UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

PUBLIC MEETING

EXAMINING PROPOSED CHANGES TO
RESTITUTION AND COMPENSATION

AND

PREVENTION & RESPONSE TO RETALIATION
AGAINST VICTIMS OF SEXUAL ASSAULT CRIMES

THURSDAY
JUNE 18, 2015

The Panel met in The George Washington
University, School of Law, Faculty Conference
Center, 2000 H Street, N.W., Washington, D.C., at
9:00 a.m., Hon. Elizabeth Holtzman, Chair,
presiding.

PRESENT

Hon. Elizabeth Holtzman
Hon. Barbara Jones
Victor Stone
Tom Taylor
WITNESSES:

Overview of the Continuation of Care for Former Active-Duty Service Members and Family Members who are Victims of Sexual Assault

Ms. Mary Kaye Justis, Director, TRICARE Health Plan
Dr. Cara J. Krulewitch, CNM, Ph.D., FACNM, Director, Women's Health, Medical Ethics and Patient Advocacy, Clinical and Policy Programs, Office of the Secretary of Defense
Dr. Stacey Pollack, Ph.D., National Director of Program Policy Implementation, Veterans Health Administration
Ms. Diana M. Williard, Quality Assurance Officer, Compensation Service, Veterans Benefits Administration
Ms. Stephanie Li, Chief, Regulations and Policy Staff, Compensation Service, Veterans Benefits Administration

Review of Relevant Uniform Code of Military Justice Provisions, Fines, and Forfeitures and Further Deliberations on Restitution as an Authorized Punishment at Court-Martial

Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe
Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service
Developing a Department of Defense Uniform Crime Victim Compensation Program with Consultation from Claims System Experts

Mr. Kenneth R. Feinberg, Founder and Managing Partner, Feinberg Rozen, LLP (by telephone)
Mr. R. Peter Masterton, Chief, European Tort Claims Division, U.S. Army Claims Service Europe
Mr. Dan Eddy, Executive Director, National Association of Crime Victim Compensation Boards

Special Victims' Counsel Perspectives on Retaliation against Victims of Sexual Assault Crimes in the Military

Lieutenant Commander James Toohey, U.S. Navy, Victims' Legal Counsel
Lieutenant Commander Kismet Wunder, U.S. Coast Guard, Special Victims' Counsel
Captain George "Rob" Lavine III, U.S. Army, Special Victims' Counsel
Captain Micah Smith, U.S. Air Force, Special Victims' Counsel
Major Chantell Higgins, U.S. Marine Corps, Victims' Legal Counsel

STAFF:

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

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MS. FRIED: Good morning. This public meeting is now open. Welcome, Panel Members. This is the 11th public meeting of the Judicial Proceedings Panel since Fiscal Year 2010 Amendments, also known as the Judicial Proceedings Panel.

My name is Maria Fried and I'm the Designated Federal Official for the JPP. The JPP is Congressionally mandated by the National Defense Authorization Act, Fiscal Year 2013, Section 576(a)(2), as amended.

The JPP is tasked with conducting an independent review and assessment of the judicial procedures conducted under the Uniform Code of Military Justice involving sexual assaults and related offenses since amendments were made to the Uniform Code of Military Justice regarding those offenses Fiscal Year 2012.

The JPP issued its first report on February 4, 2015 and that report is available on
The JPP website at www.JPP.whs.mil. For additional information on the establishment of the Panel, Panel Membership, and Panel charter is also available on the website. Presentations and resources used by the Panel are also posted to the website.

The distinguished Members appointed to the JPP are the Honorable Elizabeth Holtzman, who is also Chair of the JPP, the Honorable Barbara S. Jones, Vice Admiral (Retired) Patricia A. Tracey, Professor Thomas W. Taylor, Mr. Victor Stone.

We have a member who needs to leave early today and in order to accommodate the member and ensure maximum number of participation and discussions in deliberations, the agenda was revised from that which was published in the Federal Register and the revised agenda was posted to the website on or about 4 June.

We have received one request for an oral statement this afternoon. The period for public comment is designated to begin at 4:45 and the
speaker is allowed five minutes to make her
comments.

We also received a written statement
from the presenter and from another member of the
public. Both written statements have been
provided to the Panel and is available for the
public upon request.

Information provided to the Panel
Members is a matter of public record. As such,
material provided to it including reports,
transcripts, minutes, agendas, and other
documents are accessible to the public unless its
disclosure is exempted by law. And with that,
I'd like to turn it over to the Chair, Ms.
Holtzman.

CHAIR HOLTZMAN: Thank you very much, Ms.
Fried, and good morning to everyone. I'd like to
welcome everyone to the June meeting of the
Judicial Proceedings Panel. Four Panel Members
are here in person today. Unfortunately, Vice
Admiral Tracey could not attend today's session.

Today's meeting is being transcribed and
also video recorded by Army Television. The meeting transcript and link to the video recording will be posted on the JPP's website.

I'd also like to take this opportunity to mention a very important matter affecting the Panel that happened since our last meeting. And that is that Kyle Green is now a Colonel. And we want to congratulate you, Kyle.

Col GREEN: Thank you, ma'am.


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

Today's meeting addresses two of the Panel's focus topics, restitution and
compensation for victims of sexual assault crimes in the military and prevention and response to retaliation and ostracism against victims of sexual assault crimes. The agenda for today's meeting has been updated from the initial schedule posted in the Federal Register notice of this meeting.

This morning, the Panel will continue its review of restitution and compensation. We first considered this topic at our March public meeting. We held a short deliberation session at our April meeting to discuss our initial perspectives. Today we will focus on three components of restitution and compensation.

First, we will review the continuation of care for former active-duty Service members and their family members who are victims of sexual assault. Next, we will discuss the issues incorporating restitution as an authorized punishment in courts-martial. Then following a lunch break, we will consider the development of a Department of Defense uniform crime victim
compensation program.

We are pleased to have civilian and military experts here to assist us with each of these topics and we look forward to hearing their perspectives as the Panel Members discuss their views and recommendations.

This afternoon, we will turn our attention to victim retaliation, which was the subject of our April and May public meetings. We will hear from Special Victims' Counsel from each of the Military Services who will share their perspectives about the retaliation experienced by their clients, and in at least one case, by themselves. We then scheduled time for the Panel to deliberate and discuss information it's received on retaliation.

Finally, each public meeting of the Judicial Proceedings Panel includes time to receive comments and input from the public. As you heard, we've received some comments in respect to that. Thank you very much for joining us today and we are ready to begin our first
Our first session deals with the Overview of the Continuation of Care for Former Active-Duty Service Members and Family Members who are Victims of Sexual Assault.

We will hear from Ms. Mary Kaye Justis, Director of the TRICARE Health Plan, Dr. Cara J. Krulewitch, Director of Women's Health, Medical Ethics and Patient Advocacy in the Office of the Secretary of Defense, Dr. Stacey Pollack, National Director of Program Policy of the Veterans Health Administration, Ms. Diana M. Williard, Quality Assurance Officer, Veterans Benefit Administration, Ms. Stephanie Li, Chief, Regulations and Policy Staff of the Veterans Benefits Administration.

Thank you so much, members of the panel, for coming to help educate us. We'll begin with Mary Kaye Justis. Thank you, Ms. Justis.

MS. JUSTIS: Thank you. Good morning.

Thank you for having us here today. We very much appreciate the opportunity.
I'm sure that you are aware that at the Department of Defense as a part of the TRICARE Health Plan, we offer broad services and very comprehensive services for our active-duty and our active-duty family members. This involves pretty much all aspects of medical services, as well as behavioral health services. And I'm very proud of what we're able to offer for individuals.

We also offer a variety of continuation options for individuals who may leave the Service after a sexual assault situation that you're discussing today as a part of it. There are opportunities for continuation through a basic continuation of care program, through transitional care, and through other statuses like secretarial designee.

And those provide for care both in the network in the case of continuation of care or transitional care options, and at the MTFs. So there are options to receive care both within the military treatment facilities, as well as outside
in what we consider the Purchased Care Network
from civilian providers.

So that's an overview of the options
that we have available. Thank you.

CHAIR HOLTZMAN: Thank you. Dr. Cara J. Krulewitch?

DR. KRULEWITCH: Good morning. I want
to thank the Panel for inviting me to speak about
DoD healthcare policy today. And as you said, I
am Dr. Cara Krulewitch and I'm the Director of
Women's Health, Medical Ethics and Patient
Advocacy for the Office of the Assistant
Secretary of Defense for Health Affairs.

DoD health policies on medical care
management of sexual assault providers within the
Military Health System fall under the purview of
Health Affairs, where I am. The Department of
Defense has policies in place that address
eligibility for care, the care provided in
military treatment facilities, to include
behavioral health care.

My focus today is to discuss policies in
place for sexual assault victims in particular. There are several policies for the healthcare of survivors of sexual assault. Department of Defense Instruction 6495.01, Sexual Assault Prevention and Response Program, sets policy for who is eligible for more than limited emergency care.

Department of Defense Instruction 6595.02, Sexual Assault Prevention and Response Program Procedures, sets policy for acute and follow-up healthcare management of survivors of sexual assault.

DoD Instruction 6490.10, Continuity of Behavioral Health Care for Transferring and Transitioning Service Members, sets policy for the behavioral healthcare continuity for members who transition between healthcare providers when moving to a new duty station or when transitioning out of Service.

As in the civilian sector, individuals who present to an emergency room with life-threatening injuries will receive care to
stabilize and treat any injuries regardless of their eligibility. DoD Instruction 6495.01 and 6495.02 define cases of sexual assault as priority care emergencies, regardless of the survivor's appearance.

These policies also specify further treatment depending upon eligibility for care. It is Department policy that healthcare meets or exceeds the recommendations set forth in the Department of Justice National Protocol on Sexual Assault Medical Forensic Examination Programs Adults and Adolescents.

This includes responding to all cases of sexual assault as priority emergency cases for treatment, offering a sexual assault forensic exam or SAFE, notification of the Sexual Assault Coordinator or Sexual Assault Program Response Victim Advocate, and the provision of gender-responsive, culturally competent, trauma-informed and recovery-oriented care.

Our policy requires health providers to provide comprehensive medical care with needed
follow-up and referral, offer appropriate
testing, prophylactic medications and treatments,
and assessment for the need for behavioral health
services. DoD 6495.02 also sets specific
selection criterion training requirements for
providers who are credentialed or authorized to
perform SAFEs.

If the survivor requires behavioral
healthcare, there are requirements for a warm
handoff between healthcare providers, whether to
a new duty station or if they are transitioning.
As I noted above, policies for the type and
extent of care beyond emergency care is linked to
the survivor's eligibility.

Service members, dependents, retirees,
and certain reservists receive the full range of
services of the MHS, the Military Health System,
to include follow-on care after the initial
emergency care is rendered. For eligible
beneficiaries over the age of 18, this includes
the services of the sexual assault medical
forensic examiner and a Sexual Assault Response
Coordinator or a Sexual Assault Response Program
Victim Advocate, and other services as needed,
and follow-on care by referral or through the
military treatment facility.

If, however, a victim is not otherwise
eligible for ongoing care by the military, once
they are stabilized, they are referred to support
services in the civilian community. Thank you.

CHAIR HOLTZMAN: Thank you very much, Dr.
Krulewitch. We'll next hear from Dr. Stacey
Pollack.

DR. POLLACK: Hi. I'm Dr. Stacey Pollack
and I'm presenting on behalf of the VA and Ms. Li
and Ms. Williard. We understand this is the
first time the VA has been invited to this Panel,
and so we appreciate the Panel inviting us and
letting us talk a little bit about the VA's
treatment and benefits related to military sexual
trauma.

I think it's important for us to start
and talk about what is military sexual trauma by
the VA's definition. Military sexual trauma is
the term used by the VA to refer to an experience
of sexual assault or repeated threatening sexual
harassment that a veteran experienced during his
or her military service.

The definition used by the VA comes from
the federal law, Title 38 U.S. Code 1720(d). And
the actual definition is, "Psychological trauma,
which in the judgment of a VA mental health
professional resulted from a physical assault of
a sexual nature, battery of a sexual nature, or
sexual harassment which occurred while the
veteran was serving on active-duty, active-duty
for training, or inactive-duty training."

Sexual harassment is further defined as,
"Repeated unsolicited verbal or physical contact
of a sexual nature which is threatening in
character." And it's important to sort of note
that the VA definition does include sexual
harassment. MST is a term used by the VA; it is
not a term used by the Department of Defense.

More concretely, MST from our definition
involves any sexual activity where a Service
member is involved against his or her will. For example, someone who is pressured into sexual activities, someone who is unable to consent to sexual activities while intoxicated, unwanted sexual touching or grabbing, threatening, offensive remarks about a person's body or sexual activities, and threatening or unwanted sexual advances. So we have a much broader definition than just sexual assault.

In terms of how common MST is in the VA, VA has a national screening program in which every veteran who is seen for healthcare is asked whether or not he or she has experienced military sexual trauma. Our data indicates that one in four women and one in 100 men respond, yes, that they've experienced military sexual trauma. It's important to recognize though that these rates only speak about veterans who have chosen to get VA healthcare. This cannot be generalized to make an actual estimate of the rates of sexual assault and harassment amongst individuals in the military.
And it's also important to remember that even though there are -- the percentage of women who have experienced sexual assault or MST is higher, based on numbers there are more men in the VA system who are seeking care for military sexual trauma.

So how has VA responded to the problem of MST? Every VA facility has what we call an MST Coordinator. Those are points of contact for MST-related issues. They can help people find and access VA services and programs.

VA has this national screening program where every person who comes in for care is asked about military sexual trauma. We know often individuals do not report sexual trauma, so we have created a proactive screening program to ask people if they've actually had these experiences to make sure that if someone has, that they get connected with the services that are available for them.

For VA, all treatment for physical and mental health conditions related to military
sexual trauma are free of charge. People are not
charged for their healthcare related to any
experience of MST. And it's important to
understand for our system, people do not need to
be service-connected, do not have to have
benefits to be able to access VHA healthcare.
Even if they are not eligible for other VHA care,
they're still eligible for treatment related to
conditions secondary to MST.

They don't have to have reported that
they were a victim or a survivor of an assault
while they were on active-duty. They are still
eligible for VHA care.

One of the questions that often comes up
is, do we provide service-connection or benefits
for individuals who have experienced a military
sexual trauma? And the answer is, no. We don't
service connect for MST itself.

We service-connect or provide
compensation and benefits for individuals who
have a disability, a condition that is secondary
to their experience of military sexual trauma.
So not for the event itself, but for a medical condition, whether that be psychological or physical in nature.

The most prevalent service-connected disability secondary to MST is post-traumatic stress disorder. And because individuals often do not report that they have experienced an event while they were on active-duty, we have set up what we call "markers." And both Ms. Williard and Ms. Li can certainly talk about this more as we go on, or if the committee has questions.

But markers are really sort of indirect evidence that an event actually occurred. We don't require someone have reported that that event occurred while they were on active-duty, but if there are markers such as somebody's performance changing while they were on active-duty, asking for transfer to another unit, seeking mental healthcare, those can all be considered markers and we look for those in terms of sort of indirect evidence that a sexual assault, military sexual trauma, sexual
harassment may have occurred.

In order to improve the grant rate for MST-related PTSD claims in the VA, DVA in the last couple of years has done extensive training of both VBA and VHA clinicians and adjudicators/raters to the point where the grant rate for PTSD claims of military sexual trauma traumas has about equaled that for combat trauma.

