society as a whole.

14 For a survivor, the ability to recover  
15 for economic losses is critical. At least one  
16 study found that the ability -- that victims  
17 regard practical financial assistance as key to  
18 their recovery and in fact is one of the most  
19 important victim services that can be available.

20 In assessing the adequacy of current  
21 compensation and restitution schemes the Panel  
22 may find it useful to reflect on the program's

1 purposes.

2 As the articles that were included in  
3 the briefing materials detail, there are various  
4 rationales that have been offered through victim  
5 compensation programs. Under some views, these  
6 programs reflect the government's legal  
7 obligation to provide government-funded victim  
8 compensation based on the idea that society is  
9 responsible for the costs of crime.

10 In other words, the occurrence of  
11 crime reflects the failure of police -- in other  
12 words, state protection.

13 Others see compensation as social  
14 welfare programs designed to advance society's  
15 humanitarian obligation to assist those who are  
16 vulnerable.

17 Others simply view victim compensation  
18 programs as a way of supporting the criminal  
19 justice system's goals of promoting prosecution  
20 and convictions.

21 Another perspective views crime victim  
22 compensation programs as a way of distributing

1 the costs of crime across society and, of course,  
2 still others -- other programs are structured as  
3 providing a substitute for damages awards that  
4 could be obtained through the court system.

5 Remembering several abuse rationales  
6 in this context you might think about the  
7 compensation system overall as providing victim-  
8 centered restorative approach that aims to meet  
9 victims' unmet practical economic needs as fully  
10 as possible, taking into account the multiple  
11 challenges that survivors face in leaving long-  
12 term abuse.

13 So I'll say a few words just to  
14 summarize what some of the data is about  
15 survivors' outstanding economic needs and I'll  
16 speak generally since most of the data focuses  
17 generally on both intimate partner and sexual  
18 violence.

19 Of course, intimate partner violence  
20 often includes sexual violence and most of the  
21 studies -- most of the empirical data focused  
22 generally on the general population and not

1 specifically about the military population but  
2 I'll spell that out as much as possible.

3 So under any rationale, addressing  
4 survivors' unmet economic needs resulting from  
5 the violence is an essential part of an effective  
6 compensation system.

7 Survivors consistently report  
8 incurring expenses including medical and mental  
9 health costs and lost income. The largest  
10 component of intimate partner and sexual  
11 violence-related costs is health care, and as you  
12 no doubt know, health consequences include  
13 physical injury, psychological trauma, physical  
14 health problems, depression and drug and alcohol  
15 abuse.

16 Medical costs have been estimated at  
17 over \$2,000 per victimization for those who have  
18 sought and received treatment. Other estimates  
19 place the cost to a survivor of a single incident  
20 of sexual assault at up to \$110,000. That  
21 includes medical and mental health care, lost  
22 productivity and pain and suffering. Lost wages

1 also are a critical component of the toll of  
2 sexual violence.

3 The Centers for Disease Control found  
4 that over 20 percent of women who were raped and  
5 over 17 percent of those who were physically  
6 assaulted by an intimate partner lost an average  
7 of seven to eight days of paid work.

8 One study of those raped by an  
9 intimate partner found that a fifth reported  
10 losing time from work and a published study  
11 specifically looking at sexual assault victims  
12 found that one-half reported losing their job in  
13 the aftermath of the assault and this is  
14 consistent with an informal study of sexual  
15 assault survivors who were working at the time of  
16 the incident, which similarly revealed that over  
17 half of them either lost income, had to take time  
18 off without pay, or had to quit their jobs as a  
19 result.

20 As I said, fewer studies have looked  
21 specifically at the needs of survivors of  
22 military sexual assault. Those that have, as you

1 know, confirmed the stark economic impact as well  
2 as survivors' unmet economic needs.

3 So the Service Women's Action Network  
4 reported that 40 percent of homeless women vets  
5 reported having experienced a sexual assault.

6 SWAN's report also detailed the ways that sexual  
7 assault leads to high rates of substance abuse,  
8 which of course are accompanied with its own  
9 treatment and associated costs. The ACLU, along  
10 with SWAN, detailed the difficulties that vets  
11 face obtaining VA disability benefits for PTSD  
12 claims related to military sexual assault and, as  
13 you know, vets are unable to use the court system  
14 in the ways that civilians can to recover for  
15 their losses.

16 I know a question before the Panel is  
17 about restitution, and restitution may be a  
18 meaningful source of compensation for some  
19 survivors.

20 Some studies have found it is both one  
21 of the most under-enforced victims' rights  
22 overall but it is also one of the most

1 significant factors that can affect victims'  
2 satisfaction with the criminal justice system.

3 I'd submit that there's no  
4 justification for concerns about fabrication that  
5 have been suggested in the context of claims for  
6 restitution surrounding sexual assault that are  
7 any different from any other claims for  
8 restitution.

9 Notwithstanding the value of  
10 restitution, restitution may not be suitable in  
11 all circumstances. As others have noted,  
12 perpetrators may lack when they have limited  
13 resources but in addition restitution accompanies  
14 a criminal prosecution and not all survivors may  
15 want to engage with the criminal justice system.

16 With respect to the concern that  
17 restitution or forfeited wages may adversely  
18 impact innocent victims -- in other words,  
19 dependents.

20 A fact finder should be able to take  
21 into account both the victims' and dependents'  
22 respective needs in making a determination.

1           But moreover, I think the potential  
2 conflict reflects the fact that compensation  
3 should be -- for the victims should be considered  
4 separate from offender accountability.

5           While both are important and may  
6 relate to one another, the avenues for  
7 compensation should be available even where a  
8 perpetrator has limited capacity for providing  
9 compensation.

10           At the same time, survivors should  
11 have the option of recovering from the  
12 perpetrator whether through the court system or  
13 through a restitution hearing. One value of  
14 victim compensation systems historically has been  
15 the ability to afford compensation to the  
16 survivor without requiring her to re-engage with  
17 the perpetrator.

18           As Judge Stone referenced earlier,  
19 that may be the last thing that a perpetrator  
20 wants to do. Alternative models such as that  
21 recommended by SWAN could create a no-fault  
22 system for recovery, for example, funded as part

1 of the Department of Defense budget, which might  
2 be preferable to relying on adjudication in an  
3 individual case.

4 In conclusion, I applaud efforts to  
5 review the comprehensiveness of victim  
6 compensation and restitution programs, given the  
7 importance of addressing survivors' economic and  
8 practical needs.

9 As evidence will detail, current  
10 program requirements such as law enforcement  
11 cooperation and prompt reporting requirements,  
12 innocent victim requirements and limits based on  
13 financial need operate both to perpetuate  
14 outdated stereotypes and to unduly exclude many  
15 who would benefit from assistance.

16 Support for a comprehensive program is  
17 essential to truly assisting survivors and moving  
18 forward after they have been subject to sexual  
19 assault. Thank you again for the opportunity to  
20 testify and I look forward to your questions.

21 JUDGE JONES: Thank you. All right.

22 Professor Rutledge?

1                   PROF. RUTLEDGE: Good morning. My  
2 name is Professor Njeri Mathis Rutledge. I would  
3 like to begin by first thanking the Panel for  
4 this wonderful opportunity to speak on this  
5 important topic.

6                   I'm also grateful to the JPP staff for  
7 the resources they provided, my colleagues at the  
8 institution South Texas College of Law, where  
9 Dean Don Guter, a retired rear admiral for the  
10 Judge Advocate General Corps for the Navy, is  
11 leading that.

12                   Of course, the views expressed today  
13 are my own. I will not be reading the prepared  
14 written statement that I submitted earlier.  
15 Instead, I'd like to highlight what I feel are a  
16 few key points.

17                   The panel prepared a series of  
18 questions and solicited responses from various  
19 Service branches regarding compensation and  
20 restitution. One response stood out in  
21 particular to me.

22                   It was question 56, and the response

1 stated, "The purpose of the military justice  
2 system is not to make the victims of crime whole  
3 or put them in the same position they would have  
4 been had the crime not occurred. It's to ensure  
5 that justice is served on the guilty."

6 I found this written statement both  
7 insightful and troubling. It is my respectful  
8 position that if that represents the true  
9 definition of justice in the military, it's time  
10 for change.

11 There can never be justice in the  
12 truest sense without considering the needs of  
13 victims. A victim should not have to suffer  
14 economic consequences simply because of the  
15 unlawful actions of someone else.

16 Surely, change is on the horizon. The  
17 progressive ideas and the amendments to the UCMJ  
18 and adoption of the Special Victims' Counsel is a  
19 high standard that should be emulated by the  
20 civilian system of justice.

21 I am grateful for the work of this  
22 panel, the staff, the Department of Defense and

1 Congress for being instruments of change in favor  
2 of victim's rights.

3 The impact of crime, particularly  
4 sexual violence, is multifaceted. Victims of  
5 sexual violence are at greater risk of post-  
6 traumatic stress disorder, alcohol abuse,  
7 depression, chronic medical problems.

8 Sexual violence has directly derailed  
9 countless careers and families. Survivors have  
10 significant needs related to medical treatment,  
11 counseling, lost wages.

12 Victims of domestic violence who are  
13 also sexually assaulted may have additional needs  
14 related to relocation expenses and dependent  
15 care.

16 Adult victims of sexual assault also  
17 need support and validation from family members  
18 and the broader community. For the men and women  
19 who serve our military there is no more important  
20 community.

21 For too long military victims of  
22 sexual assault have complained of feeling both

1 betrayed and abandoned by their community. The  
2 proposals that are being considered by the Panel  
3 today are a positive step toward ensuring that  
4 victims are considered in the quest for justice.

5 It will also enhance the perception of  
6 fairness towards adult sexual assault victims in  
7 the military. State crime victim compensation  
8 programs can benefit both military and civilian  
9 victims.

10 But as I detailed in my scholarship,  
11 the restrictive eligibility requirements can also  
12 be used to deny victims. There is also a one-  
13 year limitation usually for filing a claim.

14 Sexual and domestic violence victims  
15 or sexual and domestic violence crimes are  
16 historically under-reported. The requirements of  
17 CVC funds, of victim cooperation and contributory  
18 misconduct can vary depending on individual  
19 boards and how they define them and that can work  
20 against victims of sexual and domestic violence.

21 Now, it's true that the various  
22 Service branches repeatedly emphasize that the

1 needs of military victims of sexual assault were  
2 well covered by the wide array of benefits and VA  
3 benefits following retirement.

4 That premise, however, was challenged  
5 by the insightful public comment from Greg Jacob,  
6 policy director of SWAN, the Service Women's  
7 Action Network.

8 Mr. Jacob suggested even military  
9 victims can fall through the cracks. Moreover,  
10 military benefits will do very little to make the  
11 civilian victims of military sexual violence  
12 whole.

13 Allowing more opportunities for sexual  
14 assault victims to obtain restitution through  
15 court-martial, expanding Article 139 to include  
16 bodily injury and allowing convening authorities  
17 to transfer forfeit pay and allowances would mark  
18 important steps towards making victims whole.

19 Notably, many of the proposals that  
20 call for change seem to be met with some  
21 resistance based on the Service branch responses.  
22 An interesting repeated theme raised was

1 restitution and compensation would ultimately  
2 hurt victims who will be viewed as driven only by  
3 financial gain.

4 I can say as a former prosecutor in  
5 Texas, Harris County, asking victims about their  
6 feelings on restitution, injury, punishment --  
7 what we refer to as rip calls -- was a standard  
8 procedure.

9 Victims of crime who request  
10 restitution would and should never be viewed as  
11 greedy or having ulterior motives. Based on the  
12 reluctance from some Service branches I wonder if  
13 there are some certain misconceptions about what  
14 restitution and compensation are actually meant  
15 to accomplish.

16 It's not intended to be a form of  
17 punitive damages or damages for pain and  
18 suffering. Those type of claims obviously are  
19 best served in civil court.

20 Restitution and compensation share a  
21 dual role of reimbursing victims for verifiable  
22 expenses. Just like property claims can be

1       quantified, so can most medical expenses.

2               The court-martial or a commander in an  
3 Article 139 proceeding are both more than capable  
4 of reviewing written statements or actual bills  
5 for medical treatment and making a decision.

6               Moving beyond property crimes and  
7 expanding Article 139 to include bodily injury is  
8 the next logical step.

9               Restitution is particularly intriguing  
10 as a concept in the military system because,  
11 unlike the civil system, there is a much greater  
12 likelihood that funds can actually be recovered.

13              Finally, expanding the convening  
14 authority's options to consider victims when  
15 deciding on waiving forfeited pay and allowances  
16 is a bold and important step in favor of victims'  
17 rights.

18              When making decisions about justice,  
19 all stakeholders need to be considered,  
20 especially direct victims. Although dependent  
21 children and spouses are indeed innocent victims,  
22 they are not the only innocent victim in a sexual

1 assault case.

2 In conclusion, I support the ideas  
3 being considered by the Panel today. I am also  
4 intrigued by the idea of the military having its  
5 own separate crime victim compensation program.

6 I look forward to your questions.  
7 Thank you.

8 JUDGE JONES: Thank you very much.

9 Next, Professor Lollar. Thank you.

10 PROF. LOLLAR: Good morning, Madam  
11 Chair, and good morning, other panelists, Mr.  
12 Stone and, I believe, Mr. Taylor.

13 My name is Courtney Lollar and I also  
14 share my colleagues' view that I'm grateful for  
15 the opportunity to be here this morning and, like  
16 them, I also represent my own views here and not  
17 the views of the University of Kentucky College  
18 of Law where I am employed.

19 I approach this topic from a bit of a  
20 different perspective than some of my colleagues  
21 here today.

22 I spent many years as a public

1 defender first in the state system and then in  
2 the federal system and I continued in that  
3 capacity to work on behalf of indigent criminal  
4 defendants.

5           And my interest in restitution and  
6 compensation arose in that capacity initially.  
7 Over the years, I represented numerous indigent  
8 defendants who were ordered to pay restitution  
9 amounts that, because they were indigent and  
10 often faced difficulty in terms of getting  
11 employment after a criminal conviction, their  
12 ability to repay the restitution that was ordered  
13 was often limited and so they would pay in very  
14 small amounts over a period of time, often not  
15 getting anywhere near paying the amount of  
16 restitution that was ordered.

17           So that became the basis of my  
18 scholarly research once I entered academia and I  
19 think it is a very important topic and I'm  
20 pleased that the Panel is considering this topic  
21 for today.

22           So let me say at the outset that I,

1 broadly speaking, share my colleagues' view that  
2 court -- the court-martial should be vested with  
3 authority to order victim compensation as part of  
4 military sentencing.

5 For many of the reasons that my  
6 colleagues have articulated, victim compensation  
7 often is a critical remedy for victims of crime.

8 However, drawing from my own research  
9 and from my own experiences, I have three  
10 specific concerns that I wanted to articulate to  
11 the Panel today that I think is important to be  
12 taken into consideration in figuring out whether  
13 and how to craft a compensatory remedy for  
14 victims of sexual abuse or sexual assault.

15 The first point I'd like to make is  
16 that, as was indicated earlier, in the federal  
17 system restitution is mandatory and the  
18 defendant's ability to pay is not allowed to be  
19 considered under the Mandatory Victims  
20 Restitution Act.

21 That has become a significant barrier  
22 to compensation in the federal system. Studies

1 have shown that prior to the enactment of -- by  
2 law which is the first statute to make it  
3 mandatory, when courts could take the defendant's  
4 ability to pay into consideration restitution  
5 was actually paid a greater percentage of the  
6 time than it has been since restitution became  
7 mandatory.

8           Since restitution became mandatory,  
9 the amount of criminal debt from unpaid  
10 restitution fees to victims that are non-  
11 government victims rose from six billion dollars  
12 to \$64 billion in 2010. So it, obviously,  
13 tenfold increased.

14           The flip side of that is that victim  
15 satisfaction has gone down because victims are  
16 being told that they are going to get something  
17 that they're not going to get.

18           And so rather than feeling like the  
19 system is more responsive to them now because  
20 their views are being taken into consideration,  
21 they're feeling like they're being promised  
22 something that is not realistic.

1           And there have been social studies of  
2 crime victims that have showed that many of them  
3 would prefer to receive a smaller dollar amount  
4 that's not the full amount of losses, as the  
5 federal system requires, but that is actually a  
6 smaller amount and have a greater percentage of  
7 that paid -- either most of it or all of it --  
8 paid off as opposed to being promised an  
9 unrealistic amount that they're really -- not  
10 really going to ever receive very much of.

11           I realize at first blush that might  
12 seem to be an uncomfortable fit when we're  
13 talking about transferring that over to the  
14 military system. But I do think that there are  
15 some parallels.

16           It's my understanding both from the  
17 testimony this morning and from the readings that  
18 I did in preparation for the day that someone who  
19 is sentenced to incarceration while on a court-  
20 martial receives either no pay or a one-third of  
21 their pay while they're incarcerated.

22           Obviously, often after the court-

1 martial they're discharged from the military and  
2 they would lose both employment and the ability  
3 to make any compensation after that point.

4 Often, it's very difficult, you know, as with  
5 other criminal convictions, to be able to obtain  
6 work.

7 And then, again, the issue of the  
8 spouse independence -- if a female defendant is  
9 being ordered to pay some portion to spouse  
10 independence I think that's an important  
11 consideration to be taken into account.

12 So I do share -- I think that to the  
13 extent that Service members' forfeited wages  
14 could be used not only to support spouse  
15 independence but to be able to help fund crime  
16 victims.

17 I think that that's an important thing  
18 to at least take into consideration. But, again,  
19 I think that the process and how that happens  
20 needs to be looked very carefully at to avoid the  
21 problems that happen in the civilian system in  
22 terms of having unpaid restitution and empty

1 victim satisfaction.

2           The second point I would like to make  
3 is that there needs to be a substantial nexus  
4 between the crime and the losses claimed. One of  
5 the things that's been happening in the federal  
6 system in the civilian criminal justice system is  
7 that restitution has been -- has become an  
8 increasingly expansive remedy.

9           It has been used with regularity to be  
10 -- to be ordered for losses beyond the loss of  
11 conviction or the offense of conviction. So in  
12 the civilian context restitution has been imposed  
13 for conduct for which a criminal defendant has  
14 been acquitted, conduct not charged in an  
15 indictment, restitution to third parties and then  
16 restitution for abstract and original losses that  
17 go on indefinitely from years into the future.

18           And so that has expanded the  
19 restitution conception so that it has become  
20 something that looks much more like civilian  
21 damages, right -- civil damages, and it has  
22 turned the compensatory remedy into much more of

1 a punitive remedy, which then brings in  
2 constitutional implications because once it  
3 becomes a punishment you end up having to think  
4 about the Sixth Amendment and a jury trial right  
5 and the Eighth Amendment, the excessive fines  
6 clause.

7 And so the concern when restitution  
8 becomes much more of a punitive remedy than one  
9 that has a closer nexus to the actual losses  
10 being claimed is that, again, it becomes -- has  
11 constitutional implications.

12 The spoke of that line begins to grow  
13 when we get into, again, things like emotional  
14 losses, loss of wages for 40 to 60 years in the  
15 future as opposed to something that's a more  
16 short-term remedy.

17 And, again, I recognize that sometimes  
18 harms are not time-barred, right. But I do think  
19 that there is a degree to which the restitution,  
20 again, has been increasingly expansive in the  
21 criminal system and the civilian system, and that  
22 should be something that I would hope the Panel

1 would take into consideration in terms of  
2 crafting a remedy.

3 A third point I want to make I think  
4 addresses actually a little bit of something  
5 that's come out over the course of the morning  
6 and that's the use of the terminology  
7 restitution. And so it may seem like it's more  
8 of a technical consideration but I actually think  
9 it has broader implications more than just an  
10 issue of language.

11 So in the context of talking about  
12 Article 139, the issue kept coming up about it  
13 being most of the remedies that seem to be in  
14 place are addressing the issue of property.

15 And the reason for that is if you  
16 think about restitution as it's historically been  
17 conceptualized, it was the disgorgement of  
18 unlawful gain. In the civilian system -- in the  
19 civil side of the civilian system that's still  
20 what restitution is.

21 The fact that we call what we're doing  
22 in the criminal system restitution is really a

1 misnomer and, frankly, has led to a lot of  
2 doctrinal confusion.

3 I think victim compensation or moral  
4 compensation is a more accurate term to look at  
5 what we're actually doing in the criminal system.

6 Victim compensation, when it's more  
7 specifically, again, the nexus to the crime and  
8 the payment is more linked, when it gets broader  
9 and gets into, again, expanded time frames and  
10 for offenses that are beyond the offense of  
11 conviction, I think moral compensation gets more  
12 at what the criminal justice system, you know, is  
13 founded on, which is this idea of morality and  
14 moral blame burdens.

15 And so I think it's not a small point  
16 to think about what the terminology is when the  
17 Panel thinks about crafting a remedy because I  
18 think that's part of what the confusion is when  
19 we talk about restitution.

20 The way the military justice system  
21 seems to conceptualize restitution is how it has  
22 been traditionally conceptualized in the criminal

1 system which is, again, more of a disgorgement of  
2 unlawful gain as opposed to compensation of  
3 victim losses.

4 So that -- with that I'll close my  
5 remarks and I appreciate the time and the  
6 attention of the Panel today. Thank you. I look  
7 forward to your questions.

8 JUDGE JONES: Thank you very much.

9 Mr. Taylor?

10 MR. TAYLOR: Yes. So, thanks to all  
11 three of you for being here today and for sharing  
12 your views with us.

13 I'd like to start with you, if I may,  
14 Professor Lollar, and ask you a little bit more -  
15 - talk a little bit more about this concept that  
16 you discussed about restitution being imposed for  
17 circumstances or facts either not in evidence or  
18 for which the defendant was not convicted.

19 Do judges make special findings  
20 normally when that happens? I mean, how do you  
21 know what -- how you come up with the dollar  
22 value or the figure when you're relying upon

1 circumstances as opposed to adjudicated findings  
2 of guilt?

3 PROF. LOLLAR: Oftentimes, as I --  
4 again I don't want to presume what you do or  
5 don't know. So I'll just say --

6 MR. TAYLOR: Presume I know nothing  
7 about it and start with that.

8 PROF. LOLLAR: Okay. The standard is  
9 lower so it's not beyond a reasonable doubt at  
10 sentencing at this point. And so judges only  
11 have to look at a preponderance of the evidence  
12 and whether that's been met in terms of the  
13 sentencing context.

14 And so they will take what's been  
15 prepared, as your colleague indicated earlier, in  
16 the pre-sentence report and the information  
17 that's been provided and it is up to the  
18 prosecution to prove that, right.

19 They do have to show the amount of the  
20 losses and as indicated it's required. It's, you  
21 know, under the federal law. It's something  
22 that's absolutely required.

1           They interpret the full amount of  
2 losses in a broader sense. Again, there's a  
3 split. So to be fair, there is a split among the  
4 circuits and what different districts do and what  
5 different circuits do and, frankly, what  
6 individual judges do in terms of making a  
7 determination of what counts as the full amount  
8 of losses.

9           I think things got a little more  
10 complicated this past year when, in the child  
11 pornography context, the Supreme Court said in  
12 the Paroline case that it's sort of up to judges  
13 basically to determine when restitution is  
14 difficult to figure out they just have to do --  
15 basically, do their best.

16           And so that's essentially where things  
17 are in the federal system and that's how -- why  
18 there's such a disparate range of how restitution  
19 is ordered.

20           MR. TAYLOR: Okay. Well, thank you  
21 very much.

22           Professor Rutledge, you talked a

1 little bit in your article about the cooperation  
2 requirement and how you thought maybe that was  
3 misplaced or misjudged.

4 Could you say more about that, please?

5 PROF. RUTLEDGE: Yes. Historically,  
6 and my article focused on domestic violence  
7 victims, but the same is true for sexual assault  
8 victims as well.

9 Sexual violence usually comes with a  
10 component of shaming the victim and some victims  
11 decide they don't want to prosecute or they want  
12 to stop prosecution or something of that nature.

13 And so if you have a situation where  
14 a victim decides they no longer want to go  
15 through with the prosecution, under the  
16 compensation boards in every state, every  
17 jurisdiction gets to make -- define this term the  
18 way they see fit.

19 There's no real policy guidance on  
20 this. They can say that you're not cooperating  
21 so cooperation can mean you have to see through  
22 the entire prosecution, you need to, you know, do

1 everything we say.

2 So it's almost like a quid pro quo  
3 relationship -- if you help us with enforcing  
4 these law enforcement principles then we may  
5 consider your compensation claim but if you don't  
6 we can deny it, and I think that's very  
7 troubling.

8 MR. TAYLOR: Okay. Thank you.

9 Professor Goldscheid, you mentioned  
10 that among the more under-enforced rights is this  
11 right to restitution. Could you say more about  
12 that, about how restitution is normally enforced  
13 and why it's under-enforced?

14 PROF. GOLDSCHIED: Yes. What I was --  
15 thank you for the question -- what I was  
16 referring to is really the way that restitution  
17 is handled in practice, and no doubt some of the  
18 other panelists both on this panel and later  
19 today will be able to speak to the day-to-day  
20 practice in more depth than I.

21 But what I was referring to was some  
22 of the studies and also what I know from my

1 experience on the ground from the civil  
2 perspective in that routinely, particularly in  
3 state court prosecutions, prosecutors don't seek  
4 restitution.

5 In fact, it's often not even raised in  
6 the course of a criminal prosecution at all.  
7 That's what been detailed in some of the -- some  
8 of the studies that have been done.

9 MR. TAYLOR: Thank you very much.

10 JUDGE JONES: Could I ask you,  
11 Professor, what does happen in the -- let's go to  
12 the state system. There's been a prosecution.  
13 The victim does not get any restitution in that  
14 proceeding. Then where do they go and how does  
15 that work? Or anyone else who knows the answer.

16 PROF. GOLDSCHIED: So they do have the  
17 option, and I assume that you're asking where do  
18 they go in terms of compensation --

19 JUDGE JONES: Yes.

20 PROF. GOLDSCHIED: -- for their  
21 losses. So assuming that they don't have another  
22 avenue for compensation -- for example, through

1 health -- just taking medical expenses, for  
2 example, through health insurance --

3 JUDGE JONES: Right.

4 PROF. GOLDSCHIED: -- they could go to  
5 the State Victim Compensation programs for  
6 compensation.

7 JUDGE JONES: And there they file a  
8 claim which presumably asks them has there been a  
9 court proceeding --

10 PROF. GOLDSCHIED: Exactly.

11 JUDGE JONES: -- and asks a variety of  
12 questions?

13 PROF. GOLDSCHIED: So as my colleague  
14 suggested, state programs and procedures vary.  
15 State requirements vary. The overall framework  
16 is that there is, as you suggest, an application.

17 Often a police report -- often if not  
18 always the police report is required, sometimes  
19 within a certain period of time, and then  
20 documentation is required for the losses. States  
21 do have requirements both for reporting within a  
22 particular period of time and then requirements

1 such as the cooperation requirement, in some  
2 cases the innocent victim requirement, and other  
3 requirements that can serve to exclude folks that  
4 I think we might broadly agree should be entitled  
5 to compensation.

6 The innocent victim requirement  
7 sometimes operates to exclude people who may have  
8 -- may be deemed to have participated in some  
9 way. So consider a case of, say, sexual assault  
10 within a domestic violence context or in an  
11 acquaintance rape circumstance.

12 I think -- my guess is that you're  
13 aware of some of the disputes that arise about  
14 victim's conduct and whether a victim is in fact  
15 to blame or has contributed in some way, and that  
16 can become very problematic and can become a bar  
17 to her ability to recover compensation through  
18 the State Victim Compensation programs.

19 And I'll just say one other  
20 possibility for compensation is, of course, the  
21 tort system and as you know that's -- military  
22 victims have additional barriers in that -- in

1 that context.

2 JUDGE JONES: So a military -- well,  
3 a civilian victim could file a civil claim but it  
4 would have to be under the Federal Tort Claims  
5 Act because of the governmental immunity issue?

6 PROF. GOLDSCHIED: Yes, that's --

7 JUDGE JONES: Do any of you know are  
8 -- here's my question. I think someone mentioned  
9 some statistics about how much money people are  
10 actually getting in compensation. Could I hear  
11 that again? On average. Is there -- are there -  
12 - is there such data, Professor Goldscheid? I  
13 think you mentioned it.

14 PROF. GOLDSCHIED: I don't believe  
15 that that was the statistic that I cited. I  
16 think the statistic I cited was on the cost to  
17 victims. JUDGE JONES: Okay.

18 PROF. GOLDSCHIED: That data is  
19 available. I would need a moment to locate it.

20 JUDGE JONES: And what -- and the  
21 average cost then was --

22 PROF. GOLDSCHIED: I don't want to ---

1 I don't have that number offhand. I don't know  
2 if --

3 JUDGE JONES: Oh, okay.

4 PROF. RUTLEDGE: I thought you said  
5 2,000.

6 PROF. GOLDSCHIED: Oh, the data for  
7 the cost? I'm sorry.

8 JUDGE JONES: Yes. Yes.

9 PROF. GOLDSCHIED: The cost - my  
10 apologies. The cost has been estimated at over  
11 \$2,000 per victim in medical costs.

12 When a broader range of costs is taken  
13 into account -- there are a range of estimates,  
14 as you might imagine. Different calculations  
15 take different things into account, but the  
16 estimates go as high as \$110,000 per victim for  
17 one sexual assault and that's taking into account  
18 both medical, mental health, lost productivity  
19 and pain and suffering, which I recognize, you  
20 know, are not typically parts of the crime victim  
21 compensation recovery.

22 JUDGE JONES: Right. So unless -- it

1 sounds to me like unless a victim actually went  
2 into civil court and went through a second civil  
3 suit, the likelihood of recovering very much from  
4 the crime victims compensation boards beyond a  
5 few thousand dollars -- let's be generous here --  
6 is practically nil.

7 Do you have any idea how many victims  
8 actually pursue cases beyond the crime victims  
9 boards?

10 PROF. GOLDSCHIED: Within the military  
11 context or beyond the military context?

12 JUDGE JONES: Actually, I'd like to  
13 hear both numbers, or guesses, if you have that.

14 PROF. GOLDSCHIED: Yes. I'll speak to  
15 outside of the military context.

16 JUDGE JONES: Sure.

17 PROF. GOLDSCHIED: I could get -- I'd  
18 be happy to get back to you with numbers. I  
19 don't have those numbers offhand, but I will say  
20 that it's fair to say that most of the civil  
21 claims that are brought based on sexual assault,  
22 and I'll focus on sexual assault.

1                   JUDGE JONES: Yes. I'm sorry. I  
2 should have qualified that.

3                   PROF. GOLDSCHIED: Many of those cases  
4 are brought in the context of assaults committed  
5 within an institution.

6                   So for example, sexual assaults that  
7 are committed at someone's workplace, or by an  
8 employee or someone associated by an employer.  
9 Or a sexual assault on campus, either by an  
10 employee, by someone else in the campus system or  
11 some other institution.

12                   Claims are brought by individuals, and  
13 I could get back to you with numbers, but there  
14 are other limitations on those civil claims as  
15 well. Those claims are brought under Tort  
16 theories.

17                   JUDGE JONES: Yes.

18                   PROF. GOLDSCHIED: They're also  
19 brought, in some cases, under civil rights  
20 theories. Under the theory that a sexual assault  
21 or an act of domestic violence violates the  
22 survivor's civil rights.

1           There's a much smaller universe of  
2 those cases but those are brought as well and I'd  
3 be more than happy to provide briefing on some of  
4 the data, some of the --

5           JUDGE JONES: Well, I guess in some of  
6 the civil rights cases there may never have even  
7 been a criminal -- many of these, there won't  
8 have ever been a criminal prosecution in the work  
9 site cases for the most part, and universities,  
10 for that matter.

11          PROF. GOLDSCHIED: Exactly, and one of  
12 the reasons that some of those civil rights  
13 claims were created by statute was precisely  
14 because many survivors either don't or can't  
15 avail themselves of the civil -- of the criminal  
16 justice system.

17          JUDGE JONES: I'm sure I'll have some  
18 more questions, but Mr. Stone, why don't I let  
19 you go next?

20          MR. STONE: Okay. Thank you. I'd  
21 like to start with Professor Lollar. I don't  
22 think I understood your -- where you were coming

1 out on your second point.

2 Is your second point that what's  
3 available in terms of restitution and  
4 compensation should be broadly construed or  
5 should be narrowly construed?

6 PROF. LOLLAR: Should be narrowly  
7 construed, that there needs to be a close nexus  
8 between the -- I mean, basically it should be the  
9 offense of conviction or the underlying conduct  
10 of the conviction as opposed to something more  
11 broad than that because I think that that starts  
12 to get constitutional implications which is -- I  
13 think that's - I guess I'm -- the reason it  
14 sounds confusing is because I'm saying if you do  
15 choose to take that route I would just suggest  
16 that to be aware of the constitutional  
17 implications that might be brought in when the --  
18 when the nexus becomes more broad.

19 And so it's -- my recommendation would  
20 be to stay narrow because if you keep the nexus  
21 smaller then I think the constitutional  
22 considerations become more limited.

1           MR. STONE: And I guess that leads me  
2 to ask why you think that's the case in the  
3 military system.

4           We've heard in our prior hearings and  
5 in a lot of situations that the military is  
6 different, that they're trying to run a military  
7 operation and therefore they have much more  
8 paternalistic and over broad view than a civil  
9 system and so, for example, you don't have a real  
10 jury of peers.

11           I mean, there's all kinds of things  
12 that happen differently and if they're trying to  
13 maintain a disciplinary system and they want to  
14 have, let's say a broader Article 139 restitution  
15 system that goes beyond the narrow offense of  
16 conviction, recognizing that a lot of times  
17 crimes are pled down in order to dispose of them  
18 or you have Article 15 proceedings and it isn't  
19 altogether clear what exactly the crime is if ---  
20 or you go to, you know, charges like conduct  
21 unbecoming or whatever it is. Do you still feel  
22 that way within the military context?

1           PROF. LOLLAR: Not as it currently  
2 stands, but I understand that your mandate was  
3 slightly broader than what is currently happening  
4 and so I was addressing -- as the Panel considers  
5 how to make the changes, it was something I was  
6 just suggesting the Panel would keep in mind in  
7 determining what changes to consider recommending  
8 in this particular instance.

9           So as it currently stands, I don't  
10 believe that that's an issue and in fact that's  
11 part of what I was trying to say is that  
12 currently as it's structured -- again, this links  
13 into the point about the terminology. Currently  
14 as it's structured in the military system,  
15 Article 139 reads, except for the word damages,  
16 as a straight up restitution provision, not as  
17 something more broad where the harms that we're  
18 talking about begin to become more attenuated.

19           And so I'm saying in the event that  
20 the Panel is considering making changes to  
21 broaden it, it's something to keep in mind in  
22 terms of how broad the Panel considers going and

1       whether the Panel wants to -- just to be aware of  
2       the fact that there may be constitutional  
3       implications the more that it becomes less  
4       reimbursement and more punishment, right?

5               When the nexus becomes broader it  
6       begins to resemble much more punishment than a  
7       specific reimbursement of losses that have been  
8       verified as in a state compensation fund system.

9               MR. STONE: But the state compensation  
10       fund typically has nothing to do with the overall  
11       criminal justice system in a state, whereas the  
12       convening authority basically runs the military  
13       member's entire life.

14              PROF. LOLLAR: Correct.

15              MR. STONE: So that's why I guess I'm  
16       a little confused about why you don't think if we  
17       have one system, let's say a revised Article 139,  
18       it shouldn't be broad enough so that military  
19       members don't have to think about additional  
20       suits or going to outside compensation systems.

21              PROF. LOLLAR: I think that perhaps  
22       I'm not being clear because that's not what I'm

1       advocating. I'm not concerned about Article 139  
2       being broader to -- other than the terminology,  
3       to include bodily injury, I mean, because I  
4       understand that's specifically, I believe, what  
5       the Panel has been tasked with considering in  
6       specifics.

7                   I would say that when you start  
8       getting into bodily -- again, when you get into  
9       reimbursement as opposed to disgorgement, I think  
10      the term restitution becomes confusing, but  
11      again, the further you get away -- if we're  
12      talking solely about documented bodily injury  
13      that has certain medical costs associated with it  
14      that have been, again, documented and that  
15      documentation is clear -- and mental health,  
16      right? I mean, I think that those things are  
17      both critical parts of it.

18                   So I'm not saying that that shouldn't  
19      be taken into consideration. I'm just saying the  
20      farther away from that one gets, the more there  
21      become other issues. But I'm not advocating not  
22      including bodily injury in Article 139. That's

1 not the position I'm taking.

2 MR. STONE: Would you include lost  
3 wages?

4 PROF. LOLLAR: I think lost wages have  
5 to have some sort of -- again, I'm a little  
6 uncomfortable with a cap, but some sort of  
7 something so that there's a very clear nexus with  
8 what the actual offense is and I think when you  
9 talk about -- for example, I've seen claims for  
10 lost wages from a person who's 21 asking for lost  
11 wages until the age of 65. I think that that's a  
12 lot, and I think that there needs to be some sort  
13 of limitation.

14 I don't dispute that on some level I'm  
15 sure that that crime has affected the person and  
16 will affect the person for the remainder of their  
17 life. So I'm not saying that, but I do think  
18 when you're talking about compensation at some  
19 point there are other factors that come into  
20 play. I don't know where that line should be  
21 clearly drawn.

22 I think some lost wages and income in

1 the instances we've been talking about here ---  
2 when Professor Goldscheid was talking about, you  
3 know, there are certain numbers of hours that  
4 people lose. I'm not saying don't compensate  
5 those. I think that makes perfect sense to  
6 compensate them, but I think when you talk about  
7 40 years of compensation that starts to be -- to  
8 seem like a different scenario.

9 JUDGE JONES: Could I jump in and ask  
10 one quick question?

11 Am I correct that when, in the state  
12 court system after a criminal conviction, there  
13 is restitution or compensation as part of the  
14 sentence, it would not include lost wages until  
15 someone is 65 or possibly even restitution or  
16 compensation for pain and suffering? Or am I  
17 wrong?

18 Are judges -- I know that in the  
19 federal system there are very few bodily harm  
20 crimes that come before federal judges. So I'm  
21 unfamiliar with that, but I'm curious to know  
22 whether things that one would normally expect to

1 see in a civil suit are actually being  
2 compensated in the criminal justice system in the  
3 state systems.

4 PROF. RUTLEDGE: I can't speak to  
5 research of that, Madam Chair, but I can say just  
6 from anecdotal evidence from serving as a  
7 prosecutor in use in Harris County, which is the  
8 fourth largest DA's office in the nation,  
9 restitution was always limited to actual medical  
10 expenses.

11 They would never consider bodily ---  
12 they would never consider lost wages. They would  
13 never consider pain and suffering or anything of  
14 that nature. It would always be something that  
15 could be reimbursed so it would be limited.

16 JUDGE JONES: Okay.

17 PROF. LOLLAR: And I think that's  
18 consistent --

19 CHAIR HOLTZMAN: Madam Chair, may I --  
20 may I ask questions?

21 JUDGE JONES: Yes. Thank you. Go  
22 ahead.

1                   CHAIR HOLTZMAN: Thank you. Thanks to  
2 all the members of the panel for taking the time  
3 and effort to come and help enlighten us. I just  
4 have a preliminary question that anybody can  
5 answer.

6                   As I understand it, an active duty  
7 member, if he or she wants compensation beyond  
8 the medical compensation that the military  
9 provides, it's --- and there's no restitution  
10 ordered for whatever reason, and there is no  
11 broken telephone, is relegated to the state court  
12 in which the crime took place or a state --- not  
13 state court, state compensation system for  
14 compensation for lost wages or any other kind of  
15 harm. Is that correct?

16                   PROF. RUTLEDGE: That is correct,  
17 Madam Chair. The state compensation claims --  
18 the crime victim compensation claim is a payer of  
19 last resort.

20                   So as long as those damages aren't  
21 paid through some other benefit that would kick  
22 in. They would also have the right to sue

1 civilly.

2 CHAIR HOLTZMAN: Right. So what I ---  
3 what I see here is that we have a bunch of  
4 different little pots of gold, some of which are  
5 really inaccessible, some of which are itty bitty  
6 and don't provide the full remedy that is  
7 desirable. And so I think it's a very confusing  
8 situation, particularly for people in the  
9 military and who are victims and civilians who  
10 are victims of military sexual assault.

11 And so I'm just wondering whether we  
12 should be trying to -- instead of enhancing one  
13 little pot and changing another little pot trying  
14 to rationalize this system in a way that's going  
15 to give appropriate compensation to victims. So  
16 I don't know if anybody has a comment about that.

17 I don't know why someone should have  
18 to go three separate places -- courts-martial and  
19 the convening authority, the state system,  
20 Article 139. I mean, you have enough to deal  
21 with when you're a victim of a crime without  
22 thinking about all these other processes, in my

1 judgment. Anybody have a comment on the panel  
2 about that?

3 JUDGE JONES: Professor Goldscheid?

4 PROF. GOLDSCHIED: Thank you very much  
5 for that question and observation and comment and  
6 I guess I would say two things.

7 One, just picking up on the question  
8 before about victim compensation programs. The  
9 recovery may be small but it still may be  
10 significant, particularly given the capacity to  
11 recover for lost wages. But I very much  
12 appreciate your comment about perhaps  
13 reconsidering the system to come up with a more  
14 comprehensive program that could more fully  
15 address needs.

16 And I'll just point out, as you know  
17 from my article, that Congress has, of course,  
18 devised compensation systems for other kinds of  
19 victims in other kinds of cases, and as you know,  
20 I looked at the 9/11 victim compensation program,  
21 which of course, addressed victims who in many  
22 ways have an experience that's distinct from that

1 of survivors of intimate partner and sexual  
2 violence but in many ways have experienced --  
3 their experiences are similar.

4 So that stands as an example. Perhaps  
5 sui generis, but perhaps from which we can learn  
6 and perhaps you might want to take into account  
7 in thinking about the ways that that system and  
8 others have approached conceptions of  
9 compensation.

10 Broadly making information available,  
11 having a perhaps unspoken assumption being in  
12 favor of compensation, eliminating some of the  
13 requirements that we talked about here, such as  
14 innocent victim requirement which seems to have  
15 an underlying presumption that -- of the risk of  
16 fabrication, and you could create a program like  
17 that that still addresses concerns about fraud,  
18 which of course you have to take into account.

19 PROF. LOLLAR: I would sort of respond

20 --

21 JUDGE JONES: Professor Lollar?

22 PROF. LOLLAR: -- if I'm remembering

1 one of Professor Goldscheid's earlier comments  
2 correctly, I think she said something about  
3 making it a part of the DoD budget.

4 I mean, I don't know if there's a way  
5 -- and obviously, this is way beyond the scope of  
6 what I know about. But, you know, if there is a  
7 way to create sort of the military parallel to  
8 the state victim of crime compensation fund that  
9 takes all these things into consideration and  
10 then would be less dependent perhaps on an  
11 individual defendant's resources of allocation  
12 with what each person's paying into --

13 JUDGE JONES: We're having a musical  
14 interlude now.

15 CHAIR HOLTZMAN: I'm sorry. It's my  
16 phone here. Please forgive me.

17 JUDGE JONES: You didn't have to give  
18 yourself up.

19 CHAIR HOLTZMAN: I know, but like  
20 George Washington, I cannot tell a lie.

21 JUDGE JONES: All right. I'm going to  
22 move to Professor Rutledge.

1 CHAIR HOLTZMAN: Wait, wait, wait. I  
2 still have -- I'm sorry. May I ask another  
3 question?

4 JUDGE JONES: Sure. Of course, Liz.

5 CHAIR HOLTZMAN: Thank you. My other  
6 concern is why to go with this problem of  
7 compensating victims through restitution from the  
8 defendant.

9 I don't know, obviously, if there are  
10 gains that the defendant has, disgorgement is an  
11 obvious solution as a result of the crime, but  
12 since most of these defendants are -- if not  
13 impecunious, borderline, what is the -- and so  
14 the victim -- the likelihood the victim is going  
15 to get the kind of compensation that he or she  
16 needs from the defendant relatively remote, what  
17 is the benefit of this exercise?

18 Does -- is there some punitive  
19 advantage from imposing the restitution  
20 requirement on the defendant? Why are we looking  
21 to go that route?

22 JUDGE JONES: Professor Lollar?

1           PROF. LOLLAR: So I think, you know,  
2           historically it was something that, again, was  
3           more disgorgement.

4           I think over time if you look at the  
5           legislative history and if you look at the  
6           Supreme Court case law and, frankly, the circuit  
7           court case law, there's a real split.  
8           Increasingly, there are only a couple of circuits  
9           that really identify restitution as solely a  
10          reimbursement or disgorgement mechanism.

11          CHAIR HOLTZMAN: No, that's really ---  
12          excuse me. That's not really my question. My  
13          question isn't whether restitution should be this  
14          or that, but why as a policy matter, as a  
15          philosophical matter, as a practical matter, are  
16          we looking to restitution as opposed to victims  
17          compensation through a fund as a vehicle for  
18          making the victim whole, and is that the best  
19          route?

20          PROF. LOLLAR: I would agree that it's  
21          not the best route, you know, and, frankly, the  
22          judicial conference at the time, when restitution

1 became mandatory, suggested it was probably not  
2 the best route but Congress felt differently at  
3 the time.

4           So I actually agree with you that I  
5 think a victims crime compensation fund --- I  
6 think that there are -- what I was trying --  
7 about to say was that I think that there are --  
8 there are -- the courts that look at it  
9 punitively, believe that there is a punitive  
10 purpose to it and so that is why it is also, in  
11 most courts these days, used as a remedy because  
12 it's a dual purpose for most courts.

13           Again, most courts view it as having  
14 a punitive purpose in terms of punishment of the  
15 defendant and so that's philosophically part of  
16 the underlay of it, but I would agree that I  
17 think the -- I think it's not effective in terms  
18 of as a practical matter in doing what it's  
19 supposed to be doing.

20           JUDGE JONES: Did you have something  
21 to say, Professor Rutledge?

22           PROF. RUTLEDGE: Yes. Thank you,

1 Madam Chair, for the question. I believe  
2 restitution is important as a matter of justice.

3 For me, the distinction between  
4 restitution and compensation is restitution  
5 orders the defendant to pay and there's something  
6 about justice in terms of having the defendant  
7 have to do this as opposed to the community  
8 obligation and a compensation program.

9 I'm also not clear, although indigency  
10 is an issue for the civilian system, if it's  
11 really true that every military defendant is in  
12 fact indigent. I think there's actually a  
13 greater chance and opportunity for restitution to  
14 actually be collected in the military system,  
15 which is why I don't think this is a futile  
16 exercise. I think it's a very important one.

17 But I also echo the comments -- I  
18 think SWAN also mentioned as well -- of perhaps  
19 having a military victim -- crime victim  
20 compensation program that's independent. I also  
21 am very grateful for the SVC program because it's  
22 through that program that hopefully victims will

1 be able to better navigate all the different  
2 avenues.

3 And just to go back to the earlier  
4 question you had, Madam Chair, I think it's  
5 important to have a variety of opportunities to  
6 make victims whole. Now, even though some of  
7 these seem like little bitty opportunities, I  
8 don't think it's realistic that a victim is going  
9 to go through three or four processes. I believe  
10 that once she or he learns of her rights she'll  
11 pick whatever fits best with his or her needs.

12 JUDGE JONES: Thank you. Was there  
13 any other response? A very long time ago I  
14 interrupted you, Mr. Stone.

15 MR. STONE: I know it was for a very  
16 quick question, too.

17 JUDGE JONES: Anything further?

18 MR. STONE: Yes. I want to pick back  
19 up the thread that we were just discussing.

20 I'm a little confused about the last  
21 comment to Professor Rutledge about that it's  
22 more -- it seems appropriate to have the

1 defendant pay the restitution in the military  
2 system. I'd like if you could, just as I did  
3 with Professor Lollar, for you to focus for a  
4 minute on our mandate to talk about the military  
5 system.

6 It seems to me from what we've learned  
7 sitting as a panel here from the very beginning  
8 is that most people who were convicted in the  
9 military system of sexual assault, if they are,  
10 never go back to a position as a -- as a wage  
11 earner in the military.

12 They go to jail and they're kicked out  
13 and that makes it very hard for a victim to  
14 expect, either while they're in jail or after  
15 they're kicked out, and who knows where they go -  
16 -- the system doesn't have to keep track of them  
17 -- that they're ever going to be able to collect  
18 that restitution again and therefore it seems to  
19 me trying to get it from the defendant is almost  
20 a hopeless task.

21 By the same token, it seems to me that  
22 telling military sexual assault victims that it

1 depends which of the 50 states you happen to be a  
2 resident of as to how much and whether you're  
3 going to be considered an innocent victim.

4           It seems to me that's also unfair  
5 because a military person who's convicted could  
6 have just raped two women and one of them is a  
7 resident of State A and the other one is a  
8 resident of State B and one gets legitimate  
9 restitution and the other one doesn't qualify.

10           So this is sort of the point that I  
11 was trying to make before about the scope of  
12 restitution. If the military is truly this  
13 remote, unified body that's trying to take care  
14 of its own and it already has an article that  
15 deals with restitution, I'd like your views on  
16 whether it makes more sense to take that article  
17 and make it meaningful.

18           Maybe make the time period during  
19 which restitution can be filed 90 days after the  
20 conviction is final. Maybe include bodily harm  
21 and lost wages that have occurred by the time of  
22 the application.

1                   Not future lost wages, that's  
2                   speculative. I'm talking about lost wages that  
3                   they can say, because I was not a military  
4                   member, I was a dependent and I'm a teacher and I  
5                   lost six months or I lost two weeks or I lost  
6                   whatever I lost, and tell the military we're not  
7                   going to be dependent on whether this particular  
8                   state has a particular filing period, which may  
9                   be very short, or whether the particular state's  
10                  fund is out of funds for this particular fiscal  
11                  year.

12                  This happened on -- as a result the  
13                  military wants to prosecute it. If you want to  
14                  prosecute it, then you take care of not only  
15                  providing the criminal justice mechanism to do  
16                  it, you also take care of the restitution.

17                  But you've already recognized, but  
18                  unfortunately your Article 139 mechanism is old  
19                  and outdated and it needs to be fixed. And I  
20                  think maybe that was Chairperson Holtzman's --  
21                  where she was going and I guess I'd like to hear  
22                  all of your views on whether, again, instead of a

1 million small avenues, we have one bigger, better  
2 avenue to supplement what the convening authority  
3 may or may not do.

4 If they want to take care of it,  
5 that's great. I don't want to take authority  
6 away from them, but if they don't, that we have a  
7 meaningful backup article that looks at what's  
8 going on here. So I'd like each of your views,  
9 if you don't mind.

10 PROF. RUTLEDGE: I'll start. First,  
11 I would like to say that the resources available  
12 to a career criminal in the state process may be  
13 very different from the resources available to a  
14 military defendant who has been working before  
15 they were arrested. So that may -- that means to  
16 me that there is some possibility of restitution.

17 Article 139 is a very forward thinking  
18 provision because outside the judicial process we  
19 have a commander who can make a decision. So I  
20 would absolutely be in favor of them not only  
21 considering bodily injury, but lost wages.

22 JUDGE JONES: Professor Goldscheid?

1                   PROF. GOLDSCHIED:  So I think it may  
2                   -- I appreciate the suggestion and the impulse to  
3                   have one comprehensive system and to either  
4                   minimize or eliminate the piecemeal nature of the  
5                   current programs for compensation.

6                   I wonder if it would be helpful to  
7                   separate conceptually, and perhaps as a policy  
8                   matter, ideas about looking to the defendant --  
9                   to the particular defendant and looking -- I like  
10                  how Professor Rutledge framed it, looking to the  
11                  community for what I think of as accountability.

12                  So restitution, of course, is invoked  
13                  in the context of a criminal prosecution and may  
14                  approximate punishment, but I think at least some  
15                  of us think about or could think about punishment  
16                  as a form of accountability and restitution may  
17                  make sense in that context.

18                  But it does seem to me fairly clear  
19                  that looking to the individual defendant and  
20                  presuming that there's going to be a successful  
21                  criminal conviction in these cases is very  
22                  problematic because it's going to leave so many

1 victims without compensation.

2           So I guess, to me, I like the idea of  
3 a comprehensive program. I think at least in  
4 part there has to be a mechanism that goes beyond  
5 the particular defendant. While I'm all in favor  
6 of accountability, and we can talk about the  
7 limits on that and what might be realistic or  
8 feasible in different contexts, I think it's also  
9 important to have a robust program that provides  
10 for meaningful compensation.

11           And if I could just say a couple of  
12 things just about the state programs. Some  
13 things that limit the state programs'  
14 effectiveness in addition to the requirements we  
15 talked about earlier, are the extent to which  
16 those programs received funding both for  
17 dissemination of information about the programs  
18 and also administrative capacity.

19           So those programs often have extensive  
20 backlogs just because they don't have staffing  
21 and often, I know myself, as someone who had  
22 worked in the victims -- worked on behalf of

1 victims for years, I had done work in terms of  
2 civil recovery for many years before I knew that  
3 victims could go to the state victim compensation  
4 program. So all to say that they're under  
5 publicized.

6 So publicity and administrative  
7 support, I think, are two important things to  
8 take into account if you're thinking about how  
9 you could either complement or create a new  
10 program that would in fact effectively reach more  
11 victims.

12 PROF. LOLLAR: And I would echo  
13 Professor Goldscheid's views. I guess would also  
14 add as a way -- you know, what often happened in  
15 most of the courts in which I practiced is that a  
16 convicted defendant of any type was ordered to  
17 pay a set amount into a victim of crime  
18 compensation fund -- \$100, I think, you know,  
19 it's probably gone up since I was practicing here  
20 in D.C., but a certain set amount, depending on  
21 whether it was felony or a misdemeanor  
22 conviction.

1           And so then it's not dependent --  
2           there is still responsibility. There is still  
3           accountability, saying look, you still have to,  
4           you know, have some financial obligation and  
5           maybe there's a way to do that that links it to  
6           that person's -- you know, back to this issue of  
7           somebody having had income, maybe there's a way  
8           to link it to their financial resources and to do  
9           some sort of mechanism in that way, especially if  
10          it's a case that has some sort of restitution  
11          component to it.

12                 But I think there would be a way to  
13          create a similar kind of fund and victim  
14          compensation -- I mean, in the military system  
15          that would allow for victims still to get that  
16          but not have it necessarily be dependent on the  
17          resources of an individual defendant that may or  
18          may not have them either at the time or in the  
19          future.

20                         MR. STONE: That accountability  
21          discussion, again, does not sound -- seem to me  
22          to be particularly relevant in the military

1 because you're talking in a civil society where  
2 the people insisting on accountability are not  
3 the employers of the person who committed the  
4 crime.

5 If punishment and accountability is  
6 what's at stake, that's the convening authority's  
7 decision to put a person in prison or fine him or  
8 have him ordered discharged from the military.

9 If restitution is supposed to be  
10 disgorgement of illegal gains, it seems to me,  
11 making the victim whole is something that a  
12 military system itself is uniquely situated to do  
13 and to take care of and also is more uniquely  
14 situated.

15 I can say this because I myself was  
16 unaware until some of our earlier meetings and I  
17 heard some of the military members say that many  
18 of the sexual assaults -- an overwhelming  
19 proportion, occur when often both participants  
20 have had alcohol, often on base, at various  
21 military informal social gatherings.

22 I think that a military restitution

1 system would understand that that's something  
2 which they're not going to prohibit and therefore  
3 they wouldn't conclude that that means that the  
4 victim is not innocent because she was drinking  
5 alcohol at the same party that the defendant was  
6 drinking alcohol.

7 I don't think state systems are going  
8 to understand that military perspective, that  
9 this group is assigned somewhere and they have to  
10 be on base and if they want to celebrate  
11 something they celebrate it together. They don't  
12 decide whether or not they're going to walk into  
13 a bar and have a drink, and so I think that the  
14 military situations are unique.

15 I think that the military sentencing  
16 is unique and therefore I think the restitution  
17 ought to be something that is tailored and fine-  
18 tuned to the military system, and so I find, you  
19 know, saying well, the victim would like to have  
20 some accountability from the defendant. They get  
21 that in the military when the convening authority  
22 decides to impose the criminal sentence.

1           So I don't see that as being a  
2           component, that's why I'm hoping to get your  
3           feelings about whether we're really in a slightly  
4           different league here when we're looking at  
5           military sexual assault cases.

6           PROF. LOLLAR: I think my  
7           accountability point was actually more in  
8           response to Professor Rutledge's concerns. I  
9           think I understand your point.

10          You know, again, I go back to, I  
11          think, sharing Professor Goldscheid's perspective  
12          that I think there is a way to have, again, the  
13          idea of community involvement and community  
14          responsibility which is, I think, what I hear you  
15          talking about in terms of the military. In terms  
16          of the specific mechanisms, I don't know that I  
17          have any more to offer than what's already been  
18          offered.

19          JUDGE JONES: Go ahead. Sure.

20          PROF. RUTLEDGE: I would just say the  
21          restitution -- in many ways it's symbolic,  
22          honestly, but it is actually a debt that's owed

1 to the victim.

2 When a military defendant is  
3 convicted, you're right, it's the employer who's  
4 making that determination --- the convening  
5 authority, but this is something that is  
6 particular to the victim. You owe this victim,  
7 you need to restore that victim and in that  
8 context, that's why that's an important system of  
9 justice.

10 But it is symbolic and I think your  
11 point is well taken in terms of the military  
12 system is different.

13 JUDGE JONES: Professor, go ahead.

14 PROF. GOLDSCHIED: Just one thought on  
15 that is certainly, in the civilian context and  
16 this -- I'm not personally sure how applicable  
17 this is to the military context.

18 But certainly in the civilian context  
19 there are instances in which a survivor of sexual  
20 assault, or intimate partner violence that may  
21 involve sexual assault, does not want to re-  
22 engage with the perpetrator and that's in large -

1 - that's, I think, in large part accounts for the  
2 low numbers of civil cases in the civilian  
3 context. And so I would wonder how much that  
4 would limit survivors' ability to be compensated  
5 in the military and the military system.

6 So I very much take your point that  
7 the military context may be unique in some ways  
8 and maybe uniquely situated to create a  
9 compensation system, but I -- my instinct tells  
10 me that that same reluctance to want to have to  
11 re-engage through a criminal prosecution or  
12 perhaps through some kind of restitution hearing  
13 may apply in this -- in the military context as  
14 well and make restitution that, again, is tied  
15 between the perpetrator and the particular victim  
16 less advantageous.

17 MR. STONE: I guess my reaction to  
18 that is because the military is now providing  
19 Special Victims' Counsel to victims, and has been  
20 even before that providing special victims'  
21 counselors to victims, those people should be  
22 authorized in the system to make that application

1 for the Article 139 restitution benefits, again,  
2 because we're -- the military is a separate  
3 system and it's trying to look after its own and  
4 see that people are taken care of.

5 It's already got people who are  
6 counsel to the victim, so the victim isn't out  
7 there alone and having to re-engage the  
8 defendant. They have a counsel who should be  
9 able to do that on their behalf and just obtain  
10 their signature. That --

11 PROF. GOLDSCHIED: That's certainly a  
12 very important distinction. I would wonder what  
13 happens over time.

14 So you know, if the -- part of the  
15 restitution arrangement involves payments over  
16 time, the effectiveness or the ability or the  
17 difficulties may compound depending on how much  
18 the Special Victims' Counsel is involved over the  
19 longer haul.

20 JUDGE JONES: Okay. I want to thank  
21 you very much.

22 CHAIR HOLTZMAN: Madam Chair, may I

1 just ask one quick question, please?

2 JUDGE JONES: Okay, Liz.

3 CHAIR HOLTZMAN: With regard to the  
4 Article 139, availing one's self of that -- for a  
5 victim to avail one -- herself or himself of that  
6 requires a criminal process, and so Article --  
7 the Article 139 remedy does not apply in any case  
8 in which there is a restricted report, is that  
9 correct?

10 And in that case, then we're talking  
11 about thousands of military victims who can't be  
12 assisted by an expansion of 139, which goes to  
13 the earlier point I made about the piecemeal  
14 system that we have now in the military.

15 JUDGE JONES: That is a much larger  
16 point, Liz.

17 CHAIR HOLTZMAN: Can anybody -- any of  
18 the panel members want to comment about the  
19 Article 139 expansion? I know it's maybe a  
20 little bit too esoteric -- too military-centric  
21 question.

22 PROF. RUTLEDGE: I would love to

1 follow up.

2 JUDGE JONES: I think Professor  
3 Rutledge is going to take a stab.

4 PROF. RUTLEDGE: Well, I don't know if  
5 I can take a stab because I'm not an expert in  
6 military justice, but I would love an opportunity  
7 to follow up on that.

8 I did not realize that a restricted  
9 report would not avail -- be able to avail  
10 themselves of Article 139 at all. So I think  
11 that should be amended.

12 JUDGE JONES: Well, let me ask this  
13 quick question now. If -- in the civilian  
14 restitution system isn't it necessary to have  
15 some report by the victim for -- in order to  
16 qualify for restitution as a victim of a crime?

17 PROF. LOLLAR: Yes.

18 PROF. RUTLEDGE: It depends on the  
19 jurisdiction.

20 California recently amended its crime  
21 victim compensation regulations, especially as it  
22 relates to military victims. So actually a

1 report to your physician can count or a  
2 restricted report can count.

3 So they'll look at the totality of the  
4 circumstances, not just a police report. The  
5 problem with that, even though California is very  
6 forward thinking, is that this is going to vary  
7 from jurisdiction to jurisdiction.

8 JUDGE JONES: Right, and in California  
9 is there a police report or not? You're saying  
10 no, they don't need it anymore?

11 PROF. RUTLEDGE: They'll consider a  
12 police report but it doesn't have to be just the  
13 police report.

14 JUDGE JONES: Got it. Okay.

15 You look very anxious to speak,  
16 Professor, and I'm happy to hear from you. Go  
17 ahead.

18 PROF. GOLDSCHIED: I was just  
19 wondering --- a small point, an issue, that of  
20 course, restitution in the state systems is tied  
21 to a criminal prosecution. I believe you are  
22 referring to compensation language.

1 JUDGE JONES: I am talking about  
2 compensation. Thank you. Thanks very much.

3 Mr. Taylor?

4 MR. TAYLOR: So I just have one  
5 footnote. I think that under Article 139 there's  
6 no requirement for any criminal conviction  
7 whatsoever.

8 So it is an administrative proceeding  
9 based upon someone's having their property  
10 wrongfully taken and it's an administrative  
11 adjudication by a commander. So there is no  
12 requirement for a crime or for anything -- any  
13 other offense to have been committed, just a  
14 wrongful taking.

15 CHAIR HOLTZMAN: But it becomes  
16 public. Isn't that correct?

17 JUDGE JONES: Well, public to the  
18 commander and the --

19 CHAIR HOLTZMAN: And the other people  
20 on the panel, and maybe beyond that.

21 LT. COL. GREEN: Ms. Holtzman, this is  
22 Lieutenant Colonel Green. That's correct.

1           An Article 139 complaint does have to  
2 be made to a commanding officer and so a  
3 restricted report or someone who has filed a  
4 restricted report would have to make the decision  
5 to make an additional report to the commanding  
6 officer under the provisions of Article 139 as  
7 they exist currently.

8           JUDGE JONES: All right. Thank you so  
9 much. This was very helpful and it's a pleasure  
10 to hear from each of you.

11           We're going to take a ten-minute break  
12 and then when we come back we'll begin the panel  
13 on state compensation programs.

14           (Whereupon, the above-entitled matter  
15 went off the record at 11:05 a.m. and resumed at  
16 11:21 a.m.)

17           JUDGE JONES: All right. Sorry for  
18 the delay, ladies and gentlemen. Good afternoon.  
19 Is it afternoon? Not yet? Okay. Good morning.

20           CHAIR HOLTZMAN: Feels that way.

21           JUDGE JONES: All right. As I said,  
22 this is the panel for state compensation

1 programs, and so we may begin with Mr. Eddy, the  
2 executive director of the National Association of  
3 Crime Victim Compensation Boards.

4 MR. EDDY: Thank you very much, and  
5 thank you to the Panel for this opportunity.  
6 I've had the pleasure of training before military  
7 audiences on a number of occasions, and it's  
8 always worthwhile for me to see what's going on  
9 with their systems, their victims and how they  
10 help them, and this has been a learning process  
11 for me as well.

12 I did submit a one-sheet summary that  
13 points out the basic comp 101 background for  
14 compensation programs. I'm going to presume  
15 that, based on what I've heard, you have a pretty  
16 good familiarity with state compensation  
17 programs.

18 However, there are certain aspects and  
19 nuances that seem to be of particular interest.  
20 So I'm just going to speak somewhat  
21 extemporaneously in reaction to what we've heard  
22 so far.

1           Let me first say though that there are  
2           compensation programs in all 50 states, beginning  
3           in California in 1965, followed closely by New  
4           York and other states.

5           There is no federal program except one  
6           for international terrorism victims overseas.  
7           It's called ITVERP. It's International Terrorism  
8           Victim Expense Reimbursement Program; it's run by  
9           the Office for Victims of Crime, U.S. Department  
10          of Justice.

11          Most of the money - two-thirds of the  
12          money or more -- comes from state funding  
13          sources, which is criminal fees and fines. The  
14          rest comes from federal sources through the  
15          Victims of Crime Act.

16          I want to jump quickly -- I know our  
17          time is limited -- to the discussion of the  
18          obstacles that were cited by the professors. I  
19          think, by and large, before I do take a little  
20          bit of exception to some of the remarks, by and  
21          large they presented a very fair and complete  
22          picture of state compensation programs, which are

1 available to victims of -- military Service  
2 members who are victims of violent crime.

3 We find that there are very few such  
4 claims coming in from military victims because of  
5 the extensive resources available. They are  
6 covered by insurance. They are -- the  
7 transitional compensation may help domestic  
8 violence victims whether or not they are Service  
9 members themselves. So I know there are -- the  
10 people to my left here who actually work with --  
11 who direct compensation programs may be able to  
12 provide a perspective on that.

13 But the door is open. Not many  
14 victims walk through that door. I might address  
15 that aspect first, the under-utilization or the  
16 under -- the lack of knowledge about compensation  
17 programs.

18 I think our perspective is that yes,  
19 compensation programs have to, and the military  
20 is working hard for its victims, has to  
21 publicize, has to work hard -- it's a daily thing  
22 -- the people that compensation programs depend

1 on to deliver the message are the people in the  
2 field who work with victims daily.

3 Gene's staff, as big as Texas is,  
4 they're not able to go out to every precinct in  
5 Texas to talk to victims about compensation.  
6 What they depend on are the substantial federal  
7 funds through the Victims of Crime Act that now  
8 fund 4,000 programs, soon to be more than 10,000  
9 since Congress has more than tripled the money  
10 for victim assistance funding -- by the way,  
11 without giving one penny more to state  
12 compensation programs because of limitations in  
13 the law.

14 We'll get into that. But let me  
15 address the reporting requirement and the  
16 innocent victim requirement, which in some  
17 states, programs cannot even consider when it  
18 comes to sexual assault victims.

19 I know we have a couple our  
20 distinguished panelists from New York. The New  
21 York Crime victim compensation program could not  
22 consider the innocence of a sexual assault victim

1 if it wanted to because any sexual assault victim  
2 who submits to a forensic exam automatically goes  
3 through the door to regular compensation. Yes,  
4 they have to go for a forensic exam.

5 I don't know how many victims of  
6 sexual assault -- and this would be an unknown  
7 number anyway because there are so many  
8 unreported victims of sexual assault -- but if  
9 someone does go and gets the sexual assault exam  
10 done for forensic purposes, that is sufficient  
11 for the reporting and cooperation requirement in  
12 New York State.

13 It's also sufficient in several other  
14 states -- a growing number. In Texas, I'll just  
15 point out -- Gene can speak to that if he wishes  
16 -- if the victim submits to the forensic exam,  
17 they will get the physical injury treatment costs  
18 at that visit covered without any further  
19 cooperational reporting.

20 I don't want to belabor this point.  
21 It's just that programs are evolving, and I think  
22 when I see some academic research that seems to

1 be from a different era in terms of --  
2 particularly in terms of sexual assault and  
3 domestic violence victims, where programs are  
4 becoming more flexible, and as the attention in  
5 the military system on sexual assault victims  
6 demonstrates, it's in the news every day.

7           Campus sexual assault is a big issue  
8 as it well should be. Compensation programs are  
9 also evolving, and I think -- I think it would be  
10 a mistake for this panel to see that some of the  
11 requirements that are imposed on all victims.

12           For example, is it important for  
13 someone to report to police and cooperate with  
14 law enforcement? These programs understand  
15 because they work together with the victims  
16 service programs like shelters and other  
17 counseling programs for sexual assault victims as  
18 well as DV victims.

19           They understand the difficulties that  
20 people have working through the system with  
21 reporting and cooperating. So many have become  
22 more flexible.

1 I've had more than one manager of a  
2 compensation program, many, say if we get a claim  
3 from a sexual assault victim or a domestic  
4 violence victim -- and yes, if they have reported  
5 to police perhaps in a minimal way, gotten a  
6 temporary restraining order or submitted to a  
7 forensic exam it's an automatic payment  
8 situation.

9 We're not going to question what  
10 happened in this particular circumstance, because  
11 we know that the overwhelming majority of these  
12 victims are the victims that we should be  
13 serving.

14 So in our discussions at the  
15 conferences -- I've been working with the  
16 national association for more than 25 years now -  
17 - we discuss these issues all the time at our  
18 conferences, and I just don't want this panel to  
19 be left with the impression that we are not  
20 working to try to make our programs more  
21 flexible, particularly for female victims of  
22 violence, whether in sexual assault or domestic

1 violence.

2 Those are particular focus areas, and  
3 it's because of the work of academic folks like  
4 the ones you just heard from as well as diligent  
5 and dedicated advocates in the field that force -  
6 - and we appreciate this -- our attention on  
7 those particular victims.