There are separate lanes to process MST claims in VA and we just actually rolled out a course that the DoD was working with us on in terms of looking for individuals who are separating from the military, who are going through a separation health assessment where all VHA providers are providing those individuals as they're separating with information about military sexual trauma, so that they are aware of the benefits that may be eligible to them and that they are aware also of the importance of making a report through the Safe Helpline, through the DoD channels so that they are able to access both care and benefits.
MS. WILLIARD: Good morning. My name is Diana Williard. I'm the Quality Assurance Officer for Compensation Service for Veterans Benefits Administration. I'm also a veteran. I spent 20 years in the Army and I retired in 1992.

I am utilized in my position as the Quality Assurance Officer as a subject matter expert due to my experience from in the Service, but also because I am very good with the claims process and finding the markers for these type of claims.

In the military, I was a whistle-blower for military sexual trauma events that happened to my Soldiers. I'm very passionate about these claims.

I am part of the Undersecretary's task force, where Undersecretary Hickey started a task force for more intensive training for our claims processors. We continue to evaluate that training. We continue to look at these claims. They are very complex claims, but we are there to help our veterans and we work with our partners...
at VHA to continue this process for our veterans.

MS. LI: Good morning. Thank you again for having us. My name is Stephanie Li. As the Chair indicated, I am the Chief of Regulations and Policy within Compensation Service within the Veterans Administration.

We are responsible -- my Staff and I are responsible for the regulations that Dr. Pollack was speaking of that referred to how we service-connect conditions related to military sexual trauma to include post-traumatic stress disorder marker process. So I can speak to anything on that if folks have more questions.

Prior to coming ---- joining this position, I worked at the Board of Veterans Appeals as a counsel for seven years adjudicating claims at the appellate level. During that time, I adjudicated a number of military sexual trauma-related cases, so I'm quite familiar with how these claims sort of are processed from the ground up, along with Ms. Williard.

And currently in my current position,
I'm looking at sort of the policy surrounding it, considering all of the different interests, some of the legislative proposals, and legislation that has been introduced in Congress surrounding this issue. Thank you.

CHAIR HOLTZMAN: Thank you, Dr. Pollack and Ms. Williard and Ms. Li. I guess we'll start questions now. Mr. Taylor?

MR. TAYLOR: Thank you. Well, first of all, thanks to all of you for being here today and thank you for this important service that you're performing for all of our veterans, as well as active-duty and military family members.

Ms. Justis, in your experience working with TRICARE and particularly in this area of sexual assault survivors, what gaps, if any, have you identified? What kinds of cases have come to your attention where you might say, we need to be able to provide this, but somehow we cannot because of the regulations or the law? Do you have any examples of situations that make you worry about whether we're doing a good enough
job?

MS. JUSTIS: That's a great question.

Certainly. What I see in my role, is that we have obviously a very comprehensive benefit for active-duty family members as well as active-duty and in addition, for retirees or individuals who separate, certainly. That includes pretty much all aspects of medical services and behavioral health services.

As I look at where are the gaps in care, I would say probably the biggest gap, which is one that we are probably all aware of, is the sharing of information. Whether it's between us and the commercial networks and us and the VA through an electronic means. I would say that is probably one of the areas that I see the biggest gap in currently.

I believe we have the skill sets and the ability and the tools to provide the care that is needed. I mean, we have great ability in the TRICARE program to look for emerging technologies now, to look for established treatments, to
provide care that's medically necessary, which includes certainly all aspects of behavioral health.

I think the piece that is missing is that communication, the electronic sharing of information to assure that key components of that medical record of the individual's care are carried throughout the system and shared appropriately without difficulty. Thank you.

MR. TAYLOR: So, in addition to sharing of information, have there been policies that you have seen that, in your opinion, get in the way of providing the kind of support and care that we really should be providing to members and their families?

MS. JUSTIS: Frankly, what I see is that when we find an individual who has specific needs that may be outside of what is normal treatment or what is normally done, if there is a way that we can provide that care, we do find a way. I think sometimes externally, the perception may be that the goal is to say no, but actually the goal
is to get to yes as long as it's safe and effective, proven treatment.

We have the ability with the recent NDAA that was passed that provides for emerging technologies and treatments. And that's a great tool for us to have. That gives us some additional flexibility for treatment and treatment tools that are not yet meeting kind of the statutory reliable evidence standards, that does allow us to bring in new technologies and treatments sooner. So I think that's a great tool that Congress has given us to use.

MR. TAYLOR: Well, thank you very much.

MS. JUSTIS: Thank you.

MR. TAYLOR: Dr. Krulewitch, same question to you. Do you see policies from your perch that you wish we could change in order to provide a better package for the victims?

DR. KRULEWITCH: I think that Ms. Justis has answered it quite well. I don't have any additional to say.

MR. TAYLOR: Well, one thing you said
that I thought was very interesting is that when
the eligibility question comes up -- let's say
for example, you have a pure civilian victim who
because of the nature of the injury ends up at a
military treatment facility, so you provide
emergency treatment.

How long do you keep that person in the
care system ---- the military care system before
you have to handoff ---- before you have to hand
a person off into some civilian support
structure?

DR. KRULEWITCH: I don't think there's
specific policy on how long you keep the person.
Definitely, they need to be stabilized, and there
would be a warm handoff to assure that they
received a sexual assault forensic exam. That's
part of policy.

MR. TAYLOR: Well, do you have an idea
about whether that could be a matter of days or
weeks as opposed to hours?

DR. KRULEWITCH: No, I don't have an
idea from policy.
MR. TAYLOR: Okay. Dr. Pollack, do you have any evidence of how VA's changing the standards for MST has impacted your ability to grant more PTSD claims?

DR. POLLACK: So, it's not so much that we changed the standards. I think it's -- unless you're referring to a while back when we changed the standards to allow for markers. Is that what your question is?

MR. TAYLOR: That's what I'm referring to, the evidentiary requirements.

DR. POLLACK: So, yes. It has increased our ability to grant claims for MST. Ms. Li, I don't know if you have the data?

MS. LI: Sure. I can ---- we originally changed our regulations back in 2002 in which we relaxed the evidentiary standards for PTSD based on military sexual trauma. In any situation, we always need evidence of injured service event.

So in the case of military sexual trauma, as Dr. Pollack indicated, we oftentimes don't have any specific indication of the MST
itself in service, and we relied on circumstantial evidence, which we call markers.

This is quite different from every other sort of PTSD regulation we have. For example, if you are a combat veteran, we'll accept lay testimony, but first we need to establish that you were in combat. Our fear-based stressor regulation, as long as we can -- you may have to first show that you were in an area of hostile military or terrorist activity before we can accept that statement and get an exam.

In the case of military sexual trauma, we look for, again, that marker, that circumstantial evidence. Something that may indicate something happened, and then we submit it to VHA for professional opinion as to whether the markers and the testimony of the individual, as well as the exam, sort of together paint the picture that, yes this individual has PTSD and it is due to a sexual trauma that occurred in service.

Since we have sort of beefed up our
training on that in 2011 -- we always have had this since 2002, but in 2011 our Undersecretary put together a task force to build some new training materials and collaborated with VHA as well. Since that, we have seen the grant rate rise from approximately 34 percent to -- I think within six months of the initial training in 2011, we were up to 55-percent grant rate. And the grant rate for all the other PTSD at that point was 60 percent.

Now, there's always going to be fluctuations in our grant rate as we move because of the nature of what conflicts are happening and how many individuals are applying for post-traumatic stress disorder claims. But since 2011 and the introduction of that training, we've seen a trend that's continued where our MST PTSD grant rates are remaining within about five percentage points and sometimes matching those grant rates for all other types of PTSD.

MR. TAYLOR: So just one last question from me for this round. And that is, in
attempting to put together a package of circumstantial evidence that would constitute markers, do you have any difficulty getting information in the records from the Military Services? Are they bureaucratic about how they release the information, given privacy and other concerns, or is it a pretty easy release of records to you for this purpose?

MS. LI: I'm going to let Diana talk about this because this is sort of her area of expertise.

MS. WILLIARD: Thank you. When we go and look at a claim for PTSD as related to military sexual trauma, you almost have to kind of be a detective. We do get the Service records from DoD. That's not a problem.

It's putting the parts of the puzzle together. We look at the veteran's statement and then we start looking for the markers, the clues to help put that puzzle together. These claims are very complex because oftentimes veterans do not report the incident for fear of retaliation,
for being ostracized -- whatever, for whatever reason.

   And what happens there is that we will look at that veteran's statement, but then we look for around the time they're talking about, when the event happened, we look for, did they go to sick call? How many times did they go to sick call? Did they go to sick call and ask for a specific provider? Did they ask -- if it happened to a female, they'll go and say, I want to see a female provider. They will also look to see -- we'll look to see pregnancy tests, sexually transmitted disease tests.

   We'll look for behavior changes in their 201 file. We'll look at if they've identified maybe another veteran as the perpetrator. We may look to see if there's anything -- if they have a claim in there, if there's something that we can correlate. We'll look at their buddy statements. Some veterans submit diaries. Some submit letters where they share the event with a family member.
So we look at every single piece of information. We make phone calls. These are very traumatic events and veterans ---- when we need additional information, sometimes it is very difficult because they flash back to the event. Sometimes they don't want to talk about it. Sometimes they feel like they have to relive it again by just going through the whole process. It's very difficult, but we put those pieces together.

MR. TAYLOR: Thank you.

CHAIR HOLTZMAN: Thank you. Judge Jones?

JUDGE JONES: Can I just pick up on that for a minute, Ms. Williard? Can you tell me, and I'm sure it varies, about how much time it takes to figure it out in the average case? I mean, this sounds very time-intensive doing this detective work.

MS. WILLIARD: It is. There is one veteran in particular that I've worked with for four years to finally get the PTSD diagnosis for
his military sexual trauma event that happened in service.

Sometimes the markers are right there and we can piece it together right away, but I think on the average, a claim for a military sexual trauma takes almost close to 300 days.

JUDGE JONES: And before you make that determination, there can't be any of the treatment, correct? It's not authorized? Or are they getting treatment?

MS. WILLIARD: We hope they're getting treatment, but treatment can be, yes.

JUDGE JONES: Well, what's the authorization mean then? I mean, the diagnosis, if you will?

MS. LI: So I know Stacey is going to talk about the treatment, but I do just want to point out, in addition to the Military Sexual Trauma Coordinator at the VHA, VBA has military sexual trauma -- the MST Coordinator at each of our regional offices. We have one male and one female.
And that individual is designed to sort
of help individuals as they go through the
benefits side and hook them up with their VHA
counterparts, which will allow them to get the
free care that they need. Here, I'll let Stacey
speak more to that.

DR. POLLACK: So as we said, there's
free healthcare related to any event of military
sexual trauma. There is not any authorization
that's needed.

If a veteran walks into any VA facility
and said that "I have experienced military sexual
trauma and I would like treatment for PTSD or for
a mental health condition or for anything," that
person is offered care at that point.

There's not special authorization and
they will not be billed for that care. They
don't need to have filed a claim. They don't
need to be service-connected. They don't need to
have ever reported what occurred.

JUDGE JONES: So we're talking about
authorization for benefits --
MS. LI: Yes.

JUDGE JONES: -- needing that diagnosis for benefits?

MS. LI: Yes, ma'am. Monthly compensation benefits that they're receiving.

JUDGE JONES: Okay, and that would be what you've been calling a service-connected disability?

MS. LI: Correct.

JUDGE JONES: All right. Thank you. I don't have any other questions, Madam Chair.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes. Let me just be sure that I understand some of the comments that were made.

Ms. Williard, your focus here is just on the Service member, right? In other words, the dependents are not covered by you at all? They don't get in the door, right?

And the same thing is true if it's a civilian victim of a military person, that they don't get in the door? So you're focused
entirely on it being a former active-duty member?

           MS. WILLIARD: A veteran. That's --

           MS. LI: And I do want to actually point
out, it's not limited to active-duty. We do
service-connect or provide compensation benefits
for individuals serving in the Guard and the
Reserves.

           For purposes of compensation benefits,
if someone experiences an MST event during a
period of active-duty for training or even an
inactive-duty for training, just a weekend
status, that is considered an injury within our
regulations and we will service-connect any
disability that develops as a result of that MST
event.

           So we're not just talking about
individuals serving on full active-duty. And
it's important to note that this is also beyond
MST that occurs sort of as you would say in the
line of duty or by another military member. If
someone's on some sort of duty and a civilian in
the general population and they experience an MST
event during that duty, we would service-connect that as well. It's not limited to sort of Service member-to-Service member events.

MR. STONE: But that does require that they be entitled to veterans benefits, isn't that right?

MS. LI: They would need to qualify for compensation purposes as a veteran, have that veteran status. But again, gaining that veteran status for folks who are serving on a ---- even a weekend status, there just needs to be an injury shown that resulted in a disability. And for purposes of our regulation, we will consider an MST event to be an injury.

MR. STONE: I guess that wasn't what I was getting at.

MS. LI: Okay.

MR. STONE: I am aware of individuals who, as a condition of their termination from the military, have to waive their veterans benefits generally. And that includes all their medical care benefits. So if their termination, their
separation includes a waiver of veterans benefits, you're not going to see them, right?

MS. LI: I'm not familiar with individuals waiving entitlement to all veterans benefits. Certainly there are individuals, depending on their discharge -- they're discharged under dishonorable conditions, that can impact their entitlement to certain benefits.

Or if they're discharged under other-than-honorable conditions, there's a process that VA goes through where there's either a list of statutory bars where they're not entitled to benefits or there are certain conditions or circumstances in which VA can evaluate them and pay benefits. But I'm not familiar with individuals waiving anything and how that would impact their entitlement to us.

MR. STONE: I understand. I am familiar with it and I know that there are people with honorable discharges who've been asked to waive veteran benefits in order to get the discharge. And I'm just saying, but you're not going to see
those, right? If they've waived their veterans benefits?

MS. LI: I mean, if an individual came to us seeking benefits, there's always going to be some sort of evaluation as to whether the individual is eligible as a veteran as we define it in our statutes and regulations.

So certainly someone who had waived in the scenario you're speaking of, that wouldn't stop them from coming to VBA and going through the process of reviewing their entitlement. But again, I'm not aware of any sort of ability of someone to sort of waive their entitlement to benefits.

MR. STONE: I'm just making a point. They have to have veterans benefits to get into your organization? To get into a VA hospital to be seen, right?

MS. LI: I wouldn't know about the --

MR. STONE: Okay.

MS. LI: -- health side.

DR. POLLACK: They don't have to have
benefits. They don't need to be service-connected. They don't need to have filed a claim. If anyone who has veteran status walks into any VA facility, they are eligible for care related to MST.

MR. STONE: They have to have a DD-214 that says they're entitled to veterans benefits, don't they?

DR. POLLACK: They have to have a DD-214 and they have to --

MR. STONE: That's what --

DR. POLLACK: -- have veterans status.

MR. STONE: That's what I wanted to know.

That's correct. Again, talking about these people who are not covered, if I can go to Dr. Krulewitch, I noticed that you finished your opening remarks and you said again, the questioning, something about a handoff. If the handoff turns -- I presume that's to a private provider after this person is done getting their emergency care.

But there are many people who don't have
mental health benefits. If the person you handed them off to is going to need to expend money for treatment or medication, I presume that unless the person who's been handed off has mental health benefits, they're not going to be treated.

   JUDGE JONES: You're talking about insurance for that?

   MR. STONE: Yes. Right.

   JUDGE JONES: Private insurance?

   MR. STONE: Unless they have private insurance --

   DR. KRULEWITCH: I'm going to pass that to Ms. Justis.

   MR. STONE: Okay.

   MS. JUSTIS: And I'll speak broadly because obviously there's some variation to what private insurance covers, but with the Affordable Care Act, as we know, everybody is required to have health insurance.

   A piece of that is also the mental health parity that every insurance organization is required to cover mental health care the same
way that they cover medical care. So you can't put extensive day limits on it, service limits on it, that you don't have as a part of your medical coverage.

So every individual in the United States should have access to good medical care as well as good behavioral health care as a part of their commercial insurance plan, whether it's through an employer, whether they're purchasing it on an exchange, or whether it's a part of Medicare and Medicaid.

MR. STONE: But that's a policy matter, but there are still millions of people who would rather pay the fine than carry medical insurance. Many young people who feel they can't afford it and so they don't have medical, certainly not mental health care coverage.

And so I guess my question still remains. They get handed off, but you don't -- you stop reimbursement even to this private provider. You don't provide them reimbursement for any depression medication or treatment they
would provide. The person who's handed off has to have their own private mental health care coverage. Isn't that right?

MS. JUSTIS: Certainly if they were TRICARE eligible or a part of the DoD or VA system, they would be covered through those areas. In addition to, as you say young people or other folks who may choose to pay the fine believing that they're certainly well, there are whole variety of other resources available from a mental health perspective. Community mental health centers, extensive support systems.

So there are a variety of support systems. And within the DoD system, there are the victim advocates who continue to work with the individual and would assure connection to the correct resources throughout that.

MR. STONE: I guess that's not the answer to my question. My question is TRICARE is done with them. Is that right?

MS. JUSTIS: TRICARE has eligibility that is defined in statute in terms of who is eligible
for TRICARE coverage. We have a broad variety of ways to do continuation of coverage for active-duty, for retirees, for families. Even if the military member left the military prior to retirement, there are continuation and transitional care options that are available.

But for a civilian -- you are talking about a civilian who would never have been eligible for TRICARE coverage, obviously then if they don't meet eligibility criteria for TRICARE, we wouldn't be able to personally provide those services for them. However, there are the connections to help assure that they get the care in the commercial networks, civilian networks.

MR. STONE: Let's go from the person who doesn't obviously qualify for TRICARE because they are not a dependent or an active-duty person. Let's go to the dependents for a second.

In the information that we previously got, I understood that there was total TRICARE coverage for certain things like STD testing and prophylactic medications, but that TRICARE as to
psychiatric medications and treatment was only partial coverage for dependent victims. And we were informed that it is only until the accused's separation and then TRICARE stops.

And the something for services that have a cap, like outpatient psychotherapy, that it was only until the accused's separation. Is that right or am I misunderstanding that?

MS. JUSTIS: I think that it's probably a misunderstanding. Certainly, TRICARE has an extensive formulary of medications. So for anyone who's receiving any kind of behavioral health medications, there is the ability to provide something on the formulary or something off formulary if that was what was necessary. Broad range there in the ways people who get medications.

When you talk about psychotherapy, the coverage for psychotherapy, TRICARE offers extensive psychotherapy coverage. In addition to providing long-term care, providing many options, we offer an initial eight kind of unmanaged
psychotherapy visits. So if somebody wants to seek behavioral health treatment and is uncomfortable sharing it with a family member, sharing it with a provider, we allow that to happen to really encourage not to have any barriers for people seeking treatment.

When an individual leaves the Service, unless they go to a family member and the sponsor, whether there's a perpetrator or not, there are also options for continuation of coverage through transitional care, through continuation of benefits. Those can go on up to three years. So there are some pretty extensive options that allow for continuous coverage.

MR. STONE: Do they pay -- they have to pay for that extension during the three-year period?

MS. JUSTIS: The continuation of healthcare benefits is done similar to a COBRA in the commercial section where there is some payment involved in that. They are paying for it. And I don't know the payment off the top of
my head for the transitional care benefits.

MR. STONE: Okay. So once their active-duty member is separated, there's going to be a cost to them of the additional care?

MS. JUSTIS: It depended on where they received the care. There could be some cost for the care. Although as I'm sure you're aware, the co-pay structure, co-insurance is very, very low from the TRICARE perspective.

MR. STONE: And we were also told that there were certain exempted services that both active-duty veterans and dependents don't get and the reference was made by prior witnesses to things like eye movement desensitization and reprocessing.

MS. JUSTIS: Sure.

MR. STONE: Would you like to comment on that?

MS. JUSTIS: I'm happy to speak to those. I'm sure that you're probably aware that TRICARE is a kind of statutorily defined benefit, able to cover areas that are medically necessary, which
includes behavioral health areas.

The eye movement desensitization is specifically covered as a part of the PTSD diagnosis. So certainly if a provider felt that, that was a warranted course of action and treatment for somebody who was suffering, whether it was through sexual trauma or other trauma, that, that would be a covered service.

What we always look for is you would go see your own practitioner and provider, is what the provider recommends as being medically necessary. And every treatment situation, they may not recommend that as an appropriate intervention. They may recommend other interventions. But that specific eye movement disorder, yes, is covered.

MR. STONE: To get that then, they will have to have had a PTSD diagnosis first?

MS. JUSTIS: It would be covered as a part of PTSD. I would assume anybody who's receiving treatment for post-sexual trauma, that would be a part of it. If they did not have that
PTSD diagnosis and their provider indicated that they needed that service, we would certainly look for ways to be able to approve that.

And I'm confident with our ability to look for medically necessary services as long as they are directly covered under our statutory abilities, that we would work hard to make sure that individual received that service.

MR. STONE: I think those were all the questions.

CHAIR HOLTZMAN: Thank you. With regard to other victims, let's say, civilian employees in the Department of Defense, and if they are, for example, sexually assaulted on a military base or by a military personnel, what benefits are there for them? Any?

DR. KRULEWITCH: Well, it's policy that they -- if they are assaulted on base and they're an employee that they will receive limited benefits of treatment. Most certainly emergency care. Most certainly a sexual assault forensic exam, if they wish one. And some of the benefits
of the Sexual Assault Response Coordinator or
their designated Sexual Assault Program Advocate.
Beyond that, if they need further care, I can't
speak to the benefits of that.

MS. JUSTIS: If they were a civilian
employee on a military base, they would certainly
have access to the full range of OPM throughout
the HPP. But from a TRICARE coverage standpoint,
if they were not eligible for TRICARE coverage,
they would receive the initial benefits as the
Doctor described and in addition what was
available in their civilian coverage. Unless
they are in an overseas situation and then
there's expanded opportunities there.

CHAIR HOLTZMAN: So who covers them?
Just so that I can be clear on that? Who would
pay for a civilian employee or just a civilian
who's not an employee, but who's an invitee, a
guest on a military base? What would happen in
that circumstance? Who would cover them?

MS. JUSTIS: A civilian overseas on a
overseas base, then they have received care
within the MTF. That occurs with --

CHAIR HOLTZMAN: What's an MTF?

MS. JUSTIS: Military treatment facility.

CHAIR HOLTZMAN: All right.

MS. JUSTIS: So they'd receive care often through the MTF. And dependent on what their additional status may be, often secretarial designee for somebody who might otherwise not be eligible for the care, would receive care in the MTF also.

CHAIR HOLTZMAN: While they're overseas. Once they come back here, who covers them?

MS. JUSTIS: Their personal insurance would continue to cover them if they were not a TRICARE eligible beneficiary.

CHAIR HOLTZMAN: Assuming they had that.

MS. JUSTIS: If they were working as a contractor within the Department of Defense or as a government civilian, they would be covered by insurance.

CHAIR HOLTZMAN: Okay. Did you have a comment, Dr. Krulewitch?
DR. KRULEWITCH: No. I -- she just said it. Because you're talking about me in particular because I'm a civilian employee of the Department of Defense. And the expectation is that I'll have coverage.

The people may opt out and pay the fine. I think there may be strong encouragement for me to absolutely have coverage. So I'm proud that I have very good healthcare coverage. And so my coverage would definitely pay for that.

CHAIR HOLTZMAN: Okay. Did you have something? Yes, go ahead.

MR. STONE: I had one further question. I notice that everybody on this panel is a civilian, even if you're a civilian employee of DoD, which it seems to me is very good because it means you're not subject to rotation throughout your career and you can develop expertise as we heard Ms. Li mention, and use that expertise in the position you're in.

Is that pretty standard in all of your workplaces that most of the people are civilian
employees? And, therefore, they tend to have
fairly long, dedicated backgrounds in the care?

MS. JUSTIS: I think there's certainly
within the Department of Defense, within Health
Affairs, the DHA, the Defense Health Agency, we
have variety of military and civilian employees.
Certainly many of the civilians are retired
military, not all. I'm an example of not a
retired military person.

But there's also quite a few people who
are part of the military who work side-by-side
and are very active with the folks in uniform.
In my area as Director of the TRICARE Health
Plan, I have a variety of military members at all
levels, both at my OCONUS locations as well as
CONUS Regional Offices and in the Defense Health
Agency. So it's a good combination for me.

MR. STONE: And do they tend to have two-
year rotations?

MS. JUSTIS: It varies. Some certainly
have two- to three-year rotations. Others may
stay for longer periods depending on their
assignment structure.

MR. STONE: I guess in those situations, it's more difficult for you to have ongoing follow-on care with the same doctors than the VA if they have non-military doctors because the doctors are there, I presume, for longer than two- and three-year rotations. Is that right? Dr. Pollack?

DR. POLLACK: The providers in the VA are not on rotation. So it is -- a provider could be hired and could stay 30, 40 years.

MS. JUSTIS: Did you have a specific concern in terms of the relationship with providers?

MR. STONE: Well, I just think that the contrast is interesting. That on the VA side, they can have continuing care from perhaps the same professional for many years. Whereas on the TRICARE side, there's going to be a rotation.

So that if a person who's been a victim tries to develop a relationship with a particular mental health professional, it's going to
typically last two years and then it's going to be a rotation. It's not -- we've seen that in a lot of the different locations with people looking for help.

MS. JUSTIS: Sure. And I'm sure you're also aware of some of the telemedicine and other things that are done. But my understanding is that the service often, if there is a reason for the individual to stay in the same geographic area, we'll work to achieve that.

For them to put their family first and special needs. So that they don't have to go through that change in a provider. So I believe the military works hard to accommodate special needs.

CHAIR HOLTZMAN: I'm going to reclaim my time. Sorry. Okay. I just want to go to some of the points that were raised in the GAO report, if you don't mind, about VA treatment. First of all, you mentioned about the MST markers -- I mean the markers that you have to have for an MST-related claim, when it's related to the PTSD.
And you've done -- I think it's fair to say that you've tried to do training programs and intensify your efforts to make sure that your identification markers -- you're doing a better job at that. But the report says that when a veteran is diagnosed with a mental condition other than PTSD, for example, depression or anxiety disorder, I'm quoting from the report, Page 24, that you can't use markers.

So how do you -- if a veteran comes in without PTSD and has these other mental health issues and says, I was sexually assaulted, but I never made a report, et cetera, et cetera, how do you validate that and how do you provide benefits in those cases?

MS. LI: It's extremely difficult.

CHAIR HOLTZMAN: And why is the standard different? For PTSD, for all these other mental health issues.

MS. LI: Of course, so --

CHAIR HOLTZMAN: If you don't mind --

MS. LI: Oh, no, no. It's important to
know that over 90 percent of claims for military
sexual trauma benefits are PTSD.

CHAIR HOLTZMAN: I can imagine.

MS. LI: So we're talking a small
percentage of ---

CHAIR HOLTZMAN: Yes. But that's
thousands of people.

MS. LI: Right. And when folks come in
seeking benefits, oftentimes they're not -- we
don't expect them to know what their diagnosis
is. So most folks come to us claiming PTSD and
it's not until we actually get them in the exam
setting and have them before a professional that
we can actually give them the correct diagnosis.

The reason that PTSD has a different
standard -- for all service-connection claims, we
have to have three things. We have to have a
current disability. We have to have something
that happened in service. And we have to have a
link between what happened in service and the
current disability.

With regard to mental health conditions,
PTSD is the only condition that we have where there can be a delayed onset. So when we have a diagnosis many years after service, we can look to see what happened in service. And that's why we have these relaxed evidentiary standards. Because we may not have evidence of symptoms of the disability in service because it may not have manifested at that point.

And Stacey can probably speak to the medicine and science of this, but with regard to why we don't have a different standard for, or we have a different standard for other mental health is because if someone develops a different mental health diagnosis, such as depression, anxiety, we expect to see symptoms of that disability in service. Because it shouldn't be a delayed onset from the event itself. So --

CHAIR HOLTZMAN: May I just ask a question about that?

MS. JUSTIS: Sure.

CHAIR HOLTZMAN: Is there scientific evidence that these other mental health
conditions don't manifest themselves at the time
and they can't be a delayed onset?

MS. LI: I would reference Stacey on
that.

CHAIR HOLTZMAN: Stacey, you're the
expert here.

DR. POLLACK: Yes. So --

CHAIR HOLTZMAN: I'm sorry, Dr. Pollack.

DR. POLLACK: No, that's okay. You can
call me Stacey.

CHAIR HOLTZMAN: I don't mean to be
familiar.

DR. POLLACK: And it's like you said, it
is a challenge. And certainly someone could have
depression and symptoms of depression. There
could be no evidence of that while they're on
active-duty. And then they may come to the VA,
file a claim for depression, for PTSD, be
diagnosed with that.

It could certainly be considered that,
that could be related to their assault. But it's
very difficult for us to make that nexus because
of the regulations. I think because of this difficulty -- and, you're right, it is a challenge.

This course that we just developed is really trying to get active-duty Service members to recognize the importance of having some evidence while they're still on active-duty so that for conditions other than PTSD, that if they chose to file a claim, whether that's when they -- at that point in time, whether it's five years down the road, ten years down the road, or 20 years down the road, there is some evidence that we can go back and sort of, in the VA from a benefits perspective, have that nexus, that connection that there was something that actually occurred while that individual was on active-duty. But you're correct, it is a very large challenge right now.

CHAIR HOLTZMAN: So let me ask you, what are you doing about it?

DR. POLLACK: So I think --

CHAIR HOLTZMAN: This very large
challenge?

DR. POLLACK: I think really we just
rolled this course out and as every Service
member who is going through the separation health
assessment with the VA gets a packet of
information about military sexual trauma, which
includes information about benefits and the
importance of making sure that we have this
information.

MST from the VA perspective, is
discussed during TAP, during the Transition
Assistance Program. We're really trying all
avenues that we have to educate people about this
challenge.

CHAIR HOLTZMAN: So if I understand
correctly, I mean, I'm really a neophyte here, so
please forgive me. What you're saying is that to
deal with this non-PTSD veteran, the onus is on
him or her to come forward before they separate
from the military and provide some evidence.

Otherwise, you're going to have a devil
of a time. Is that a fair statement or an unfair
-- I don't mean to put words in your mouth, but
I'm trying to understand.

MS. LI: I don't think you're making an
unfair statement. I think it's important to know
that when folks come in, generally we look for
something -- in creating that link between, as
Stacey was talking about, creating that link,
that nexus that we need. In creating the link
between what they have today and what they had in
service, certainly evidence of something in
service is always going to help us make that
link. But it's not required.