8 I don't have anything more  
9 particularly to speak to but I want to suggest  
10 that any questions about compensation programs  
11 and how they operate, not only can I try to help  
12 with those, but these two distinguished members  
13 to my left actually operate these programs daily  
14 and can certainly speak to any issues with  
15 compensation programs that you might want to  
16 delve into.

17 I should mention one last item.  
18 Thirty state compensation programs now are  
19 responsible for paying for the forensic exams of  
20 sexual assault victims for all victims in the  
21 state.

22 This is without regard to reporting or

1 cooperation. It costs about \$40 million  
2 annually, which is close to a third of all the  
3 federal funding that goes to these state  
4 programs.

5 The federal funding that comes to the  
6 programs is about \$150 million a year. Forty  
7 million of that goes to pay for forensic exams --  
8 and combined with the state money as well.

9 It's not just the federal money that  
10 goes for those; it's a combination of the state  
11 and federal money. That's without regard to  
12 reporting cooperation, and most of the programs  
13 in these 30 states that do that will pay for  
14 related services immediately needed by the  
15 victim, whether it be STD testing, prophylactic  
16 medication.

17 It may be -- these are usually done by  
18 trained nurses, who may provide some initial  
19 counseling and referral, and these folks are also  
20 trained to say, "Look, I have a compensation  
21 application right here - would you like help to,  
22 you know, get it going?"

1           "Here it is, you know, here's someone  
2 to contact for you to help -- to help get it  
3 filled out." All of this is available to members  
4 of the military who've become victims of crime.

5           Again, we don't find many of them  
6 coming to state programs because of the  
7 circumstances, but it's --

8           JUDGE JONES: But compensation, if  
9 they decide they do want to apply, would then go  
10 into other areas like lost wages -- that sort of  
11 thing?

12           MR. EDDY: Yes. The compensation  
13 programs, the major categories of payment --  
14 medical bills is about 50 percent of what they  
15 pay out, counseling about 10, lost wages about 20  
16 percent, funeral and burial about 10 percent.

17           JUDGE JONES: Thank you. All right.  
18 Thank you very much, Mr. Eddy. Ms. Reed?

19           MS. REED: Good morning. I'm Laura  
20 Banks Reed, and I'm the director of the Crime  
21 Victims Compensation program in D.C. Superior  
22 Court. So my travel here this morning was very

1 easy, just a couple of blocks away.

2 I have been the director of this  
3 program for the past 18, going on 19 years now,  
4 and I was fortunate when I came into this  
5 position because it was just at a time when the  
6 statute had been changed, and administration of  
7 the program was taken over by the court.

8 So our statute has the benefit of some  
9 of the more victim-centered provisions that Mr.  
10 Eddy spoke of. Yes, the statute does require  
11 that crimes be reported to the police. But we  
12 have three exceptions. Sexual assault is one of  
13 the exceptions.

14 If a sexual assault exam is obtained,  
15 then that meets the reporting requirement. In  
16 cases of domestic violence, if a civil protection  
17 order is pursued, that is an exception to the  
18 reporting requirement.

19 And in the case of -- in cases of  
20 child cruelty, if a neglect petition is filed,  
21 then the parent or whomever does not have to go  
22 and make a police report.

1           And one of the things I wanted to  
2 emphasize, and I'd like to say I can't over  
3 emphasize it enough, is the importance of  
4 compensation programs being closely partnered  
5 with other service providers.

6           Right across the street from this  
7 building in the Superior Court building the court  
8 has created a domestic violence intake center,  
9 and in this center a victim of domestic violence  
10 can go and see a prosecutor, an advocate, a  
11 mental health professional, a lawyer.

12           They get everything done. It's like  
13 one-stop shopping, and then they have the beauty  
14 of the compensation program being located just  
15 across the street.

16           This has so increased our ability to  
17 serve victims, and we even have a satellite  
18 office in -- a satellite domestic violence intake  
19 center in Southeast Washington -- and there is a  
20 compensation staff member who's on site.

21           They do the civil protection orders by  
22 teleconference. So I just can't over-emphasize

1 the importance of having compensation embedded  
2 with other necessary services; it makes the  
3 entire process so much easier for victims.

4 In addition to the things that -- the  
5 services that Dan talked about -- one of the  
6 things that we find extremely sought after by  
7 sexual assault victims is temporary emergency  
8 shelter and moving expenses, and our compensation  
9 program does provide some payment for both of  
10 those.

11 If the sexual assault occurs in the  
12 victim's home, it becomes a crime scene. That is  
13 not a place that they want to return to and in  
14 some instances even can return to.

15 For their peace of mind and sense of  
16 security, we also pay for the cost of lock  
17 changes or bars on windows, security systems, and  
18 these are services that really help victims start  
19 to get a better sense of normalcy in their lives  
20 after a crime.

21 Our maximum payment is \$25,000, but  
22 the average payment in most claims is somewhere

1 between \$3,000 or \$4,000. We do -- you do have  
2 to file a claim within a year of the crime, but  
3 in the District of Columbia the statute is  
4 written within one year or within one year of  
5 learning of the program.

6 So I don't think, in our 18 years  
7 there, that we've ever turned away an application  
8 for timely filing. We are victim centered; we  
9 try to find a way to make things work, and  
10 there's no way that we could operate in a vacuum.  
11 We rely extremely heavily on our victim services  
12 partners who are here today. So thank you.

13 JUDGE JONES: And could I just quickly  
14 ask you where is your funding from, specifically?  
15 You may have said it.

16 MS. REED: The funding for the  
17 Superior Court program comes from the court's  
18 revenue -- court cost filing fees and specific  
19 fines against criminal defendants, and we also  
20 receive a federal grant from the Office for  
21 Victims of Crime.

22 JUDGE JONES: Thank you.

1           Mr. McCleskey, you're from the -- the  
2           director of the Texas Crime Victims Compensation  
3           Program.

4           MR. MCCLESKEY: Yes, ma'am. Good  
5           morning, and thank you for inviting us here  
6           today.

7           JUDGE JONES: Good morning.

8           MR. MCCLESKEY: I'm going to be a  
9           little bit unique from my background. I'm a  
10          retired Marine Corps officer who has had special  
11          court-martial convening authority. So I have  
12          greatly enjoyed watching this committee over the  
13          past couple of years and watching the discussion  
14          this morning. I definitely think you're going  
15          down the right track.

16          I would give you one example that I've  
17          experienced in Texas. This regards a Special  
18          Victim Counsel that was working in the Air Force  
19          a couple of years ago.

20          Without giving too many details about  
21          the case itself, the Special Victim Counsel  
22          contacted us, assisted the victim in applying to

1 us. The victim was a resident of Texas, but she  
2 was a victim of a crime overseas. But, because  
3 she was a resident of Texas, we could cover her.

4 Without that Special Victim Counsel,  
5 that victim would not have known about Texas'  
6 crime victims compensation and would not have  
7 been able to apply, and we paid a significant  
8 amount of money in that case for things that  
9 could not be covered.

10 The Special Victim Counsel is an  
11 important aspect in dealing with state crime  
12 victim compensation programs and I'm very excited  
13 that you all have gone forward with that.

14 JUDGE JONES: Could I quickly ask you,  
15 is that a civilian victim or military?

16 MR. MCCLESKEY: It was a civilian  
17 victim.

18 JUDGE JONES: Pardon me? Civilian  
19 victim.

20 MR. MCCLESKEY: It was a civilian  
21 victim --

22 JUDGE JONES: Right.

1 MR. MCCLESKEY: -- from a active duty  
2 military suspect.

3 JUDGE JONES: Understood.

4 MR. MCCLESKEY: The Texas program is  
5 one of the biggest in the nation. My advance  
6 materials -- I gave you a bunch of statistics. I  
7 showed you our -- what we pay out by types of  
8 payments, et cetera.

9 But for the people that are here, we  
10 average getting about 100 new applications every  
11 business day. We pay out an average of about  
12 \$300,000 every business day, which comes out to  
13 be \$65 million to \$85 million per fiscal year.

14 We are a large volume claims  
15 processing program and, of course, the challenge  
16 for me, as the director and our staff, is we have  
17 to process things as quickly as possible while  
18 trying to give that one-on-one attention to  
19 people as we process things through.

20 Advocates will always say it's a  
21 cumbersome process. But, candidly, we can't  
22 approve an application until we get the

1 application.

2 We can't reimburse or pay a bill until  
3 we get the bill, and those are just things that  
4 you have to have from an audit perspective before  
5 you can disburse those kinds of funds out.

6 In Texas, we do a significant amount  
7 of training with the military. We've trained  
8 extensively at Fort Hood, Air Forces bases in  
9 Wichita Falls, Air Force bases in San Antonio,  
10 with the Army out at Fort Bliss.

11 With the two Fort Hood shootings,  
12 we've sent crisis teams up to cover for  
13 assistance things that the Army could not cover -  
14 - things like travel to funerals for all of the  
15 civilian victims in those two incidents.

16 So we have a pretty good relationship  
17 with Fort Hood in those types of issues.

18 In my advance materials, I tried to  
19 bring up one issue we have in Texas that seems to  
20 come up fairly frequently with a victim of family  
21 violence or it could be sexual assault that's  
22 family violence.

1           We've talked about transitional  
2 assistance that the military provides when the  
3 active duty member is being separated, which  
4 usually means that active duty member has gone to  
5 a court-martial or is going through  
6 administrative discharge proceedings.

7           If the active duty only gets an  
8 Article 15 -- a non-judicial punishment -- that's  
9 not available. And the dependent wife and  
10 children want to move; that's where a state  
11 compensation program like Texas comes in.

12           We're able to relocate that family  
13 where the active duty -- when the military  
14 cannot, because it's our understanding that  
15 transitional assistance doesn't extend down to  
16 just an Article 15 conviction. Or not a  
17 conviction but a hearing of nonjudicial  
18 punishment.

19           So that's a gap that I would like to  
20 see the committee possibly explore because in  
21 cases of family violence or sexual assault --  
22 sexual assaults have kind of changed over the

1 past two years that I've been out -- that sexual  
2 assault goes to court-martials almost all the  
3 time and family violence does not.

4 Family violence is still handled quite  
5 a bit in Article 15s, and there's a gap in the  
6 coverage in the transitional assistance program.

7 Dan talked briefly about sexual  
8 assault forensic exam reimbursements. We pay  
9 \$5.3 million a year for that in Texas.

10 The legislation he was talking about,  
11 where victims would get their initial medical  
12 covered, is pending before the Texas House. I  
13 testified about it on Tuesday.

14 I think it's going to pass. It costs  
15 us about \$3 million a year, but that's money that  
16 we have and that we can afford. The Texas  
17 program is very well funded.

18 In my advance materials I provided you  
19 our revenue sources. We're mainly funded by  
20 court funds -- I'm sorry, court fees -- and  
21 basically, you know, everybody who goes to court  
22 -- going to court in Texas includes speeding

1 tickets -- pays into the crime victims comp fund.

2 When I do training I commonly say who  
3 all has donated to the fund of a speeding ticket,  
4 and I always have to raise my hand. So that's  
5 currently the Texas story. We do actively work  
6 with the military and appreciate very much the  
7 committee's work with the development of the  
8 Special Victims' Counsel.

9 JUDGE JONES: Thank you very much, Mr.  
10 McCleskey.

11 That's Ms. Silverberg next. You're an  
12 advocacy and outreach supervisor for Network for  
13 Victim Recovery.

14 MS. CHARLES: I think we are going to  
15 switch our order a little bit.

16 JUDGE JONES: I'm sorry. I had  
17 already been instructed to read those out in the  
18 order that you were seated, and I didn't. My  
19 apologies. All right. Ms. Charles.

20 MS. CHARLES: We mixed it up on you.  
21 Thank you for the opportunity to testify today  
22 regarding this critical victims service.

1           My name is Nikki Charles, and I'm  
2           currently the co-executive director of Network  
3           for Victim Recovery of D.C. We're a  
4           comprehensive crime victims services organization  
5           that I co-founded in 2012.

6           NVRDC offers comprehensive advocacy  
7           and legal assistance for all survivors of crime  
8           in the District. Additionally, we run the 24  
9           hour sexual assault crisis response project for  
10          the city, responding when any survivor of sexual  
11          assault seeks a forensic medical exam, which is  
12          roughly around 400 people a year.

13          Approximately 40 percent of those do  
14          not report to law enforcement. We submit a  
15          compensation application in nearly 100 percent of  
16          those cases.

17          Prior to that, I worked for Maryland's  
18          Department of Public Safety and Correctional  
19          Services in a number of capacities. In 2010,  
20          under pressure from crime victims, community  
21          victim service providers and the State Board of  
22          Victim Services, Maryland Criminal Injuries

1 Compensation Board was overhauled in an attempt  
2 to create a more victim-friendly and trauma-  
3 informed compensation program.

4 A victim services administrator  
5 position was created, which I filled, and in that  
6 role I developed and delivered an extensive  
7 training curriculum for the staff, advocated for  
8 clients directly, undertook a statewide marketing  
9 outreach campaign, and designed and implemented  
10 policies and procedures in an attempt to improve  
11 overall services for crime victims.

12 The compensation awarded through state  
13 programs is often the only tangible benefit a  
14 victim of crime can receive post-victimization.

15 If no report is made or no offenders  
16 identified, charged, prosecuted or found guilty,  
17 any opportunity for restitution or a civil  
18 judgment basically evaporates.

19 Yet, research has long shown that  
20 compensation programs are tremendously under-  
21 utilized, as Mr. Eddy mentioned, for many  
22 populations including adult sexual assault

1 victims, which is our focus today.

2 Most of my comments today will deal  
3 with crime victims compensation generally as each  
4 individual program, as you've noticed, has its  
5 own statute, policy, procedures that govern  
6 eligibility, varying coverages and benefit absent  
7 funding levels.

8 They are no way a criticism of the  
9 good work being done by many programs who are  
10 faced with funding shortfalls, increasing  
11 applicants and an inability to project from year  
12 to year.

13 These enhancements are offered from a  
14 purely victim-centered perspective without regard  
15 to the fiscal impact that implementing them could  
16 cause. Many of the challenges sexual assault  
17 victims face when seeking compensation are due to  
18 statutory variances and interpretation. Almost  
19 all programs have some type of report to law  
20 enforcement requirement as well as the  
21 requirement that the victim cooperate with law  
22 enforcement.

1           The timeliness of that report varies  
2           from program to program but is sometimes as short  
3           as 48 hours. For sexual assault victims this can  
4           be problematic for several reasons, and delays in  
5           reporting are not abnormal due to the common  
6           feelings of shock, fear, trauma and, sadly,  
7           shame.

8           Even when a victim does report to law  
9           enforcement within the eligible time frame, at  
10          times the report reflects an experience that  
11          doesn't qualify under certain statutes such as  
12          when the suspect reports they had consensual sex.

13          These reporting challenges can be  
14          overcome by programs with a desire to be victim-  
15          friendly in several ways. Accepting a receipt or  
16          acknowledgment that a forensic exam or rape kit  
17          has been conducted or that a protection order has  
18          been granted in lieu of a traditional report to  
19          law enforcement is one way. Implementing an  
20          unless good cause is shown clause to the timing  
21          requirement of both application submission, and  
22          report filing is another.

1           Another challenge that keeps survivors  
2           from accessing compensation is the innocent  
3           victim concept, which is a requirement in many  
4           state compensation statutes but eligible victims  
5           cannot have taken part in, provoked, participated  
6           in or committed a crime at the time of the  
7           victimization.

8           While this seems reasonable to many,  
9           consider an underage student who is drinking and  
10          then raped at a party. Would she be ineligible  
11          for crime victim compensation because she was  
12          drinking underage? The Maryland Court of Appeals  
13          in a 2010 Marks v. Criminal Injuries Compensation  
14          Committee Case that the compensation board's  
15          record must establish an element of causation  
16          that connects the conduct of the victim to the  
17          actual crime committed against them.

18          Benefit limitations are another area  
19          that deserves exploring. As I mentioned, all  
20          states have varying limits on what they can pay  
21          for and to what extent. Most cover traditional  
22          mental health interventions but exclude some of

1 the more progressive therapies including massage  
2 therapy, acupuncture, mindfulness and meditation,  
3 which are showing great promise in treating  
4 trauma.

5 The sub caps can be as low as a \$1,000  
6 maximum benefit, which only gets the survivor  
7 five to ten visits with a traditional mental  
8 health clinician.

9 Many programs will cover lost wages  
10 that result from the victimization if the victim  
11 has physical injuries that prevent the victim  
12 from working.

13 Many sexual assault victims have  
14 minimal physical injuries, but their  
15 psychological injuries can be equally as  
16 debilitating and keep them from working too,  
17 particularly if the assailant is a co-worker.

18 Medical care is another commonly  
19 covered expense. Rape kits, diagnostic testing  
20 and SDI prophylactics are all eligible expenses.  
21 But it's also very difficult to get coverage in  
22 order to terminate a pregnancy that resulted from

1 a rape.

2 Tattoo removal is a common need of  
3 human trafficking victims that is rarely covered.  
4 As a compensation administrator in Maryland, we  
5 were able to cover tattoo removal for a victim  
6 who had every visible inch of her body covered  
7 with her trafficker's first name.

8 Based off my experience of seeing how  
9 critical compensation is to a survivor's recovery  
10 process, I strongly recommend the Panel considers  
11 the current barriers that sexual assault  
12 survivors face within state programs.

13 It is important to address early on  
14 the possible challenges within the military  
15 context -- not just for Service members but those  
16 civilians impacted by the acts of those not in  
17 the military. Thank you for your time.

18 JUDGE JONES: Thank you very much.

19 Ms. Silverberg?

20 MS. SILVERBERG: Good morning. I'd  
21 like to thank the Panel and their staff for the  
22 opportunity to share my experiences on the

1 importance for compensation for survivors of  
2 sexual violence.

3 My name is Lindsey Silverberg, and I'm  
4 the outreach and advocacy supervisor of the  
5 Network for Victim Recovery. In this capacity, I  
6 oversee the advocacy portion of the 24-hour  
7 sexual assault crisis response project for the  
8 District.

9 Out of a personal passion, I also  
10 serve as the organization's military liaison by  
11 establishing MOUs with local installations,  
12 training military members on community resources  
13 and participating in educational activities.

14 In the two-plus years I've worked for  
15 NVRDC, I have accompanied nearly 200 survivors of  
16 sexual assault through the medical forensic  
17 examination and seen the substantial impact that  
18 the crime victims compensation funds has on an  
19 individual's ability to deal with the sexual  
20 assault.

21 State compensation programs provide  
22 access to emergency housing, cover out of pocket

1 medical expenses, lost wages and provide  
2 reimbursement for mental health counseling.

3 As you heard earlier today, research  
4 has estimated that the economic impact of a  
5 single incident of rape can be anywhere from  
6 \$87,000 to up to \$100,000.

7 This figure includes the medical care  
8 costs, mental health services, lost productivity,  
9 and pain and suffering. Compensation programs  
10 work hard to minimize this overwhelming economic  
11 impact.

12 Today, I'll share with you one  
13 survivor's experience interacting with the  
14 military justice system to highlight the  
15 important opportunities that you have to improve  
16 the current options for survivors and to  
17 recommend the establishment of a progressive  
18 compensation fund.

19 Early one morning several months ago,  
20 I responded to Med Star Washington Hospital  
21 Center to meet a survivor of sexual assault. The  
22 survivor -- a civilian -- had been assaulted by a

1 Service member the night before on a military  
2 installation outside of D.C.

3 After spending hours giving a  
4 statement to military police and more hours at a  
5 hospital that did not provide a medical forensic  
6 exam, she was finally able to access services  
7 through the District's sexual assault response  
8 program.

9 Overwhelmed and exhausted, the  
10 survivor endured a four-hour invasive exam, in  
11 which the nurse documented the narrative of the  
12 assault, took pictures of her injuries and  
13 conducted a full body medical examination to  
14 collect evidence.

15 Throughout the exam, we spent time  
16 discussing survivor safety, her options for  
17 involvement in the military justice process and  
18 the next steps.

19 As an advocate, it's part of my role  
20 during this process to explain the crime victim  
21 compensation funds and assist survivors in  
22 filling out that paperwork.

1           I informed the survivor that she would  
2 be receiving bills from the first hospital that  
3 she was taken to, also for the ambulance drive to  
4 get her to Washington Hospital Center and for the  
5 prescribed prevention medications that she'd  
6 receive after she left.

7           The survivor was very grateful that a  
8 state compensation program existed to help  
9 recover the medical expenses that she had no  
10 other way to pay.

11           Weeks after the forensic exam, the  
12 survivor shared with me that she was no longer  
13 interested in participating in the reporting  
14 process. She was attempting to regain normalcy  
15 in her life and did not believe that engaging in  
16 a process that may take months or even a year  
17 would be beneficial to her wellbeing.

18           As a result of this single decision,  
19 she was no longer eligible to receive assistance  
20 from the state compensation program due to the  
21 eligibility requirement that survivors must  
22 cooperate with law enforcement.

1 Desperate to find a solution, an NVRDC  
2 staff attorney and I reached out to the military  
3 victim advocate to see if a similar compensation  
4 program existed within the military.

5 We were referred back to the state  
6 compensation program. Currently, there are no  
7 concrete solutions that exist to assist this  
8 survivor with the almost \$3,000 in medical bills  
9 incurred from just seeking services.

10 The survivor has shared with me that  
11 her experience after the rape has been as  
12 traumatic as the actual assault itself.

13 She feels that she may be forced to  
14 participate in a system that she's not interested  
15 in out of need to cover her medical expenses.

16 I share this survivor's experience for  
17 three reasons. First, some crime victim  
18 compensation programs, as you've heard, accept  
19 the sexual assault forensic examination as -- in  
20 lieu of a police report or protection orders.

21 For a crime that is so often under-  
22 reported or not reported at all, providing

1 alternatives like this -- or even to go a step  
2 further and accept a signed statement from a SARC  
3 in the case of a restricted report -- would help  
4 gain access to compensation funds that could be  
5 the difference between the road to recovery and  
6 the stress of having to pay substantial out-of-  
7 pocket costs.

8           Second, while the military is able to  
9 cover costs for Service members and dependents,  
10 reservists and civilians may be unduly impacted  
11 by military sexual violence without remedy.

12           And third, the military is uniquely  
13 set up to handle and execute an impactful  
14 compensation program. This panel has a profound  
15 opportunity to recommend thoughtful compensation  
16 eligibility requirements by survivors of sexual  
17 assault but do not have the potential to  
18 revictimize or blame the survivor.

19           Thank you for your time.

20           JUDGE JONES: Thank you. Questions?

21           Mr. Stone.

22           MR. STONE: Ms. Silverberg, I don't

1 know if you heard my comments to the last panel  
2 but I was -- it seems to me like you are in favor  
3 of having a more expanded restitution program  
4 within the military so that they don't have to  
5 come outside in making some kind of resources  
6 available even based on restricted reports.

7 I don't know if you -- I didn't know  
8 if you had a little more detailed plan of that,  
9 or if that's something you'd be willing in a  
10 follow-up letter to try and put together and send  
11 us just so we can see more concretely how you  
12 think, based on your experience, that that would  
13 work. Is that something we could ask you for?

14 MS. SILVERBERG: Yes, I would be happy  
15 to provide a follow-up letter. I don't have a  
16 lot of set ideas on what that would look like or  
17 how it would be implemented.

18 But I do think that would be very  
19 impactful to survivors of sexual violence that  
20 aren't in a position or not ready to report a  
21 crime that's happened to them.

22 MR. STONE: A question that I have --

1 and you can answer it or anybody else on the  
2 panel -- having to do with the innocent victim  
3 situation is that, again, as I mentioned to the  
4 last panel, it's common on -- in military  
5 installations that people who don't have passes  
6 will attend their own informal party in -- you  
7 know, on military bases, where they may or may  
8 not be underage but there's alcohol flowing, and  
9 the sexual assault victim will tell you quite  
10 candidly, "Yes, everybody at the party got  
11 drunk," but she didn't expect to be sexually  
12 assaulted, and that's what happened.

13 And I guess what I'm wondering is  
14 under state compensation programs, would that  
15 disqualify the person as not being an innocent  
16 victim because voluntarily went to the program -  
17 - to the party and they voluntarily got drunk?

18 Would it depend on whether or not  
19 there -- it was underage drinking, or would them  
20 admitting they got drunk without it being forced  
21 on them be enough to disqualify them from a  
22 compensation program?

1 JUDGE JONES: Mr. Eddy?

2 MR. EDDY: I welcome the question.  
3 Thank you. "Innocent victim" is not a phrase  
4 that occurs in any compensation law that I'm  
5 aware of.

6 What does exist in every state  
7 compensation law is something called  
8 "contributory misconduct." It is one of the  
9 basic requirements. Contributory misconduct, as  
10 was pointed out by Nikki here and a court  
11 decision in Maryland -- there are other decisions  
12 in other courts -- I've studied this because  
13 every year I lead the contributory misconduct  
14 workshops at three different conferences.

15 So it requires not just misconduct,  
16 criminal activity or something substantially  
17 wrong, not just something in poor taste. It also  
18 requires that that caused what happened. The  
19 underage drinking woman, yes, if she's 19 perhaps  
20 she has committed a crime.

21 I don't know if privacy of homes and  
22 what not, how that plays into this. The way the

1 compensation programs would look at that is okay,  
2 of the two-part test -- misconduct, okay. Has it  
3 caused what happened? No. What if she woke up  
4 and the guy was assaulting her with a baseball  
5 bat? Would you pay that claim? Yes. No, her  
6 getting drunk didn't cause this guy to beat her  
7 with a baseball bat, right?

8 Well, if he assaults her with a  
9 different weapon is that any different? No.  
10 That's what we teach compensation programs, and  
11 I'm fairly confident that -- I can't speak for  
12 all 50 states, and most of them don't have  
13 boards, by the way.

14 They're operated as in these cases by  
15 individuals who are trained in victim services,  
16 who work closely, as Laura was emphasizing, with  
17 their counterparts. Let me take a moment.

18 I don't mean to deny the examples that  
19 are provided, but I think there are many other  
20 examples of the success of the system. The  
21 reporting requirement certainly is an issue for  
22 sexual assault victims, and it is something that

1 I think we're going to see some evolution on. So  
2 I appreciate the human example that was provided.  
3 I'll take that to heart, and it will be something  
4 as we talk about these issues in the state --  
5 these are state legislative decisions.

6 These aren't these administrative  
7 decisions. These don't -- these folks don't set  
8 the law and neither do I. But these are evolving  
9 standards in many programs.

10 The Virginia compensation program  
11 director says, "We don't have a filing  
12 requirement in the department -- we waive  
13 everybody in. It's in the books. We waive  
14 everybody because we can, no cause exception."

15 So I think with regard to sexual  
16 assault victims and to a certain maybe lesser  
17 degree to domestic violence because circumstances  
18 may be more complicated; this innocent victim  
19 phrase simply is not operable.

20 MR. STONE: Do you have -- I noticed  
21 when you were giving your presentation you said  
22 there's very few military victims who make it to

1 the state programs. Do you either have  
2 percentages or actually numbers?

3 Is it 1 percent of the victims  
4 nationwide? Is it, you know, is there some data  
5 somewhere that would be useful to us?

6 MR. EDDY: There is no national data;  
7 I know that for sure. We have national data. We  
8 know average cost per claim. We know total paid  
9 out. But things like that -- we have all that  
10 information, but the breakdowns of military -- I  
11 don't know if Gene keeps that; I'm sure Laura  
12 does not.

13 MR. MCCLESKEY: Anecdotally, it's a  
14 very, very small percentage. Texas is a large  
15 state. You know, we're getting 25,000 to 28,000  
16 applications per year. I would estimate less  
17 than 50 involve military crimes, military  
18 dependents, et cetera. But that's just based on  
19 the population.

20 MR. STONE: Okay. And before I leave,  
21 you quickly went over some percentages generally,  
22 Mr. Eddy. About 50 percent of the compensation

1 you thought was medical costs and 20 percent was  
2 lost wages. What were the other two categories  
3 that you mentioned?

4 MR. EDDY: Yeah. The major categories  
5 are medical bills, more - about 55 to 60 percent  
6 nationally. Mental health counseling is 10-15  
7 percent. Funeral bills 10-15 percent, and then  
8 the last major category is lost economic support  
9 or economic loss, which mostly is lost wages  
10 because mostly they're dealing with people who  
11 have been injured and cannot return to work for a  
12 period of time but also lost support for family  
13 members and funerals.

14 So those are the major categories.  
15 Beyond that, relocation is a growing and  
16 expensive item. In Florida, which is one of the  
17 states that pays for relocation -- about half of  
18 them do -- it's 20 percent of what they pay out  
19 now is for relocation. Also difficult to  
20 administer. Mostly for DV victims.

21 They move back in with the offender,  
22 which is their choice, but it might -- you know,

1 these are things that make these cases more  
2 difficult.

3 But I heard managers say, when we get  
4 a claim from a sexual assault victim we almost  
5 sigh in relief, because we're not going to deal  
6 with contributory misconduct -- we're not going  
7 to deal with the bar fight.

8 Why are -- let me just take one moment  
9 -- why are these rules there? Well, we know that  
10 statistically most crime is committed among  
11 males, and it involves -- it may involve drugs --  
12 drug dealing.

13 It may involve lots of things that the  
14 public funds, both federally and state, are not  
15 intended to be used for. So we require -- the  
16 laws generally require reporting so that people  
17 do let the police investigate and see what  
18 happened, cooperation which criminals may not  
19 always want to do, contributory misconduct -- if  
20 someone is killed or injured in the course of the  
21 drug trade, they're not going to be eligible for  
22 these scarce public funds.

1           And that's why these programs have to  
2 look at police reports. When they get sexual  
3 assault victims, the police report kind of goes  
4 like that. Did the police say something  
5 happened? Okay.

6           MR. STONE: Is there a category of  
7 those that you mentioned or -- and maybe this is  
8 for anybody on the panel -- that you think among  
9 military victims of restitution or compensation  
10 that you think in particular -- now remember,  
11 because the military does tend to provide  
12 medical.

13           Tends to -- it does tend to provide  
14 all these other services. Is there something  
15 that reoccurs regularly? We heard, you know,  
16 that in Texas that it may be family members who  
17 want to go to a funeral.

18           Is there something you see commonly  
19 that you think we should pay attention to because  
20 that's one of those gaps where restitution and  
21 compensation is not available in the military?

22           MS. REED: I do want to share with you

1 a situation with military members that I became  
2 aware of. The crime victims compensation program  
3 here in D.C. assisted in the response to the Navy  
4 Yard shooting, and many of the military members  
5 later came and filed applications with us.

6 Had concerns about getting mental  
7 health treatment because it would be made part of  
8 their record and would be held against them, they  
9 felt, and my staff heard that more than once.

10 MR. EDDY: I don't have anything to  
11 add. Maybe Gene does. But I think you've raised  
12 one point I wanted to address, which is there are  
13 a relatively small number, if you look at  
14 national statistics, of sexual assault and  
15 domestic violence victims who apply for  
16 compensation.

17 I think one reason, and I think you've  
18 touched on it, sir, is that there are a plethora  
19 of other services available. The Victims of  
20 Crime Act -- the federal money that will provide  
21 \$2.6 billion nationally, only \$150 million of  
22 that will go to compensation programs.

1           Close to \$2 billion will go to fund  
2 close to 10,000 victim service programs across  
3 the country, all of which are supposed to help  
4 people apply for compensation and be trained in  
5 that so they're supposed to be doing that.

6           But what do those programs provide?  
7 Well, perhaps they provide the service -- the  
8 confidential counseling that a victim wants to  
9 get -- sexual assault victim who doesn't want to  
10 report or cooperate.

11           There are supposed to be programs in  
12 every state of the country -- in the country and  
13 communities where she can go. The domestic  
14 violence victim who needs shelter - she will  
15 never have to go to a comp program to get that  
16 service paid for.

17           It's paid for by the federal  
18 government through these funds. Counseling, case  
19 management -- I think it's the combination of  
20 both of these types of programs where  
21 compensation fills a specific need which has to  
22 do with payment of medical bills that are

1 outstanding and that type of thing, or lost wages  
2 or funeral bills. But we're glad that there are  
3 so many services now being funded that may meet  
4 other needs, particularly for people that don't  
5 want to go into the criminal justice system.

6 JUDGE JONES: Thank you. Mr. Taylor?

7 MR. TAYLOR: Yes. Let me start by  
8 thanking all of you for this important service  
9 that you're providing for our society. It's  
10 truly important. It's important to us.

11 It's important particularly to all  
12 those who receive the benefits of your services.  
13 So thank you. That's a big shout out for all of  
14 you at the beginning.

15 Mr. Eddy, I wanted to ask you in a  
16 little more detail something about the 72-hour  
17 requirement.

18 I thought I heard you say between the  
19 lines that you thought that was probably going to  
20 be a thing of the past, particularly for sexual  
21 assault cases and particularly in situations like  
22 New York that have passed laws that could become

1 a model law. Is that -- were you all on this?

2 MR. EDDY: Yes, sir. Really briefly,  
3 I've been with these compensation programs,  
4 working with them as the executive director of  
5 this association -- which all 50 states belong to  
6 -- for about 25 years.

7 Twenty-five years ago, most states had  
8 72-hour reporting requirements. Some have 48  
9 hours. Now we find that Ohio has no reporting  
10 requirement -- no limit.

11 You still have to report but you can  
12 have as long as you want. Texas has a year. So  
13 it's not 72 hours, and that's something that's  
14 evolved.

15 Whether it will disappear entirely,  
16 you know, one of the chief problems is  
17 administratively. If the programs, as Utah and  
18 Vermont and some of these other states have just  
19 -- they just don't have a reporting limit at all,  
20 well, you get the seven-year-old claim and you  
21 can't -- and someone reports seven years later,  
22 and you can't find the police report.

1           The bills are gone away. You know,  
2           those are the issues that come up. So in brief,  
3           to answer your question, I do think there will be  
4           more evolution, and for sexual assault victims in  
5           particular, there is a recognition that they may  
6           not come forward quickly.

7           So are there programs that still  
8           enforce the requirements strictly? Certainly  
9           there are. You know, when I hear a story like  
10          they shared at the end of the panel here, it's  
11          something we like to take to our conferences and  
12          say, look, this is the reality.

13          You know, there are other states that  
14          are doing it differently, and you can be more  
15          flexible.

16                 MR. TAYLOR: I thought that was the  
17                 sense of your comment, and I certainly endorse  
18                 that. One of the interesting items in your  
19                 brochure that I think you covered but it's not  
20                 mentioned specifically here is transitional  
21                 housing.

22                 Even though it's not listed

1 specifically, is that something that many  
2 programs would cover for sexual assault victims  
3 so they can move out of the apartment, out of the  
4 house?

5 MR. EDDY: Yeah. About half - a third  
6 to a half of the states will cover some  
7 relocation expenses. Some of these terms have  
8 terms of art -- transitional housing.

9 You know, it might mean putting  
10 someone up in a hotel. That may be less covered,  
11 in fact, than actually moving expenses for  
12 someone to move from one residence to another,  
13 perhaps a month or two of rent, utility hookup.