So if someone doesn't feel safe, feels
fear of retaliation, ostracization and doesn't
come forward in service, if they come in
generally within a short period after service,
and that's what I think Stacey's trying to
explain with the VHA and the separation health
assessment, we're trying to explain to people,
look you're getting ready to leave service, maybe
you don't want to bring this up, maybe you just
want to get separated and get out and get into
At that point, come to VHA, come to VBA, come to VA and we're going to get you the care immediately and we're going to get you on the path to benefits. Because oftentimes, folks who file shortly after service, that link is -- there's almost no time differential.

CHAIR HOLTZMAN: Okay. Now, leaving aside the burden on the victim here or the veteran, what are you doing to develop markers? What are you doing on your side to help identify ways in which you can better link or more scientifically link the subsequent appearance of a mental health issue with the veteran's service in the military? Are you addressing that issue now?

MS. LI: In terms of helping our adjudicator identify markers?

CHAIR HOLTZMAN: Well, coming up with a policy on how -- yes, right. What are we going to do with this problem? How are we going to find -- we don't have markers, so now what are we
going to do? Are you in the throwing up your
hands situation? Or are --

MS. LI: No.

CHAIR HOLTZMAN: Okay. So what are you
doing about it?

MS. LI: I think, as Diana started to
explain, we could probably sit here and talk for
an hour about all the different things that are
markers and we are never going to identify what
is a -- every single marker. It's important to
know that we continue to train our --

CHAIR HOLTZMAN: I'm talking about this
other area. I'm not talking about the PTSD area.

MS. LI: You're talking about --

CHAIR HOLTZMAN: The non-PTSD area.

MS. LI: -- building markers in --

CHAIR HOLTZMAN: What are you doing to
develop policy to identify the equivalent of
markers or to identify ways in which you can make
a scientific determination that there is or there
isn't a link to military duty? What are you
doing about that? I mean, not you personally,
but --

MS. LI: Sure.

CHAIR HOLTZMAN: -- what are they doing about it?

MS. LI: At this time -- we're always looking at our policies, we're always looking at what we're doing. But at this time, we don't have any plans to expand the marker program or the marker process to the non-PTSD --

CHAIR HOLTZMAN: Okay. So you aren't.

MS. LI: -- diagnoses.

CHAIR HOLTZMAN: So, anybody else have a comment about that?

DR. POLLACK: Not about the benefits piece, but just to make clear that you don't have to have PTSD to get mental health treatment. You can have depression --

CHAIR HOLTZMAN: I got that.

DR. POLLACK: -- or any other mental health issues.

CHAIR HOLTZMAN: Thank you. And let me just --
MR. STONE: Then could --

CHAIR HOLTZMAN: No. Just let me finish --

MR. STONE: We do have a question, but --

CHAIR HOLTZMAN: I just want to go on because I still have -- then I'll let you or the Members of the Panel ask. My other question is, okay, the military now or for the past several years, has had a system in which there is restrictive reporting.

Which means there's no -- so I'm a military person and I say, I'm not reporting this. I don't want it to be reported elsewhere, but I'm making a restrictive report. I'm reporting either to the chaplain or I'm reporting to the VA. And then I said, I don't want anything else done.

How do you have a record of that? Do you have a record of that? So that they can establish that in fact there was something done when they were in the military?

MS. LI: So we have a process when we
receive a claim based on MST and the process is, is that we have one of our MST Coordinators or MST Specialists, as a policy, as a matter of our procedures, contact the individual. And if they can't reach them, we prefer over the phone, but obviously sometimes we leave messages and people don't get back to us so we have a follow-up letter that goes out as well.

But the goal is to make contact and explain and ask the individual, have you filed either an unrestricted or a restricted report. And if they filed an unrestricted report, we can access all that. The restricted reports, we give them information about how they can get a record.

At this time the VA doesn't have the authority to get those records from DoD since it was a restricted report. But we give information including who to contact within DoD, within their particular branches, on how to get those restricted reports and get them to VA.

CHAIR HOLTZMAN: Okay. So there is a process. So in other words, DoD is keeping a
record of those reports?

MS. LI: Absolutely.

CHAIR HOLTZMAN: And the victim or the veteran has the power to access them?

MS. LI: Yes.

CHAIR HOLTZMAN: And get them to the VA?

Okay. Thank you.

DR. KRULEWITCH: There's a paper trail. For a restricted report, the restricted report stops any further investigation and actually essentially creates a wall around the survivor so that no further information is provided. But there's a paper trail.

CHAIR HOLTZMAN: Excellent. Thank you.

I just wanted to have that clarified. Now, I have one just quick question. Maybe this won't be so quick, but I hope it is. What are you doing about -- I mean, there are various treatments that you have for MST.

But what are you doing to evaluate the effectiveness of those treatments? What's the science and the medicine behind trying to
evaluate the effectiveness of those treatments,
develop new treatments, to improve the
treatments?

DR. POLLACK: So there are not treatments
for MST itself, because MST is an event. So
there are treatments --

CHAIR HOLTZMAN: Oh, I'm sorry.

DR. POLLACK: No. That's -- we only want
to try and educate people.

CHAIR HOLTZMAN: All right.

DR. POLLACK: So I'm going to take my
opportunity to make sure we do that.

CHAIR HOLTZMAN: Okay. I've been put in
my place.

(Laughter.)

DR. POLLACK: I'm not putting you in your
place. But there are treatments -- I'm assuming
what you're asking about is what we're doing to
evaluate treatments for PTSD. Because PTSD is --

CHAIR HOLTZMAN: That's related to MST.

DR. POLLACK: That is related to MST --

CHAIR HOLTZMAN: Okay.
DR. POLLACK: -- because that is the most common of the diagnoses. Within VHA, we require that all facilities provide both cognitive processing therapy and prolonged exposure, which are two types of evidence-based psychotherapy for post-traumatic stress disorder.

There are VA, DoD clinical practice guidelines that have been put out in terms of treatment of PTSD, treatment of depression, and a wide range of mental health disorders. And we are always evaluating our programs and evaluating the treatment effectiveness. There's lots of research out there looking that these treatments are effective.

You asked a question previously about EMDR. EMDR is also an evidence-based treatment. It can be used at some facilities and there are some agencies that use that treatment. It is not required, but certainly people are eligible for that care.

MS. JUSTIS: And if I can add also, from the DoD, from the TRICARE standpoint, we do a
frequent review of emerging technologies and treatments to learn what is coming that may not be fully proven yet. But what are the emerging technologies? What are new treatments?

One of the abilities that Congress has given us in the last year was the ability to put emerging technologies and treatments into practice sooner. And so that has been a great tool for us. So it really is something we take seriously. We monitor regularly and we try to move out as quickly as we can on it. As soon as they have some level of medical viability, obviously, some efficacy.

CHAIR HOLTZMAN: Okay. Thank you. Anybody -- Mr. Stone, you had one question?

Judge Jones?

JUDGE JONES: Just one quick question.

In terms of canvassing for new treatments and that sort of thing. Is there any emphasis placed on treatments for men as opposed to women? It was something that came up constantly when we had the prior Panel that there didn't -- they didn't
seem to seek it out, frankly, in the same numbers or proportion as women did.

But also that there didn't seem to be always separate or maybe even if separate, different approaches for the care of the male victim. And maybe there shouldn't be. I don't know. I'm not a psychologist or a psychiatrist. But is there any data or anything you can add to the very little we know about that?

DR. POLLACK: So the evidence-based treatments for PTSD are effective both for men and for women. And we are constantly looking in the VA about how to expand our services for male survivors of MST. Men, you are correct, are more reluctant often to come into treatment.

Within the VA perspective, it's often harder to get men into, say, groups than women, based on stigma. And we do a lot to try and sort of reduce that stigma. We have even our sort of outreach materials really actually have men on them as well to try and encourage men and recognize that this is not a female problem.
For VA, people coming into VA, they can request a provider of a certain gender if that makes them more comfortable. And we do have some sites that have male specific programs.

DR. KRULEWITCH: Although part of the title of my position is Women's Health, when we discuss anything related to medical management of sexual assault, we're focused on gender-responsive medical management. And we've had discussions -- I chair a working group that does have the title Women's Health in it.

But when we talk about sexual assault matters, we talk about gender responsive and if there are specific approaches that may be more effective in males versus females. We also talk about trauma-informed care. So that --

CHAIR HOLTZMAN: About what?

DR. KRULEWITCH: Trauma-informed care. So we do focus also on experiences that could have happened in the person's lifetime that may affect how they even present. And we're looking at all those pieces.
I'm not a psychologist, I'm a nurse midwife, so my focus is a little bit different. But we do have experts in psychology on the group as well. And there is a psychological health council that's also been looking at this. So I have experts to draw on for that.

CHAIR HOLTZMAN: Thank you. Mr. Stone?

MR. STONE: I just wanted to clarify the point that came up when we were talking about non-PTSD care of the veterans. And I wasn't sure I understood it exactly.

Suppose the veteran comes in and denies they have PTSD from the sexual event, the sexual trauma, and they're not going to help you find any markers because they don't want a diagnosis of PTSD. But they do say they're depressed and they'd like depression medication.

Now, I presume, they're not going to qualify for benefits in that case. Will they also not qualify for medications and treatment services?

DR. POLLACK: No. They'll absolutely
qualify for any sort of treatment services really. It does not have to be PTSD. Anybody who comes into the VA with any condition secondary to a MST event, whether that be depression, whether that be an STD, whether that be a broken jaw related to an assault that occurred, is eligible for VHA healthcare for that condition.

MR. STONE: So when you were talking about trying to establish later and the difficulty if it's not PTSD, that it was them having to show what happened during their service time, that's only asking benefits. In other words, them getting a check --

DR. POLLACK: Right.

MR. STONE: -- a benefit check that doesn't -- okay. Because --

DR. POLLACK: Correct.

MR. STONE: -- in my own mind, it's not always easy for me to separate when they're getting care from when they're qualifying for a check.
MS. LI: And I just want to point out
that when an individual -- although we try to
engage the veteran in the claims process because
obviously they're in the best position to know
what sort of information is out there that might
assist in supporting their claim, we don't expect
veterans to come in and know exactly what they're
looking for until we try to help them through
that process.

But if they don't want to participate,
as Diana can speak to as well, the adjudicators
are trained to go through the file with a fine-
tooth comb. And she sort of described it as a
detective process.

So we're not relying on the individual
themselves to identify their markers, we are
looking for the markers. And that can be
anything from their Military Service treatment
records, their personnel files, statements
submitted on behalf of the individual from their
family members.

And, again, even if the veteran --
individuals we see frequently want a particular diagnosis to be applied to them or don't want a particular diagnosis. So even if an individual comes in and said, I don't have PTSD, I have depression, we're going to look at that claim from a mental health perspective in general. And if they are showing treatment for PTSD or they're showing -- we send them for an examination and the diagnosis comes back PTSD, that's what we're going to rely on.

We want to make sure that individuals who don't have the medical expertise to sort of diagnose themselves are getting sort of the full range of care and evaluation as we make the decisions about whether to send them that monthly compensation check.

MR. STONE: Yes. The reason I ask, and this relates also to the last question you were just asked. I think that if a woman is the victim of the military sexual traumatic event, and she's upset about it, I think she is going to report it and make a record.
But I think if a man, and there's many more men in the military, is the victim, he may not have reported it at the time. He would not want you to go back and talk to the other people in his unit. He kept the thing totally quiet because he wanted his military career to go on.

But now much later with no record at all and no markers for you to find, he's having trouble in his life. And so that's why I was asking whether or not he's going to be able to -- even if he says, well it's not PTSD, but in the meantime he can't hold down a job or focus on what he's doing.

MS. LI: It's important to note that as we do this marker process, it takes one marker. Just one marker in the file for us to trigger that need to order an examination and evaluation by a VHA mental health professional. We're not looking for a whole host of circumstantial evidence.

It could be the individual indicated that the event happened in the winter time, they
might not be specific about the timeframe because maybe they have forgotten, and we see that around the same time, that their performance improved or their performance declined.

Or maybe they indicated that they were physically assaulted during the military sexual trauma and we see that they went in and were treated for some scrapes and bruises, but there was no mention of a military sexual trauma.

It could be anything. And if we see just one of these markers, we're going to go and get these individuals evaluated to make sure that someone can sort of give the thorough evaluation of the evidence as well as interacting with that individual.

MS. WILLIARD: And as an example, I have a lot of male veterans that call me. Somehow they get my phone number and they call. And that's fine. For an example, would be a veteran who maybe has had his claim denied a couple of times.

We look at it again, and since our
training, and this veteran talks about how there was some kind of ritual. During that ritual, he was assaulted. But then he went AWOL. All right. And from the AWOL, then he talks about as he was chased through the ship that he was pushed from the catwalk. Okay.

So now I'm looking, okay. I see that he went AWOL, he got punished for being AWOL. I also see that he has an entry where he has two broken ankles and the medic wrote that he tripped from the catwalk. Okay.

But it all revolves -- you put all those little puzzle pieces together and then you have a diagnosis and you get him the eval, you get him the diagnosis and there it is. But it's looking for those markers. And so the whole story was there. And after you talk with the veteran, after you read the statement two, three, maybe four times, you're able to get that veteran service-connected.

MR. STONE: And you just mentioned he's had the claim denied --
MS. WILLIARD: It may be denied --

MR. STONE: -- two times --

MS. WILLIARD: -- two or three times --

MR. STONE: Okay.

MS. WILLIARD: -- it's possible.

MR. STONE: My question right here was by whom? What is that appeal process before it gets to you? Or is it the same time? Or are you able to overrule that appeal process?

MS. WILLIARD: It just happened that -- before I became a Quality Assurance Officer, I was still doing ratings while I was -- before I got to this position, I was still working in the Regional Office. I came across this claim. And something just, my gut said, this happened.

And so I start looking, I start calling the veteran, the veteran started calling me back, talked to that veteran more. It's educating our folks too and that's what we're doing. We have folks that are on special operations teams now that look at these claims. That are trained to look for these markers. So we find new markers
every day.

   MR. STONE: No. I guess I was asking about the process though. The person makes the claim, is it a VA doctor who denies it? Is it a VA administrator? And who does he appeal that to?

   MS. LI: So the Benefits Administration, you file your claim with the Regional Office, and it goes through our claims adjudication process. So it's an individual working in your Regional Office who's a rating specialist.

   And if an individual is denied service-connection for their condition, they have one year in which to submit what we call the Notice of Disagreement and begin the appeal process. It's a two-stage appeal process. There is an opportunity for another Regional Office-level de novo review. That is optional. They usually can take that or they can move to the second stage of the process.

   And if they submit their second appeal, which we call a Substantive Appeal, is what gives
jurisdiction to the Board of Veterans Appeals. And that's going to be your last level of agency review. At that point, the individual if they're not satisfied can appeal to the Court of Appeals for Veterans Claims.

Or at any stage in the process, the individual can withdraw the appeal, cannot appeal. And so, what happens is if an individual -- let's say an individual either stops their appeal or their appeal finishes and they decide not to go on to the next step.

After the time limit to continue your appeal has expired, the individual has an opportunity in the future to come back and what we call reopen that claim. And at that point, we require new and material evidence to reopen the claim. So we're saying you just need something that you previously didn't bring to us to look at that.

And it starts a new claim and it starts the whole process over again for them to go through and appeal. And individuals are not
limited in the number of times that they can
reopen a claim. So it's possible that
individuals can come to us five, six times.

Right now, with our MST PTSD, because we
had such a ramp-up in our training and sort of
moving both into the special operations claims,
we have a special review going on for folks who
were previously denied prior to December 2011 for
a PTSD claim based on MST. At this time, any
individual who was previously denied prior to
2011, we are encouraging them, we've reached out
to a little over 5,000 that we were able to
identify. But we're taking anyone that comes in.