14 That is a rather typical things for  
15 the half of the states that can cover that. The  
16 other half of the states are looking at those  
17 items and saying, "We may not have the money to  
18 now devote what Florida is doing."

19 Twenty percent of its money is going  
20 to that expense, and Laura can share stories  
21 about transitional housing that would last a  
22 workshop --

1           MR. TAYLOR:  And I see you're nodding.  
2           You know something about this, so please share  
3           that with us.

4           MS. REED:  We have been providing  
5           temporary emergency shelter since 1996 and moving  
6           expenses since 2001, and I don't have all the  
7           figures in front of me but last year our  
8           compensation program -- and we're just a tenth  
9           maybe of the Texas program -- we paid out about  
10          \$8 million in victims claims.

11          But our temporary emergency shelter  
12          and moving expense costs were close to \$3  
13          million.  So it is very expensive.  It is very  
14          labor intensive.

15          We are fortunate that we are in this  
16          small jurisdiction and can have direct contact  
17          with victims because this would not be the sort  
18          of thing that you could easily do by mail or even  
19          by email.

20          There are documents that you have to  
21          review, people that you have to talk to.  You  
22          have to make sure that if we are moving someone

1 to a different location that they can actually  
2 pay for it after they get there.

3 If they're renting a piece of property  
4 from a private landlord, you have to make sure  
5 that that landlord actually owns the property.

6 So it's very labor intensive, and it's  
7 one of those things -- especially in the domestic  
8 violence realm -- where you just won't know,  
9 thank goodness, how many lives you're saving.

10 I mean, when you consider a sexual  
11 assault or a violent domestic violence situation  
12 and if making services available so that the  
13 victim does not have to walk back in that door  
14 and suffer the same treatment again is a  
15 wonderful thing.

16 MR. TAYLOR: Well, thank you for that  
17 answer. I think also your comment about the  
18 Washington Navy Yard shooting was very  
19 interesting because, as you know, the ability of  
20 people to talk about PTS has been an issue,  
21 whether it's entered in mental health records or  
22 other medical records.

1           And many commanders have now gone on  
2 record to talk about their own seeking of mental  
3 health counseling.

4           So I'm interested in this question to  
5 the extent that you feel comfortable answering  
6 it. I noticed that one of the limitations on the  
7 program is that you're supposed to not provide  
8 for an expense that's covered by some other  
9 federal benefits program.

10           So did you figure out a way, if you're  
11 able to say so, in the Washington Navy Yard  
12 incident to figure out a way to help the people  
13 who came to you for assistance?

14           MS. REED: What we are able to do is  
15 it's those things that are covered by another  
16 source called collateral resources, and we take  
17 the position that for something as private as  
18 mental health counseling, you pick where you want  
19 to go.

20           There are often -- we don't tell  
21 people you can only see a provider that is  
22 covered under your insurance, and so in that way

1 if there is a service that the victim truly needs  
2 they can get it with -- really, without running  
3 afoul of the requirements of the law.

4 There's nothing in our law that says  
5 that you must only seek services from your  
6 insurance provider. Most do, but there's nothing  
7 that absolutely requires it --

8 MR. TAYLOR: Okay. Thank you.

9 MS. REED: -- in the interests of  
10 victims.

11 MR. TAYLOR: Thank you for that  
12 clarification.

13 Mr. McCleskey, I was curious when you  
14 were talking about the numbers of claims that  
15 your office is responsible for viewing and the  
16 amount of money that you pay out.

17 What are some of the claims that  
18 people make that you don't pay for? What are  
19 some expenses you do not cover?

20 MR. MCCLESKEY: We will typically get  
21 requests to pay for things -- I'm assuming your  
22 question is what the statute will not allow?

1 MR. TAYLOR: Yes.

2 MR. MCCLESKEY: People would like us  
3 to buy them new cars that are damaged in the  
4 crime, new homes that are damaged in the crime -  
5 - property loss. Very few -- our compensation  
6 program does not cover property loss at all. So  
7 property loss --

8 MR. TAYLOR: Mm-hmm. Any payment for  
9 pain and suffering?

10 MR. MCCLESKEY: We do not do pain and  
11 suffering. No, sir.

12 MR. TAYLOR: Okay. I have no more  
13 questions.

14 MR. EDDY: If I might speak to that,  
15 sir --

16 MR. TAYLOR: Yes, please do.

17 MR. EDDY: - there was one program in  
18 Rhode Island that did cover pain and suffering up  
19 to \$15,000. It went bankrupt. Claims were  
20 backlogged ten years because they did not have  
21 the money to pay for it so that was the last  
22 compensation program that pays for pain and

1 suffering.

2 MR. TAYLOR: Thank you.

3 JUDGE JONES: Any other questions?

4 Liz?

5 CHAIR HOLTZMAN: Yes. Just a couple  
6 questions. What -- are their caps on the amount  
7 of money that can be compensated for mental  
8 health purposes?

9 MS. REED: Yes. In the District of  
10 Columbia, our cap for adult victims is \$3,000,  
11 and for minor victims it is \$6,000.

12 CHAIR HOLTZMAN: And what would be the  
13 medical -- the other cap on medical costs?

14 MS. REED: Medical costs would be --

15 CHAIR HOLTZMAN: Non-psychiatric, non-  
16 mental health costs.

17 MS. REED: Right. There is no sub  
18 limit on it, but it's subject to the overall  
19 limit of \$25,000.

20 CHAIR HOLTZMAN: And what's the  
21 rationale for the limit on mental health costs,  
22 if you know?

1 MS. REED: Well, it -- we team up with  
2 a number, after speaking mainly with providers in  
3 the neglect system, who gave us an idea of how  
4 many sessions they provided to victims of child  
5 neglect and abuse, and it seems to have worked.

6 MR. EDDY: Nationally speaking, about  
7 half the state compensation programs do not have  
8 a sub limit on mental health counseling. It goes  
9 up to the full cap, which averages \$25,000.

10 New York State has no limit  
11 whatsoever, counseling or medical. It can go --  
12 and they say they have their million-dollar cases  
13 -- the head trauma cases, brain injury cases.

14 Other states -- California may have  
15 \$10,000 for minor victims and, you know, some --  
16 about half the states do have limits on their  
17 expenses. Some of it is cost related. There is  
18 also some consideration of these are not long-  
19 term insurance programs forever. Compensation  
20 programs try to get people who are indigent into  
21 Medicaid to cover long-term needs.

22 These are essentially safety nets in

1 most states with limited public resources to try  
2 to get someone through the initial trauma -- not  
3 to provide mental health services for life. Even  
4 \$25,000 will only go about three to five years.

5 CHAIR HOLTZMAN: Let me go back to the  
6 -- thank you for that. Let me go back to the  
7 question of the innocent victim.

8 The example was given that it wouldn't  
9 -- the innocent victim issue wouldn't come up  
10 when you have a victim of a rape and the  
11 assaulter -- and both the assaulter and the  
12 victim are drunk, and the assaulter has a weapon.

13 We all understand that's the  
14 stereotypical view of rape. But not every rapist  
15 has a weapon. Now, if we're talking about -- if  
16 we change the facts of that case and we talk  
17 about the example, and we talk about a situation  
18 where you have two people -- young people -- the  
19 victim has been drinking substantially; the  
20 assaulter has no weapon.

21 Is the drinking considered a  
22 contribution to the -- contributory to the crime?

1 MR. EDDY: No, Ms. Holtzman. I  
2 grimaced as you said that, because the weapon I  
3 was referring to was actually an organ of the  
4 body -- not a gun or a knife -- and the example,  
5 just to explain, was if someone did have a weapon  
6 -- a baseball bat -- and attacked the young,  
7 vulnerable woman who drank and passed out, every  
8 compensation program would pay that claim. She  
9 did not cause what happened.

10 CHAIR HOLTZMAN: Right.

11 MR. EDDY: She made herself  
12 vulnerable. If someone attacks with a bodily  
13 weapon as opposed to a baseball bat but is naked  
14 without a weapon, that is no different than if  
15 they are attacked by the baseball bat. That's  
16 what we teach compensation programs.

17 CHAIR HOLTZMAN: Is it -- okay. Has  
18 anybody reviewed, given -- has anyone reviewed  
19 actually how these programs work in effect in  
20 terms of the innocent or the noncontributory  
21 issue? Because we still have a problem in this  
22 country about law enforcement in some places even

1 taking sexual assault seriously.

2 So I wonder what your confidence is  
3 based on that these programs are really not  
4 penalizing people who are not contributing in any  
5 way but may be viewed by society as contributing.

6 MS. CHARLES: If I may, I think Mr.  
7 Eddy brought up a really good point earlier when  
8 he talked about who makes the determination of  
9 what is an eligible comp claim and the importance  
10 of training those individuals in programs like  
11 Laura's, where the executive director is the  
12 determining participant.

13 She, obviously, has a great deal of  
14 practical experience but there are some  
15 compensation programs that still use boards made  
16 up of people with other jobs who may or may not  
17 have -- they're appointed by the governor, in  
18 most cases.

19 They may or may not have the training  
20 or wherewithal to make those determinations, and  
21 that's what I was speaking to when I testified  
22 to the perception of this innocent victim

1 concept, even though there needs to be causation,  
2 and those of us that work in the program  
3 understand -- or have worked in those programs  
4 understand that.

5 So Dan, do you know how many programs  
6 still use boards as a determinant?

7 MR. EDDY: Only about a fourth of the  
8 states use boards. I do want to emphasize  
9 contributory misconduct is a small percentage of  
10 all cases and even a small percentage of those  
11 that are denied.

12 In sexual assault -- my point,  
13 briefly, is this -- in sexual assault it's a  
14 relatively easy call for programs. They're not  
15 going to -- it's the most innocent victim you can  
16 have, and the questions that come up in courts of  
17 law, which are real -- did she consent, et  
18 cetera, is this a presentable case -- these are  
19 things that comp courts may have to deal with  
20 because they rely entirely on police reports.  
21 They don't have independent investigators.

22 But where the contributory misconduct

1 case law comes in, the provision law comes in --  
2 Was this guy doing a drug deal when he got shot?  
3 What happened in that bar when these two guys  
4 ended up going back in the back and fighting?

5 Those are the ones that Gene and Laura  
6 wrestle with somewhat infrequently, but on -- you  
7 know, that's what contributory -- that's where it  
8 plays in. I think it's a little bit of a mistake  
9 to think that it's looked at very much in the  
10 context of these cases.

11 I don't -- Ms. Holtzman, I don't have  
12 specific statistics on this in terms of sexual  
13 assault claims and how many might be denied on  
14 that basis.

15 But the legislatures have put these  
16 laws in for a reason, which is to try to keep  
17 the, for want of a better term, you know, the  
18 hardcore criminals and the people that do stupid  
19 things in bars -- I mean, mostly young males from  
20 accessing public funds, not rape victims.

21 CHAIR HOLTZMAN: Well, I wish I could  
22 share your confidence, but I really don't without

1 some better information and particularly given  
2 the information now that a quarter of the states  
3 use boards, can't train them or may be difficult  
4 to train them for various reasons, making these  
5 decisions.

6 So I appreciate where you're coming  
7 from, and I wish that were the case. But we have  
8 to take a look at the fact that military  
9 personnel or others -- victims of military sexual  
10 assaults -- are going to be possibly subjected to  
11 decisions that are made on a basis of lack of  
12 training and stereotypical thinking.

13 But thank you very much for your  
14 answer; I have no further questions.

15 JUDGE JONES: Thank you. Mr. Stone?

16 MR. STONE: Yeah. I would just like  
17 to add, I mean, we've heard at earlier panels --  
18 and, again, this is because it's the military --  
19 that one of the main issues that keeps coming up  
20 in sexual assaults is the collateral misconduct  
21 of the woman or man assaulted who doesn't want to  
22 report it, because there's many more rules in the

1 military than you have in a civilian situation.

2 So it may be that they're not supposed  
3 to be fraternizing with this superior or this  
4 training instructor and it's a violation, or  
5 they're not supposed to be involved with alcohol  
6 at their age or drugs and it's also a military  
7 involved violation, whereas perhaps in a civilian  
8 setting it wouldn't be.

9 So the result is we get to the  
10 contributory misconduct a lot faster and one of  
11 the issues for the Special Victims' Counsel was  
12 what do they do with it, because they're supposed  
13 to be representing the victim and now they have a  
14 collateral criminal case.

15 So we do see that, maybe in a  
16 different proportion of cases than you see it,  
17 and so then, you know, it raises the problem a  
18 little more frequently and I don't know - you  
19 don't have to have a response to it, but I think  
20 that's why as a panel we have a slightly  
21 different view.

22 We're looking at that very narrow

1 segment, you said, of cases that you see. We're  
2 not looking at 99 percent of your cases; we're  
3 only looking at 1 percent.

4 JUDGE JONES: Any other comments?

5 Well, it seems to me that, possibly with the  
6 exception of the boards, you have far less of a  
7 problem with respect to contributory conduct  
8 issues than we do in the military.

9 All right. I want to thank each and  
10 every one of you panelists here now as well as  
11 all of our earlier panelists this morning. Thank  
12 you very much. We couldn't do this without you;  
13 we need your input and your insights.

14 Thanks again. We are going to take a  
15 half hour break for lunch and we'll be back then  
16 again. Thank you.

17 (Whereupon, the above-entitled matter  
18 went off the record at 12:23 p.m.)  
19  
20  
21  
22

1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (1:10 p.m.)

3 JUDGE JONES: We're going to begin the  
4 afternoon with a panel of presenters who will  
5 talk to us about how victims can obtain  
6 restitution or compensation for crimes under the  
7 UCMJ. And I'm going to begin by asking Mr.  
8 Charles Cosgrove to start. And, Mr. Cosgrove, you  
9 are Chief, Programs Branch, Criminal Law  
10 Division, Office of The Judge Advocate General,  
11 United States Army. Right?

12 MR. COSGROVE: Yes, ma'am, thank you.  
13 Good afternoon. Thank you for this opportunity,  
14 ladies and gentlemen.

15 Army Victim Assistance Program is  
16 Command-based but actually looks more like an  
17 installation-based program. Each general court-  
18 martial convening authority is required to have a  
19 Victim Witness Liaison, and we have 81 of those  
20 folks across the Army. Some installations have  
21 more than one, some organizations have more than  
22 one, some, of course, only have one.

1           They are trained, or I should say we  
2 provide training annually for them. We fund it  
3 from our office. They are trained on victim  
4 compensation in I would say three ways. First of  
5 all, if they read our regulation, which is  
6 Chapter 17 of AR 27-10, the three or four main  
7 ways we've talked about here today; that is the  
8 pretrial agreement, transitional compensation,  
9 Article 139, and state compensation programs are  
10 all discussed in our regulation, and if they want  
11 the short version, we have a checklist in the  
12 back of the regulation that also mentions all  
13 those programs.

14           We do not discuss each of those  
15 programs in our annual training. We will probably  
16 always discuss transitional compensation because  
17 it's complicated.

18           JUDGE JONES: I'm sorry. You said  
19 you'll always discuss what?

20           MR. COSGROVE: We probably do not  
21 discuss each of those at our annual training.

22           JUDGE JONES: All right.

1 MR. COSGROVE: We almost always discuss  
2 transitional compensation because it's probably  
3 the most complicated program.

4 JUDGE JONES: Thank you.

5 MR. COSGROVE: I will say this with  
6 respect to the state compensation programs, and I  
7 know you have some of this in your material  
8 because I've seen some of your materials. The DD  
9 Form 2701 is issued by law enforcement people,  
10 and those are generally the first people who meet  
11 with victims and witnesses. And we also tell our  
12 Victim Liaisons to reissue them routinely even if  
13 you think the police or law enforcement people  
14 have issued them.

15 The DD 2701, in addition to reminding  
16 people of their rights, has on the very first  
17 page contact information for the Victim Witness  
18 Liaison, for the investigator, for the -- perhaps  
19 most importantly for your information, the State  
20 Crime Compensation Program. And there's also a  
21 reference to the State Crime Compensation Program  
22 within the form.

1           For calendar year '18, excuse me,  
2           calendar year '14, we between law enforcement and  
3           our Victim Witness folks, and there'll be some  
4           good education here, we issued 8,600 of those  
5           across the Army. And we do that -- and I tell  
6           them -- I hate to repeat myself, to give them out  
7           early and often because -- and I explain to these  
8           men anecdotally that victims will lose the ones  
9           issued by law enforcement, so that's an important  
10          part of the program simply because we do want to  
11          make sure victims are aware of their options in  
12          that area.

13                 Our Victim Witness Liaisons are  
14          responsible for, in addition to that, being able  
15          to facilitate and help people get the services to  
16          which they might be entitled if they're either  
17          soldiers or family members, and civilian victims,  
18          as well; although, they certainly have less  
19          options within the military system. That would  
20          include such things as health care, referral to  
21          chaplains, those kinds of things. And for our  
22          civilian victims that might be off-post referral

1 to rape crisis centers or to domestic violence  
2 shelters, as necessary.

3 JUDGE JONES: And those would be places  
4 you might have -- just be aware of or have an MOU  
5 with? Is that the idea?

6 MR. COSGROVE: I'm sorry, ma'am. I  
7 didn't quite understand your question.

8 JUDGE JONES: You said something about  
9 rape crisis centers for the civilian victims.

10 MR. COSGROVE: Well, we could  
11 conceivably refer military or civilian victims to  
12 a rape crisis center.

13 JUDGE JONES: Right.

14 MR. COSGROVE: For example, in a  
15 restricted report they might want to go there,  
16 although, might be the gals would probably not  
17 see the people on a restricted report simply  
18 because they wouldn't know about them. It's  
19 conceivable, I suppose, they might have talked to  
20 them at some time or another, but typically they  
21 would not see those folks. They might end up  
22 advising one of our sexual assault Victim

1 Advocates, providing assistance indirectly to get  
2 downtown to see some of those folks. They should  
3 know about off-post -- in general, off-post  
4 service that can help victims.

5 JUDGE JONES: All right. Thank you.

6 MR. COSGROVE: Our regulation also  
7 requires that victims be consulted about the  
8 decision not to prefer charges, and on pretrial  
9 agreements, among others. So, while I can't  
10 guarantee you that happens every time, we do have  
11 policy that requires victims to be consulted in  
12 that area.

13 I would like to comment on one thing  
14 I heard earlier today, and that refers to your  
15 question, Mr. Stone, concerning transitional  
16 compensation and child victims.

17 I do a lot of work with the  
18 transitional compensation program and I suggest  
19 to you that I have never heard anybody across the  
20 Army ever suggest that a child who had been  
21 abused by a parent sexually or otherwise was a  
22 participant in that crime, and I would never

1 recommend that they consider it so.

2 The main question I get in that area  
3 that is participation by a family member is --  
4 and it's usually mother. Dad is usually  
5 offender, mother is usually on the side line;  
6 where a mother fails to cooperate in the  
7 prosecution in some way. And the question -- I've  
8 always said no, that doesn't qualify as  
9 participation in the crime. And subject to your  
10 questions, I think that covers the watershed for  
11 now.

12 JUDGE JONES: All right. Thank you very  
13 much. Major Sameit, is that how you pronounce  
14 your name?

15 MAJ. SAMEIT: Yes, ma'am.

16 JUDGE JONES: All right. Officer in  
17 Charge, Trial Counsel Program, Trial Counsel  
18 Assistance Program. Thank you. You can go ahead.

19 MAJ. SAMEIT: Yes, ma'am.

20 I am the OIC of the Trial Counsel  
21 Assistance Program, as you mentioned, and I'm  
22 also the Assistant Program Manager for the Victim

1 Witness Assistance Program, and oversee that  
2 program for the Marine Corps.

3           Similar to what Mr. Cosgrove  
4 described, we do an annual training every single  
5 year for all of our Victim Witness Liaisons  
6 throughout the Marine Corps. Unlike Mr. Cosgrove,  
7 we only have 12 major Marine Corps installations  
8 with Victim Witness Liaisons overseeing those  
9 programs.

10           During that training we see a lot of  
11 turnover annually of our Victim Witness Liaisons.  
12 It is a collateral duty for all these  
13 individuals, and we are training every single  
14 year on all the points of restitution,  
15 transitional assistance, Article 139 claims, as  
16 well as having it within pretrial agreements.

17           Our office -- I work within Judge  
18 Advocate Division. I work for Colonel Baker, and  
19 we also oversee trainings. We do annual training  
20 for all prosecutors where we specifically talk  
21 about the Victim Witness Assistance Program, and  
22 restitution so the prosecutors are aware of all

1 the different options that are available. We  
2 teach it at the Commander's course, as Colonel  
3 Baker mentioned briefly, where we have a 2-1/2  
4 hour legal block and we talk about victim  
5 restitution. And we also assist in training our  
6 Family Advocacy Program who are the individuals  
7 that oversee transitional assistance, and we  
8 teach them about how that ties into the court-  
9 martial process, as well.

10 When I was invited to be the speaker  
11 here, as well, Mr. Nelson mentioned that there  
12 were three potential options that were being  
13 considered. I believe they were mostly from  
14 Lieutenant Colonel Jones' article on military  
15 victim restitution, and I just wanted to give  
16 some brief comments since I'm in charge of  
17 training and advising prosecutors on some of  
18 those options. And I know Article 139 has been  
19 discussed in depth today.

20 Some of the conflicts with using  
21 Article 139, as Colonel Baker mentioned at the  
22 beginning, the claim has to be made within all

1 the Services within 90 days. Obviously, with  
2 delayed reporting with sexual assault, a lot of  
3 times that would not happen which would be an  
4 obstacle with the way that the Article is  
5 currently written.

6           Additionally, the complaint is made to  
7 the Commanding Officer, and he's required to  
8 appoint an independent investigating officer, so  
9 you would have an independent investigation going  
10 independent of the law enforcement investigation.  
11 That is not, necessarily, someone that's trained  
12 to investigate domestic violence-type offenses,  
13 or sexual assault-type offenses, so it could  
14 potentially do a lot of damage to your sexual  
15 assault investigation.

16           Additionally, you would have the  
17 Commander, if this is going before a preferral or  
18 referral decision, the Commander would then have  
19 to make a decision by a preponderance of the  
20 evidence whether or not he believes this harm  
21 occurred, which could ultimately conflict your  
22 Commander out from being able to make a preferral

1 or referral decision since he's already on the  
2 record having made a decision that by a  
3 preponderance of the evidence I believe this did  
4 occur before the defense even presents any  
5 evidence in an Article 32 hearing.

6 And, finally, if the Article 139 were  
7 delayed until after the court-martial process, it  
8 would really take out all of the benefits of the  
9 Article 139, because the best benefit of the  
10 Article 139 complaint is it's taken directly out  
11 of the accused's salary. And if the accused is  
12 now in the brig, chances are the accused will not  
13 have a salary coming in at that point. Either  
14 he'll only have one-third of his salary with  
15 forfeitures, or he'll have no salary at all if  
16 it's at a general court-martial. So, the way  
17 Article 139 is written right now, there are a lot  
18 of barriers to using that as a comprehensive  
19 restitution statute.

20 One of the options that was brought up  
21 was deferral and waiver of forfeitures, and  
22 allowing that to go to the victim. Right now, it

1 can go to the accused's dependents which if the  
2 dependents were victims that is certainly  
3 something that is a powerful option.

4 Just some barriers with that.  
5 Obviously, it would not be a restitution-type  
6 system. It would be more of a compensation  
7 because it's really the government getting it  
8 since the accused is forfeiting the money to the  
9 government normally.

10 Additionally, there would be a huge  
11 disparate affect to officer and enlisted court-  
12 martials. Most enlisted are automatically reduced  
13 to E1 upon a court-martial conviction. If they  
14 receive a punitive discharge or a certain amount  
15 of confinement by administrative regulation  
16 they're automatically reduced to E1. So, if two-  
17 thirds of their pay or all their pay were going  
18 to the victim, it would be an E1's pay. That same  
19 provision doesn't apply to officers and warrant  
20 officers, so there would be a huge disparate  
21 effect depending on the rank of the accused  
22 Service member.

1           And, finally, I wanted to talk about  
2           the MVRA-type restitution where the court would  
3           adjudge restitution. Just some of the differences  
4           between the federal system and the military  
5           system, and why some of the difficulties we would  
6           have in the military system if that were enacted.  
7           In the military system, obviously, sentencing  
8           goes immediately after the findings, unlike the  
9           federal system. All of the claimed compensation  
10          would have to be disclosed to the defense up  
11          front and, obviously, this could open up new  
12          avenues of cross-examination, and could  
13          potentially be the difference in a close case.

14                 Additionally, you're adding additional  
15          burden on the trial counsel. In the military  
16          there is already a humongous burden on the trial  
17          counsel. He's responsible for producing all the  
18          witnesses, all the witness travel, he's  
19          responsible for bringing the defense witnesses  
20          in, as well, responsible for all subpoenas,  
21          getting all the evidence in his cases. If the  
22          accused is in confinement, the trial counsel is

1 even responsible for getting the accused there  
2 and in the right uniform, so there's already huge  
3 administrative responsibility on top of the trial  
4 counsel. This is adding yet one more layer of  
5 responsibilities on the trial counsel to present  
6 this evidence on sentencing.

7           Additionally, obviously, we have  
8 member sentencing and we have no sentencing  
9 guidelines. There's probably a good chance that  
10 if victim restitution were on the table at the  
11 court-martial, members might be inclined to give  
12 a shorter sentence in the hope that the accused  
13 could then get out of prison and pay restitution  
14 to the victim at that point, so there would be an  
15 incentive in that way. And without any sort of  
16 sentencing guidelines, that would be a powerful  
17 argument for the defense to give a shorter  
18 sentence in the case.

19           And then finally, also, my last point  
20 was with member sentencing, obviously, you don't  
21 have the same level of in depth education on  
22 victim trauma and counterintuitive behaviors, so

1 especially in the military where you have a very  
2 independent-minded panel, in general,  
3 understanding why a victim because of this trauma  
4 would have lost work and wouldn't be able to  
5 self-heal could be an issue in the military with  
6 our panels, as well.

7 And with that, that's all I have in my  
8 notes. Thank you very much for the opportunity to  
9 speak.

10 JUDGE JONES: Thank you very much,  
11 Major Sameit. Now we have Lieutenant, is that  
12 Korody?

13 LCDR KORODY: Yes, ma'am, good morning.  
14 Lieutenant Commander Patrick Korody.

15 JUDGE JONES: Thank you.

16 LCDR KORODY: Madam Chair and Panel  
17 Members, good morning, and thank for you for the  
18 opportunity to discuss victim compensation and  
19 restitution. I would like to tell you a bit about  
20 my background as a Judge Advocate to put my  
21 testimony in context.

22 I commissioned in the Judge Advocate

1 General's Corps during law school and following  
2 military training reported to my first duty  
3 station in March 2006. With the exception of a  
4 six-month deployment to Iraq where I worked in  
5 Iraqi courts, and a temporary assignment as a  
6 Staff Judge Advocate to an afloat squadron  
7 commander, my entire career has been spent in  
8 military courtrooms.

9 I have completed tours as trial  
10 counsel, defense counsel, senior defense counsel,  
11 and senior trial counsel. Since October 2013, I  
12 served as the supervising attorney in the Navy  
13 Victim's Legal Counsel Program. In this case  
14 capacity, I supervise six Victim's Legal Counsel  
15 or VLC, and to date I have served as the VLC for  
16 48 sailors and dependents.

17 Finally, since 2009 I've been  
18 certified by the Judge Advocate General of the  
19 Navy as a specialist under our Military Justice  
20 Litigation Career track. I hope to offer the  
21 Panel two perspectives here, one as a VLC, and  
22 the other as a deck plate military justice

1 practitioner who has worked hundreds of  
2 investigations and court-martials, or courts-  
3 martial.

4 My experience as a VLC has shown me  
5 that the victim's level of satisfaction with the  
6 current compensation and restitution available to  
7 the military will depend on that victim's  
8 military status. Military victims have access to  
9 a vast network of supporting health services all  
10 free of charge. They continue to receive their  
11 full paying allowances, and suffer no financial  
12 harm related to receiving services or  
13 participating in a court-martial proceeding.

14 For example, a sexual assault victim  
15 who is sent to inpatient treatment for care  
16 continues to receive their full pay, has their  
17 care fully paid for, and is not charged any leave  
18 for their absence from work. Military victims may  
19 receive long-term financial support and services  
20 if the harm suffered from the assault results in  
21 a disability, medical separation, or medical  
22 retirement.

1           In short, while I can tell you there  
2 are some exceptions, military victims of sexual  
3 assault are appropriately compensated, in my  
4 opinion, under the current system.

5           Dependent victims receive similar  
6 access to support and health services but are not  
7 compensated, in my opinion, by the military for  
8 lost wages or other economic harm caused by the  
9 assault. As has been discussed here earlier, they  
10 may receive relocation at military expense for  
11 safety reasons or incident to a court-martial  
12 conviction.

13           There is no mechanism within the  
14 military for dependents to recover financially  
15 for the long-term harm caused by assault.  
16 Dependents assaulted by the sponsor Service  
17 member may receive limited, short-term financial  
18 support as a result of a court-martial conviction  
19 in the form of either forfeitures of pay and/or  
20 transitional compensation, but I will tell you in  
21 my experience, dependent victims must diligently  
22 pursue such payments.

1           Additionally, there's often a period  
2 of time which in my experience often lasts  
3 several months between a court-martial conviction  
4 and the beginning of payments of forfeitures and  
5 transitional compensation. In my opinion, the  
6 Military Justice System can do more for this  
7 class of victims to cover the financial harm that  
8 a family incurs as a result of pursuing a  
9 prosecution of their sponsor Service member.

10           Unless it is agreed to in a pretrial  
11 agreement or a voluntary effort by the accused,  
12 restitution is unavailable for a non-dependent  
13 civilian victim with the Military Justice System,  
14 and compensation or court-martial participation,  
15 or participation during any investigation is  
16 minimal.

17           This class of victims, as we've heard,  
18 is often referred to other governmental  
19 compensation organizations who make their own  
20 determination, who follow their own rules as to  
21 whether the victim is a victim and should receive  
22 any compensation. And, of course, that is

1 contingent on the victim actually pursuing such  
2 a course of action. In my opinion, the Military  
3 Justice System can do more for this class of  
4 victims to cover the expenses and financial  
5 losses related to the crime.

6 All victims regardless of class are  
7 always reminded of their right to file suit in  
8 civilian court to seek damages. This is no easy  
9 task for most sexual assault victims, military  
10 dependent or civilian. Nor does the common  
11 military offender have deep pockets that would  
12 lead a civilian attorney to take a contingency  
13 fee case. Additionally, a convicted accused pay  
14 is normally forfeited, as we've talked about, as  
15 part of the adjudged punishment or automatically  
16 by operation of law.

17 As a deck plate military justice  
18 practitioner, my perspective on victim's  
19 compensation and restitution focuses on the  
20 mechanics of payment and enforcement of any type  
21 of -- or any such monetary awards. For example,  
22 at an Article 58b, the UCMJ permits a convening

1 authority to waive forfeitures in favor of  
2 dependents currently regardless of whether the  
3 dependent is a victim, and regardless of whether  
4 the accused has requested such a waiver. Such  
5 authority only vests at the time of taking the  
6 convening authority's action which is often  
7 months after trial. Between the trial and such  
8 action, the only way currently to insure payment  
9 of forfeitures to a dependent victim is that the  
10 recently convicted accused voluntarily requests  
11 deferral of such automatic forfeitures. And,  
12 finally, such payments may not continue more than  
13 six months following the convening authority's  
14 action.

15 With regard to the proposal to award  
16 forfeited wages of incarcerated members, I  
17 support providing convening authorities broad  
18 discretion to pay forfeitures to dependent  
19 victims from the date of trial and beyond the six  
20 months of convening authority action as currently  
21 in the law. I do feel that dependents should have  
22 to demonstrate a need for the financial

1 assistance.

2 I will state, I believe transitional  
3 compensation is generally insufficient to provide  
4 the financial support needed for a dependent  
5 victim and family to essentially begin a new  
6 life. A dependent victim usually faces difficulty  
7 enforcing a judgment for spousal or child support  
8 through civilian courts while an accused is  
9 indigent as a result of confinement by the  
10 military.

11 I make this recommendation based on my  
12 experience that the military offender is often  
13 the primary provider for these families, and they  
14 do suffer financially and otherwise when choosing  
15 to pursue and cooperate in the prosecution of a  
16 military accused.

17 I support the expansion of Article 139  
18 beyond property damage in theory, but do have  
19 concern as a practitioner that victims may use  
20 the amended Article 139 to seek payment for long-  
21 term care, pain and suffering, and emotional  
22 distress. I'm not sure if Commanders are equipped

1 to handle claims that may equate to complex  
2 personal injury suits in civilian jurisdictions,  
3 nor do I think Article 139 -- an Article 139  
4 claim is the appropriate forum of litigating such  
5 complex issues. Clear guidance and standards for  
6 what shall be paid, when, and by whom are needed  
7 to insure such a measure could be uniformly and  
8 equitably applied by our Commanders.

9 I support giving the authority to  
10 order restitution upon conviction to a military  
11 judge, but not the court-martial panel at the  
12 member's trial. Calculating restitution, in my  
13 opinion, should be a ministerial task based on  
14 evidence of financial harm and judicial economy,  
15 in my opinion, favors a judge making that  
16 determination. And I know practically there are  
17 issues with the mechanics of ordering restitution  
18 enforcement and addressing the indigence of the  
19 accused.

20 From my experience an order of  
21 restitution will not be meaningful to a victim  
22 unless the payment of the monies can be

1 reasonably certain. If a victim hears an award of  
2 restitution from the court, only to be told that  
3 enforcing the award is extremely difficult, a  
4 victim may be left with the feeling that the  
5 process was unfair or simply a facade. Referring  
6 a victim to pursue further legal action to  
7 enforce a restitution award would be akin to our  
8 current practice of referring them to other  
9 governmental organizations for compensation or to  
10 file a civil suit. Such a system would not be  
11 meaningful or the satisfactory practice for  
12 victims, in my opinion, who most often want to  
13 simply put their victimization in the past and  
14 move forward.

15 In conclusion, I believe victims in  
16 the court-martial process deserve and desire  
17 compensation and restitution without delay, and  
18 without further legal action, and with the  
19 promise of payment. And I look forward to  
20 answering any questions you may have.

21 JUDGE JONES: Thank you very much,  
22 Lieutenant Korody. All right, Captain Ahlers.

1                   CAPT. AHLERS: Good morning, Madam  
2 Chair and Members of the Panel. Thank you for the  
3 opportunity to speak to you today about  
4 restitution and compensation for victims of crime  
5 under the Uniform Code of Military Justice.

6                   While I exclusively represent victims  
7 of sexual assault, my testimony is applicable, in  
8 a sense, to all victims of crime. The views I'm  
9 expressing today are my views as a Special  
10 Victims' Counsel stationed here in Washington,  
11 D.C. at Joint Base Andrews, who has been with the  
12 program since inception, currently represents 33  
13 clients, and received training at our SVC course  
14 on restitution and compensation issues. These are  
15 not necessarily the views of the United States  
16 Air Force and are mine alone.