And if we receive a claim from these
individuals, a reopened claim, we're not
requiring new and material evidence. We're just
doing a de novo review. We're going ahead,
looking through the claims file, seeing if --
what we found is in most cases, the marker was
not identified.

So we're getting these individuals the
examinations that they should've been given and
getting them service-connected. And that's just
a special review that we've been doing over the
last two years.

MR. STONE: I thought you said in answer
to a question before that you changed some of
those guidelines in 2002.

In 2011 is when we increased our training and
focus on making sure that the regulations were
being appropriately applied by adjudicators in
the Regional Offices.

MR. STONE: So is there a reason that you
don't go back to all the claims up to 2002 then?

MS. LI: That -- claims between 2002 and
2011. That were not done -- that may have been
done under the marker process, but not have been
adjudicated with the level of focus that we have
our folks doing now.

MR. STONE: So the 5,000 goes back to
2002?

MS. LI: Yes.

MR. STONE: Okay. And --
MS. LI: And I believe there's some information about that in the GAO report.

MR. STONE: And how long is that process taking? Because I understood that there are tens of thousands of backlogged cases before the Court of Veterans Appeals. So I was just wondering whether that backlog also is in the process before the Court of Veterans Appeals or it's mostly just there?

MS. LI: Well, these individuals would fall outside of the, sort of the backlog process. When they are coming in, they're coming in at the Regional Office level. So, they're getting pushed into the special operations lanes and their claims are being worked as a new claim that would come in. So they're not part of the appeals backlog.

MR. STONE: So this special operations process doesn't have a backlog or it does?

MS. LI: I can't really speak to the backlog. That's not my expertise. I mean, I know there is a VBA backlog. In terms of what
that is for the various lanes, we work every
claim and we call it sort of first in the door,
first worked.'

But as to what the processing times for
MST claims are, I think Diana spoke a little bit
about how they take a little bit longer. But I
don't know what the numbers are in terms of
backlog.

MR. STONE: In terms of take a little
longer than --

MS. LI: Take a little longer --

MR. STONE: -- what sort of general --

MS. LI: -- than sort of a basic, like,

hearing loss claim or some -- because of the
process in which we're looking to gather as much
evidence as possible, both in the military record
and outside of the military record to make sure
that we can find information that will
corroborate the event in service.

MR. STONE: I thought that the length of
some of the non-MST processes was in the realm of
one to two years. Your claims are taking longer
than that? I mean, as an estimate?

MS. WILLIARD: No. MST claims take approximately about 300 days. If you're looking -- if you have to look very hard. Okay. Some of them can happen sooner. It just depends.

The sooner the veteran files their claim and we have the markers and get the exam, sometimes it could be 125 days we could flip one around. But it just depends. Because the longer you wait to file that claim -- someone who filed a claim and they served back in the 50s, say for instance, or the 60s, there is very limited information.

A case in point was there was a female veteran who filed a claim. It was in -- well, she got out of the Service in 1953 for pregnancy. By the Office for Local Standards, women in the Service at that time were put out of the Service for pregnancy. She got out of the Service because she was raped by her supply sergeant. Okay.

There was nothing in her records. Her
records were very scant because she was in for a short period of time. However, what we found out is that prenatal records are not kept with the Service treatment records. So we went back out and looked for the prenatal records.

The marker in that prenatal record said, despite what happened to her, she plans on keeping her baby. So she confided in her physician, that was a marker, that was enough to get her an exam and to get her service-connected. But the longer you've been out of the Service, it makes it a little harder for us to get that marker trail.

MR. STONE: And that 300 days is to first review? If they want a second review and then --

MS. WILLIARD: Of course.

MR. STONE: -- they go up to the -- all of that stuff is going to add roughly 300-day periods maybe, right?

MS. WILLIARD: I wouldn't go that far.

MS. LI: Yes. I'm not familiar with the actual time line to the appeal. Each stage of
the process is a little different. And the
Board, again, has its own docket and backlog as
well.

CHAIR HOLTZMAN: Can I ask another
question about -- I'm sorry, we're just about
finished with the panel, the time for the panel.
But the VA is coming up with numbers in terms of
its determination that someone has been a victim
of sexual assault constantly.

And you basically are determining as
well more or less the year in which it happened,
at least, if not the actual date. Is there any
feedback to the DoD in terms of their being able
to develop proper data on the incidence of rape
or sexual assault? I mean, are they asking you
for your numbers? Do you provide them numbers?
Are they updating their numbers?

I mean, because it sounds to me like
you're dealing with large numbers of people every
year who are coming to you and saying -- veterans
who say, I was a victim of sexual assault? And
so that information is important to go back to
the military.

DR. POLLACK: So from a healthcare perspective, I talked about that we in VHA have a screening process --

CHAIR HOLTZMAN: Right.

DR. POLLACK: -- where we screen every person. DoD absolutely has access to our reports. We work actually very closely --

CHAIR HOLTZMAN: Okay.

DR. POLLACK: -- with DoD and they do see those reports. I don't know, Cara, if you want to add anything about that. One thing I do want to add that I think might be of help to the committee about this topic, is we're happy to provide you with the handouts that we provide to active-duty Service members who are going through the separation health assessment.

And I just wanted to stress that, that goes to all individuals who are going through -- have filed a claim for anything, so for an ankle injury. Because recognizing that there is a difficulty in terms of oftentimes people don't
I want to report, we don't want to just target individuals who have already filed a mental health claim.

We want to make sure that anybody who is separated from the Service who has filed a claim gets that information as part of the scripting that we teach our examiners. It's really to even let those examiners know to let the Servicemembers know this may not have impacted you, but this information may be helpful to another friend that you may have, a buddy of yours who's separating from the Service.

And we are happy to provide you with those handouts that really talk about the importance of having some sort of information and how that might impact your claim. It certainly doesn't help the person who got out of the military in 1955.

But as Stephanie indicated, that we are constantly looking to update our policies, our procedures, to make things better for our veterans and for our active-duty Service members.
And so we will provide this to the committee if it would be of use to you.

CHAIR HOLTZMAN: Thank you. Dr. Pollack, just to clarify something you said. Are you giving this information to separating military people who have not filed a medical claim? Do they get that as well? Is it everyone separating from the military?

DR. KRULEWITCH: I think we've decided that it goes to everybody --

CHAIR HOLTZMAN: Okay.

DR. KRULEWITCH: -- at the separation health assessment. Because of the fact that the separation health assessment can occur as much as nine months before a person separates. So there was a concern within the DoD of that confidentiality. Many people don't want to disclose what's occurred until they're absolutely out and --

CHAIR HOLTZMAN: Okay.

DR. KRULEWITCH: -- separated. So some of the separation health assessments do occur
before that time. So our agreement was that they
would get all this information to know what to do
when they're out.

CHAIR HOLTZMAN: Excellent.

DR. POLLACK: So to stress, and your
question was how the VA and DoD could work
together. So this is certainly a project that we
all work together on, VBA, VHA, DoD.

CHAIR HOLTZMAN: Thank you very much. I
really appreciate all of you coming here and
thank you for sharing your expertise with us. I
guess we can take a break. Five-minute break.
Thank you.

(Whereupon, the above-entitled matter
went off the record at 10:38 a.m. and resumed at
10:49 a.m.)

CHAIR HOLTZMAN: Our next panel is
Review of Relevant Uniform Code of Military
Justice Provisions, Fines, and Forfeitures, and
Further Deliberations on Restitution as an
Authorized Punishment at Court-Martial.

We have two presenters. First will be
Mr. R. Peter Masterton, Chief of the European Tort Claims Division, U.S. Army Claims Service, Europe. Afterwards, we will hear from Ms. Jennifer Riley, Assistant Counsel for Military and Civilian Pay, Defense Finance and Accounting Service. Mr. Masterton, welcome. You may proceed.

MR. MASTERTON: Thank you. I'd like to first thank the Panel for inviting me to come here. I'm Pete Masterton. I work at the U.S. Army Claims Service in Europe in Wiesbaden, Germany. I'm also a retired JAG.

At the outset, I'd like to say that I see many benefits, having restitution as an authorized court-martial punishment or an authorized part of a sentence at a court-martial.

I'm a former defense counsel, prosecutor and judge in the military. However, I do see some limitations and problems that I'd like to briefly point out.

First of all, restitution is unlikely, I believe, to be uniform. The military has no
sentencing guidelines of course, like the federal system. The sentencing, military sentencing authorities would probably have very little guidance on when restitution is appropriate and the amount of restitution.

A jury, or a military panel is oftentimes the military sentencing authority, and juries oftentimes only sit on a single case or a few cases. Therefore, they would have very little experience in developing appropriate restitution guidelines.

If restitution is defined to include pain and suffering, psychological injury, trauma or loss, this of course would be very difficult to measure given the problems I've just explained.

Another issue with military sentencing is that military sentencing of course occurs immediately after findings. This is the unique but important part of the military justice system, which ensures that the outcome of a military court-martial is speedy.
There is no pre-sentencing report, of course, prepared. It may be difficult to gather the appropriate restitution evidence in advance without knowing exactly what the accused is going to be convicted of.

Just by way of comparison, I'd like to describe just very briefly the claims investigation process under the Federal Tort Claims Act, the Military Claims Act, the Foreign Claims Act, the acts that my office work on in terms of investigating pain and suffering.

This is just by way of comparison. In order to pay under these statutes generally, the act would have to occur, or the tortfeasor would've had to be acting in the course of his or her duties. So, it really doesn't apply to sexual assault.

Typically, when you review pain and suffering cases and medical malpractice cases, or similar cases, we have to review the medical records carefully. We oftentimes will have an independent medical examination conducted.
The claimant is typically interviewed, preferably in person. Family members and friends are interviewed, preferably in person. Of course liability, damages and causation are all examined and once we've made a determination, an initial determination in the claim, the claimant is typically given an opportunity to address potential problems with the claim or potential gaps in the damage portion of the claim.

Typically, we do that by sending the claimant a letter explaining what reservations or problems we have with the -- with the payment of the claim. The claimant can submit additional evidence. Can submit perhaps statements by doctors or obtain an additional medical examination.

Of course, it'd be very difficult -- well, it's very difficult to do that in the context of a military sentencing proceeding.

Another thing for the Panel to realize is that it may well be unlikely that the accused would be able to personally pay restitution if
the accused is pending trial or has been convicted at a court-martial.

It's likely that either adjudged forfeitures or automatic forfeitures would be taken from the accused's pay, or that the accused would be discharged. It may be very difficult to enforce restitution.

There are many benefits, of course, of restitution. It holds the accused -- the Panel has already discussed in previous sessions that it holds the accused personally responsible for his crimes.

It gives sentencing authorities in the military more flexibility, and sentencing authorities in the military are in a unique position because they know a great deal about the facts having just gone through potentially the findings sections of trial.

So, I think there are very -- there are a great deal of benefits to restitution. I just wanted to point out a few of the potential pitfalls or limitations. That's all I have.
CHAIR HOLTZMAN: Thank you very much.

Ms. Riley, welcome.

MS. RILEY: Thank you. Thank you for having me here today. I’m an attorney with the Defense Finance and Accounting Service, also known as DFAS. I’m with the DFAS Office of General Counsel, in the Military and Civilian Pay Law Directorate.

DFAS is a Defense Agency that provides consolidated financial and accounting services to the Department of Defense. We pay all military members, all DoD civilian personnel, all military retirees and annuitants, and we also pay major DoD contractors and vendors.


Since entering my current job, I’ve handled the majority of questions that have come into our office regarding courts-martial. We receive court-martial finance questions obviously from people within DFAS but more frequently from
Service finance offices and Service JAG offices.

I've also provided training to Army trial prosecutors on court-martial finance issues through the Army Trial Counsel Assistance Program.

I was invited to today's hearing to provide assistance regarding some of the technical aspects of court-martial fines and forfeitures. I can hopefully answer any questions you might have about the implementation of fines and forfeitures, waiver and deferral of forfeitures and the timeframes that are relevant to the issues you are considering.

I can also provide information concerning some of the nuances regarding forfeitures. For example, if an enlisted member reaches the end of his term of service while he is in confinement, his entitlement to pay stops and there's no longer any pay to be forfeited.

So, although a convening authority may have deferred and waived forfeitures, the dependents of the defendant will not receive any
pay because there is no pay to be forfeited.

I wanted to make you aware of this nuance. That's something you may want to consider as you are considering providing forfeited pay to victims. There may be some inconsistencies among the victims regarding whether they actually receive forfeited pay.

I can also provide information regarding what occurs under the current law when sentences that include forfeitures are set aside on appeal so that you can discuss how successful appeals will be handled under a new statutory scheme that includes either restitution as an authorized punishment or payment of forfeitures to the victim. Thank you.

CHAIR HOLTZMAN: Thank you very much.

Mr. Taylor?

MR. TAYLOR: Mr. Masterton, you listed all the problems that you saw with restitution as a penalty. Do you think that during the evolution of the authority of military judges it is about time to give the military judge that
tool in the toolkit, along with the others that
have expanded over your career, for example,
while you served as a JAG, including a military
judge?

MR. MASTERTON: Sir, as I stated at the
outset, I do believe that it would be appropriate
to include -- this is just my personal opinion.
I do believe that it would be appropriate to
include forfeitures in the toolkit, if you will,
of the military sentencing authority.

Part of the problem, of course, is that
at least at a contested case, oftentimes the
sentencing authority is going to be a panel, a
military panel or jury.

So, the difficulty with uniformity is my
primary concern, and also the amount of time that
both the victim and the government would have to
appropriately present a restitution case, if you
will, would be somewhat limited. A lot of it
would have to be done upfront, and that may well
pose a difficulty.

Certainly, as the military justice
system evolves, many adjustments have been made. Perhaps it is time to include restitution as one of those adjustments.

MR. TAYLOR: Well, the impressive list you gave us of problems certainly are problems that we've thought about before, and I guess the question I have about them is, are there any that are proved showstoppers?

For example, on the question of uniformity or consistency that you just mentioned, military judges do have guidelines and there's no reason why it seems to me Benchbook guidelines or other guidelines cannot be in place that would enable both judges and juries -- by the way, I think our military juries are comparable to blue ribbon juries when it comes to making assessments based on their background, education and experience and so forth.

So, are there any true showstoppers that you see from that list that you gave?

MR. MASTERTON: Sir, of course, that would be ultimately for your Panel to decide. I
personally do not believe there are any showstoppers. As long as the Panel realizes that there are potential limitations in restitution as an authorized court-martial punishment, and certainly if Congress authorizes restitution as an authorized punishment and the military has given an appropriate amount of time to develop appropriate Benchbook instructions to inform panel members what guidelines they should consider in adjudging restitution, I think that it is something that certainly could be implemented in the military.

MR. TAYLOR: Well, thank you very much. Ms. Riley, what is the most frequent type of question you get that would be important for us to know in assessing any recommendations that we might make regarding fines and forfeitures and restitution?

MS. RILEY: I think a question we get often concerns entitlements to pay after a court-martial sentence has been set aside. Currently, a military member, when a sentence is set aside,
is entitled to restoration of all rights,
privileges and property that he or she was
deprived of by virtue of the executed portion of
the court-martial sentence.

I think under the current scheme, if
restitution by proxy was implemented where the
government would pay restitution on behalf of the
defendant, if that restitution sentence were
subsequently overturned, there would no longer be
authority for the government to make that payment
to the victim.

So, I believe the government would be in
a position of having to seek return of the
restitution payment from the victim. So, I think
that's a concern.