17                   On January 5th, 2013, announcing a  
18 revolutionary new approach to victim care that  
19 would become the Special Victims' Counsel  
20 Program, General Mark Welsh, the Air Force Chief  
21 of Staff remarked, "It takes a strong team to  
22 succeed in our mission to protect and defend the

1 nation, and sexual assault undermines that. This  
2 program embodies what the Air Force is all about;  
3 taking care of our people."

4 The implementation of the SVC and VLC  
5 programs across the Services have made a  
6 remarkably profound impact on how the military  
7 supports victims of these traumatic crimes.  
8 Restitution is one way that we can assist in  
9 supporting victims through the challenges of  
10 making a report of sexual assault.

11 As an SVC, traditional restitution and  
12 compensation issues will not be present in the  
13 majority of my cases. This is a result of not  
14 only the percentage of cases that actually make  
15 it to trial or the non-judicial punishment stage,  
16 but also because the military as an institution  
17 already provides support for many of the most  
18 common financial needs of crime victims, such as  
19 free health care, covered transportation costs,  
20 and for some disability compensation through the  
21 Department of Veterans Affairs.

22 Programs like the free referral

1 service, the Military One Source, has even  
2 further expanded the benefits offered to our  
3 clients. When a particular service or need isn't  
4 readily available, we as SVCs have been  
5 successful in advocating to Commanders to fill  
6 that gap and make these services available, when  
7 possible. However, not everyone is entitled to  
8 those services, as was pointed out.

9           The victims we represent who are  
10 dependents or retired members will not,  
11 necessarily, have access to the resources of the  
12 active duty force. More critically, child victims  
13 who may have weekly mental health treatment plans  
14 that span years or even decades, or child victims  
15 may not have them for a variety of reasons, for  
16 instance, the offending parent loses benefits due  
17 to a conviction, or the child simply reaches the  
18 age of threshold for eligibility.

19           A very real problem not just in the  
20 military but also the civilian system is when the  
21 non-offending parent dissuades a child from  
22 reporting sexual abuse or participating in a

1 trial for fear of losing the offending parent's  
2 benefits.

3 The Air Force SVCs provide holistic  
4 representation to our clients. More typically, we  
5 assert claims under the administrative process  
6 for items that are retained by law enforcement.  
7 For instance, we regularly help clients submit  
8 and get reimbursed for items like cell phones,  
9 computers, clothing, or other household items  
10 that are valuable evidence in a case and may be  
11 retained by law enforcement for which they are  
12 entitled to reimbursement.

13 Compensation and restitution is also,  
14 as you're aware, available directly through the  
15 Department of Defense in the form of transitional  
16 compensation. The Victim Witness Assistance  
17 Program, or VWAP coordinators are still the  
18 pinpoint for DOD-based restitution and  
19 compensation as our Air Force instructions put  
20 that responsibility with our legal offices. SVCs  
21 work with VWAPs to insure their responsibilities  
22 are met with regards to our clients. Many of the

1 VWAPs are subject matter experts on state-based  
2 compensation programs, and we look to them for  
3 assistance in our practice because our practices  
4 are local, but also span the globe. The VWAPs are  
5 the backbone that we rely on for administrative  
6 compensation issues within the Armed Services,  
7 and they play a valuable function in assisting  
8 our clients.

9 We also work with the prosecution on  
10 restitution, when appropriate, through pretrial  
11 agreements, alternative disposition, or post-  
12 trial advocacy to the convening authority. In  
13 response to a matter that was raised earlier  
14 during this meeting, I, myself, have sought to  
15 speak with convening authorities on a number of  
16 pre- and post-trial issues, and have never been  
17 denied the opportunity to speak with a convening  
18 authority directly when it came to an issue  
19 relating to a client.

20 Outside the military system, SVCs also  
21 work with clients to insure secure support --  
22 excuse me, to secure support from state

1 compensation funds. This can be a daunting task,  
2 I cannot be expert on the rules and regulations  
3 for all 50 states, much less globally, as an SVC  
4 in the Air Force has succeeded in obtaining  
5 compensation from a foreign government for a  
6 sexual assault client.

7 If regulations including the UCMJ are  
8 changed to permit restitution, our SVC practice  
9 could be assisted by securing more training which  
10 delineates state and possibly federal-based  
11 compensation programs and how they would  
12 interplay with a DOD-based restitution program so  
13 we would best be able to advise our clients  
14 whether a DOD solution or a state-enforced  
15 solution would be more appropriate.

16 I have received valuable training from  
17 the Air Force in this matter, but we can always  
18 look towards more opportunities to receive  
19 education as this need grows for clients.

20 While the SVC program is not and  
21 should not be the lead on processing claims under  
22 the restitution program, or claims for

1 restitution if implemented by the DOD. As an SVC,  
2 I have the greatest insight into what my  
3 individual client needs and how to strategically  
4 achieve those goals. Unfortunately, victims of  
5 sexual assault who seek restitution may  
6 experience negative consequences for doing so  
7 during litigation, such as a defense counsel  
8 utilizing such a request to demonstrate a  
9 tendency to fabricate.

10 I, myself, was involved in such a  
11 case. I represented a client who was raped during  
12 technical training, got pregnant and had a child  
13 as a result. Prior to me becoming her SVC, the  
14 VWAP at the legal office prosecuting the case  
15 called my client to see if she needed any legal  
16 assistance to include help with restitution. My  
17 client questioned whether she could see a legal  
18 assistance attorney in that office to discuss  
19 child support options. At trial that VWAP, there  
20 was no confidentiality or privilege, was put on  
21 the stand to testify about the questions my  
22 client had asked about and brought forward as a

1 motive to fabricate the rape simply because she  
2 had asked the question. The result was an  
3 acquittal.

4 All of this said, I believe  
5 restitution and compensation play an important  
6 and underutilized role in our system. There are  
7 several changes that I believe can be done to  
8 improve the system from the SVC perspective, and  
9 this list is certainly not exhaustive.

10 One, institutionalize the process of  
11 enforcing restitution orders. With no standing  
12 military courts, enforcement may be limited. The  
13 recommendation immediately to formalize  
14 administrative pay rate assignment for DFAS or  
15 some other administrative mechanism. As pointed  
16 out, and you all read the article on restitution  
17 under the UCMJ by Lieutenant Colonel David Jones  
18 from the Marine Corps, which this panel has in  
19 its materials, options may be limited when it  
20 comes if the accused refuses to pay.

21 Two, revise the transitional  
22 compensation regulations to permit earlier access

1 to resources not based on conviction or  
2 discharge. I'd argue as Lieutenant Colonel Jones  
3 does in his Law Review article, that transitional  
4 compensation is not really restitution. It isn't  
5 paid by the accused, and there's generally no  
6 showing needed that you've suffered any actual  
7 financial harm. It would be understandably  
8 difficult to devise a system that compensates  
9 prior to a finding, but our victims who report  
10 crimes against their spouses or even parents are  
11 put in a complex bind of whether to report the  
12 crime or be cut off from the offending Service  
13 member, or simply stay silent. That is a choice  
14 no victim should have to make.

15           Number three, bring military courts in  
16 line with the federal civilian court system and  
17 mandate that restitution or at least the  
18 consideration of restitution be an option in  
19 courts-martial proceedings.

20           And finally number four, create an  
21 information nucleus that SVCs and VWAPs can look  
22 to for assistance in navigating not only a

1 potential DOD restitution program, but also the  
2 state and federal-based programs with additional  
3 training and resources that we can look to.

4 It has been my distinct honor to  
5 appear before you today and one of the greatest  
6 challenges and professional achievements in my  
7 career to be a Special Victims' Counsel in the  
8 United States Air Force. Thank you for your time,  
9 and I welcome any questions that you have.

10 JUDGE JONES: Thank you, Captain. All  
11 right. Tom, did you have --

12 LT. COL. GREEN: Judge Jones, we have  
13 -- on the phone with us is Ms. Kathy Nelson.

14 JUDGE JONES: Ms. Nelson, I saw you  
15 weren't at the table and forgot that you were  
16 appearing by telephone. Go ahead.

17 MS. NELSON: Thank you for this  
18 opportunity to do this, and for understanding why  
19 I couldn't be there in person.

20 I'm Kathy Nelson, the VWAP Coordinator  
21 at Peterson Air Force Base since January of 1997.  
22 I've seen a lot of cases and situations. Having

1       been one of the first civilians appointed to this  
2       position, in the past few years with the rising  
3       of sexual assault cases, legislation has been  
4       forthcoming.

5                   When I was given the program it was  
6       broken, to say the least, so I started from  
7       scratch. Going back to one of my first big cases,  
8       it was a sexual assault. I have done preparation  
9       at several crime victims conferences in D.C.,  
10      Atlanta, Portland, and Denver. Currently, I'm in  
11      an instructor at the Second VE VWAP Training  
12      through Maxwell Air Force Base. The first was  
13      done in September of 2014, another will probably  
14      happen in the fall of this year.

15                   Students have seen the value of the  
16      VWAP Program and how they can assist victims. In  
17      most cases, the fear was loss of income. How do  
18      we move on and start over? The transitional  
19      compensation has been a great help even if for a  
20      short time. I have assisted many other bases in  
21      putting together packages for a program. I have a  
22      brochure that tells other bases how to set up the

1 VWAP Program, and also a brochure that is given  
2 to victims and witnesses as to how the Military  
3 Justice process works.

4 One case that stands out is where the  
5 military didn't follow up on the family of the  
6 parents who were convicted of sexual abuse to  
7 their three children. It was a case that we did  
8 not do, but through the channels and the AGC  
9 going to see the father, the military member who  
10 was an inmate at one of the local confinement  
11 facilities, we could track down the children. The  
12 mother was also confined in a prison in Florida.  
13 The father had been stationed at a base in  
14 Florida. I don't recall any more what the  
15 sentence was for either of the couple, but the  
16 father was the military member, and the civilian  
17 court handled the mother.

18 VWAP wasn't followed up, the children  
19 had gone to live with an aunt and uncle in  
20 Georgia who had become guardians of the three  
21 children. Being civilians they had no idea there  
22 was some assistance they could be receiving from

1 the military for the children.

2 I reached the aunt and told her who I  
3 was. The military had had no contact with them,  
4 and being civilians, they had no idea there could  
5 be some assistance given to the children. I sent  
6 her the application and other information, and  
7 told her what I would need to get the process  
8 started.

9 The aunt worked days and the uncle  
10 nights since these children were scared to stay  
11 home alone and were both physically, mentally,  
12 and emotionally distraught. The aunt and uncle  
13 had two older sons who became the big protectors  
14 of their cousins.

15 I sent the paperwork to DFAS and the  
16 week before Christmas I received a call from a  
17 very tearful aunt and uncle. The check had  
18 arrived for the children, but they both said,  
19 "These will go into the children's accounts. They  
20 will need this and will help us not to worry so  
21 much about their future."

22 From the very beginning, I've always

1 had a good working relationship with the District  
2 Attorney's office here and their VWAP Program.

3 They can offer some assistance to civilians who  
4 have been victims and cannot use the military  
5 facilities for assistance. There is a process of  
6 an application and a Board that meets the first  
7 of the month to review the packages. I have the  
8 paperwork, and if a victim shows an interest, can  
9 get them started.

10 A referral also is the state  
11 compensation out of Denver. I have also worked  
12 and referred individuals to the Colorado  
13 Organization for Victim Assistance known as COVA.  
14 This organization has statewide services and  
15 offers many programs. Colorado Springs is  
16 fortunate to have a great sexual assault and  
17 domestic violence center. They can offer safe,  
18 temporary housing to victims and their families,  
19 and have excellent programs to attend.

20 Military members can also contact Air  
21 Force Aid and the Airman and Family Readiness  
22 Center here at Peterson has some excellent

1 resources and connections for military members.  
2 Veterans Affairs also adds much assistance, along  
3 with Military One Source.

4 Transitional compensation for  
5 dependents has helped many feel more at ease to  
6 know there was some income they could receive to  
7 help them through this transition. But, again,  
8 this is just for the military. It isn't a lot of  
9 money, but in most cases the families have been  
10 grateful for the assistance.

11 I've only had one case through the  
12 years that chose the retirement pay over the  
13 transitional compensation because it was long-  
14 term rather than just for a few months. The  
15 spouse weighed the two, and after consideration  
16 felt for her and her two children the retirement  
17 would be the best route.

18 Restitution is not part of the  
19 military process; however, there can be a  
20 pretrial agreement instigated by the accused,  
21 defense counsel, trial counsel, Staff Judge  
22 Advocate, or convening authority, at which time a

1 disposition board considers the inmate's efforts  
2 to make restitution to the victim.

3 I have worked a couple of high profile  
4 Air Force Academy cases in the onslaught of the  
5 sexual assault cases coming to be in 2004. This  
6 was a challenge. I also have worked a General  
7 Officer case for TJAG in D.C., and there again  
8 the victims were all civilians.

9 All victims suffer from physical,  
10 mental, and emotional issues. Although not all  
11 showing in the beginning, at some point in their  
12 lives they will have issues of the trauma that  
13 they went through. The VWAP Program is there to  
14 walk them through the justice process making sure  
15 their needs are met. Special Victims' Counsel or  
16 SVCs have played a big part in assisting with  
17 many of their needs and answering their  
18 questions.

19 The military victims have many  
20 resources and avenues to work with; however,  
21 sometimes they, too, need to go outside resources  
22 for help. There is a financial cost. All victims

1 need to get their self-esteem back and be treated  
2 with dignity. What happened to them wasn't their  
3 fault, but where does this leave the civilian  
4 victim who has no access to the military  
5 resources? The financial burden can be great.  
6 Will their insurance pay for what has happened to  
7 them medically? How do they start over?

8           They do not qualify for any free  
9 assistance once the sentencing is read for the  
10 accused. I've always thought perhaps something  
11 should be there for them. Many go away with a bad  
12 picture of the military. What did they do for me?  
13 Now I'm stuck with trying to start over, and put  
14 all this behind me. Where do I go? Giving them  
15 all the resources that one can gives them some  
16 sense of helping, but is that going to make them  
17 better after what happened to them?

18           If a program is to be set up for  
19 sexual assault military and civilian victims,  
20 very strict criteria would need to be  
21 established. The transitional compensation  
22 program has those and it has worked from the

1 beginning of the program. To establish something  
2 for sexual assault victims would have to be very  
3 strict in how one would qualify to submit for  
4 compensation. Does it start with findings coming  
5 out of a court-martial stating to the victim if  
6 and when the court decides on this, then you may  
7 be able to submit a claim, or there is some  
8 pretrial agreement again on if and when the  
9 outcome is.

10 This could make the court docket a  
11 very busy situation as all victims have the right  
12 to a court-martial; otherwise, everyone will keep  
13 a claim division very busy. It would create a new  
14 division in the Air Force for an office just to  
15 handle this program. Suitability is very critical  
16 in these cases. Who makes the decision as to who  
17 gets restitution or not? I just see obstacles  
18 with the possible assistance program through the  
19 military but seeing what is going to be drawn up  
20 in guidelines may help clarify that.

21 All victims need assistance whether  
22 military or civilian. Many times I feel civilian

1 victims involved with a military member are  
2 afraid to come forward because of what is in it  
3 for me? Thank you for your time.

4 JUDGE JONES: Thank you very much, Ms.  
5 Nelson. Any questions? Mr. Taylor.

6 MR. TAYLOR: Yes, thank you. Well,  
7 first of all, thank you to all the panel members  
8 who testified here, and also by phone. Certainly  
9 appreciate your service and your forthright views  
10 today.

11 A question in general for you, anyone  
12 can answer this, has anyone on the panel sought  
13 restitution for a sexual assault victim as part  
14 of a pretrial agreement? Has anyone done that?  
15 And, if so, how did it work?

16 LCDR KORODY: I have not.

17 MAJ. SAMEIT: No, sir.

18 CAPT. AHLERS: No, sir.

19 MR. COSGROVE: Sir, my experience on  
20 active duty, not my experience in reviewing  
21 hundreds of records of trial.

22 MR. TAYLOR: So, do you have a theory

1 on why this doesn't come up from time to time?

2 MAJ. SAMEIT: Sir, I think as many of  
3 the other panel members have addressed, the  
4 majority of our sexual assault-type cases are  
5 dependents as well as active duty members, so the  
6 hospital bills aren't necessarily there. In the  
7 civilian cases that I've handled, it's something  
8 that we brief the victim on with the DD 2701s.  
9 They have had medical insurance in those cases,  
10 so it was not something that the victim brought,  
11 or the Victim Witness Liaison brought up.  
12 However, not to say that if they had better  
13 information at the time, they might not have  
14 asked for it.

15 MR. TAYLOR: So -- yes, Captain Ahlers.

16 CAPT. AHLERS: Sir, I would echo that  
17 comment, and also say that sexual assault cases,  
18 I don't see pretrial agreements being either  
19 offered or entered into in military court system  
20 perhaps as often it may be in the civilian  
21 system, so pretrial agreements are not something  
22 that I encounter very often in my practice as an

1 SVC.

2 MR. TAYLOR: So, a somewhat related  
3 question. Has anyone on the panel had occasion to  
4 assist someone in filing for state compensation?  
5 And, if so, with what results?

6 MAJ. SAMEIT: Sir, I had a victim in  
7 one of my cases. I didn't personally help her as  
8 the prosecutor, I referred her to the Victim  
9 Witness Liaison. And this was in California where  
10 she reported a sexual assault, and she did  
11 receive payment for hospital bills, as well as  
12 lost wages. It took her I believe six to eight  
13 months to get back to work, and California was  
14 compensating her in that time.

15 MR. TAYLOR: Yes?

16 LCDR KORODY: No, sir. Our eligibility  
17 for our clients are to get a Victims' Legal  
18 Counsel in the Navy, generally you have to be on  
19 active duty or a reservist, or a dependent. So,  
20 most of my clients do not have a need, and can  
21 get the compensation that they're looking for  
22 from the military.

1           CAPT. AHLERS: Sir, I did have one  
2 occasion through the State of Texas where I  
3 assisted a client because the court-martial was  
4 taking place in a couple of states over and we  
5 were able to secure some compensation for some of  
6 the unmet travel needs that came with that court-  
7 martial and her travel for it.

8           MR. TAYLOR: So, there seems to be a  
9 difference of opinion about whether it's a good  
10 idea or a bad idea to have the judge be able to  
11 direct restitution, particularly in the context  
12 of whether you're comparing the judge alone  
13 making that decision, or the question of whether  
14 a jury, a military jury is qualified to make that  
15 determination. And I think you, Major,  
16 particularly commented that you were uneasy with  
17 the idea that a jury would be involved in making  
18 that kind of determination?

19           MR. COSGROVE: I'm sorry, sir. Would  
20 you repeat that? I apologize, ladies and  
21 gentlemen, I'm a little deaf.

22           MR. TAYLOR: No, I probably didn't ask

1 the question very well, so let me see if I can  
2 rephrase the question and reframe it a little  
3 bit. Thank you for calling that out to me.

4 My question is should we be skeptical  
5 of the ability of a military jury to make a  
6 decision about restitution as compared to that of  
7 a military judge? There seemed to be some  
8 skepticism reading between the lines, and maybe  
9 not reading between the lines about some of your  
10 testimony. I'd just like for you to tell me what  
11 that is. And I think you raised that, if I'm not  
12 mistaken, Major.

13 MAJ. SAMEIT: Yes, sir. My thoughts on  
14 the issue are that when you're a military lawyer  
15 you're going to receive throughout your career a  
16 lot of training on trauma-induced behavior,  
17 counterintuitive behavior, victims' reaction to  
18 trauma, as well, throughout your career as a  
19 prosecutor or defense counsel. That's not going  
20 to happen if you're a panel member, especially a  
21 military panel member. They're not going to be  
22 drawn from attorneys.

1           So claims for -- especially medical  
2 bills are pretty straightforward. Once they've  
3 been found guilty, I think military panels would  
4 jump at the chance to find restitution for unpaid  
5 medical bills. Lost wages, I think a military  
6 judge would be better equipped to deal with  
7 issues like lost wages, about why someone would  
8 need to leave a job because of the trauma and the  
9 difficulty they're having working.

10           MR. TAYLOR: Commander Korody and  
11 Captain, you both made the comment, I think, if I  
12 understood you correctly, that you felt the judge  
13 should be able to direct restitution. Am I  
14 correct that both of you said that in your  
15 testimony?

16           LCDR KORODY: Yes, sir. And I don't  
17 feel -- I'm not skeptical about the members'  
18 ability to do it. I just don't think that the  
19 members are the appropriate forum. Their time is  
20 valuable. They spend a lot of time in these  
21 courts-martial, and I equate this more to a  
22 ministerial task of calculating what is the

1 appropriate amount of restitution based on the  
2 evidence that's been presented, so it's not that  
3 I'm skeptical about the members' ability to do  
4 it. I think they could do it if they were tasked  
5 to it, but I don't think it's necessary for them  
6 to do it. I think a judge would be better suited  
7 to do it.

8 I also believe that it should be  
9 separate from the punishment phase. If we're  
10 going to let members sentence, I think if we made  
11 a separate - made a separate determination by the  
12 judge with regard to restitution, then that would  
13 alleviate a lot of the concerns that the Major  
14 talked about with regard to them maybe lessening  
15 the punishment because of a restitution order.

16 MR. TAYLOR: Well, I think it gets to  
17 another point that Colonel Jones made in his  
18 excellent article, as well; and that is that the  
19 way the sentencing process works in the military  
20 system, you don't have this long period of time  
21 to do a pre-sentencing report as Judge Jones  
22 described this morning, that you have in a

1 federal court, so you have this long period drawn  
2 out where you've got probation officers involved.  
3 That's not part of our system, but could that,  
4 should that be part of our system?

5 LCDR KORODY: Sir, I have minimal  
6 experience in the federal system as a Special  
7 Assistant United States Attorney, and I've seen  
8 some sentencing reports mostly for misdemeanor  
9 offenses that I handled. I think we have all the  
10 information that comes in one of those reports at  
11 our fingertips in the military. Our accused  
12 generally have no prior conviction or criminal  
13 activity if they're still in the military. If  
14 they do have a conviction, we generally know  
15 about it. That's known by all the parties going  
16 into the court-martial. We know their financial  
17 situation because we know how much they're  
18 getting paid. We know their family situation  
19 because we know who their dependents are, and  
20 whether they're registered in our system, our  
21 DEERS system. So, I don't think that there would  
22 be significant delay in obtaining that

1 information for a court-martial. I think it would  
2 be ascertainable.

3 I think with regard to a victim, I  
4 think a victim, especially a victim that's being  
5 assisted by a Victim's Legal Counsel, would be  
6 prepared to present that evidence following a  
7 conviction.

8 MR. TAYLOR: Thank you. Captain Ahlers,  
9 would you like to comment on that since I also  
10 sort of pulled your comment into it, as well?

11 CAPT. AHLERS: Thank you, sir. My  
12 comments weren't necessarily that a judge instead  
13 of a panel should be the deciding authority. I  
14 don't have an official position on that, but I  
15 think that I would echo some of the comments that  
16 have already been made and say that I think  
17 they're pretty valid points with regards to that  
18 question.

19 MR. TAYLOR: Thanks to all of you.

20 JUDGE JONES: Mr. Stone.

21 MR. STONE: I'm not sure I got -- I'm  
22 not sure I understood a couple of the issues

1 correctly, so maybe you'll correct me if I'm  
2 wrong.

3 Is it just forfeiture, or is it  
4 restitution under Article 139, as well, which  
5 comes from the salary of the defendant?

6 MAJ. SAMEIT: Sir, Article 139, it's  
7 only Article 139 that comes out of the salary of  
8 a defendant and gets paid to the victim.  
9 Forfeitures and fines get paid back to the  
10 government if they're ordered in a court-martial.

11 MR. STONE: So, if restitution under  
12 Article 139 comes from the salary of the  
13 defendant --

14 MAJ. SAMEIT: Yes, sir.

15 MR. STONE: -- then it's not at all  
16 like a compensation or restitution, compensation  
17 program anyway in the states where it comes out  
18 of a fund, and nobody really cares how much money  
19 the defendant is making today, or is going to  
20 make once he's locked up in jail.

21 MAJ. SAMEIT: Yes, sir. Those are two  
22 different issues. One of the proposals was

1 Article 139 to cover bodily injury. A second  
2 proposal is currently under the UCMJ there's a  
3 provision that forfeitures and fines can be paid  
4 to the defendant's family. They can be deferred  
5 and waived, and paid to -- or to the accused  
6 family members.

7 One of the proposals was to expand  
8 forfeitures and fines being paid -- or  
9 forfeitures being paid to the accused family  
10 members to being paid to the victims, as well.  
11 That was the second issue that I was addressing.  
12 It was completely separate from Article 139. I  
13 don't know if --

14 MR. STONE: Well, when I listened to  
15 that point that I just mentioned, that it has to  
16 come from the salary of the Service member, and a  
17 whole bunch of other issues that you brought up  
18 and we heard before, like if the victim says  
19 something, it may be used against them at the  
20 trial to their detriment, and the fact that they  
21 only have 90 days to report it, and you may  
22 conflict out the person who's later higher up in

1 the chain of command. Frankly, it makes it sound  
2 to me like the current system -- and maybe the  
3 answer is it isn't used very often. It doesn't  
4 sound very -- like it's functioning very well, or  
5 that it can function very well. You listed a  
6 whole bunch of reasons that to me sounded like it  
7 needs to be fixed, that this is a system that  
8 needs to be fixed.

9 MAJ. SAMEIT: Yes, sir. If we were to  
10 move to Article 139 restitution for bodily harm  
11 to compensate for sexual assault-type cases,  
12 those would be issues that would need to be  
13 fixed. For property crimes, they're much more  
14 black and white. They're much easier cases to  
15 prosecute. I think Article 139 does work well for  
16 property crimes, but if it were moved to sexual  
17 assault and bodily harm-type injuries, I think it  
18 would have a lot of difficulties in it.

19 MR. STONE: So, for all intent and  
20 purposes today, we don't really have an Article  
21 139 restitution program that works for sexual  
22 assault crimes. Is that right?

1 MAJ. SAMEIT: I would agree, 139 does  
2 not work for sexual assault-type offenses.

3 MR. STONE: Okay. Then one of the other  
4 issues, and this is from the very first  
5 presentation we had this morning, said that a  
6 later panel, and I don't know if you are the  
7 panel, maybe you can help me, said there was also  
8 something called Military Claims Act and Foreign  
9 Claims Act compensation suits for personal  
10 injury, death, or property damage caused by the  
11 activities of the federal government. Have any of  
12 you had any experience with this Military Claims  
13 Act or Foreign Claims Act? And, if so, could you  
14 just tell us what it is, because we heard just  
15 that much this morning. We didn't hear anything  
16 about who can utilize it, if it's utilized, and  
17 if there's limits on it, and how it works.

18 LCDR KORODY: I have referred a client  
19 to file -- well, I can't say to file suit. I've  
20 informed them of the applicability of the Federal  
21 Tort Claims Act. That is the extent of what I can  
22 do as a Victim's Legal Counsel. I cannot

1 participate in any suit against the federal  
2 government. Of course, you run up against the  
3 Feres Doctrine when you're talking about the  
4 Federal Tort Claims Act, but in the circumstances  
5 of my case, I did not believe that that doctrine  
6 would apply.

7 MR. STONE: Okay, I thought this was  
8 something other than the Federal Tort Claims Act.  
9 Maybe I'm -- maybe I didn't get it right; the  
10 slide that we had said Military Claims Act, not  
11 Federal Tort Claims Act. And, therefore, I  
12 thought it was something different.

13 LCDR KORODY: Sorry, sir. I --

14 MR. STONE: Is there something  
15 different, or is that something we should ask the  
16 early presenters if it's -- to give us  
17 supplementary information on, because I didn't  
18 know what it was either. And I assumed it was not  
19 the Federal Tort Claims Act.

20 MAJ. SAMEIT: Yes, sir. It is different  
21 from the Federal Tort Claims Act. The Military  
22 Claims Act, the way it's used, as I understand,

1 it's something recently that we had not thought  
2 of on the Marine Corps side that having this  
3 panel on the discussions with the Army and the  
4 Air Force, they've highlighted for us.

5 In a lot of cases you might seize the  
6 victim's cell phone for evidence for text  
7 messages and other various evidence that they  
8 might need from the victim's cell phone. Once you  
9 seize that evidence, especially if it's going to  
10 be used during the case of that court-martial,  
11 you're going to need to hold that cell phone  
12 obviously until completion of appellate review.  
13 So, by all effects and purposes, that cell phone  
14 is gone. Through the Military Claims Act, the  
15 Army and the Air Force have successfully been  
16 filing claims to reimburse the victim for the  
17 cost of her lost property that the government has  
18 seized.

19 MR. STONE: Okay. So, it just sounds  
20 like stuff that's seized as evidence then.

21 MAJ. SAMEIT: Yes, sir.

22 MR. STONE: Okay. But none of you have

1 actually -- have any of you actually filed a  
2 claim under it?

3 CAPT. AHLERS: Yes, sir, and I  
4 highlighted that in my testimony. I've done it  
5 for a number of clients, I think in the Air  
6 Force, the SVC Program we've been relatively  
7 successful. I've helped clients file claims for  
8 things like cell phones, computers, clothing. I  
9 even had a client who had her doorknob seized by  
10 OSI for DNA evidence and we helped get that  
11 replaced, so for us it's been a relatively easy  
12 process, and our clients are being reimbursed  
13 within a few months once they file it.

14 MR. STONE: Do any of you think that  
15 could be used more broadly, because it says at  
16 least in the slide we got for personal injury or  
17 property damage. Have any of you ever seen it  
18 used for personal injury?

19 CAPT. AHLERS: My understanding from  
20 reviewing it is it's generally a claim against  
21 the government, so our nexus is generally when  
22 the military criminal investigative agency is the

1 one seizing it. It's the government, not  
2 necessarily something that's damaged by another  
3 individual, a/k/a the accused.

4 MR. STONE: So, this wouldn't work for  
5 bodily injury from the Service member who is the  
6 defendant.

7 CAPT. AHLERS: I'm certainly not an  
8 expert in that Act, but my understanding is no.

9 MR. STONE: Okay, that was one thing I  
10 was trying to understand. And I think I had --  
11 did I understand that the forfeiture salary  
12 could only go on for six months under the law?  
13 Did I hear that correctly? Is that a question of  
14 military regulation or law? Is that something we  
15 should be looking at?

16 LCDR KORODY: Under Article 58b, that's  
17 the law, six months from convening authority's  
18 action. At the accused's request, so your typical  
19 scenario would be if you have the offending  
20 parent of a child sex abuse case who's a Service  
21 member who's convicted at court-martial, he could  
22 request that those forfeitures which take effect

1 on day 15 after sentence be deferred until the  
2 time of convening authority's action. The  
3 convening authority at the time of taking action  
4 can unilaterally whether the accused requests or  
5 not waive the forfeitures for up to six months  
6 and pay them directly to the dependents. And that  
7 can also occur whether or not a dependent is the  
8 victim of the crime, so it's just a provision out  
9 there. Now we are applying it to even -- well,  
10 it's applied both ways when the victim of the  
11 crime is a dependent, or someone who's not a  
12 dependent of the accused.

13 MR. STONE: Can you tell me what the  
14 rationale for the six month limit is?

15 LCDR KORODY: I cannot.

16 MR. COSGROVE: I don't know, sir. It's  
17 in the statute.

18 MR. STONE: Okay, well, that's -- that  
19 was one question. And, I guess, the other  
20 question I have is, as we heard about the -- some  
21 of the civilian sort of analog cases earlier this  
22 morning, if there's a civil rights action because

1 of sexual assault behavior against a big  
2 corporation or against a university, typically  
3 the corporation or the university is also going  
4 to be on the hook for paying the restitution. Is  
5 there some reason that when there's a good  
6 restitution claim since it's the military that  
7 pays the salary of the Service member and is not  
8 going to be paying the salary of the Service  
9 member once the Service member is convicted or  
10 incarcerated, why the Service itself shouldn't  
11 pay the restitution claim all at once?

12 JUDGE JONES: That's a tough question  
13 for this panel.

14 MR. STONE: Well, no, if there's -- if  
15 they've thought about that, if there's a policy  
16 there. I mean, at least up to a limit like, you  
17 know, they have limits in the various  
18 compensation programs. It might be up to \$10,000,  
19 or 15, or 25, or some number, it seems to me that  
20 it's -- to the extent that the military wants to  
21 keep this system in house then, you know, the  
22 house has an obligation to see that it works.

1 JUDGE JONES: I guess we can all  
2 discuss that.

3 MR. STONE: Yes, okay.

4 JUDGE JONES: Okay. Commander Korody,  
5 you talked a lot about timing, by the time --  
6 that sometimes the compensation or restitution  
7 came so late. Could you just go through that in a  
8 little more detail for me?

9 LCDR KORODY: Yes, ma'am.

10 JUDGE JONES: And, obviously, we're  
11 talking about the current system.

12 LCDR KORODY: Yes, ma'am. So, I will  
13 give you a recent example of transitional  
14 compensation. The claim for transitional  
15 compensation was filed on the date of sentence in  
16 a case, and it took -- when you file a claim for  
17 transitional compensation within the Navy, it's a  
18 very bureaucratic process. It goes through two  
19 legal reviews, and ultimately when it's approved  
20 by the Navy, it will be forwarded over to DFAS  
21 for payment. On a good day that takes six weeks,  
22 on a bad one it takes six months for those

1 payments to start. Once they start, they do back  
2 pay for the time that payments were not being  
3 received, but --

4 JUDGE JONES: Could you just tell me  
5 who typically applies for transitional --

6 LCDR KORODY: So, transitional  
7 compensation is only available for a dependent to  
8 apply, and the case has to have involved a  
9 dependent victim.

10 JUDGE JONES: A dependent victim.

11 LCDR KORODY: Victim, so child or  
12 spouse, generally.

13 JUDGE JONES: Now, is it -- I'm just  
14 trying to put all these remedies in one place in  
15 my mind. So, is it also a fact that during that  
16 time but before transitional that dependent  
17 victim within a family will be receiving  
18 forfeited wages prior to transitional --

19 LCDR KORODY: Well, it depends, ma'am.  
20 As I stated, between the time of the effect of  
21 adjudged to automatic forfeitures which is day 15  
22 after the sentence is announced, so day 15 after

1 trial generally is when the forfeitures will kick  
2 in. As I said, under Article 58b, which I believe  
3 covers deferral, the forfeitures may only be  
4 deferred between day 15 and the time of convening  
5 authority's action at the request of the accused  
6 who was just convicted. So, if he is angry at his  
7 dependents for convicting him, he is not likely  
8 to request that deferral, and so there will be a  
9 period of time until convening authority's action  
10 or until transitional compensation takes effect  
11 where a dependent victim will not receive  
12 anything from the military. Assuming you're at a  
13 general court-martial and you have total  
14 forfeitures, special court-martial could be  
15 different when it's two-thirds. And there's some  
16 other technicalities in there depending on what  
17 the actual sentence is, whether or not it's  
18 sufficient to trigger automatic forfeitures.

19 JUDGE JONES: I guess though from the  
20 moment of the offense and harm done in a sexual  
21 assault they are still paid for services,  
22 medical, mental health, but the other types of

1 monies are not going to be available?

2 LCDR KORODY: Yes, ma'am. What you find  
3 is that you find that it becomes dependency  
4 issues, so whether it is a non-support claim to  
5 the chain of command or going out in town and  
6 attempting to get a child support or spousal  
7 support order from the civilian courts, ma'am, is  
8 how that would be handled.

9 JUDGE JONES: So, basically that would  
10 be -- you'd have to do that.

11 LCDR KORODY: Yes, ma'am.

12 JUDGE JONES: That would be a remedy.  
13 I think I know the answer to this, but if there's  
14 a forfeiture of the wages, they can go to the  
15 dependent family and/or the victim?

16 LCDR KORODY: No, only the dependent  
17 family.

18 JUDGE JONES: Right.

19 LCDR KORODY: Or a dependent -- whether  
20 the dependent is a victim or not.

21 JUDGE JONES: Right. So, just a victim  
22 unrelated is not going to be at this point in

1 time, unless there were a change made, the  
2 beneficiary of forfeited wages.

3 LCDR KORODY: Correct, ma'am.

4 JUDGE JONES: Okay. Any other  
5 questions?

6 CHAIR HOLTZMAN: Yes. Judge Jones, may  
7 I ask some questions?

8 JUDGE JONES: Yes, of course, Liz.

9 CHAIR HOLTZMAN: Thank you. Just -- I  
10 just want to clarify something for me. I'm sorry  
11 to be confused about this, but what I gather from  
12 the testimony of the panel, and let me echo my  
13 colleagues in expressing my appreciation for your  
14 time and your willingness to share your expertise  
15 with us.

16 The restitution -- what -- I'm trying  
17 to understand where the gaps are in the  
18 compensation for the victims. Okay, so if we have  
19 a victim of sexual assault who's in the active  
20 military, they would -- as I gather from your  
21 testimony, they would basically get compensation  
22 for, because the military would provide it free

1 for medical help, mental health care,  
2 transportation to and from I guess the courthouse  
3 or whatever. Those expenses would be covered. Is  
4 that correct?

5 MAJ. SAMEIT: Yes, ma'am.

6 CHAIR HOLTZMAN: So, for an active --  
7 and if there were some property damage like  
8 clothing or a purse, or cell phone, that could be  
9 compensated for under the Military Claims Act, or  
10 possibly under 139. Is that correct, for the  
11 active duty person?

12 LCDR KORODY: Yes, ma'am.

13 CHAIR HOLTZMAN: So, where is the gap?  
14 Where would restitution make a difference for  
15 victims of sexual assault who were active duty  
16 members of the military? What would they -- what  
17 would it compensate them for that they're not  
18 being compensated now for?

19 LCDR KORODY: Ma'am, this is Lieutenant  
20 Commander Korody. One situation that I can recall  
21 is where a lease was broken by a victim who lived  
22 with the offender. They weren't married. In the

1 State of Florida, there's no provision that  
2 permits someone to break a lease based on a crime  
3 and so, therefore, she was liable for the loss of  
4 her security deposit, as well as the fee for  
5 breaking the lease, ma'am.

6 CHAIR HOLTZMAN: Okay, so that's one  
7 example. Anybody else can think of any other  
8 examples? Well, you wouldn't have lost wages if  
9 you're an active duty member, so any other  
10 examples? So, the reason I'm asking this, I want  
11 to understand really the significance of the  
12 restitution remedy. And so what you're telling -  
13 what I seem to be gathering with regard to the  
14 active duty military victim that we're talking  
15 about some unusual cases, but it's not the run of  
16 the mill need that restitution would be necessary  
17 to fill. Is that correct?

18 MAJ. SAMEIT: That's accurate, ma'am.

19 CHAIR HOLTZMAN: Okay. Now, let's take  
20 the other category, which would be dependents who  
21 are victims. They could be either a victim of the  
22 person that they're a dependent of, or they could

1 be a victim of somebody else. Are they in the  
2 same position as the active duty member? No, or  
3 yes?

4 CAPT. AHLERS: Ma'am, this is --

5 CHAIR HOLTZMAN: Where would  
6 restitution count for them?

7 CAPT. AHLERS: Ma'am, this is Captain  
8 Ahlers. I would say that there's a difference  
9 because you're not going to have access for -- a  
10 non-active duty member is not going to have  
11 access to the same level of services. Now, that  
12 could depend on which base you go to whether or  
13 not dependents can even access things like dental  
14 care on base based on availability and things  
15 like that, so it would really be dependent on  
16 whether that could be covered based on what  
17 resources are available to dependents, even in  
18 some respects Guard and Reserve members if they  
19 weren't on Title 10 orders, things like that.

20 CHAIR HOLTZMAN: So, we would be  
21 talking about actual medical care? So, if for  
22 example in the course of the sexual assault there

1 were -- aside from the -- there could be some  
2 physical injury, that wouldn't be covered  
3 necessarily depending on what base you were at?

4 CAPT. AHLERS: Yes, ma'am. Medical  
5 care, mental health care are kind of the two  
6 things that immediately jump to my mind when it  
7 comes to this issue.

8 CHAIR HOLTZMAN: But they would be  
9 entitled if there were -- at a particular base if  
10 there was room for it. Is that what you're  
11 telling me? If it's not so crowded, or if the  
12 need -- you know, there's not such a long waiting  
13 list, or why does it depend on the base? In other  
14 words, is this a statutory, a regulatory  
15 exclusion, or is this just an opportunistic  
16 exclusion, or availability?

17 CAPT. AHLERS: Ma'am, I'm focusing  
18 mostly on the case where you have an accused who  
19 is off active duty, so for things that would  
20 happen afterwards. Certainly, dependents would  
21 have access to medical and care while their  
22 Service member is still on active duty, but post-

1 conviction they may not be able to have access to  
2 the same level of resources.

3 CHAIR HOLTZMAN: Okay. So, what you're  
4 saying is that -- let's say we have mental health  
5 issues that could be quite lengthy, the dependent  
6 would not be entitled to them once the active  
7 duty person were jailed?

8 CAPT. AHLERS: Potentially, yes, ma'am.

9 CHAIR HOLTZMAN: Okay, so that's --

10 LCDR KORODY: Ma'am, if I could add to  
11 that?

12 CHAIR HOLTZMAN: Yes.

13 LCDR KORODY: There's also the lost  
14 wages to attend trial, to attend medical  
15 appointments, to participate in the  
16 investigation. I'm not sure what the current fee  
17 is paid to a military witness now. I've been out  
18 of the courtroom for a couple of years, but I  
19 believe it was \$40 a couple of years ago per day,  
20 plus per diem if they actually travel from out of  
21 the area. That's not a significant amount in my  
22 personal opinion to cover them, especially if

1 they're losing wages or having to take leave from  
2 their jobs to participate in the proceeding and  
3 investigation.

4 CHAIR HOLTZMAN: So, we're talking  
5 about dependents here.

6 LCDR KORODY: Yes, ma'am. They are not  
7 -- if you have a dependent --

8 CHAIR HOLTZMAN: Okay. So, we have a  
9 lost wage issue, and we have health care issues  
10 particularly after the active duty member is no  
11 longer being paid.

12 LCDR KORODY: And when -- at some point  
13 down the road whether it's when transitional  
14 compensation ends, which may be up to three  
15 years, the family is going to lose Tricare Health  
16 Insurance, so they will be on their own at some  
17 point. And, obviously, I echo that if there are  
18 long-term care issues, there is no mechanism  
19 right now for them to -- through the military to  
20 seek compensation for that.

21 CHAIR HOLTZMAN: Okay. Now, let's get  
22 to the third category. What about civilians who

1 work for DOD, or civilians who don't work for  
2 DOD, what's their status here with regard to if  
3 they're victims?

4 MAJ. SAMEIT: Yes, ma'am. This is Major  
5 Sameit. Obviously, they would be the least  
6 compensated group. If they work for DOD they  
7 would likely have health care depending if they  
8 were full time or part time employees. And all  
9 the other civilians out there, it would just  
10 depend on what health care plans they have signed  
11 up for. So, there would be no certainty, and  
12 there would be a lot of variability in that  
13 group, so they could potentially need  
14 compensation for all the different categories  
15 that have been discussed throughout the day.

16 LCDR KORODY: Ma'am, in my experience,  
17 DOD employees are paid while they're  
18 participating in the investigation and the court-  
19 martial process, so their place of duty for  
20 court-martial would be the court-martial itself  
21 as a DOD employee.

22 CHAIR HOLTZMAN: So, they wouldn't have

1 the lost wage issue.

2 LCDR KORODY: Not in my experience,  
3 ma'am.

4 CHAIR HOLTZMAN: Okay. I guess that's  
5 really just what I wanted to get clear. Thank  
6 you.

7 MR. STONE: Can I just follow-up one  
8 second on the lost wage question? This is Victor  
9 Stone.

10 Assuming that these civilian victims  
11 or even the dependent victims are working off  
12 base and they lose a week or two just because  
13 they need to recover because they can't face  
14 their teacher, and they can't face their  
15 classroom, or whatever it is, unlike the person  
16 who's military, they're not going to continue  
17 getting paid for that period of time, so they  
18 could have two weeks, a month, two months, who  
19 knows of lost wages that they are not going to  
20 ever recover. Isn't that right?

21 LCDR KORODY: Depends on the employer,  
22 sir, but it's possible.

1 MR. STONE: Okay.

2 JUDGE JONES: I have one quick  
3 question, and maybe none of you can answer it,  
4 but it was my impression that frequently when the  
5 victim of the crime is a civilian, I know there's  
6 the option for it to be tried in the civilian  
7 court. Does that often happen, or do you see a  
8 lot of civilian victims at courts-martial?

9 CAPT. AHLERS: Ma'am, we generally do  
10 not represent a lot of civilians in the SVC  
11 program because of the way that it's structured,  
12 but when crimes occur off base, there is still an  
13 option for that individual to elect for the  
14 civilian jurisdiction to --

15 JUDGE JONES: I'm talking about -- I'm  
16 sorry. You wouldn't be representing a civilian  
17 victim.

18 CAPT. AHLERS: No, ma'am, but we could  
19 have active duty members, for instance, when  
20 crimes happen off base who have the option to  
21 elect to have the local civilian jurisdiction  
22 take the lead on the prosecution of the case.

1 And, generally, my clients at least have elected  
2 for the military to take action when it's  
3 authorized.

4 JUDGE JONES: Okay. I guess my -- I'm  
5 sorry, I'm confusing you. I just wanted to know,  
6 is it frequent that you have a civilian victim in  
7 courts-martial? Yes?

8 MAJ. SAMEIT: We have seen quite a  
9 number in the Marine Corps. It's not infrequent.

10 JUDGE JONES: Okay, as opposed to just  
11 being tried in civilian court.

12 MAJ. SAMEIT: Yes, ma'am. I think the  
13 Marine Corps, especially with sexual -- or the  
14 military, in general, especially with sexual  
15 assault takes a lot of cases that civilian  
16 prosecutors don't take.

17 MR. STONE: And are those cases that  
18 occurred -- the assault is alleged to have  
19 occurred on base or off base, typically?

20 MAJ. SAMEIT: Typically, off base, sir.

21 JUDGE JONES: Anything else? Gentlemen,  
22 thank you very, very much. Appreciate it. We'll

1 take a 10-minute break at this point.

2 (Whereupon, the above-entitled matter  
3 went off the record at 2:25 p.m., and resumed at  
4 2:42 p.m.)

5 JUDGE JONES: All right. Ladies and  
6 gentlemen, we're going to resume our afternoon  
7 session with our last panel, Perspectives on  
8 Restitution and Compensation for Sexual Assault  
9 Victims. And we're going to begin with Ms. Susan  
10 Smith Howley, who's the Director of Public  
11 Policy, National Center for Victims of Crime. Is  
12 that the right way to pronounce your name, is it  
13 Howley?

14 MS. HOWLEY: Yes, it is. Thank you.

15 JUDGE JONES: Thank you. Go ahead.

16 MS. HOWLEY: Good afternoon, members of  
17 the Panel. It is my pleasure to be here this  
18 afternoon and to represent the National Center  
19 for Victims of Crime on these important issues.

20 The National Center is celebrating 30  
21 years of advocating for the rights and interests  
22 of victims of crime. Our members include victim

1 advocates at community-based programs, and in the  
2 criminal justice system. I've been a victim  
3 advocate at the national level for over 20 years  
4 advocating for the rights of crime victims,  
5 including victim compensation and restitution,  
6 and I hope to share that experience with you this  
7 afternoon.

8           You've heard quite a bit about victim  
9 compensation today already, so I won't spend a  
10 lot of time on that, but just to reiterate that  
11 as you've heard there are gaps in the current  
12 system, what's available through the military or  
13 through state compensation programs, the gaps  
14 depending on whether the victim is an active duty  
15 Service member versus retired, versus civilian,  
16 or a reservist, or a dependent. Of course, the  
17 benefits that are payable vary quite a bit, what  
18 forms of mental health treatment are available,  
19 whether there's a cap.

20           And then another issue that hasn't  
21 been raised is, are the benefits that are  
22 available through these different programs really

1 matching the needs of the victim? Maybe what a  
2 sexual assault victim really needs is a security  
3 system so that they can feel safe again at night,  
4 or maybe what they really need is job retraining  
5 because they can't go back to the same type of  
6 job where they were sexually assaulted, so it  
7 could be that they need something different,  
8 something more flexible than the current programs  
9 allow.

10           Victims of crime should be eligible  
11 for some compensatory response, for the same  
12 compensatory response regardless of their Service  
13 status or the vagaries of the local program in  
14 the state where they're stationed at the time of  
15 the crime.

16           But moving now to restitution,  
17 restitution as you have heard before relates to a  
18 payment by the offender under court order. While  
19 not a government program, the court orders  
20 restitution and the court and other agencies  
21 enforce the order while the offender is under  
22 supervision. Restitution is not principally a

1 punishment, it's not a substitute or an  
2 alternative to a fine or incarceration. Its goal  
3 is to compensate the victim. At least one federal  
4 Court of Appeals has said of federal restitution,  
5 "It is essentially a civil remedy created by  
6 Congress and incorporated in criminal proceedings  
7 for reasons of economy and practicality." Through  
8 restitution at sentencing or as part of a plea  
9 agreement, the forum that has established the  
10 defendant's responsibility for the act has the  
11 authority to order repayment of the readily  
12 provable out-of-pocket expenses sparing the  
13 victim the time and the expense of hiring an  
14 attorney to bring a separate civil suit.

15 The laws of every state and the  
16 federal government give courts authority to order  
17 restitution to the victim, and at least 29  
18 states, and as you know, the federal government  
19 mandate the ordering of restitution, or at least  
20 require the court to state on the record the  
21 reasons for not ordering it. While restitution is  
22 generally ordered paid to the direct victim of a

1 crime, it can also be ordered for the State  
2 Victim Compensation Program that paid some of the  
3 victim's crime-related expenses. This is an  
4 extremely important source of support for state  
5 compensation programs, many of which have  
6 difficulty paying all approved claims every year.

7 Restitution is important to crime  
8 victims, including victims of sexual assault for  
9 two reasons. First, it can be ordered for a wider  
10 range of damages than can be covered by existing  
11 compensation programs; most notably, property  
12 loss or damage. But, second, it represents a  
13 direct accountability from the perpetrator  
14 recognizing that as a result of the criminal  
15 offense they, the victim, were personally harmed.

16 Mr. Stone previously asked whether  
17 this accountability in the form of restitution is  
18 really important given the fact that there is --  
19 that the defendant is already being held  
20 accountable through a sentence, but that's  
21 separate. That's an accountability for simply the  
22 violation of law; whereas, restitution is

1 accountability to the individual victim.

2 Now, the strength of the importance of  
3 that is going to vary from victim to victim. As  
4 Mr. Stone noted earlier, some victims may by the  
5 time it gets to sentencing believe that the  
6 defendant has taken responsibility for his  
7 actions and restitution, and maybe they don't  
8 have much in the way of financial loss and it may  
9 be less important. For some, it's extremely  
10 important.

11 As was also noted earlier, there's a  
12 clear need to do more than provide a right to  
13 restitution. Laws and regulations need to  
14 articulate the implementation of that right. For  
15 example, how will the victim's request be made  
16 known, as was raised and discussed earlier today.  
17 Can the victim be heard at the time of sentencing  
18 or disposition to make that argument on their  
19 own? It's very important that that be included,  
20 not simply that a right to restitution be  
21 articulated, but that the means by which that  
22 right will be implemented be included in whatever

1 the Panel decides.

2 In considering restitution in the  
3 military context, a concern has been raised  
4 regarding the immediacy of sentencing  
5 proceedings. Unlike cases of serious crime in the  
6 civilian setting where the sentencing hearing is  
7 convened weeks or months after conviction,  
8 sentencing often immediately follows upon  
9 conviction in the military setting. The concern  
10 has been expressed that this does not allow time  
11 to adequately consider victim's losses, or the  
12 defendant's financial resources.

13 A victim's losses should, as a rule,  
14 be quantified far earlier in the process than  
15 sentencing. The extent of the harm caused by an  
16 alleged criminal act should be a significant  
17 factor in considering the seriousness of the  
18 offense at the time of charging the offense, or  
19 in negotiating a plea, as well as in seeking a  
20 sentence. A process should be established to  
21 gather that information from the victim early on  
22 in the process and to be adding to it when

1 additional expenses are identified. And, in this  
2 context, the Special Victims' Counsel or Victims'  
3 Legal Counsel can be gathering that information  
4 all along.

5 As for determining a defendant's  
6 assets and ability to pay in order to set a  
7 payment plan, the DOD might consider the approach  
8 used in Colorado. There restitution is ordinarily  
9 due immediately at sentencing, but if the  
10 defendant requests a payment plan in order to pay  
11 the restitution over time, he or she then is sent  
12 to meet with a court collections investigator.  
13 This court professional has received special  
14 training and meets with a defendant to problem  
15 solve, discuss any resources or options the  
16 offender has to allow for payment, gather  
17 financial and other personal data to get a clear  
18 picture of the offender's ability to pay, and  
19 design a payment plan of the shortest duration  
20 reasonably possible.

21 One recurring problem with restitution  
22 in the civilian context is that victims may wait

1 years to receive full restitution. Many of them  
2 are never paid in full. Lieutenant Colonel Jones'  
3 thoughtful article regarding strengthening  
4 restitution in the military system suggests  
5 restitution by proxy, whereby following an order  
6 of restitution, if a defendant is unable to pay  
7 immediately, the military could pay the victim  
8 the full amount ordered and then collect from the  
9 defendant over time. We applaud this suggestion  
10 because it provides immediate relief to the  
11 victim.

12 A similar situation, a similar system  
13 is used in Vermont where there is a restitution  
14 fund that pays the victims the amount of  
15 restitution owed to them up to \$10,000, and then  
16 takes on the burden of collecting from the  
17 offender. Today the majority of victims in  
18 Vermont receive their full restitution.

19 Whether or not the proxy system is  
20 adopted in creating a restitution scheme, we urge  
21 you to adopt procedures that require the ordering  
22 of restitution in every case where a victim has

1       sustained a financial loss, insure that  
2       restitution orders are clearly and consistently  
3       reported at the time of sentencing, noting the  
4       amount ordered and to whom it should be paid,  
5       promote the earliest possible payment of  
6       restitution, provide that payment of restitution  
7       is prioritized over payment of a fine or other  
8       assessment. Victims should always be paid first.  
9       Provide for the careful creation of a payment  
10      plan for those defendants who do not have an  
11      immediate ability to pay, and make it easy for  
12      them to pay, whether by cash, credit card, or  
13      other means. Track payments, including regularly  
14      billing, or otherwise informing defendants of the  
15      amount still owing and payments that have been  
16      made, extend supervision where a defendant  
17      defaults in payment. Where a defendant has  
18      willfully failed to pay or willfully failed to  
19      make a good faith effort to pay, the court should  
20      have the authority to order short-term  
21      incarceration. The prospect of this consequence  
22      can be a powerful motivator. And, again, this is

1 not incarcerating someone for an actual inability  
2 to pay, but for a willful failure to pay or  
3 failure to make a good faith effort. And at the  
4 conclusion of supervision, any outstanding  
5 restitution should be converted into a civil  
6 judgment, but bear in mind that most victims do  
7 not easily collect on a civil judgment and would  
8 have to hire an attorney to figure out how to do  
9 that.

10 Restitution can be an important right  
11 for victims providing for recovery. Of course,  
12 the limitations are significant. As you've  
13 already heard today and been reminded it only  
14 attaches after a plea or conviction, so for all  
15 those victims who never report, or whose cases  
16 don't result in a plea or conviction, they're not  
17 eligible. And unless there is a fund, a victim  
18 may never recover what's owed to them, but it is  
19 an important right and an avenue for recovery.

20 Let me conclude by reminding this  
21 panel that as you consider the issues of victim  
22 compensation and restitution, you have an

1 opportunity to make the military a leader. You've  
2 identified a number of gaps and places where we  
3 have failed victims in the current existing  
4 systems. You can build on the successes of  
5 existing approaches and fill in the gaps in those  
6 schemes in whatever you design, and the rest of  
7 the country can follow you.

8 As you do so, I want to leave you with  
9 two overarching recommendations. One, adopt a  
10 victim centered approach. As programs are  
11 designed or rules and laws drafted, do not create  
12 a system that limits your future victim response  
13 to answering what from this menu of relief can we  
14 give to this victim, but instead what does this  
15 victim need to recover from the crime? Let this  
16 thought guide you in developing rules for  
17 eligibility and benefits.

18 And, second, insure that the systems  
19 you are creating are applicable, or at least  
20 easily extendable in the future to victims of  
21 crime other than sexual assault. In the victims  
22 field, we have come to recognize the universal

1 aspects of trauma. We've understood the parallels  
2 across a range of victimizations and abuse, and  
3 the more we understand, the more our response is  
4 expanding to provide justice and healing for all.

5 I commend this panel for taking on  
6 these important issues and look forward to any  
7 questions you have. Thank you.

8 JUDGE JONES: Thank you very much, Ms.  
9 Howley. We'll turn now to Ms. Bridgette Harwood,  
10 Director of Legal Services, NVRDC.

11 MS. HARWOOD: Thank you. My name is  
12 Bridgette Harwood, and I'm the Co-Executive  
13 Director and the Director of Legal Services at  
14 Network for Victim Recovery of DC. I would like  
15 to thank the Panel and their staff for addressing  
16 this important issue, and inviting me to inform  
17 the recommendations.

18 You heard about NVRDC's wrap-around  
19 advocacy, legal services, and 24-hour sexual  
20 assault crisis response from my colleagues  
21 earlier, and I'll be reading an abbreviated  
22 version of what I submitted for testimony with an

1 occasional ad lib based off of some questions  
2 posed on the previous panels.

3 I've spent my entire legal career as  
4 a crime victims' rights attorney, and prior to  
5 co-founding NVRDC in 2012, I served as a staff  
6 attorney at the Maryland Crime Victims Resource  
7 Center. Since coming to NVRDC, my work has  
8 shifted to a heavy focus on sexual assault  
9 survivors and their legal rights. Of the 600  
10 clients we serve a year, approximately 75 percent  
11 of them are survivors of sexual violence. And  
12 while at NVRDC, I've also offered expert  
13 consulting to civilian attorneys representing  
14 military survivors of sexual assault in asserting  
15 and enforcing their rights to dignity and  
16 privacy.

17 From conversations with these  
18 attorneys and from the earlier panel, it seems  
19 that restitution is not a remedy that survivors  
20 often seek through the Military Justice System,  
21 even with the advent of Special Victims' Counsel.  
22 And I assure you, this is not because there are

1 no out-of-pocket losses. Survivors saddled with  
2 financial debt resulting from a criminal act live  
3 with the constant reminder of the victimization  
4 they endured over and over again.

5           The right to both request the  
6 restitution and enforce that order allows for  
7 survivors to regain some sense of control of  
8 their experience and move forward in their  
9 healing journey. And while compensation programs  
10 help to alleviate this burden, they do not offer  
11 the same sense of justice from a survivor's  
12 perspective. This is why our staff attorneys at  
13 NVRDC assess every single criminal case for  
14 possible restitution claims and educate every  
15 single survivor we represent on their rights and  
16 how to enforce orders as a matter of course.

17           Today I hope to offer a snapshot of  
18 restitution within the civilian context, and  
19 address some unique issues that have come up both  
20 in state and federal courts. I really can't  
21 stress enough just how critical it is for Special  
22 Victims' Counsel, for convening authorities, and

1 for military judges to understand the breadth of  
2 costs related to sexual violence, because at  
3 first glance one may think military survivors and  
4 dependents don't have medical expenses or mental  
5 health out-of-pocket losses. But there are some  
6 very important gaps to consider, the exemptions  
7 and limitations within Tricare, and the  
8 treatments that are actually available through  
9 coverage providers.

10 For example, how easily can survivors  
11 access mental health services that offer eye  
12 movement desensitization reprocessing, much  
13 easier said as the EMDR to treat PTSD. It is  
14 actually really rare for providers to offer EMDR  
15 as a therapy; however --

16 CHAIR HOLTZMAN: Excuse me. Could you  
17 tell us what those initials mean, please?

18 MS. HARWOOD: Yes, it's -- if I can say  
19 it right this time, I'll do my best.

20 CHAIR HOLTZMAN: Thank you.

21 MS. HARWOOD: It's eye movement  
22 desensitization and reprocessing, a very specific

1 treatment. And it's actually listed in the  
2 Department of Veterans Affairs and the Department  
3 of Defense's practice guidelines as a highly  
4 recommended treatment for survivors of trauma.  
5 However, this treatment isn't always provided  
6 through available Tricare providers, and  
7 survivors may have to seek civilian private  
8 treatment providers to get this actual EMDR  
9 treatment.

10 So, in referencing Madam Chair  
11 Holtzman's question earlier about are there  
12 actual gaps, I think we have to look at what are  
13 the exemptions in Tricare. For example, if  
14 someone wants to seek outpatient psychotherapy  
15 more than two times a week, they're going to be  
16 paying for that. That is not covered right now in  
17 the current system. One of my colleagues made I  
18 think a really helpful analogy around how  
19 civilian survivors can seek compensation and  
20 restitution for mental health and saying that if  
21 I sought as a survivor mental health services  
22 outside of my coverage network, that would still

1 be covered both under my restitution claim and a  
2 compensation claim. Why wouldn't that be a case  
3 for both civilians and active Service members who  
4 are also survivors that seek coverage outside of  
5 Tricare? Just a helpful analogy there.

6 So, as the military addresses the  
7 right to restitution for survivors, you will most  
8 likely consider the requisite causation that must  
9 be shown before a survivor is entitled to  
10 compensation through restitution. In local DC  
11 cases and other federal courts pursuant to the  
12 CVRA, the MVRA, and the VWPA crime victims are  
13 defined as those directly and proximately harmed  
14 by the commission of an offense. And at NVRDC we  
15 have successfully overcome arguments that certain  
16 injuries are too attenuated.

17 Recently one of our clients received  
18 permanent injury to her nose when her former  
19 partner punched her in the face. And following an  
20 assault charge and a court-ordered no contact the  
21 defendant continued to text our client. And,  
22 ultimately, the United States Attorney's Office

1       pled that charge down from an assault to a  
2       criminal contempt for a violation of the no  
3       contact order. The prosecutor opposed our request  
4       for restitution based on their interpretation of  
5       the direct and proximate cause connection to the  
6       injuries; however, the court allowed for lost  
7       wages related to the direct result of the  
8       violation of the no contact order in conjunction  
9       with the prior assault.

10               This case is interesting really for  
11       two reasons. First, had the prosecutors  
12       considered the medical costs as part of the plea  
13       negotiation, the victim could have potentially  
14       received all of the requested amount of future  
15       restitution associated with the estimated cost  
16       for reconstructive surgery. And, second, when  
17       crafting procedures for the issuance of  
18       restitution, it's important to consider how the  
19       causation required will impact the convening  
20       authority's ability to order restitution at  
21       sentencing.

22               Related to the concept of causation is

1 the issue of compensation for future losses. In  
2 my opinion, the future of restitution is future  
3 restitution. The entire purpose to make survivors  
4 whole again implies a forward-looking approach.  
5 State and federal courts tackling this issue have  
6 taken many differing approaches.

7 In a Baltimore City case, for example,  
8 I successfully advocated for a 19-year old man to  
9 receive future restitution from a shooting that  
10 left him a paraplegic. Alaska, Colorado, and  
11 Wyoming state courts have also allowed for this  
12 along with some federal courts, as well, like the  
13 Ninth Circuit, affirming an order for future  
14 counseling costs and the cost of future STD  
15 testing in a sexual assault case.

16 There are also future costs that are  
17 not known at the time of sentencing. The VWPA  
18 allows the victim 90 days to capture the entire  
19 mosaic of what their losses from the defendant's  
20 conduct will be. And, additionally, 60 days after  
21 the discovery of further loss the right to  
22 request an amended order. However, even this

1 requires the showing of good cause for failure to  
2 include the subsequent out-of-pocket loss in the  
3 original request.

4 This amount of time is particularly  
5 challenging when one considers the research  
6 around delayed onset of PTSD related to a  
7 traumatic event. New research actually suggests  
8 that this can account for nearly a quarter of all  
9 of those individuals diagnosed with PTSD. A  
10 survivor who experiences this could clearly not  
11 know at the time of sentencing, or even 90 days  
12 out, the costs related to their injuries. I  
13 encourage the Panel to consider this issue when  
14 developing guidelines around the allowable  
15 timeline to request restitution, and the broad  
16 discretion of the convening authority to amend  
17 the restitution obligation post-sentencing.

18 So, I could really wave the magic wand  
19 of what a survivor centered approach to  
20 restitution within the military would look like,  
21 I envision survivors having independent rights to  
22 participate in restitution requests in every

1 sentencing hearing, whether the result of a  
2 pretrial agreement or a contested trial. Best  
3 practices would even suggest mandating  
4 prosecutors to confer with survivors, and  
5 actually include their request for losses prior  
6 to accepting that pretrial agreement.

7 In light of the breadth and complexity  
8 of the economic harm caused by sexual violence,  
9 it is critical that the convening authority have  
10 broad discretion to order restitution both as  
11 part of the sentence, and as a condition to the  
12 military equivalent of probation. And,  
13 additionally, it makes sense to add physical and  
14 psychological injury and lost wages, as Mr. Stone  
15 pointed out, as the eligible claims under an  
16 Article 139 claim. And I would even go further to  
17 suggest that it makes sense to allow for what the  
18 VWPA allows in amending future unknown losses  
19 that are discovered after a sentencing.

20 The civilian courts have clearly not  
21 perfected the right to restitution and the  
22 issuance procedures. After all, for the first

1 time ever, the Supreme Court addressed a case  
2 related to restitution just last year in  
3 Paroline. I predict that attorneys and advocates  
4 in the crime victims' rights movement will more  
5 consistently seek both future costs and  
6 unconventional out-of-pocket losses until these  
7 statutes and splits in circuits around the country  
8 are clarified. But the military has a unique  
9 opportunity to create a forward-thinking approach  
10 where the convening authority's discretion is  
11 broad enough to actually capture all of the  
12 survivor's losses related to an offender's  
13 conduct. Thank you for your time today.

14 JUDGE JONES: Thank you very much, Ms.  
15 Harwood. All right, Colonel Mulligan. Good to see  
16 you again.

17 COL. MULLIGAN: Judge Jones, nice to  
18 see you again. Judge Jones, Mr. Taylor, Mr.  
19 Stone, I'm going to forego some formal remarks  
20 and get straight to really what I think is the  
21 heart of what you're looking for.

22 The military, in 2009, started forth

1 with the SVP program. What we also had in 2009  
2 was a shooting at Fort Hood, Texas, and from that  
3 we learned a lot about how the military delivered  
4 victim services. And what we learned is there's a  
5 synergy that needs to be created between what the  
6 military can offer, and what the states offer,  
7 and that really the gap in the seam was an  
8 inability to understand and access all of those  
9 services that were available.

10 Now, I know the Director of the Texas  
11 Crime Victims Fund testified earlier today. In  
12 the case that I prosecuted, we accessed his funds  
13 for about \$180,000, but that wasn't the only  
14 place we went. We also went to the Office of  
15 Victims of Violent Crime for over \$1 million. And  
16 if you look at the Fort Hood case as an example,  
17 you had military members fully compensated, no  
18 lost wages, no medical. They were paid 139 claims  
19 for their clothes, for their cell phones, for  
20 their boots, anything that a claim was filed for,  
21 they were paid. That doesn't mean they were ever  
22 made whole. Some, in fact, were medically

1 discharged, but those benefits continued.

2 For the civilians in that case, the  
3 contractors in the building who didn't suffer a  
4 gunshot wound, they were still compensated,  
5 because we went to the state system. They filed  
6 for lost wages, they filed for mental health  
7 counseling, they filed for medical bills that  
8 were unpaid. We went to OVC to arrange money to  
9 allow for victims to do so many things, to attend  
10 all hearings, something the military normally  
11 does not do. We're not funded to have victims  
12 attend all of our hearings. We're funded to have  
13 them appear as witnesses.

14 What we learned in 2009 is there were  
15 a lot of services and monies available that we  
16 weren't accessing. And the lesson we learned was  
17 we need more education, and we needed to create  
18 another person to do that. So, currently, we're  
19 in the process of hiring 23 Special Victim  
20 Witness Liaisons.

21 To answer Judge Jones' earlier  
22 question, and to correct the record, a dependent

1 of sexual assault or sexual abuse, all of the  
2 medical bills will be fully paid. If they're not  
3 available on post, you will be Tricared out,  
4 CHAMPUS'd out. If my daughter was to have been  
5 assaulted and the military did not offer mental  
6 health counseling or any other Service that she  
7 was medically referred to, she would be CHAMPUS'd  
8 out. There is not a gap in the seam either on  
9 active duty or military dependents.

10 Interestingly, before coming here on  
11 Monday, I asked the SVC community to tell me, as  
12 I appear before this panel, what is the number  
13 one non-compensated expense. Understanding SVCs  
14 do not represent civilians, they only represent  
15 Service members, the answer overwhelmingly, cell  
16 phones. And in some cases it's the difference  
17 between they filed the claim and they got the  
18 depreciated value of their iPhone 6, and not the  
19 replacement cost. That's not to make light in any  
20 way of the restitution and compensation that  
21 should be paid by either the accused or a fund to  
22 make them fully whole. I stand ready to answer

1 your questions, and I'll pass the floor to Teresa  
2 Scalzo.

3 JUDGE JONES: Thank you, Colonel. Ms.  
4 Scalzo, we meet again, as well, I believe.

5 MS. SCALZO: Yes. Madam Chair and panel  
6 members, good afternoon, and thank you for the  
7 opportunity to discuss restitution and sexual  
8 assault victim compensation with you. I was asked  
9 to address what inadequacies may exist in our  
10 current system. I initially gained insight into  
11 how civilian restitution and crime victim  
12 compensation programs operate at the local  
13 civilian level when I was a prosecutor in  
14 Northampton County, Pennsylvania. And as has been  
15 pointed out earlier, problems exist with the  
16 ability to collect restitution. I have personally  
17 handled many hearings where we attempted to  
18 collect restitution from defendants who could not  
19 or would not pay.