MR. TAYLOR: Any others you'd like to
share?

MS. RILEY: The other thing I mentioned
about the fact that a lot of times the --
depending upon when a member's term of Service
expires, deferred or waived forfeitures may
actually not be paid.
So, again, there may be inconsistency as to whether victims actually receive money if deferred forfeitures or waived forfeitures are provided to them.

MR. TAYLOR: Thank you.

CHAIR HOLTZMAN: Thank you. Judge Jones?

JUDGE JONES: I just want to establish a couple things to make sure I understand. Right now, the convening -- there is no such thing as a sentence that contains restitution, correct?

MR. MASTERTON: That is correct.

JUDGE JONES: The convening authority can reach an agreement or have an agreement which as part of it has the defendant agreeing to make restitution, right or wrong?

MR. MASTERTON: That is correct. A pretrial agreement can include a term that requires the accused to pay restitution. That pretrial agreement would be approved by the convening authority. The case would then be sent to trial. The accused would, under the terms of
the pretrial agreement typically plead guilty,
and in return would be obliged to make
restitution.

If the accused did not make that
restitution, then the pretrial agreement would --

JUDGE JONES: Would be breached?

MR. MASTERTON: They would breach the
terms of the pretrial agreement. If the sentence
happened to be greater, the adjudged sentence of
the court-martial happened to be greater than the
sentence limitation of the pretrial agreement,
the accused would then be required to serve
additional time, for example, that was in the
adjudged sentence.

JUDGE JONES: So, when you said
initially that you'd seen a lot of restitution
cases, you were talking about just the context of
the Federal Claims Act, or the Military Claims
Act? Those civil processes, is that what you
meant?

MR. MASTERTON: The claims that I was
mentioning, my office and the U.S. Army Claims
Service, and actually the Air Force and the Navy adjudicates a number of different types of claims under a number of different statutes.

JUDGE JONES: Right. It's a civil process.

MR. MASTERTON: It is, but the claims statutes typically require -- at least here in the United States -- typically require that the tortfeasor be acting in the scope of his or her duties, which typically isn't going to be the case in a sexual assault.

JUDGE JONES: So, by definition, you wouldn't have seen sexual assault cases? Or not?

MR. MASTERTON: Almost by definition. There is one exception that I was going to discuss at the session this afternoon. Under the Foreign Claims Act, we are authorized to make claims payments for Soldiers' actions, Sailors' actions, Airmen's actions outside the scope of duties.

For example in Iraq, Afghanistan and Europe, we oftentimes use this authority to pay
for sexual assaults, murders.

JUDGE JONES: Just as a matter of

policy?

MR. MASTERTON: As a matter -- well, the
Foreign Claims Act, the goal of the statute, is
to promote good relations with our host nations.
So, there is one small exception where we do
actually see these types of claims. Again, the
same process that I was describing before of an
individualized investigation is done in each of
those cases.

JUDGE JONES: I would assume that would
include, aside from the investigation into the
actions, you know, the act itself that caused the
injury. Do you also investigate the value of the
claim? How do you investigate what restitution
you should pay for pain and suffering?

MR. MASTERTON: Yes, ma'am. We very
carefully investigate the damage part of the
claim. When we are -- medical malpractice is
perhaps the best example that perhaps is similar
at least to sexual assault cases where we have a
claimant interview.

We'll have a -- usually the claimant himself or herself will submit medical records. If not, we'll request a release of medical records. A HIPAA release. So, we'll examine all the appropriate medical records.

Sometimes, we will have an independent medical evaluation or examination done of the claimant. Similar to what the VA does. In some cases, that is a government position. In some cases, it's an independent position that we and the claimant agree on and will pay for.

Then as I mentioned before, the claimant is typically given the opportunity to -- we send the claimant a letter, explaining to the claimant what gaps we see in the causation portion of the claim, and of the damages portion of the claim, the injuries.

We'll tell the claimant, for example, you don't have sufficient medical records to show the injuries that you've alleged, and the claimant will then have the opportunity to
provide additional medical records, get an additional exam perhaps.

JUDGE JONES: But you do make decisions where you decide you should pay the claimant?

MR. MASTERTON: All the time, ma'am.

JUDGE JONES: And how do you value the claim?

MR. MASTERTON: Under the Foreign Claims Act in Germany, we typically value the claim by looking at similar court cases. Under the Foreign Claims Act, we do it in consistence with foreign law. So, we will take a look at sexual assault and rape cases in the German courts, for example, in Germany. We will do an evaluation to determine exactly how much the German courts have paid for -- it gets very specific, a sexual assault case involving a specific type of trauma, involving a specific length of medical treatment.

We very carefully evaluate the claim itself, and we very carefully evaluate all the court cases that are similar.

JUDGE JONES: I guess what I'm getting
to is that in the criminal context, to ask for --
or for there to be a charge or request for
restitution from a military jury, or maybe just
the judge, it would require that kind of
analysis.

I'm talking about pain and suffering.
I mean you can always compute compensation with
respect to medical expenses and all of that. But
it seems to me, and you may agree with me or you
may not, that it would be difficult not just for
a panel, but also for the military judge himself
to make this kind of decision about restitution
as part of the -- a penalty in a criminal case.

MR. MASTERTON: Yes, Your Honor, it
would be. I would concede that. Not --

JUDGE JONES: I know you can do it. You
can do it, but --

MR. MASTERTON: My office is capable of
doing it after a long and careful examination
that sometimes takes months. At a military
court-martial, the findings are adjudged, and
then sentencing proceeds immediately thereafter.
Certainly, some of the investigations that I've talked about that we do in a claims context could be done upfront, and typically is done upfront. It is not unusual at military sentencing proceedings for the victim to desire to testify during sentencing.

However, without knowing exactly what the accused is going to be convicted of, it may be difficult to do all of the examinations that I've discussed upfront and certainly the panel isn't going to be able to come back midway through their deliberations and ask the victim to provide.

It is possible for the panel to ask questions of specific witnesses, but it'd be difficult to do the same type of investigation that I described in a claims setting.

JUDGE JONES: When you began your discussion, you talked about restitution and forfeitures together. Are you suggesting that the forfeitures would be the only way to fund the restitution? I just wanted to ask.
MS. RILEY: Well, I think that's the concern with restitution is that because of how frequently forfeitures are imposed on a convicted member's pay, it is unlikely that the member would have any means to pay a restitution sentence.

JUDGE JONES: And so, I guess what you're saying is restitution actually could come from the resources of the defendant, but that in most cases in the military, that defendant isn't going to have the kinds of resources necessary to pay a restitution penalty, and it would have to come from forfeitures.

I just wanted to make sure I understood the connection. Is that about right?

MR. MASTERTON: I would agree with that, ma'am. I'm not sure I made that connection before, but I would agree. I would agree that it would be difficult.

I think I did state before that it would be difficult to ensure that the accused actually paid the restitution. A fine is an authorized
penalty at a court-martial. Oftentimes, it is
difficult to enforce the fine for the same
reasons.

JUDGE JONES: Can you tell me typically
what are the numbers on fines? I mean would they
be the same kinds -- would a restitution penalty,
and I know this is difficult because there is no
restitution penalty. There are only agreements,
but would you expect restitution penalties to be
even higher than fines that are assessed? I
don't know what fines are assessed. That's why I
am asking you.

MR. MASTERTON: Typically, and again
this is just my experience in the courts-martial
that I've tried. Typically, a fine is adjudged
in a case that involves some sort of a monetary
unjust enrichment by the accused. Typically, for
example, someone who steals from the government.

BAH fraud is one of the cases where we
see corrupt fines. Oftentimes, a judge -- and
for example, if the accused has stolen $30,000,
perhaps he'll have a fine of $30,000 adjudged as
part of the sentence. It is difficult to enforce that particular fine.

   It's hard to say restitution because it isn't an authorized penalty.

JUDGE JONES: That fine sounds to me like restitution to the agency that lost the $30,000. But I mean in sexual assault, and assuming that the victim is a military member, really we're talking about pain and suffering because in terms of compensation if you wanted to add things like medical bills and all that, there aren't any.

   So, I think we're just talking about -- are we just talking about pain and suffering in the context of a criminal sexual assault case?

MR. MASTERTON: Ma'am, in the context of a criminal sexual assault case, we're certainly talking about pain and suffering. We also may be talking about unreimbursed medical expenses for a civilian --

JUDGE JONES: For a civilian, right.

MR. MASTERTON: -- not associated with
the military, victim. We may be talking about
property loss that is associated with the case,
to the extent there is property loss.

JUDGE JONES: Okay.

MR. MASTERTON: So, there may be other
parts of restitution that would be easier to
prove than pain and suffering.

JUDGE JONES: I think that's it. Thank you.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: I'd like to pick up on that
for a second. If I understood the generalization
that I'm hearing, that in military sexual assault
cases, there really generally is not a fine
imposed. Is that right, in your experience?

MR. MASTERTON: That is correct.

MR. STONE: And restitution is not
imposed?

MR. MASTERTON: Restitution is not an
authorized punishment.

MR. STONE: Okay, so all we're left with
in this realm is forfeitures, right?
MR. MASTERTON: Yes, sir, and the panel of course or the military judge sentencing authority has the authority to adjudge forfeitures. Even if they don't, certain sentences will automatically result in forfeitures.

If there's discharge imposed or if there is confinement for over a certain period, there's automatic forfeitures that would kick in. The accused generally won't be earning any pay while in prison, or a very small -- at least there will be some forfeitures typically while the accused is in prison.

MR. STONE: So, we're not collecting any significant amount of money in forfeitures either? Like you have fines or restitution, right?

MR. MASTERTON: Well, the bottom line is the accused, to the extent he's still in the military and their term of service hasn't expired, is not being paid as a Soldier, Airman or Marine while in confinement.
MR. STONE: So, there's not a forfeiture, nothing to forfeit?

MR. MASTERTON: Of course, the accused, while he's in confinement, if there's no adjudged forfeitures and there is no automatic forfeitures, the accused would be earning money, earning his military pay up until the end of his term of service, something that used to be not uncommon before automatic forfeitures were enacted by Congress approximately 15 years ago.

So, I mean the automatic forfeitures and adjudged forfeitures are certainly important because if they didn't exist, the accused would be paid while in jail. That money would go to the accused. Then perhaps we'd have more opportunity to take that money and pay it to family members or to victims.

MR. STONE: I see dollars as pretty fungible so I don't understand exactly. I could totally understand why the military doesn't want to pay a salary to someone it has just sentenced to prison, but I don't see why that dollar
matters in terms of making things right for the victim.

I can understand the military saying, "I'm housing you in a prison. I don't have to pay you your salary while I'm, by the way, giving you room and board." I totally understand that.

MR. MASTERTON: Yes, sir.

MR. STONE: But I guess I don't see the connection that I thought you were just making that we would have those dollars. I don't think those dollars matter, even in the civilian sector while certain fines and forfeitures wind up being available to the Office of Victims of Crime at the Department of Justice to go after state grants to help victims. Those aren't the only ways that victims get compensated. That's just a separate grant program that's out there.

MR. MASTERTON: Yes, sir.

MR. STONE: So, I don't see that tie. Also, before we leave this conference, maybe Ms. Riley, you can explain to me. I heard you say one of the problems will be that even if the
person doesn't go to jail, they will be
discharged, and there will be nothing to forfeit.
Did you say that? Did I hear that right?

MS. RILEY: I don't believe I mentioned
discharge, but that is true. If someone is
discharged, then they're obviously no longer
entitled to pay.

MR. STONE: So, I guess my question is,
is there a mechanism that allows the forfeitures
to carry over to the person's retirement pay?
Because most of these military people will have
earned some kind of retirement pay that the
government is paying. Just like if you owe money
to a federal court, it can be taken out of your
tax refund.

I guess I'm wanting to know why there
isn't a similar mechanism that if you're afforded
some kind of a forfeiture that doesn't continue,
you retire the next day and you've been kicked
out of the Service, terminated. But you have a
nice retirement you're getting; is there a
carryover?
MS. RILEY: I believe adjudged forfeitures do apply to retiree pay. Automatic? I don't believe they do. Those are only effective while you're confined or on parole. So, I don't believe automatic forfeitures apply to retiree pay.

I don't know how high of a percentage there are of retirees being -- I only have experience with maybe a handful of people entitled to retiree pay that were -- that they were being subject to forfeiture.

MR. STONE: So, it is possible?

MS. RILEY: It is possible. I think it is just infrequent.

MR. STONE: Okay, so this now goes to the next question I had, which is something Mr. Masterton brought up, which is the lack of guidelines that -- and it seems to me that the guidelines are all that much more important because unlike in a civilian sector where -- when appointed a judge, you serve for a long enough period of time that after a year or so, you start
to acquire a lot of experience with certain cases
or after several years.

    In the military, people are rotated.
So, a person gets to be a military judge who
previously wasn't in that position, and they may
not serve in that position very long because
their career may take them in other courses.

    So, it seems to me it is even more
imperative than in a civilian sector that they're
given guidelines that give them both a range of
likely punishments, which we have in the federal
system, as well as perhaps a minimum and a
maximum so that they know at a minimum what
should be imposed, and at a maximum what is
available, but also a range of what is -- in
fact, the federal sentencing guidelines were
arrived at by looking at actual punishments, and
then they derive ranges so that judges would know
what's actually happening out there. Because
even then, they only know what comes before them
in their court, and they're very interested, and
they want to be uniform across all the federal
courts, the 50,000 criminal prosecutions a year.

And so, the Sentencing Guideline Commission decided to give them guidelines, and they talked about the heartland, the range, that a judge can go above or below. But that's typical in those kinds of cases.

I think it would be even more important than in the civilian sector with this rotation of judges. I guess I'd like your input.

JUDGE JONES: Before you answer that, could I just interject? With respect to restitution per se though, you don't have a heartland or guidelines. It is varied case by case.

MR. STONE: Well, no. There are referral Guidelines that talk about -- they relate essentially to fines, but in a criminal fraud case how much the size of the fraud is affects both the sentence of incarceration as well as what's going to be ordered in terms of fines.

JUDGE JONES: I agree, but I think we're
talking about restitution in the context of sexual assault cases here, and I don't think -- I am just saying I'm not sure the guideline analogy fits precisely. That's all.

MR. STONE: Well, the Supreme Court had to deal last year, as you may know, with transmission of pornographic images of a juvenile, and there's a statute that required full restitution of and penalties to victims. The numbers involved in that case were in the millions of dollars.

In response to the Supreme Court's ruling in that case, Congress has come back and I believe they've now passed a statute that makes it a mandatory $25,000 fine if you are a person whose pornographic images have been --

JUDGE JONES: I don't disagree, but a fine is punishment, and you can put a number on it. I just say restitution is different.

MR. STONE: Right. Here we're talking about fines, restitution and forfeitures. I guess what I'm asking is if a number, in that
case it's a minimum of $25,000 fine, can be put
on someone's pain and suffering for their
pornographic images being trafficked, it seems to
me that there could as well be some kind of a
guideline proposed that provides a minimum -- at
least a minimum for the pain and suffering,
without putting a victim through trying to
establish and show how many times she broke down
in tears, and how many breakdowns she had, and
how many days she called her counselor in the
aftermath of having been sexually assaulted.

And so, that's what I'm asking: whether
you think in the military system there's even a
greater need for guidelines because of this
rotation factor that we don't have people who
will be able to benefit from years of accumulated
expertise in the job.