20 My understanding of crime victims  
21 compensation and restitution was expanded when I  
22 went to work for the National District Attorneys

1 Association, first as their attorney, and later  
2 as the Director of the National Center for the  
3 Prosecution of Violence Against Women. I've been  
4 working for the Navy since 2009. I'm currently  
5 the Deputy Director of our Trial Counsel  
6 Assistance Program, and one of my primary duties  
7 is advising trial counsel and training them on  
8 issues related to victims.

9           When asked to speak here, I consulted  
10 the Navy Senior Trial Counsel to get their  
11 insight on this very important issue. To give you  
12 context, the Navy's prosecutors are divided into  
13 nine regions. Each region has a senior trial  
14 counsel which is the supervisory prosecutor for  
15 that region, as well as our equivalent Special  
16 Victim Prosecutor. I asked them what they're  
17 seeing in the field with respect to sexual  
18 assault victims having uncompensated expenses.  
19 They told me that we've seen very few cases where  
20 victims have advised them that they have expenses  
21 other than, as Colonel Mulligan points out, cell  
22 phones, which were not compensated by either the

1 military victims compensation or some other  
2 source. That being said, it is possible that such  
3 cases exist and that we just don't know about  
4 them, the victims haven't told us, or that issues  
5 may arise in the future.

6 As Representative Holtzman pointed  
7 out, I think it's first important to start out  
8 with what is the victim's status? And we know  
9 that whether or not an expense related to sexual  
10 assault victimization is compensated depends on  
11 two things. One is the victim's status, and two  
12 is the type of expense that it is. Military  
13 members, as you've been discussing have the most  
14 coverage, with military dependents having the  
15 second most.

16 Recognizing it's possible that victims  
17 may incur additional losses not covered, I tried  
18 to divide these expenses into categories to  
19 better respond to your questions. I believe there  
20 are five categories of expenses that victims may  
21 incur as a result of victimization. The first are  
22 expenses that would be covered by state crime

1 victim compensation programs.

2 The second are expenses that would  
3 otherwise be covered by state crime victim  
4 compensation programs, but the conditions for  
5 coverage has not been met. The third category are  
6 expenses that arose from a crime which occurred  
7 outside of the United States, and the victim is  
8 not a resident of a state where crime victim  
9 compensation includes overseas victims. The  
10 fourth category is losses suffered as a result of  
11 the crime that are not otherwise covered by crime  
12 victim compensation programs. And, finally, costs  
13 incurred as part of the investigation and/or  
14 prosecution.

15 So, the first category includes  
16 expenses covered by state crime victim  
17 compensation programs. All victims in Navy  
18 courts-martial are supported by Victim Witness  
19 Assistance, or VWAP personnel. They're advised  
20 about the state crime victim compensation  
21 programs as part of the VWAP process. Victims are  
22 eligible for state crime victim compensation

1 based upon their residency, as opposed to who is  
2 investigating or prosecuting the crime.

3 Therefore, victims of Navy courts-martial are on  
4 an equal footing with victims in cases being  
5 prosecuted by civilians, which does not  
6 necessarily mean that they're going to get all  
7 that they need, just that they will get what  
8 their counterparts in civilian cases would be  
9 entitled to.

10 The second category of expenses  
11 includes those that would be covered by state  
12 crime victim compensation programs had the  
13 conditions for eligibility been met. For example,  
14 many states require a crime to be reported within  
15 a certain amount of time, or the victim is not  
16 eligible for victim's compensation. In this  
17 category, victims may not be eligible for  
18 compensation simply because they haven't reported  
19 soon enough. But, again, they're on equal footing  
20 with victims in cases being handled by civilian  
21 authorities.

22 The third category of cases include

1 cases which occur overseas. These are  
2 challenging. Although some states will provide  
3 victims compensation for residents when they're  
4 victimized abroad, many do not. In these first  
5 three categories, the status of the victim does  
6 not matter. All victims are treated the same.

7 The fourth category of case includes  
8 out-of-pocket losses incurred as a result of the  
9 crime that were not covered by crime victim  
10 compensation. This category would include  
11 expenses that did not meet the requirements I  
12 previously described, as well as things like the  
13 loss of personal property. An Article 139 claim  
14 could be filed if the victim's property was  
15 damaged by the accused during the crime.

16 The military currently has no way of  
17 covering the rest of these expenses, unless the  
18 accused agrees to restitution in the pretrial  
19 agreement. The Navy has had some success with  
20 getting restitution for victims in some of these  
21 cases, but this only works in cases where the  
22 accused pleads guilty.

1           The fifth and final category includes  
2 expenses incurred as a result of a court-martial.  
3 For example, some victims would like to have a  
4 support person travel to the court-martial with  
5 them. Convening authorities are authorized to pay  
6 many court-related expenses, such as travel. In  
7 our experience, prosecutors, Victims' Legal  
8 Counsel, and convening authorities are often in  
9 agreement on reimbursing victims for their court-  
10 related expenses, whenever possible.

11           And, finally, victims may have  
12 property collected by NCIS, such as cell phones  
13 or computers. We are working with NCIS to  
14 minimize the times when the phone or computer is  
15 taken from a victim, but due to the nature of  
16 discovery rules, as well as the rules of  
17 evidence, it may not always be possible to return  
18 the phone as quickly as the victim would like.

19           As I discussed, there are gaps that  
20 could be covered either by expanding victims'  
21 compensation programs or creating a right to  
22 restitution. For example, victims who delay

1 reporting may not be eligible, because they've  
2 waited too long to report the crime.

3 One solution would be to give military  
4 members, or to give the military its own crime  
5 victim compensation fund out of the VOCA Fund.  
6 The Office on Victims of Crime which is funded by  
7 VOCA has a military division, so it would make  
8 sense that we could have a military crime victims  
9 compensation fund. And if we did, we could create  
10 our own rules so we could recognize things, like  
11 many victims delay in reporting, so that we would  
12 avoid some of the state rules which limit the  
13 ability of victims to access those funds.

14 I do have one concern, though,  
15 depending on whatever solution is crafted as a  
16 prosecutor.

17 The Navy trains our prosecutors on the  
18 importance of trauma-informed prosecution. Our  
19 prosecutors recognize that there are two  
20 interrelated goals in sexual assault prosecution,  
21 offender accountability, and victim wholeness and  
22 healing. By recognizing the importance of both

1 goals, research shows we're better able to hold  
2 offenders accountable. However, if we expand the  
3 right to victims compensation or restitution too  
4 far, we may unduly impede investigation and  
5 prosecution efforts. Striking a balance between  
6 victim support and offender accountability is  
7 incredibly important.

8 For example, if we were required to  
9 reimburse significant restitution only  
10 tangentially related to out-of-pocket expenses, a  
11 defense attorney could effectively argue that the  
12 victim lied about the sexual assault in order to  
13 receive a financial gain. Naturally, as the  
14 issues arise we'll continue to modify our  
15 training to help prepare our prosecutors to deal  
16 with them just as we have to deal with the  
17 challenges that have come from expanded victim  
18 rights and victim lawyers.

19 I bring this up only to ask you that  
20 as with the expansion of all other victim rights,  
21 we just need to remember that there is a balance  
22 between making the victim whole and holding the

1 offender accountable. They are both incredibly  
2 important, but sometimes they need to be  
3 balanced. I look forward to answering your  
4 questions.

5 JUDGE JONES: Thank you, Ms. Scalzo.  
6 Major, is it Cloninger?

7 MAJ. CLONINGER: Yes, ma'am.

8 JUDGE JONES: Marine Corps Regional  
9 Victims' Legal Counsel. Thank you, go ahead.

10 MAJ. CLONINGER: Good afternoon, Madam  
11 Chair.

12 JUDGE JONES: Good afternoon.

13 MAJ. CLONINGER: Distinguished panel  
14 members. I am Major Richard Cloninger, Regional  
15 Victims' Legal Counsel for the Marine Corps. I  
16 cover Marine Corps Installations East area of  
17 responsibility. I'll briefly go into my  
18 background to give you some context on my  
19 perspective.

20 So, I've been in the Marine Corps for  
21 -- I thought I talked loud enough. I've been in  
22 the Marine Corps for 15 years, started out as

1 enlisted, and then commissioned in 2001, and then  
2 certified as a Judge Advocate in 2005. And during  
3 that time, I have served as a prosecutor, legal  
4 assistance attorney, a civil law attorney, and  
5 regional Victims' Legal Counsel.

6 I currently supervise four other  
7 Victims' Legal Counsel within my area of  
8 operation, and together we have represented over  
9 250 -- represented and provided legal advice and  
10 counseling to over 250 victims since our  
11 inception in November 2013. Personally, I've  
12 assisted about 50 victims and currently have  
13 about a caseload of approximately 20 victims.

14 I believe I've received more than  
15 adequate training to fulfill my duties as  
16 regional Victims' Legal Counsel. I have 24 months  
17 of Military Justice experience as a prosecutor.  
18 I've also attended a number of training sessions  
19 to include Air Force SVC training, various  
20 conferences and trainings from outside  
21 organizations, as well as Army SVC training  
22 courses, as well.

1           I'll begin with -- I'll try not to  
2 belabor the point, because as we've gone through  
3 today, we have heard a lot about the various  
4 shortcomings of the numerous compensation  
5 programs that are available to different victims  
6 throughout the Military Justice process. I think  
7 it was Congressman Holtzman that pointed out that  
8 early on this morning she said that the military  
9 has a disparate number of programs available to  
10 victims, however, they're -- these programs don't  
11 work in coordination with each other, and it's  
12 left to the victim to seek out these various  
13 programs through various people, and various  
14 organizations.

15           So, I'd like to talk about the various  
16 compensation and restitution forms that we have  
17 within the military. I won't go into detail,  
18 because we have discussed those at length today,  
19 but I would like to point out the shortcomings  
20 that we've seen as victims legal counsel  
21 assisting victims through the Military Justice  
22 process.

1           To begin with, we'll start with  
2           restitution. Article 6b states that victims have  
3           the right to receive restitution as provided by  
4           law. However, the law, as applicable to the UCMJ,  
5           provides insufficient guidance to how that should  
6           be provided. The only limited opportunities that  
7           victims have to request restitution within our  
8           system is either during the pretrial agreement  
9           negotiations per Rules for Court-martial 705, and  
10          as well as during the post-trial clemency phase.

11           The problems with that is that  
12          although the victim can express their views as to  
13          the disposition to the convening authority, and  
14          ask for restitution, it's still left up to the  
15          convening authority whether to provide that as  
16          either a term for a pretrial agreement, or as a  
17          term for clemency for the accused.

18           An issue that we have come across is  
19          that the guidance that has been put out to our  
20          prosecutors is that the convening authority shall  
21          be informed of the views of the victim with  
22          regards to pretrial agreements. That sometimes

1 gets translated into the victim or VLC is not  
2 advised of the terms of the pretrial agreement  
3 until sometimes even after it's been signed, but  
4 usually during a period of when the pretrial  
5 agreement has been either discussed with the  
6 trial counsel, and the SJA with the convening  
7 authority, and some decision has already been  
8 made, and somewhat of an afterthought, what does  
9 the victim think of this? So, sometimes as a VLC  
10 assisting a victim we're not able to fully  
11 appreciate all the terms of the pretrial  
12 agreement to be able to fully inform them of  
13 what's available to them, and express desires for  
14 restitution to be included in the pretrial  
15 agreement.

16 Also, if the convening authorities do  
17 decide that restitution is appropriate, we don't  
18 have any guidance to establish any sort of  
19 monetary value or give the commander the guidance  
20 as to what's an appropriate amount of  
21 restitution, based on all the factors that we've  
22 talked about today, not just what it takes to

1 make the victim whole again, but also all of the  
2 other punishments that are available to bring  
3 justice to the accused.

4 Furthermore, without the rules  
5 explicitly incorporating restitution into the  
6 Military Justice process, it's unclear whether  
7 restitution is a civil remedy, in which case  
8 military judges are forbidden from adjudging  
9 civil remedies under RCM 201 which includes the  
10 payment of damages, so it's really unclear right  
11 now whether based on the rules that we have, the  
12 judge has the authority, the military judge has  
13 the authority to order restitution based on the  
14 pretrial agreement, because RCM 201 doesn't  
15 address forms of restitution as the result of  
16 criminal conduct.

17 Moving on to compensation, one form of  
18 compensation that's providing the most support  
19 that we see to victims is transitional  
20 compensation. Although it does provide valuable  
21 compensation to victims, there are some  
22 shortcomings with transitional compensation that

1 we've encountered. It's only for dependents who  
2 are the victims of crimes from their sponsors, so  
3 simply a dependent who is a victim of a sexual  
4 assault, if it's not a sexual assault of their  
5 dependent, excuse me, if it's not a sexual  
6 assault committed by their sponsor, then they're  
7 not eligible for transitional compensation.

8           It's only triggered if the sponsor is  
9 either convicted at a court-martial, or is  
10 administratively separated. We have seen  
11 occasions where -- and I think it was brought up  
12 earlier, as well, that an accused may receive  
13 non-judicial punishment, Article 15 punishment  
14 and not be separated. And that leaves the  
15 dependent with the inability to apply for  
16 transitional compensation, because they are not  
17 separated, the sponsor is not separated.

18           The compensation is only for a limited  
19 time period between 12 and 36 months. Now, it's  
20 up to 36 months, and that's dependent on whether  
21 the sponsor had that much time left on their  
22 contract, so that's not the general case. We

1 typically see more in the range of about 12 to 24  
2 months of compensation being provided to  
3 dependents, so it is not a long-term  
4 compensation. It's only short term, and sometimes  
5 12 months may not be enough time for victims to  
6 be able to get back on their feet, based on the  
7 life that they were living prior to the crime  
8 committed against them.

9           The process is cumbersome. We  
10 generally see it taking about three months. I  
11 heard from a Victims' legal counsel today that  
12 they're still waiting six months on for a  
13 transitional compensation application to be  
14 approved, so it does take time. And during that  
15 time, what we've seen is to begin with,  
16 compensation at the early stages is what's most  
17 important to the victims, especially in domestic  
18 assaults, or domestic sexual assault cases.

19           The immediate concerns are either  
20 movement for safety, movement to just get away  
21 from the offender, and all of the costs  
22 associated with that, setting up a new house or a

1 new apartment, security deposits, things like  
2 that. So, immediate compensation is what we found  
3 to be the most critical for victims going forward  
4 through either the Courts-Martial process or  
5 administrative separations process.

6 We've also discussed an Article 139  
7 claim throughout the morning and today. It's  
8 another process that allows for compensation for  
9 stolen or damaged property that I think everybody  
10 has said that as it is now, it's only for damaged  
11 or stolen property. And in most of the sexual  
12 assault cases that is not really an issue, so it  
13 does not really pertain to most of the victims  
14 that we see, or that we assist.

15 We have actually within the Marine  
16 Corps VLC organization had some experience with  
17 doing an Article 139 claim. However, during the  
18 period of after a panel was empaneled by the  
19 Commanding Officer, it was determined to be  
20 damages that were suffered by the victim, and  
21 that the offender was responsible, during that  
22 time period the offender was released from active

1 duty. Once they're released from active duty, the  
2 Marine Corps no longer has control over them to  
3 garnish any wages, so the experience that we have  
4 with that is that during the time that it took to  
5 conduct the Article 139, the offender was  
6 released from active duty.

7 Based on our Service regulations, the  
8 claim must be submitted within 90 days, and we've  
9 heard how that creates problems, not only do we  
10 have delayed reporting, but we also have heard  
11 problems about how that could potentially impact  
12 the investigation and possible prosecution later  
13 on. I will just reiterate that we see that as a  
14 problem, as well, with the Victims' Legal  
15 Counsel.

16 And lastly, this provision does not  
17 assist victims with long-term injuries. It's  
18 simply for property damage, it does not include  
19 physical injuries, emotional distress, pain and  
20 suffering, the loss of consortium. It's simply a  
21 redress for damage of property.

22 Other provisions that could be seen as

1 providing compensation for victims, Article 58b,  
2 I think was brought up earlier, as well, to be  
3 able to waive automatic forfeitures, and the  
4 status of the dependent is not dependent on  
5 whether they're a victim or not. It's just  
6 whether they're a dependent, so we sometimes see  
7 this, and we sometimes don't. If the dependent is  
8 not a victim then, of course, the Victims' Legal  
9 Counsel will not see that issue.

10 But in cases where there's a domestic  
11 assault or domestic sexual assault, we have seen  
12 that and assisted victims with asking for the  
13 waiver of forfeitures to be given -- paid  
14 directly to the dependents. But as was also  
15 brought up earlier, it can only be up to,  
16 according to statute, six months, so again only a  
17 short-term form of compensation for dependents,  
18 and sometimes victims.

19 Another type of compensation available  
20 to victims is compensation for dependents who are  
21 victims of abuse by their sponsor who lost their  
22 rights to retirement pay. We have not had any

1 experience in assisting victims with this because  
2 generally speaking our victims are between the  
3 ranks of E1 and E4, and aren't at that stage to  
4 where -- I'm sorry, our offenders are typically  
5 between the ranks of E1 and E4, and aren't in the  
6 eligibility for retirement stage, so the majority  
7 of the victims that we see, this does not even  
8 pertain to them, so that's a very rare instance  
9 that we don't have any experience with at this  
10 point.

11 We've discussed state compensation  
12 funds, another option for crime victims, but a  
13 major drawback with this option is that victims  
14 have to rely upon cooperation from the Commands  
15 or law enforcement agencies to assist them in  
16 providing documentation or proof, whether it be  
17 letters from NCIS saying that yes, there is an  
18 ongoing investigation, proof to the state  
19 compensation funds to show that they are, in  
20 fact, cooperating with law enforcement in the  
21 Military Justice process.

22 And sometimes if Commands aren't

1 necessarily on board with going forward, there  
2 might be some push back with that, and  
3 unwillingness to provide that, as well. So, it's  
4 not just the victim going out and seeking  
5 assistance from the state compensation funds,  
6 they also need NCIS, in our case, to confirm that  
7 yes, they are, in fact, cooperating with law  
8 enforcement to be able to remain eligible for the  
9 compensation.

10           So in short, we currently have very  
11 limited and insufficient options to assist  
12 victims with restitution and compensation. The  
13 victim is required to request assistance from  
14 various organizations often requiring her to  
15 provide proof of harm, or cooperation with law  
16 enforcement, and they usually do not see the  
17 compensation for months, which doesn't address  
18 their immediate needs.

19           So, how does the military address  
20 those? I think one of the issues that has been  
21 brought up today was the -- I think the best way,  
22 because we see disparate forms of compensation

1 that the best way to truly take care of the  
2 victims is to provide one source, one -- the  
3 easiest way for them to get plugged into the  
4 system. That we see as being a compensation fund  
5 administered by the Department of Defense to be  
6 able to tap into -- or that the victims would be  
7 able to tap into to be able to assist them  
8 through the court-martial process.

9           If not able to do that, then we'd  
10 certainly agree with the recommendations for  
11 amending the UCMJ to specifically permit military  
12 judges to award restitution as a form of  
13 punishment through the forfeited wages of  
14 incarcerated Service members. Also agree that  
15 Article 139, UCMJ should be amended to include  
16 bodily harm. I'd even go further to include other  
17 types of damages, such as loss of wages, loss of  
18 household support, for instance. And there also  
19 needs to be clear guidelines established to  
20 calculate the correct amount of restitution in  
21 cases of sexual assault and other related  
22 offenses similar to 18 U.S.C. 3663A.

1 I would also propose additional  
2 changes such as allowing a victim to request  
3 advanced pay similar to what Service members do  
4 in say a permanent change of station move. They  
5 are allowed to request advance pay or advance  
6 travel pay. In that sort of same manner, a victim  
7 would be able -- a victim who is a dependent,  
8 much like the situational TRANSCOM, the victim  
9 dependent would be able to request advance pay  
10 against the Service member sponsor.

11 That doesn't exactly come out of their  
12 pay automatically, but then could be later on,  
13 whether it be deemed to be through restitution or  
14 other forms of compensation, be able to be either  
15 repaid through the garnishment of the sponsor's  
16 pay, if it was determined to be that they were  
17 harmed by the sponsor, or through the DOD-  
18 administered compensation fund, for instance. So,  
19 would consider -- would recommend that for  
20 consideration, as well.

21 And then, finally, another  
22 consideration is to allow the restitution -- for

1 restitution - even the offender is convicted of  
2 other crimes. I think Mr. Stone brought up the  
3 point about we have seen where an offender is  
4 charged with sexual assault, but also charged  
5 with adultery or fraternization, being found  
6 guilty of adultery or fraternization, but not  
7 guilty of the sexual assault. Having provisions  
8 that would still allow for some form of  
9 restitution or compensation even though it could  
10 be argued that they are no longer victims based  
11 on what the offender was found guilty of.

12 So, in closing, changes to restitution  
13 and compensation will certainly benefit victims  
14 in sexual assaults, but I think as Ms. Howley  
15 pointed out, that it will also -- it's just as  
16 important to move the Military Justice system to  
17 a more victim centric system, justice system,  
18 which I believe is equally as important as  
19 providing compensation to the victims. So, thank  
20 you, Madam Chair, and distinguished panel  
21 members. I look forward to your questions.

22 JUDGE JONES: Thank you very much,

1 Major. Now we turn to Major Payne.

2 MAJ. PAYNE: Thank you, ma'am. Members  
3 of the Panel, thank you so much for having me  
4 here today. My name is Major Mary Ellen Payne,  
5 and I've been an Air Force JAG for eight years.  
6 For the first four years of my career, I served  
7 at the Base Legal Office level where I had a  
8 variety of jobs, one of which included  
9 prosecuting courts-martial.

10 After that, I went to Korea and I  
11 served as the defense counsel there at Osan Air  
12 Base. I then went to Okinawa, Japan, and I served  
13 as a senior trial counsel, and in that job I  
14 only, or I solely prosecuted courts-martial. And  
15 I would travel around, mostly within the Pacific,  
16 to the different air bases there, and I would sit  
17 as the first chair prosecutor on cases there. And  
18 in all of those assignments I prosecuted or  
19 defended sexual assault cases as part of the  
20 cases that would come up, or would come to court-  
21 martial.

22 For the past eight months, I have been

1 serving as an Appellate Government Counsel at  
2 Joint Base Andrews here in the National Capital  
3 Region, and as part of that job, I read a lot of  
4 records of trial. I handle appeals in front of  
5 the Air Force Court of Criminal Appeals and the  
6 Court of Appeals for the Armed Forces. And,  
7 naturally, a lot of those cases that I'm handling  
8 on appeal are sexual assault cases where the  
9 accused was, in fact, convicted.

10 So, today I would just like to touch  
11 briefly on a few challenges from a trial  
12 practitioner perspective that I see with  
13 implementing a program of military, or a program  
14 in the military for victim restitution. And my  
15 first point that I'd like to talk about, I think  
16 Ms. Scalzo touched on it a little bit.

17 When as a trial practitioner I'm  
18 approaching any type of issue, I always think  
19 well, is this going to make it easier, or is it  
20 going to make it harder for me to prosecute a  
21 particular case? And so my immediate concern when  
22 thinking about a victim restitution program is,

1 is there a potential that this program could be  
2 used against a victim at trial?

3 And I feel as a prosecutor for the  
4 past two years before this, I felt as if I was  
5 constantly fighting against a pervasive  
6 stereotype that women routinely fabricate sexual  
7 assault allegations. And, no doubt, I envision  
8 that defense counsel will see a restitution  
9 program as fodder for impeachment at trial. The  
10 argument is going to become that a victim has a  
11 motivation to lie because she could possibly  
12 receive, he or she could possibly receive  
13 financial compensation from the accused.

14 I also worry in the realm of discovery  
15 that this could possibly open the flood gates. We  
16 have very liberal discovery in the military.  
17 Defense counsel are very creative as to what they  
18 can ask for in discovery, and military judges, at  
19 least in the Air Force, they can be very liberal  
20 in deciding in favor of allowing discovery. And  
21 my concern would be that if there is a victim  
22 restitution program that all of a sudden a

1 victim's financial circumstances could become an  
2 issue at trial, and could devolve into a mini  
3 trial as to what this victim's financial  
4 circumstances are.

5 I think that prosecutors would  
6 certainly have to be prepared for this reality, a  
7 restitution program becoming a tool for  
8 impeachment. They must be prepared for that, and  
9 they must develop strategies to combat against  
10 it. Now, my second point that I'd like to  
11 address is whether or not military panels would  
12 be the best institution for adjudging  
13 restitution. And I believe this was touched upon  
14 briefly in the panel before this.

15 Military panels are given very little  
16 guidance as far as adjudging sentences. A lot of  
17 times they're given a maximum punishment and it  
18 may be far greater than they may actually in  
19 reality consider adjudging. And a lot of them --  
20 in the Air Force, at least, we do not have  
21 standing panels, so a lot of our panel members  
22 will be sitting on a court-martial for the first

1 time, and they really just have no idea what is  
2 an appropriate punishment to adjudge.

3 And there are no sentencing  
4 guidelines, as I think was mentioned. There are  
5 not any mandatory minimums, except I think within  
6 the past year now certain offenses under the UCMJ  
7 require mandatory dishonorable discharge. But  
8 other than that, there really are not any other  
9 mandatory minimums that must be adjudged.

10 And from my experience, I just do not  
11 believe that the court-martials that I've seen  
12 have the knowledge or the information to adjudge  
13 -- to be able to adjudge sentences appropriately.  
14 And I would have a lot of concern with leaving  
15 this solely in the hands of a military panel who  
16 just probably do not have the breadth of  
17 experience or information to be able to make an  
18 informed decision.

19 I think from what I've seen of the  
20 verdicts that come back, or the sentences that  
21 come back, sometimes they're very low compared to  
22 what you would see in the state or the federal

1 systems. So, I think that the main reason for  
2 that is because of the fact that the military  
3 panels just don't have much of a guideline to go  
4 on, and we don't routinely sentence individuals,  
5 so I would ask that the Panel take this into  
6 consideration when you are making your decisions  
7 or you're providing your report.

8 And those were the two main points  
9 that I wanted to make. And thank you, again, for  
10 having me, and I'm happy to answer any questions  
11 that you might have.

12 JUDGE JONES: Thank you. Ms. Holtzman,  
13 did you want to ask some questions?

14 CHAIR HOLTZMAN: Just going to the  
15 point that was raised at the outset, the idea of  
16 a system other than a restitution system, more  
17 like a system for the World Trade Center, the  
18 9/11 victims. How would that -- what's your  
19 reaction to that idea, as a way of avoiding some  
20 of the problems you've raised that expanding  
21 restitution would cause?

22 And also as a vehicle for --

1 rationalizing might not be the right word, but  
2 for trying to locate all the various victim  
3 compensation programs in the military in one  
4 place, as well as dealing with the question of  
5 whether victims of military assaults who are  
6 civilians or dependents should be forced to  
7 resort to state compensation systems. What's your  
8 view of that?

9 MS. HOWLEY: I'll start with that.

10 This is Susan Howley.

11 The World Trade Center Fund and many  
12 of the other victim funds have gone to a -- like  
13 a lump sum payout based on the level of injury  
14 sustained. So they do certain classifications.  
15 If you sustained a broken leg versus a death  
16 versus mental trauma, and don't look specifically  
17 at what were the out-of-pocket expenses.

18 So, it's a completely different way of  
19 looking at this. It's appropriate especially  
20 where it can be very difficult to determine  
21 someone's total losses.

22 The World Trade Center Fund, the 9/11

1 Fund, was really designed to be a substitute for  
2 the tort system. And, in fact, it was because if  
3 you went to that fund you were prohibited from  
4 suing the World Trade Center or the airlines. It  
5 was, you can have this substantially similar  
6 civil recovery if you won't exercise that civil  
7 recovery.

8 I don't think we can afford that type  
9 of blanket system. It would be worth looking  
10 into, but that was extraordinarily expensive. I  
11 don't think we need to go that far in designing a  
12 system here that can adequately meet the needs of  
13 victims and avoid the pitfalls that currently  
14 exist.

15 CHAIR HOLTZMAN: Anybody else have any

16 --

17 MS. HOWLEY: I have to say, though, I  
18 have -- you know, you may want to assign a  
19 smaller group to really examine whether that  
20 would work in this context. My gut reaction is  
21 you wouldn't need to go that far.

22 Bridgette, what do you think?

1 JUDGE JONES: Yes, Ms. Harwood?

2 MS. HARWOOD: Yes. I don't want to  
3 get too tangential, but I think this is kind of  
4 going back to the one-stop shop suggestion that's  
5 been made, and I cannot overemphasize how  
6 important it is for survivors to have access to  
7 compensation programs and the right to request  
8 restitution, both of those.

9 I sort of cringe when I hear people  
10 saying, oh, but it's not really enforceable and  
11 the number of people actually get it has gone  
12 down since MVRA because what we anecdotally know  
13 --- and NCVLI, who you received materials, from  
14 has a really great article on poly-victimization.

15 And what we know about those victims  
16 who have engaged the criminal justice system  
17 multiple times is that more often than not, the  
18 single factor they use to really articulate how  
19 they felt they were treated throughout the system  
20 is not the conviction, is not the outcome, is not  
21 the payment of restitution, it was the right to  
22 participate.

1           And I don't think that we've had  
2           enough dialogue today about sometimes it's not  
3           actually about the money, I know that sounds  
4           counterintuitive, but often it's actually about  
5           the ability to have a voice in that process. So  
6           when I heard Major Collinger -- if I'm saying  
7           that right, saying sometimes we're not even  
8           learning about these pretrial agreements until  
9           later on. To me, that's the revictimization to  
10          the victim.

11           Whether or not they get that money or  
12          not in a restitution order, they may actually be  
13          able to seek some funds through compensation  
14          whether it's a state program or a military  
15          program and be okay with that, but they're  
16          stripped of the right to ask for it, and that's  
17          why restitution is important, even if you have  
18          this wonderful, wonderful one-stop compensation  
19          process, it's really about the act of  
20          participating and I don't want to lose sight of  
21          that today.

22           CHAIR HOLTZMAN: Let me just add that

1 we've been focusing on that for quite some time,  
2 both in this panel and in other panels, the right  
3 of victims to be heard. This is just a more  
4 narrow focus on how we can listen to their  
5 concerns with regard to restitution. So don't  
6 think we haven't taken that seriously, that's all  
7 I'm trying to say.

8 MS. HARWOOD: I don't, I just had to  
9 say that. I'm sorry.

10 MAJ. CLONINGER: Ma'am, if I could.  
11 This is Major Cloninger.

12 JUDGE JONES: Major.

13 MAJ. CLONINGER: To add to that, the  
14 issue that we have with the different  
15 compensation programs in the military right now  
16 is all -- each of those programs are determined  
17 by the status of the victim, whether they're a  
18 dependent, or whether they're active duty, or  
19 whether they're a civilian.

20 With a fund to -- for all victims  
21 regardless of their status of whether they're  
22 active duty or whether they're civilians, if

1 they're a victim within the military justice  
2 system, have a place to go to and be treated  
3 equally regardless of their status is something  
4 that's very important because not only on the  
5 outset are their statuses different, but also  
6 during the course of the court-martial process  
7 their statuses may change, and quite often do.

8 We have a number of active duty  
9 victims who ETSSs either simply because of the end  
10 of their contract or they get out early because  
11 they want to get away from the military. So once  
12 they leave active duty, then their ability to  
13 receive compensation for additional mental health  
14 or medical expenses changes, and there was some  
15 talk about whether the VA would cover that or  
16 not, or whether that falls under military sexual  
17 trauma.

18 Those are two completely separate  
19 issues, and if they are to receive long-term VA  
20 care they still have to have a showing that this  
21 was Service-related, that these injuries  
22 requiring this care are Service-related. Unlike

1 military sexual trauma where they can go to  
2 counselors and just by simply saying, I was a  
3 victim of sexual assault, receive counseling.  
4 That's only, again, a short-term counseling  
5 benefit to them.

6 But the point is that the statuses  
7 change, and so that can be alleviated by one fund  
8 if you were to be able to administer that and  
9 track, and have a single place for victims to be  
10 able to apply for various compensations.

11 JUDGE JONES: Ms. Scalzo --- oh, I'm  
12 sorry.

13 MAJ. CLONINGER: And not to be  
14 dependent on outcomes of court-martials.

15 Certainly, compensation and  
16 restitution go hand in hand, but as I've seen, as  
17 what I stated, the immediate financial needs of  
18 the victims are what we typically experience  
19 with. So I am somewhat focused towards the  
20 compensation piece, but that said, restitution  
21 goes hand in hand with that and is just as  
22 important.

1 JUDGE JONES: Ms. Scalzo.

2 MS. SCALZO: Ma'am, my suggestion was  
3 similar to that only if we had a military crime  
4 victim compensation fund, perhaps under VOCA, we  
5 would pay out-of-pocket expenses by the lump sum  
6 payment, then we wouldn't have to learn the rules  
7 of 50 different states.

8 We would also be able to craft rules  
9 recognizing the reality of sexual assault, which  
10 is that many are not reported within 48 hours, or  
11 five days, or whatever the requirements of the  
12 states might be. We could also cover overseas  
13 victims.

14 JUDGE JONES: I'm sorry?

15 MS. SCALZO: We also be able to avoid  
16 the problem of whether a particular state covers  
17 overseas victimization or not.

18 JUDGE JONES: So this would be for all  
19 victims.

20 MS. SCALZO: All victims.

21 JUDGE JONES: And it would be out-of-  
22 pocket expenses.

1 MS. SCALZO: Yes, ma'am.

2 JUDGE JONES: Liz, do you have another  
3 question?

4 CHAIR HOLTZMAN: No, I think this is  
5 a biggie so I'm fine.

6 JUDGE JONES: Can I take everybody  
7 back to Article 139 for a minute.

8 Is it worth adding bodily injury to  
9 139 or not? I hear that it's dual  
10 investigations. You've got to get a resolution -  
11 - or you have to make your report in 90 days, I  
12 guess. I just want to know what anybody really --  
13 or not really, what do you think about 139? Is  
14 it worth adding it, or not? Colonel?

15 COL. MULLIGAN: Ma'am, I've actually  
16 filed a 139, very simple process. 139 was really  
17 designed for good order and discipline.

18 Private Mulligan goes in and smashes  
19 the television of Private Brown. Private Brown  
20 can go to small claims court and sue his buddy  
21 and wait to get the TV fixed, or he can go file a  
22 139 and have the Commander quickly convene a

1 board, and it goes quickly.

2 JUDGE JONES: I understand it  
3 completely, its utility in property cases.

4 COL. MULLIGAN: So I think to add  
5 bodily injury is to make it do something it was  
6 never designed to do. It adds a level of  
7 complexity to it, it is not administered by  
8 lawyers, it's administered by Commanders. I  
9 think it's the wrong place to look. I do not  
10 think 139 expanding bodily injury is a good idea.

11 JUDGE JONES: Okay.

12 MR. STONE: What do you want us to do?  
13 What would you suggest, a new Article? 139a?

14 COL. MULLIGAN: I don't think the UCMJ  
15 is civil court. I don't think that's where we  
16 should be adjudicating bodily injury.

17 JUDGE JONES: Or at least not under  
18 139 administratively.

19 COL. MULLIGAN: Correct.

20 JUDGE JONES: So let me ask the next  
21 question, and maybe this will get to I think what  
22 we're all wondering.

1           So is there any utility in giving the  
2 convening authority guidance on what restitution  
3 is, so that at some point a military judge --  
4 well, I guess first and foremost, the convening  
5 authority will know better what he's ordering, if  
6 he ever does order restitution, and/or guidance  
7 for a military judge at the conclusion of a  
8 courts-martial. I mean, that one also seems a  
9 bit complicated to me.

10           I mean, right now I don't -- it  
11 doesn't sound like convening authorities are  
12 ordering restitution. Is that fair?

13           COL. MULLIGAN: Ma'am, my experience  
14 is that restitution is something the defense  
15 counsel comes forward and offers to pay,  
16 attempting to negotiate a better deal.

17           JUDGE JONES: Right.

18           COL. MULLIGAN: Or puts it into a  
19 pretrial agreement that can then be enforced, but  
20 restitution is not something that we really want  
21 to give to the convening authority to try and  
22 figure out.

1                   JUDGE JONES: That sounds good to me.  
2                   Okay, so 139 isn't going to work, and is there --  
3                   - where do you see, if anywhere, a discussion  
4                   going with respect to military judges?

5                   Forget the panels, I think there are  
6                   a lot of problems because of timing if nothing  
7                   else in panels once they've reached a verdict,  
8                   then trying to be presented with the evidence so  
9                   that they can decide restitution. Is there any  
10                  utility in having restitution -- I mean, is  
11                  restitution really on the books as a remedy here  
12                  at the conclusion of a court-martial?

13                  COL. MULLIGAN: Ma'am, I've never seen  
14                  it.

15                  JUDGE JONES: Okay.

16                  COL. MULLIGAN: I've been on active  
17                  duty for 26 years. I've prosecuted cases from  
18                  larceny to capital murder, I've never seen  
19                  restitution.

20                  JUDGE JONES: All right, then I think  
21                  we're back to if we have -- I mean, the idea of  
22                  having one fund that takes care of all victims

1 has a great deal of appeal under these  
2 circumstances.

3 I don't know what the other  
4 alternatives are, if it's not 139, or trying to  
5 encourage convening authorities to order more  
6 restitution. Mr. Taylor, you're always wise.

7 MR. TAYLOR: Well, I do have -- thank  
8 you for that compliment, not many people say  
9 that. I did have a question.

10 Since the consensus seems to be moving  
11 in the direction of this one fund idea and that  
12 is, for those who would, proposed that or  
13 suggested that as an alternative, are you  
14 thinking of this as something like the SWAN  
15 proposal, that this would be like a workman's  
16 compensation? Or is this something that the  
17 judge would still order and yet it be paid by  
18 another source, so you don't have to worry about  
19 enforceability that you pointed out, Ms. Howley,  
20 earlier?

21 So for those of you who have talked  
22 about this, talk about how you envision it might

1 work. Ms. Scalzo?

2 MS. SCALZO: Yes, sir. I would  
3 envision it would work like a state victim  
4 compensation fund, and we'd have to take a look  
5 at the states, and perhaps my colleagues would  
6 have a better suggestion of which state we might  
7 want to emulate. It sounded like Vermont really  
8 had a nice program.

9 But I would model it after that where  
10 it was staffed with perhaps civilians because  
11 it's pretty complicated to figure out how do you  
12 give restitution -- or not, sorry, restitution,  
13 give compensation in a particular case.

14 JUDGE JONES: Yes, because there  
15 really isn't -- we're not really talking about  
16 restitution.

17 MS. SCALZO: Right, correct. Right,  
18 right.

19 JUDGE JONES: And this is not court  
20 ordered, it's --- so it's really compensation.

21 MS. SCALZO: It would be like  
22 compensation. A victim would submit a request.

1                   JUDGE JONES: Does that sound right to  
2 you, Ms. Howley?

3                   MS. HOWLEY: One of the things that  
4 you'd have to distinguish is unlike state victim  
5 compensation programs, if you are trying to use  
6 this fund to substitute for what a victim might  
7 get at restitution, as well as compensation, then  
8 you need to look open ended at each possible  
9 expense and look not at, you know, will award up  
10 to \$3,000 for mental health, but instead are  
11 these mental health expenses related to the  
12 crime?

13                   And I think that would be fairly easy  
14 to determine, but you would not want to go to the  
15 same system that states have of caps and sub-  
16 caps. The net result will not be that much  
17 different because in looking at the total amount  
18 that victims are currently claiming in most  
19 restitution cases, or in most compensation cases,  
20 it's actually fairly low.

21                   We only have a relatively small  
22 proportion of cases with very high claims of out-

1 of-pocket expenses, whether that be for --

2 JUDGE JONES: Probably all my lack of  
3 understanding here, but are we talking about --  
4 or you explain to me, can you get -- obviously,  
5 everybody agrees you should be able to get  
6 reimbursed, if you want to call it that, for all  
7 of your damages to the point in time where you  
8 make your claim.

9 Now, when you come in you may be --  
10 you may suffer future losses. Are we -- is that  
11 what you're also including in your scheme?

12 MS. HOWLEY: I wasn't addressing that,  
13 but that is one of the beauties that this one-  
14 stop shop, one-stop fund, could take care of.

15 Rather than requiring a court to at  
16 this given point in time figure out what the  
17 likely future counseling costs are going to be,  
18 or likely future lost income, you could  
19 periodically revisit or allow a victim to come  
20 back. You could award what's reasonably  
21 foreseeable for the next year or so, and then  
22 submit an additional claim.

1           The way that the most generous states  
2 do, for example, with victim -- with compensation  
3 for mental health treatment, is they might easily  
4 award ten sessions of counseling and after that  
5 the therapist files something to indicate the  
6 need for additional expenses. So I can see  
7 something like that working in this fund.

8           JUDGE JONES: Yes, Ms. Harwood?

9           MS. HARWOOD: If we're talking about  
10 sort of marrying the purpose of restitution and  
11 the purpose of compensation through what you  
12 called reimbursement, full reimbursement, this  
13 pool to pool funding form, can be really  
14 powerful, right, in avoiding the state  
15 compensation caps, all these things.

16           The other side to that -- and to take  
17 a very unpopular position, I'll just own that  
18 right now --

19           JUDGE JONES: I can't wait to hear it.

20           MS. HARWOOD: -- is that we know when  
21 you look at empowerment-based models what we ---  
22 like the NVRDC, it's not always efficiency that's

1 important, it's options.

2                   And that's why I'm going to  
3 stick to my original suggestion that we should  
4 broaden 139 because if a survivor says for  
5 whatever reason, I don't care if this complicates  
6 an investigation, this is the avenue I want to  
7 take, that's the option they should have.

8                   And it's the same with -- and I'm not  
9 going to take the position on whether the judge  
10 or the authority -- I don't understand enough  
11 about the complexities there, but I think having  
12 some sort of mechanism outside of that pretrial  
13 agreement to also have restitution ordered  
14 directly from that individual offender.

15                   In stripping that --- the ability for  
16 the victim to seek that, because we think --- we  
17 make a lot of assumptions saying, we think it's  
18 better to have a one-stop shop, I think would be  
19 really dangerous in assuming we know what  
20 survivors want and what options they want to  
21 take.

22                   JUDGE JONES: Okay.

1 MAJ. CLONINGER: Ma'am, if I could,  
2 but don't discount restitution. Victims still  
3 have the ability to make choices within the  
4 court-martial process, much like the Article 139  
5 claim, when it comes to whether or not to ask for  
6 restitution or not. So as I said, restitution --  
7 -

8 JUDGE JONES: What you've -- you've  
9 given me an idea. So I suppose that even if we  
10 had a one-stop shop, if you want to call it that,  
11 that would not vitiate the ability for a  
12 commander to forfeit wages for those six months  
13 and have them paid directly to the fund or the  
14 victim, I guess.

15 Right now they go to the victim, if  
16 it's a dependent. Have I confused everybody?  
17 You're shaking your head, that's a good sign.  
18 Ms. Harwood, what are you thinking?

19 MS. HARWOOD: No, you're right. So  
20 right now that the forfeiture right is available  
21 for those dependents. I think it's well within  
22 what you're considering to say why isn't that

1 going to be expanded to all victims of sexual  
2 assault, and that is not going to be captured in  
3 this one-stop shop because that's a pool of  
4 money.

5 It's not directly being taken  
6 from the individual that's responsible, and  
7 that's the sense of justice I talked about in my  
8 testimony. And believe it or not, it actually  
9 matters to survivors in many cases where the  
10 money comes from, not that it comes.

11 JUDGE JONES: So leaving the provision  
12 for forfeiture in with the monies going to the  
13 victim and maybe expanding it to all victims  
14 would satisfy your concern.

15 And obviously, any monies received  
16 that way would be a factor when the person went  
17 to the fund, because they may have already been  
18 reimbursed. Ms. Scalzo, you look perplexed.

19 MS. SCALZO: It just seems a bit of a  
20 shell game to me, because the government is  
21 delaying the forfeiture of wages so --

22 JUDGE JONES: The government is?

1 MS. SCALZO: Delaying the forfeiture  
2 of wages in order to do that, and we would  
3 otherwise have just stopped paying them. So it's  
4 really just the government paying the victim. So  
5 if --

6 JUDGE JONES: Well, if they're paying  
7 at either end but it makes the victim feel better  
8 getting it directly --

9 MS. SCALZO: Well, if the victim -- if  
10 we're able to convince -- if the victims don't  
11 understand that it's not really the accused  
12 paying them, then perhaps --- and I would defer  
13 to my military colleagues on this, but I would  
14 guess that the victims would probably figure out  
15 that it really wasn't coming from the accused.  
16 And if I wanted the accused to -- if I wanted a  
17 pound of his flesh, I'd want restitution to come  
18 from the accused.

19 JUDGE JONES: Okay. That's a fair  
20 point.

21 MAJ. CLONINGER: But it's important to  
22 know, ma'am, that at this point in time we don't

1 have the ability to force that on the accused,  
2 that the judge does not have the ability to order  
3 restitution, or convening authority order  
4 restitution unless the accused agrees to that.  
5 So, that should be --

6 JUDGE JONES: I thought the accused  
7 had to ask for it in one instance, but that there  
8 was the authority to forfeit from the --

9 MAJ. CLONINGER: Well, that's if he's  
10 adjudged or if there's automatic forfeitures.

11 JUDGE JONES: Right.

12 MAJ. CLONINGER: So, he's already  
13 losing the money anyway.

14 JUDGE JONES: Right. Oh, no, no, I --  
15 - yes, I understand that, Major.

16 MAJ. CLONINGER: Okay. If you're  
17 going to -- I can -- rather than it go to the  
18 U.S. Treasury, I can direct it to your  
19 dependents.

20 JUDGE JONES: Well, I guess I'm --

21 MAJ. CLONINGER: But for restitution,  
22 we need the authority or the ability for the

1 military judge to have that as an appropriate  
2 punishment to be able to take an additional pound  
3 of flesh.

4 JUDGE JONES: Yes, I'm not -- I'm  
5 actually not opposed to restitution. I think I  
6 understand what Ms. Harwood's talking about and  
7 the needs of victims to feel that they are  
8 getting something from the defendant personally.

9 MS. HARWOOD: Right, and to the point  
10 of forfeited wages, I think that's important, but  
11 again I think from a victim's perspective it is -  
12 - the two-fold point you make about restitution  
13 both to make the survivor whole again, but also  
14 rehabilitation of the offender. Right?

15 And if the offender is getting some  
16 sort of consequence, right? Not that they're  
17 directly paying, but they're actually seeing some  
18 sort of consequence because this victim has  
19 sought the right to reimbursement. I think  
20 that's valuable, despite the nuances of who's --  
21 where the money is coming from.

22 JUDGE JONES: Well, I think, though,

1       like -- you'd end up at the end of the day with  
2       part of a sentence being restitution that  
3       wouldn't have anything to do with wages that were  
4       forfeited, and it might or might not have any  
5       value, but it would be an order. Is that what  
6       we're talking about here?

7               MR. TAYLOR: So, I'd like to follow up  
8       on the comment I made earlier and ask you this  
9       question, Ms. Howley. You mentioned that Vermont  
10      had this scheme by which you would have the  
11      victim receive payments from the state, but the  
12      payments would actually come from the person who  
13      had been convicted, if I understood what you  
14      said.

15             The state becomes a pass-through, this  
16      idea of restitution by proxy. So that then if  
17      the payments stop, it's not -- if the person  
18      ordered to make the payments refuses to make the  
19      payments, the victim will still get the payments.  
20      It's just that the state has the responsibility  
21      of doing the enforcement.

22             MS. HOWLEY: Right, but the --

1                   MR. TAYLOR: Which I would think you  
2 would be in favor of.

3                   MS. HOWLEY: Right. What's different  
4 in Vermont is that the victim is paid all at once  
5 by the state.

6                   MR. TAYLOR: A lump sum.

7                   MS. HOWLEY: Yes, and then over time  
8 the state takes on the burden of collecting from  
9 the defendant.

10                  MR. TAYLOR: Have any other states  
11 implemented a model somewhat similar to that to  
12 your knowledge?

13                  MS. HOWLEY: No, they have not. No.

14                  MR. STONE: Isn't every restitution  
15 order ordered as a condition of probation  
16 enforced that way in every state? When a judge  
17 orders restitution as a condition of probation,  
18 the probationer pays it to the probation office,  
19 not -- doesn't send a check to the victim, and  
20 the court passes it through.

21                  MS. HOWLEY: Right, or to the court,  
22 but there it's one payment at a time. That's the

1 difference.

2 MR. STONE: I mean, victims don't --  
3 as far as I know, victims don't want their home  
4 address going to their defendant.

5 MS. HOWLEY: In a few states the  
6 victim can have the payment made directly to  
7 them, but typically it does go through either the  
8 court clerk or the probation officer, or  
9 something like that.

10 The difference in Vermont is that in  
11 Vermont the victim gets all of their restitution  
12 right away and they don't have to wait to see if  
13 the defendant is going to pay the \$25 a month for  
14 the next 10 years.

15 MR. STONE: I understand that. I  
16 understand that.

17 MS. HOWLEY: Right.

18 MR. STONE: The vast majority of money  
19 that the Office of Victims of Crime is giving all  
20 these states in their compensation funds are  
21 coming from fines from large corporations in  
22 fraud cases.

1 MS. HOWLEY: Yes.

2 MR. STONE: So it is the money from  
3 the defendant, and it is ultimately going to the  
4 victims. I mean, you can call it a pass-through.

5 It's a little bit tortuous, but the  
6 victims are perfectly happy to get it from  
7 compensation funds without getting it directly  
8 from their victim, because I know some victims,  
9 the ones who could afford, paid it in.

10 MS. HOWLEY: Well, it is --

11 JUDGE JONES: Being defrauded is a  
12 little less personal a crime usually.

13 MR. STONE: No, no, no, but the fraud  
14 money isn't limited to new victims of frauds. It  
15 goes into the Office of Victims of Crime who can  
16 then distribute it for every kind of crime under  
17 the sun. That's where the states are getting the  
18 money from, multi-million dollar fraud  
19 settlements.

20 CHAIR HOLTZMAN: Can I ask a couple of  
21 questions here, please?

22 JUDGE JONES: Yes, Liz.

1           CHAIR HOLTZMAN: Number one, I want to  
2 know about -- because we're talking about  
3 enforcement here, to what extent are we talking  
4 about incarceration for the defendant? I'd like  
5 to know about that issue. And then there's a  
6 second issue, somebody said, I'm sorry because I  
7 don't have everybody's face --

8           (Telephonic interference.)

9           CHAIR HOLTZMAN: Can you hear me?

10          JUDGE JONES: Yes, go ahead.

11          CHAIR HOLTZMAN: Okay, and the second  
12 question has to do with a point that was raised  
13 earlier, that somehow the restitution is good for  
14 the defendant in some way because the defendant  
15 now faces the consequences of his act -- usually  
16 his, not her.

17                 What evidence is there for that  
18 statement? And what difference -- I mean, how  
19 has this led to rehabilitation in any way or  
20 greater sensitivity, or greater understanding on  
21 the part of the defendant that the defendant has  
22 to pay the victim restitution? Do we have any

1 evidence for that statement?

2 MS. HOWLEY: We don't have --

3 CHAIR HOLTZMAN: And then I'd like to  
4 know about the incarceration issue.

5 MS. HOWLEY: We don't have solid  
6 evidence that the payment of restitution is good  
7 for the defendant. We have a lot of anecdotal  
8 evidence from people who work with defendants,  
9 especially juveniles in programs where they can  
10 earn restitution and pay their -- they can earn  
11 money to pay their restitution.

12 There was one study out of  
13 Pennsylvania that indicated that defendants who  
14 paid their restitution were less likely to  
15 recidivate, and that did not hold true for  
16 defendants who paid their fines. So that  
17 indicated that something different was going on  
18 where a defendant is paying back, is undoing some  
19 of the harm that they did, but we don't have a  
20 solid evidence base, just a sense of the people  
21 who work with defendants and then that one little  
22 study.

1                   And then as far as incarceration --

2                   CHAIR HOLTZMAN:   And does that include  
3   violent crimes, or was that just property crimes  
4   in that study?

5                   MS. HOWLEY:   No, that was restitution  
6   across the board.

7                   CHAIR HOLTZMAN:   Okay, thank you.

8                   MS. HOWLEY:   And then with regard to  
9   incarceration, the only point that I was making  
10   was that sometimes having the threat of a short-  
11   term incarceration for a willful failure to pay  
12   restitution can be important.

13                   There are some restitution enforcement  
14   courts at the state level, especially in Arizona,  
15   where if a defendant is shown -- let's say  
16   they're getting their hair colored, or they have  
17   a hunting license, or they clearly have assets  
18   and yet they haven't paid diddly on their  
19   restitution order, the court can bring them and  
20   say if you don't make a -- I see you appear to  
21   have an ability to pay.   If you don't cut down  
22   that cable bill and make a payment in the next

1 month you're going to have to be -- have to go to  
2 jail for the weekend, and that's worked  
3 tremendously.

4 You certainly don't want to be in a  
5 position of incarcerating anyone who has an  
6 inability to pay, but it's different where people  
7 are flouting the court order.

8 MS. HARWOOD: And this is Bridgette  
9 Harwood, if I can just briefly speak to the first  
10 point you made on enforceability.

11 I implied some challenges in the  
12 civilian system in my testimony. I will tell you  
13 in the years I've been doing this, I have never,  
14 ever seen a defendant incarcerated or serve the  
15 remainder of their sentence because of their  
16 violation of probation because they weren't  
17 paying restitution ever. I have spent many, many  
18 hours advocating and persuading supervising  
19 agents, probation agents to file a violation of  
20 probation so that the court can address this  
21 issue, and that has somewhat been effective.

22 The reason I mention that, you guys

1 have this unique opportunity that I foresee based  
2 off of the way the military system is set up that  
3 enforcement of restitution would potentially be  
4 much easier than it is in the civilian context.

5 So we -- like I said, I've never seen  
6 incarceration for failure to pay. What I have  
7 seen is in a federal case I did out of Maryland,  
8 we were able to work in getting tax garnishments  
9 and we've done wage garnishments in Maryland, as  
10 well, but it can be -- it can really require that  
11 a victim has access to that legal assistance to  
12 file those requests.

13 JUDGE JONES: Yes, Colonel Mulligan.

14 COL. MULLIGAN: I'd respectfully  
15 disagree that it would be easy in the military  
16 because we don't have standing courts. The judge  
17 is finished when he authenticates the record.

18 So there is no probation -- I came  
19 from the state system in Oklahoma. I'm familiar  
20 with how probation and parole works, and we had a  
21 full time office of staff to track people for  
22 restitution and payment of court costs. I've

1 done those revocation hearings when they failed  
2 to pay, but we're talking about accused soldiers  
3 who on the 15th day of confinement lose all pay  
4 and allowances unless something happens. They're  
5 going to have an inability to pay.

6 JUDGE JONES: Right.

7 COL. MULLIGAN: And once they're  
8 released, there's no court to take them back to,  
9 to enforce.

10 JUDGE JONES: If you can find them.

11 COL. MULLIGAN: If you can find them.

12 MS. HARWOOD: If I can clarify --  
13 sorry, I feel like I'm stealing a lot of time  
14 here.

15 If I can clarify, it's in those unique  
16 circumstances when that person is going to remain  
17 in the military, right, that we talked about the  
18 Article 15 --- or I forget, but in those  
19 particular situations there is a unique ability  
20 to make sure enforcement happens, and I'm not  
21 talking about enforcement through probation. I'm  
22 just talking about enforcement of the payment

1 generally. I do think that the two concepts are  
2 very different.

3 JUDGE JONES: I think though, that  
4 when we're dealing with sexual assault, a sexual  
5 -- a finding of sexual assault against a member  
6 of the Services is going to end with that person  
7 being separated.

8 MS. HARWOOD: We would hope so, yes.

9 JUDGE JONES: So I don't think we're  
10 really looking at a situation where he's going to  
11 be able to be there to be monitored.

12 MS. HARWOOD: And just another point  
13 we hear all the time in civilian courts that the  
14 person no longer has an ability to pay, they're  
15 going to prison for a very long time, or jail,  
16 and we have successfully won the argument by  
17 saying, look, you cannot predict that this person  
18 won't get out, make earnings or win the lottery.

19 So I think it again makes a lot of  
20 assumptions that defendants will never have the  
21 ability to pay just because they've been released  
22 and they may not be working at this moment, or

1 they're going to be incarcerated.

2 MR. STONE: It's just that there's  
3 nobody to follow up on it in the military once  
4 they're out.

5 MS. HARWOOD: Sure.

6 MAJ. PAYNE: Ma'am, if --

7 JUDGE JONES: Oh yes, Major Payne?

8 MAJ. PAYNE: Yes, ma'am. Within the  
9 military now you do see on occasion sentences  
10 adjudged where the court-martial will adjudge a  
11 fine contingent upon confinement, and if it was  
12 worked into this -- if a concept of restitution  
13 was worked in as a potential sentence that could  
14 be adjudged, then there's a possibility that the  
15 restitution could be adjudged.

16 Whereas if they do not pay it, then  
17 they spend extra time in confinement. There are  
18 a lot of, I guess, practical things that you  
19 would have to work out.

20 MR. STONE: That's not going to work.  
21 The Supreme Court is not going to let you --we're  
22 not back to debtors' prison, so we're not going

1 to be able to keep people in who can't afford to  
2 pay. So, if you stop their salary, that's not  
3 going to be a workable solution.

4 MAJ. PAYNE: Well, sir, they do at  
5 this time -- I mean, when I was a defense counsel  
6 I had a client who was told pay this fine, and if  
7 you don't pay, and there was a certain date by  
8 which he had to pay, you will be spending an  
9 extra year in confinement.

10 So I don't know if it's a perfect  
11 solution to somehow -- I guess to somehow try to  
12 do restitution that way as well. You will pay  
13 this certain amount or else you will go to --

14 MR. STONE: I think we're trying to  
15 look for a broader solution that'll handle 99  
16 percent of the cases, not the few that might fit  
17 into some narrow exception.

18 So I'm frankly persuaded that payment  
19 early that comes from a fund that the military  
20 has -- whether it's like Vermont or anybody  
21 else's, or the federal government's, that the  
22 military worries about keeping going by taking

1 fines from convicted defendants. Or anybody  
2 who's lucky enough to stay in and still have a  
3 salary, as small as that is. Or gets a job in  
4 prison just like the Bureau of Prisons currently  
5 now has a financial responsibility policy, and  
6 they get not very much, but they get a little bit  
7 of money from the person's prison salary.

8 That should be the restitution or  
9 compensation program's problem and not the  
10 victim's, and not the military judge who's no  
11 longer assigned to the case, you know, or the  
12 Judge Advocate General's. It seems to me we can  
13 handle that problem and solve a lot of these  
14 problems.

15 So I think we're looking for a broader  
16 solution that covers sexual assault cases, but  
17 maybe some others as well.

18 MAJ. CLONINGER: Ma'am, if I may also  
19 add. Another potential small way of enforcing  
20 that is whenever anyone is confined automatically  
21 they get five days off for every 30 days for good  
22 time. So automatically their release date is

1 recalculated, and make that good time contingent  
2 on repayment of the restitution. If they don't  
3 pay the restitution, then they have to serve out  
4 the full sentence.

5 And, of course, then once they are  
6 separated the military loses the ability and  
7 control to enforce that at that point, but would  
8 still at least be some time to be able to put the  
9 screws to him, if you will.

10 MR. STONE: Well, I don't think the  
11 Bureau of Prisons or the prison authorities  
12 generally would be too happy with losing what  
13 they consider to be a disciplinary measure that  
14 they have to keep good order in their prisons,  
15 but I do know that if you violate -- and they  
16 have a whole laundry list in the CFRs of prison  
17 violations, yes, one possible punishment,  
18 depending on the level, is good time. Although  
19 that's a fairly severe punishment.

20 And I'm sure failure to make -- to  
21 follow the financial responsibility program that  
22 the prisons have must be a violation, but that

1 depends on you having a job and you earning more  
2 than, you know, a dollar a week. It depends,  
3 you'd have to have a job that earns, you know, a  
4 couple of dozen dollars a week, and then they  
5 have a 25 percent limit.

6 It's a lot more complicated than that,  
7 but prisons use the deduction for good time for  
8 their own internal purposes. That's why they  
9 fight for it so they can control their inmates,  
10 and I don't think they would be too happy losing  
11 that -- one of their few measures of control.

12 JUDGE JONES: Ms. Scalzo.

13 MS. SCALZO: With the new rules  
14 requiring that all rape, sexual assault, and  
15 sodomy charges be handled at no lower form than a  
16 general court-martial, and upon conviction are  
17 required to kick those folks out, either  
18 dishonorable discharge or dismissal, we'd have to  
19 rely on an entity other than the military to  
20 collect the money in the most serious of  
21 offenses.

22 It sounds as though some of what's

1 being talked about is assuming that we're having  
2 something other than a conviction, and in my  
3 experience other than in a civil court, I don't  
4 know how you would order restitution except upon  
5 a conviction.

6 JUDGE JONES: That's when it would  
7 have to be ordered if it's restitution.

8 MS. SCALZO: Right, so -- and if we're  
9 convicting of rape, sodomy, or sexual assault,  
10 they're gone.

11 JUDGE JONES: Any other comments? Ms.  
12 Harwood, did you want to say something?

13 MS. HARWOOD: Well -- and this is out  
14 of ignorance. I would pose the question and in  
15 full disclosure knowing that I work within this  
16 field in a context where it's very, very common,  
17 in all the systems I've seen, to see the simple  
18 sweetheart plea, right?

19 From a sex 1, to what we have here in  
20 DC, a misdemeanor of sexual assault. Less than 3  
21 percent of these cases even get into a final  
22 trial because it's so common. Is that a common

1 practice?

2 That's a question I have that is sort  
3 of giving me pause in what I'm hearing, because  
4 if that -- okay, if you're saying no, then yes,  
5 some of this makes more sense, but if you are  
6 seeing these pretrial agreements that were  
7 mentioned earlier resulting in a less serious  
8 conviction in sexual assault cases, I think we  
9 have further discussion.

10 JUDGE JONES: Colonel Mulligan.

11 COL. MULLIGAN: I think as the guy  
12 wearing Eagles, I'm going to have to answer that  
13 question, but we don't see -- having practiced in  
14 the civilian world and then practiced in the  
15 military, the ability to strike a second page and  
16 take something from a felony to a misdemeanor,  
17 the ability to take something from sex assault  
18 down. The prosecutor really doesn't have that  
19 authority. Any deal is going to have to be  
20 accepted by the convening authority, and it's not  
21 been our practice.

22 MS. HARWOOD: So the pretrial

1 agreements typically are in respect to the  
2 original charges.

3 COL. MULLIGAN: Unless there's  
4 something you're coming in -- you have a problem  
5 with proof, you're going forward on the original  
6 charges preferred.

7 MR. STONE: It seems to me, based on  
8 what we just heard before, that restitution is  
9 what defense counsel offer to get a better deal,  
10 means to me that restitution is not serving the  
11 victim.

12 I'm not interested in a better deal  
13 for the defendant. I'm not even interested in  
14 what's easier and maybe makes it more likely for  
15 the prosecutor to get a conviction. It's -- the  
16 idea of restitution, if it's going to be there at  
17 all, is to help the victim. And that system as  
18 it currently stands is not -- was not designed to  
19 help the victim.

20 And that's maybe why we're looking at  
21 it, and those reflect Ms. Payne's comments about  
22 -- I mean, they show why this has to be looked at

1 because it doesn't integrate well now with  
2 current theories of what we would like to do for  
3 victims. It's, to me, pretty outdated if it's  
4 looking backward instead of forward.

5 Now, one of the questions that I had  
6 for Ms. Harwood is she wanted to know about is  
7 there a way to update the award later. Well, it  
8 seems to me if you call this restitution and it's  
9 handled by a military judge, you're going to have  
10 a double jeopardy problem. A judge sentences and  
11 that's the end of the sentence. I don't think  
12 you can go back to a judge who has sentenced and  
13 where there's been an appeal a year later and ask  
14 for more of anything.

15 I think you could do it if you have a  
16 fund that's administered somewhat separately from  
17 the criminal prosecution system and doesn't come  
18 out of the victim -- the defendant's pocket, but  
19 I think if it's tied to the defendant and it  
20 comes out of his case, the judge is actually  
21 gone, that court-martial has been dissolved, and  
22 I think the defendant would have a legitimate

1 double jeopardy complaint that, gee, I thought  
2 that's all I was getting punished back then.

3 So I don't know exactly how we do that  
4 other than with a fund.

5 MS. HARWOOD: Two things, don't  
6 interpret anything I'm saying to mean the fund is  
7 a bad idea. I just very, very strongly believe  
8 in it's the survivor's choice about what option  
9 they want to take. Whether that's a fund, or a  
10 request for restitution ordered by a judge, but  
11 to your second point.

12 In the Victim Witness Protection Act,  
13 there is actual language that says look, we're  
14 conscious of the fact that you might learn about  
15 a loss after this person has been sentenced. So  
16 within 60 days of discovering that loss come  
17 back, and if we can find good faith reason for  
18 why it wasn't included in the original request,  
19 we'll consider that and we can possibly amend the  
20 order, and that's not an illegal sentence.

21 So I think you have this incredible  
22 opportunity to construe the guidance that you've

1       been hearing needs to be created if you give the  
2       military judge authority to order this, to  
3       consider the practical challenges. What do we do  
4       when the judge is no longer available, like who  
5       does that go to? Who makes the decision to amend  
6       the order?

7               They're not impossible things, they're  
8       just things that we have to be intentional and  
9       thoughtful about when we develop the guidelines  
10      and the limits around the timeline and the  
11      availability for restitution, and even future  
12      restitution that wasn't vested at the time of  
13      sentencing.

14             JUDGE JONES: Well, I confess, I have  
15      to take a look at that. I was unaware that there  
16      is any kind of provision like that.

17             MS. HARWOOD: It's in 3664(d)(5), I  
18      believe you'll find the language.

19             MR. STONE: Yes, but those are talking  
20      about situations typically where it wasn't known  
21      and could not have reasonably --

22             MS. HARWOOD: Right.

1 MR. STONE: -- been discovered.

2 That's like a delay any time.

3 You can't bring a lawsuit if you  
4 didn't know about it, and there's at least a  
5 reasonable argument that you're going to get from  
6 the defendants that in a sexual assault situation  
7 you could ask the counselor right now, do you  
8 think this person is going to suffer future  
9 psychological damage and get a fair answer. So  
10 it's a little bit different.

11 MS. HARWOOD: I don't want to belabor  
12 the point, but I think my specific articulation  
13 about the late onset of PTSD -- typically an  
14 expert would say that if you haven't suffered  
15 symptoms within the first 30 days, that you're  
16 not going to suffer from PTSD, but now we're  
17 finding that 25 percent of these individuals are  
18 suffering symptoms 90 days out.

19 So why aren't we, in this specific  
20 context, where we know rape trauma syndrome is  
21 so, so common. Why wouldn't we consider, when  
22 developing guidelines around restitution, the

1 ability that the survivor may not reasonably  
2 foresee, based off of their diagnoses at the time  
3 of sentencing, that 90 days out they may now have  
4 PTSD that they didn't have at the time of  
5 sentencing?

6 I think there are really unique  
7 situations, again, that might be rare but  
8 important enough to consider.

9 JUDGE JONES: I think we're --

10 CHAIR HOLTZMAN: If I could just say

11 --

12 JUDGE JONES: Okay, go ahead, Liz.

13 CHAIR HOLTZMAN: I just wanted to say  
14 one thing. Your concern about the development of  
15 symptoms of PTSD are totally legitimate, but the  
16 problem is that you're trying to get a solution  
17 for it through a mechanism that is really not  
18 capable of giving you that kind of solution, or  
19 may not be.

20 And it's like putting a -- what's the  
21 cliché? A round peg in a square hole, or  
22 something like that. I mean, that's what we're

1 doing here. So my concern has been to try to  
2 maybe go back to tabula rasa, a clean situation,  
3 where we can say well, what kind of system will  
4 work best for sexual assault victims given  
5 particularly the fact that some of the injuries  
6 will not be manifest until much later? That's  
7 the only point I'd like to make.

8 JUDGE JONES: And I think one that's  
9 not tethered to the need for criminal  
10 conviction, a sentence, and then jurisdiction  
11 with a particular court is certainly going to be  
12 more flexible. I know it may not be what you'd  
13 like to define as restitution, though, Ms.  
14 Harwood.

15 MS. HARWOOD: Thank you.

16 JUDGE JONES: Okay. Anything else?  
17 Any other questions?

18 MR. TAYLOR: I would just like to add  
19 one comment. Thanks to all of you for a very  
20 thoughtful and helpful discussion, and  
21 specifically, Colonel Mulligan, congratulations  
22 to you for figuring out how to leverage all the

1 resources you did in the Fort Hood case.

2 I think the point is it will take us  
3 a long time really to come to some sort of  
4 solution about how this might work best, and in  
5 the meantime I hope that there are lessons  
6 learned from your experience that are being  
7 shared with the other Services so that while we  
8 are sorting out all the different options, people  
9 will be able to take advantage of the many places  
10 they can now go, albeit unsatisfactory perhaps,  
11 in toto in order to get the best possible outcome  
12 for victims.

13 COL. MULLIGAN: Thank you, sir.

14 JUDGE JONES: All right, thank you  
15 very much. We're adjourned.

16 (Whereupon, the above-entitled matter  
17 was adjourned at 4:37 p.m.)  
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In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 03-13-15

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*Neal R Gross*

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Court Reporter

**NEAL R. GROSS**

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