MR. MASTERTON: Sir, if I could go back
just for a minute to your prior question. Just
to make clear, if a Soldier/Sailor/Airman
receives a discharge, he or she loses any
retirement benefits. And that's often times a
sentence -- however, your prior point is well taken. There are certainly Service members who are sentenced for sexual assault to prison terms, or sentenced to some other -- or given some other sentence who do have retirement benefits.

Certainly, those retirement benefits --
I think the answer was given before that those retirement benefits could be -- could be available for forfeitures, for fines.

MR. STONE: Do you think most judges know that, realize that when they're sentencing? That's the point.

MR. MASTERTON: Certainly the issue of retirement, if that's a -- if the Soldier on trial is retirement eligible, that issue is very carefully examined by the sentencing authority, and the defense is typically interested in presenting evidence on exactly how much those retirement benefits are worth.

So, that issue does get examined very carefully. The specifics of what happens to the retirement benefits if a restitution is adjudged
-- obviously now one can't be, but what happens to those retirement benefits in light of a fine or in light of forfeitures, those specific topics may not be fully investigated during sentencing proceedings. There may well be certain sentencing authorities that don't know that much about it.

Regarding the federal sentencing guidelines, that's certainly been a debate that's been ongoing in the military, whether it's, some form of sentencing guideline should be imposed, perhaps outside the scope of this particular meeting.

CHAIR HOLTZMAN: Excuse me, definitely outside the scope. So, please don't address it.

MR. MASTERTON: I would point out that military judges do have a form of tenure. They are given tenure for a three-year assignment. But as you point out, they do rotate. And juries, of course as I mentioned before, are only going to have perhaps one case that they sit on.

MR. STONE: You also mentioned that
there were no pre-sentence reports, and it seems to me that this goes to the procedure in the court-martial that the sentencing follows the adjudication of guilt. I'm wondering if you think it is a tremendous problem to have a delay, given that these are panels that are put together ad hoc, and it is hard to say -- I can't think of a civilian criminal sentencing situation for sexual assault that doesn't include a pre-sentence report that typically takes at least 30 days to prepare and a victim impact statement that may or may not be part of that pre-sentence report but also takes some time to allow it to be prepared and yet that's going on on a regular basis in the military because of this time issue.

So, I was going to ask for your views on how much time we -- how much of a delay could be imposed without totally devastating the system? I mean are all -- could the panel be brought back three weeks later? A month later? Are the officers typically around to be brought back for a brief session to do sentencing? Would it
totally change the nature of a court-martial situation?

MR. MASTERTON: Sir, one of the debates in military justice has always been the need for discipline and efficiency in the military justice system, and the need for fairness both to the accused, and quite frankly to the victims and to the government.

The current court-martial system ensures that courts-martial can be done relatively quickly. In places like Iraq and Afghanistan, it is important to be able to move the military justice system just as quickly as reasonably possible.

Again, the fact that the military sentencing proceedings happen immediately after findings is just one of the issues that I brought up. It certainly would be possible, and I have seen cases where a short delay is authorized between the findings phase and the sentencing phase. But again, very unusual.

I think perhaps the more typical
solution or the more typical result would be to try to do as much of the investigation on the injury to the victim upfront, as much as can be done.

I'd just point out that it may be difficult to do that in all cases.

MR. STONE: Well, pre-sentence reports aren't written before there's a finding of guilt in civilian courts, among other reasons, because the defendant on the advice of his lawyer is not about to talk to a pre-sentence investigation report writer.

So, I really don't think that that's a plausible option. And I guess I go back to my question, which was do you think having a 30-day delay would totally be incompatible with the system?

MR. MASTERTON: I think having a 30-day delay would, number one, turn the military justice system into something it currently isn't, and I think that it would have a significant impact on, adverse impact on, military discipline
and the ability to move courts-martial quickly.

CHAIR HOLTZMAN: I'm going to cut the questions now, Mr. Stone, because we have a 12:00 session.

MR. STONE: I can continue with the --

CHAIR HOLTZMAN: Well, will we have time, Kyle? Because I'm just concerned. We have to have lunch and we have a 12:00 -- someone is going to be on the phone at 12:00, which is a problem. So, we have to start again at 12:00.

I think Mr. Masterton will be back in the afternoon. So, I guess you could lay ambush for him then. Just I want to ask one really quick question on my behalf. Forfeitures, could you just briefly, what is an automatic forfeiture and what is an adjudicated forfeiture?

MS. RILEY: Certainly. There are two ways that forfeitures can be imposed on a member's pay. One is if the members or the judge -- actually adjudicates a forfeiture, puts that in the sentence.

The other way is if the forfeiture
occurs as a matter of law. That happens when a member is sentenced to either 60 days -- excuse me, six months of confinement or a punitive discharge and any confinement.

A member's pay would be forfeited 14 days after the sentence is adjudicated.

CHAIR HOLTZMAN: Okay. I guess I can ask in the afternoon about pain and suffering in restitution cases. Okay, well, because of our time constraints I think we'll end this session, but I want to thank both members of the panel for very informed presentations and for sharing your expertise with us. Thank you.

(Whereupon, the above-entitled matter went off the record at 11:32 a.m. and resumed at 12:20 p.m.)

CHAIR HOLTZMAN: The Panel will recommence.

May we have some -- if everybody's talking, can we just pause.

The panel is called Developing a Department of Defense Uniform Crime Victims
Compensation Program with Consultation From Claims System Experts.

I want to, first of all, thank all the panel members and particularly Mr. Feinberg for their patience in waiting for us. Unfortunately, the lunch was delivered about 45 minutes late and we raced through it. So, we appreciate very much your patience.

And our first presenter is Kenneth Feinberg who's the founder and managing partner of Feinberg Rozen, LLP. We're very honored to have his presence by telephone with us today.

Mr. Feinberg, just to accommodate your schedule, what we'll do is after you make a presentation, the Panel will question you and then you can be excused so that we don't -- I know you have a hard deadline of 1:00 and we don't want to keep you in any way beyond that.

So, thank you very, very much for agreeing to appear by phone with us today and share your expertise.

Mr. Feinberg, you may commence.
MS. FEINBERG: Well, thank you very much, Congresswoman Holtzman. And I'm grateful to the Panel and I'm honored that you've reached out to me.

I can fairly quickly summarize what I've concluded are these building blocks of any compensation program. And this is based on my experience, as Elizabeth Holtzman knows, going back to my role as Special Master for the Agent Orange Vietnam Veterans' Fraud Liability Litigation, the 9/11 Victim Compensation Fund appointed by President Bush, the BP Oil Spill Fund in the Gulf of Mexico appointed by President Obama, the Boston Marathon bombings appointed by Mayor Menino and Governor Patrick of Massachusetts and similar others, Virginia Tech shootings, the Aurora, Colorado shootings, the Sandy Hook Elementary School shootings in Connecticut, a wide range of programs where I've been asked by various policymakers to design, implement and administer compensation programs for innocent victims.
And although the programs vary program
to program, the following critical elements arise
in all of the programs. And I suggest, with
respect, that the Panel consider in its
deliberations how it would respond to these seven
or eight elements, building blocks of any
compensation program that I've been involved in.

First, how much money is there? Where
is the money coming from to pay innocent victims?
Is the money coming from private donations? Is
it coming from government? Is there a cap on the
aggregate amount of funds appropriated? Or like
9/11, all taxpayer money, was it uncapped? Was
it as much money as is necessary to pay eligible
victims?

So, question number one, how much money
are we talking about and what is the source of
the funds? Very important.

The amount of money available to
innocent victims drives all of the other
elements, building blocks. So, I'm putting this
first, question 1 and 1a, how much money and
where is it coming from as the source?

Once you know that, you go to question number two. Who is eligible to receive such compensation? How do you define eligibility?

In 9/11, was somebody eligible if they breathed the guck following the collapse of the World Trade Center or that lived in Jersey City and said that they had emphysema as a result of the 9/11 terrorist attacks?

We said no. We said in order to recover, eligibility required presence in the immediate vicinity of the World Trade Center or the Pentagon or you were on the airplanes, of course.

So, with eligibility tied to the amount of money, very, very important.

Once you decide eligibility, you get to the next issue, the methodology for calculating compensation.

Even if an individual is eligible, there has to be a transparent methodology that is being implemented to decide the amount of compensation.
Is it tort-based? Is it akin to workers' compensation? Is it a varying amount, depending on pain and suffering and emotional distress, tort concepts? Or instead, is it a flat amount paid for certain eligible injuries as defined? What is the methodology you will use to calculate what an eligible claimant will receive?

Next question, what are the proof requirements? What are the transparent proof requirements that any claimant must assert and demonstrate in order to be eligible for compensation?

Just because a claimant says, I was a spectator at the World Trade Center or I was a spectator at the Boston Marathon bombings, you have to decide what accompanies the claim for documenting and corroborating the claim.

Is it an affidavit from the victim? Does the victim have witnesses? Are there documentary records corroborating the allegation? What are the proof requirements that must accompany any eligible claim in order to receive
compensation?

Next issue, due process. Is the claimant entitled to a hearing? What is the burden of proof that the claimant must satisfy? What are the procedures that govern the assertion of a claim? Who views the claim? Who listens and makes the determination?

Is the program adversarial? Is there an opposing party opposing the claim or is it non-adversarial with the claimant and the claimant alone asserting the claim without an adversarial response?

How does the claimant go about satisfying the standard of proof, submit it with the claim? Does the claimant have to appear at all or is it purely voluntary? The claimant may decide, for whatever the reason, "I'm asserting the claim on papers of my claim form. I have no interest in prolonging my agony by appearing before a panel. I am submitting my claim on paper."

Half the people in 9/11 submitted their
claims on papers. The other half wanted a hearing. We held a hearing.

How formal is the hearing? Is there a transcript? Is the claimant or anybody else under oath? What are the due process procedures and structures surrounding the program? Does the claimant have the right to appeal if the claimant is turned down? Who hears the appeal?

If it's an advisory process with parties opposing the claim, does the claimant have the right to appeal or is the appeal one sided with the claimant? Or, in most of the claims that I do, no appeal. Once the decision is rendered, that's it.

So, due process, very important in terms of articulating a process for the processing of claims and all of the accompanying issues that go with due process.

Does the claimant have a lawyer? Is the claimant required to have a lawyer? May the claimant appear pro se? "I don't want a lawyer but I want my brother to appear with me."
These are all important due process questions which have to be dealt with in setting up a protocol to compensate.

And then there's the final issue which is, does the claimant in accepting the compensation release any litigation alternatives? Is the program -- is the compensation program an alternative to tort litigation or to the litigation system or is the compensation a gift where the claimant can receive the money, turn around and sue if the claimant so decides?

What are the consequences of a victim accepting compensation? Does the victim release and sign a waiver? "I will not litigate against anybody responsible for my injury." Or, like the Boston Marathon or Virginia Tech or Aurora, Colorado or Newtown, Connecticut, the money is a gift. You do not have to waive your right to go to court if you so desire seeking tort or other compensation.

These are the issues. Don't forget, the 9/11 Victim Compensation Fund, the BP Oil Spill
Fund, the current GM Ignition Switch Compensation Fund, those three funds which I have designed and administered are all alternatives to the tort system.

If anybody takes voluntary money from those programs, they waive their right to any civil litigation, not criminal, but civil.

Whereas, the Boston Marathon and these other programs that I've mentioned are all gifts, donated money from private donors around the country. There is no release. There is no prohibition against lawsuits.

And in none of these programs does the acceptance of compensation require a waiver of any criminal prosecution. These are all civil compensation systems. They have no interaction whatsoever, they are totally unrelated to any parallel-track criminal litigation. They're all designed as alternatives to the civil justice system or as gifts from donors from our contributors around the country.

So, those are the basic building blocks
that I check off any time we establish one of these programs, whether they're alternatives to the tort system or not.

And that's sort of a very brief ten minute summary but I hope it's helpful.

CHAIR HOLTZMAN: Thank you very much, Mr. Feinberg.

We'll begin the questions with Members of the Panel with Mr. Taylor.

MR. TAYLOR: I'll pass.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: Mr. Feinberg, I don't know whether you have had any experience with the military justice system and I mean that in terms of its criminal justice system or how it works.

But, our problem here is we're trying to decide whether it makes sense to have an independent compensation program because there are some gaps.

For instance, for civilian victims of military sexual assault, they're not covered and have to go to a state compensation program.
This is a very long and terribly vague question, but do you have any ideas about whether this is a sensible idea to follow up on or a proposal that we should look into?

MR. FEINBERG: Well, it's certainly defensible. You have to balance the perceptions of victims from the perceptions of the organized military structure.

On the one hand, I would think, and this is anecdotal, I can't prove this, but I would think analogous to my programs, the victim will find an independent compensation system more credible and empathetic.

From the victim's perspective, usually, not always, but usually, the victim welcomes administrative independence as a signal of empathy, a desire to be treated fairly outside the regular structured system versus the perception, I would think, of any organization, especially the military, that well, we can take care of our own, that our code of military justice maybe it needs to be amended.
But to establish a process completely outside the organized military hierarchy is a signal of mistrust or of absence of understanding as to how the military justice system works.

So, I think, depending on the perspective you take, from that of the victim or of the military, you begin to sort of gain some understanding or sensitivity as to what will work and won't work.

CHAIR HOLTZMAN: Our next Panel Member is Mr. Stone.

MR. STONE: Thank you for your presentation.

I think one of the characteristics that makes the military system a little bit different from some of the other systems you've discussed is that oftentimes, the victim's career is tied up in the military system.

So, the compensation application and the adjudication of it and their feelings towards it also affect their everyday existence. They're assigned to a base, their job is on base, it's a,
much more of a closed community than some of the
systems you've described so far.

And I guess what I'm interested in
knowing is either in terms of your direct
involvement or your background in looking at
these systems, have you dealt with a compensation
system and the example that comes up to my mind
is more like in a university setting where
there's a compensation program.

And, for example, there was either
sexual assault between two students that was
unconsented to or between a professor and a
student and that professor and the student, or
the two students, they have an investment in that
university. It may be their job, it may be that
they want to finish their degree, but they have a
connection to it that isn't as obvious in the
Boston Marathon, the BP oil spill maybe as much.

And so, they have an ongoing connection
and the community is going to turn around, it
might be a big corporation, for example, some
giant multinational corporation, and within it,
within the corporation, it wants to provide a compensation system to keep its organization running along smoothly, but at the same time, recognize the loss.

And the corporation, for example, or the university is going to have a fund to compensate and it's not going to worry about the amount of money, but it may look at some of these other factors.

But, you know, if it's a university, typically sexual assaults, they have informal procedures on various university campuses. I don't know if there are compensation funds.

And so, I guess that's my question. Can you think of, can you enlighten us with any information about a system that's a little more all-encompassing that is trying to take care of its members who aren't strangers and don't then go off and never see each other again?

MS. FEINBERG: Well, that's a very interesting question.

Now, in the civil justice system, 9/11,
BP, General Motors, compensating strangers. All
three of those programs, in order to assure a
perception of independence, that there is no
effort to undercut the legitimacy of a claim on
the grounds that we're doing it or we're part of
an internal closed structure.

All three of those programs required
independence on the part of the compensating body
to distance itself from the very culture and
structure that you talk about.

The only example I know of, it's a very
good question, the only example I'm personally
aware of where there was a closed structure was,
of course, Agent Orange Vietnam Veterans.

But it wasn't really closed in the sense
that the Vietnam Veterans were litigating against
the Department of Defense and the private
chemical companies that made Agent Orange.

And the real familial or cultural bond
among the Vietnam Veterans was in per se among
themselves, not against -- not as it pertained to
the Defense Department.
So, you had Vietnam Veterans wanting me to give -- to provide limited compensation, we only had limited compensation there, $250 million.

We had Vietnam Veterans urging me to give the money to other veterans and not themselves. Vietnam Veteran A would say to me, I have a skin condition due to Agent Orange exposure, don't worry about me, give it to my brother-in-arms who served with me in Vietnam who's now in a wheelchair. I want him to have the money, not me.

But the closed system that you refer to in your question probably augers well for independence on the part of the compensation program.

Although, what I can't speak to is whether or not the victim herself or himself welcomes that independence or has more confidence in the military system as being a member of that family. I don't know the answer to that question.
MR. STONE: Do you know off hand or do you think you could find out for us if there is a post hoc summary report on the Agent Orange program or a lessons learned? Because, you're right, that sounds to me at least a little more analogous to what we're looking at. And plus the fact that it was related to military issues, that might shed some light on some of the questions we're struggling with.

MS. FEINBERG: Well, it might. But, remember, at the time of that program, 1986, the Defense Department and the Veterans Administration were both at odds with the Vietnam Veterans who had come home. They were at odds over the issue of whether or not Agent Orange had caused any of the alleged diseases. And, the way we did that in Agent Orange, we adopted a workers' comp system which looked to Agent Orange exposure in Vietnam resulting in degree of disability. And the more
disabled the Veteran was, the more money they received regardless of a medical link between Agent Orange exposure and the condition.

We also set aside, very interesting, Elizabeth Holtzman knows Judge Jack Weinstein very well who had the Agent Orange case in Brooklyn. He set aside about $45 million of the $250 million, not for individual compensation but to establish an Agent Orange Vietnam Veterans Foundation to fund unique programs designed to assist Vietnam Veterans only, as opposed to other Veterans, and it worked very well.

MR. STONE: Do you think there was a GAO report on that program?

MR. FEINBERG: Oh, there is. You can go online I think. I can certainly get that for you.

There was a final report that I issued as Special Master governing the entire program and then there was a separate report that focused on the $45 million Agent Orange Foundation and how that money was spent to assist Vietnam
Veterans.

MR. STONE: Great, I'd love to see your report.

MR. FEINBERG: I'll get that for you.

MR. STONE: Great.

CHAIR HOLTZMAN: Mr. Feinberg, just one point I think I'd like to ask you about, when we're -- one of the things that we are looking at now is the fact that the variety -- there are a variety of compensation systems depending on the status -- for sexual assault victims -- depending on their status.

So, for example, if you're an active member of the military, all of your medical costs are covered. And assuming you retire without a dishonorable discharge or whatever, your benefits could be lifetime, health benefits or health costs could be covered for your lifetime.

If you're a dependent, that is going to vary depending on the status of the person you're dependent upon.

So, you may have -- if you've been a --
your spouse, for example, of an active military -
- someone who's active military personnel, you
can get health benefits for as long as your
spouse is in the active military. But after
that, it may cease.

And then, you're a civilian who happens
to be sexually assaulted by someone in the
military, you are relegated to your own private
insurance and you are relegated in terms of the
compensation program, a crime victims'
compensation program to the various states of the
United States.

And so, it depends on exactly where you
live or where the event took place, what state is
going to -- what state law is going to govern,
what state compensation program.

And so, you have a patchwork of coverage
here and you have certainly a patchwork of
coverage for the civilians. It's not all clear
to me what happens to civilians who are sexually
assaulted overseas by military personnel.

So, one of the things that we are
concerned about is how to make sure that nobody falls between the cracks here and that victims who are victimized by members of the military should, whether they are in active duty or not active duty, there should be a system that applies to them.

So, that's, I think, one of the concerns that we have.

So, I mean I think the issues you raise are very important in terms of -- in a way, obvious, but critical to setting up a proper compensation system.

And what my concern is, I don't know that I speak for any of the other Members, I probably don't, but it's to make sure that we have a fair system in place that's not dependent on the vagary of where you wind up in the United States as to what state law is going to govern, how it's going to govern, what the amount of compensation is, because that's really a matter of caprice. It should be a matter of, as you said, it should be -- even though the system is
transparent, I'm not sure how much victims will feel that it is a just and fair system.

I don't know if you have any comments or thoughts about that.

MR. FEINBERG: I would urge the Panel, as much as possible, to avoid all of those patchwork issues. It would become a Byzantine horror trying to develop a victim compensation program taking into account in individual cases that patchwork.

Instead, I would recommend, based on experience, avoiding all of that patchwork by setting up, if you're going to set up a compensation program, a standalone compensation program that does not in any way take into account that patchwork of conflicting eligibility, methodology, proof in compensation requirements. It will tie your program up in knots and I urge you to avoid it.

Instead, what we do in all of these programs, here is your compensation. This is what you're entitled to whether you're a civilian
or this person or that person. We have set up a separate program and it's very egalitarian and you will receive this and you'll receive that and you'll receive this.

Now, whatever requirements you have in other programs, or whatever offsets there might be is of no moment to us, we're going to compensate you for your proven claim here, whether there is supplemental compensation elsewhere, whether there is not supplemental compensation elsewhere, doesn't impact our program one bit.

And, at the end of the day, some others you may end up getting a lot more money because of your status. Well, that's it. So, but we're not going to offset or try and factor in those other programs. It'll create great divisiveness. It will tie your program up in knots with costs and inefficiency and you'll satisfy nobody.

So, I'm a big believer in standalone compensation, with no impact that other programs may have on this program itself.
CHAIR HOLTZMAN: Thank you.

Mr. Stone? Mr. Stone has one more question.

MR. FEINBERG: Streamline the program. You make it very efficient, cost effective and streamline by not factoring in other sources of compensation and other eligibility rules.

MR. STONE: Great. Could I quickly ask you, because we looked at some of these issues of what gets reimbursed and we sort of have like a laundry list and you could just give me a yes or no whether, for example, the 9/11 or your other programs compensated.

And one was, we were talking about services like outpatient psychotherapy with caps on the amount. Did you have caps on the amount or would you even compensate outpatient psychotherapy?

MR. FEINBERG: We never compensate outpatient mental conditions. The 9/11 statute prohibited it.

MR. STONE: Okay. What about --
MR. FEINBERG: And, in these other programs, it is difficult to prove. It is too difficult. It would be a very cost-ineffective and outpatient mental assistance or mental --

MR. STONE: Right, psychotherapy.

MR. FEINBERG: -- services.

MR. STONE: What about lost wages? Did you cover lost wages when they came to you?

MR. FEINBERG: As alternatives to the court system, yes. 9/11 lost wages, BP lost wages, GM lost wages, all part of the economic loss calculation.

All of the other programs that aren't alternatives but are gifts, lost wages are irrelevant because we're giving everybody the same amount of money.

MR. STONE: What about lost personal property like cell phones and computers?

MR. FEINBERG: In BP, yes. Yes, I think in 9/11, also yes. GM, I don't think that was an issue.

MR. STONE: What about moving expenses
for victims in 9/11, security deposits for
current apartments or the new apartment?

    MR. FEINBERG: Yes, yes, covered.

    MR. STONE: What about pain and
suffering, did you have any set amount? What did
you do if they said pain and suffering? Did you
cover it?

    MR. FEINBERG: Pain and suffering in all
three alternative programs, 9/11, BP -- well, BP,
it didn't come up, it was mostly economic loss
cases although there were some deaths and
injuries on the rig. Pain and suffering all
covered in a flat amount.

    Right now, in GM auto accidents, victims
injured and killed, $1 million added to the
economic loss calculation that you just
referenced. $1 million for the pain and suffering
of the victim, $300,000.00 each for each
surviving spouse and dependent.

    We got those numbers on averaging from
the Bureau of Labor Statistics and the Bureau of
the Census. And those numbers are readily
available.

But flat amounts, because if you try and get into the pain and suffering among various claimants, it's a horror. You'll never satisfy anybody and the calibration doesn't make sense, I don't think.

You're better off, whatever the compensation is going to be, we will add a flat amount for pain and suffering.

MR. STONE: What about when it's less than death?

MR. FEINBERG: What?

MR. STONE: What about when it's less than death, when it's just they have PTSD now?

MR. FEINBERG: Then we have pain and suffering based on a sliding scale, depending on the objective degree of injury and length of hospital stay.

So, it's very objective. We do have a sliding scale for injury, not death. But that sliding scale is objective and it's based on number of days in the hospital and the definition
of the medical injury.

MR. STONE: And does that include PTSD, things like that?

MR. FEINBERG: No, it doesn't.

MR. STONE: So, it certainly doesn't include delayed-onset PTSD?

MR. FEINBERG: No, no. In fact, what we do with any latent claim. "Mr. Feinberg, I breathed the gunk at the World Trade Center, but I won't know for 30 years whether I have mesothelioma or whatever."

We factor that in today in coming up with an award that includes any downstream latent claim.

MR. STONE: And what's the jurisdictional time limit you let people make claims in most of these programs?

MR. FEINBERG: There has to be a jurisdictional time limit. We said, in GM, right now -- now, GM is traumatic injury so this won't apply, but I'll give you an example.

If you didn't receive -- if you were in
an automobile accident and you didn't receive medical treatment within 48 hours, you're ineligible.

In 9/11, the program by statute ran out after 33 months.

In BP, no time limit, no time limit as long as the program is still running, frankly.

But I'm a big believer that if you're going to set up an alternative system of compensation, there has to be some criteria built in, very transparent that within a certain amount of time, you have to file your claim.

GM Insurance, now that's traumatic injuries, it's a little different. We told people, if you're going to file a claim to get paid millions of dollars, I mean if you didn't go to a doctor or seek help within 48 hours of the accident, how sick can you be? And we're not saying you don't have a valid cause of action, go to court if you want, but if you're looking for this program, we want proof. That doesn't have to mean that you were hospitalized, but at least
you went to a doctor within 48 hours of the accident.

MR. STONE: So, then in the Boston Marathon situation, if someone said --

MR. FEINBERG: The Boston Marathon, we didn't have a time limit on how quickly you had to see a doctor, but we told everybody that the program was going to pay any and all claims within 60 days is what we did.

MR. STONE: Right.

MR. FEINBERG: $61 million went out the door in 60 days.

MR. STONE: Okay. Just follow my hypothetical.

It's a person who says to you, "I stood next to a person who was not related to me but they were blown apart. I can't sleep anymore. I saw it, I have PTSD. It's a mental problem, I'll never get over it." They don't get anything?

MR. FEINBERG: Ineligible. You can sue, I guess. I don't know who you would sue. Ineligible.
If a program like ours in the Marathon was going to try and compensate PTSD, there'd be a million people claiming PTSD in Boston. And we only had $61 million in private money. We focused on death and physical injury only.

Anybody with property damage, lost wages, they closed down Boylston Street for two weeks, PTSD or any mental disability, you're ineligible.

CHAIR HOLTZMAN: Well, any other questions?

Well, Mr. Feinberg, I want to say thank you very much. You've been amazingly enlightening and helpful and we're very, very appreciative of the time you took and you're willingness to share your expertise with us.

MR. FEINBERG: I'm sorry I couldn't be there today in person, but I assure the Panel and Congresswoman Holtzman that I am available at any time to assist you with any specific questions or to secure any documents which I will do like Agent Orange that I promised the Panel Member,
and I'll stand by to help you in any way I can.

You're obviously involved in a very, very important public service.

CHAIR HOLTZMAN: Well, thank you very much and thank you for your kind service.

MR. FEINBERG: Thank you. Bye.

CHAIR HOLTZMAN: Bye.

I want to thank our two other presenters here for their patience while we spoke with Mr. Feinberg. I hope you understand the situation that we were -- the time constraint that we were in.

Okay, we will now hear from Mr. Peter Masterton, the Chief of European Tort Claims Division, U.S. Army Claims Service Europe.

And then, Mr. Dan Eddy, the Executive Director, National Association of Crime Victims' Compensation Boards.

Thank you very much. Both of you have appeared before this Panel before and you're just a glutton for punishment. We very much appreciate that.
And we'll start with you, Mr. Masterton first.

Thank you very much.

MR. MASTERTON: Again, ma'am, thank you very much for inviting me here.

I wanted to follow up on one of the questions you asked earlier of Mr. Feinberg dealing with compensation of victims overseas.

My office has two ways of compensating victims of crime. One is, under the Foreign Claims Act which is used overseas to compensate local national citizens. The purpose of the Foreign Claims Act is to maintain good relations with host nations.

It includes tort claims caused by our Service members when they are acting in the scope of duty and also when they're acting outside the scope of duty. So, it can include things like sexual assault, rape, vandalism and other types of tort claims including theft actually.

The compensation is based on local legal standards. My office, in Germany at least and in
Europe, investigates the cases locally.

    Just to give you an idea of some numbers, in the past year, we had 38 total claims under the Foreign Claims Act in Germany. Three of those involved sexual assault or rape. The average payment for all Foreign Claims Act claims was $3,628.00 for those three involving sexual assault or rape. The average payment was $15,656.00.

    There is no right under the Foreign Claims Act to bring a lawsuit, so we do not see any litigation resulting from those cases.

    And also, we deal with Article 139 claims. I think the Panel's already discussed that. Only used, of course, for theft and for vandalism claims, not used for sexual assault claims.

    Also, investigated, though, locally with the assistance of the local JAG office, and my office is responsible for monitoring Article 139 claims.

    Just a couple of general comments about
the proposal to create a military Crime Victims
Compensation Board, one comment, one thought that
I have on such a board is that, at least a
centralized board, in my view, would not be
conducive to a proper claims investigation.

Most claims investigated by the Army, at
least, are investigated locally. It's important
to, I think I went into this this morning in a
little more detail, it's important to do a proper
investigation, to be able to send someone out to
interview the claimant personally.

It may be important to do an
investigation of the claimant's home and talk
personally to family members and friends of the
claimant.

A compensation system that is set up to
pay victims of sexual assault cases would likely
be paid by taxpayers and I think we discussed
this this morning, if such a compensation system
was based on a conviction and a court-martial,
certainly the accused would likely have either
adjudged or automatic forfeitures and discharge
which would limit the amount of compensation
available from the accused themselves.

And also, such a compensation would
overlap with existing compensation systems such
as states' Crime Victim Compensation Boards. I
think Mr. Eddy, though, is in a better position
to discuss that.

And, of course, you heard already this
morning concerning VA disability and similar
disability benefits.

In my view, a better solution than
creating a new military compensation or Crime
Victims Compensation Board would be to ensure
that the existing programs to properly compensate
crime victims are more adequately funded and more
adequately used.

CHAIR HOLTZMAN: Thank you.

Mr. Eddy?

MR. EDDY: Yes.

CHAIR HOLTZMAN: Thank you, again.

MR. EDDY: Thank you. Thank you, Madam
Chair.
Since I have testified before this Panel before, I don't want to go over that ground again. Of course, I more than welcome your questions about how state compensation programs operate.

But I felt, and I apologize to the Panel, I didn't do quite as good a job as I should have in appearing before you previously. I think I left you with some misconceptions. So, I thought I would spend just a brief amount of time trying to clear those up.

I've put this in writing so I'm not going to read my statement, but it is available to the Panel.

I think there may be a misconception that sexual assault victims must report within 72 hours in most states. In fact, that's not true. California and Texas, Ohio and other large states have no reporting deadline whatsoever. Connecticut does not either. Smaller states don't.

There are quite a few states with longer
deadlines. It is certainly undeniable, and I
don't mean to say it's not true, but there are
different standards, there are different
deadlines.

What we find in talking to program
managers is that those with shorter timeframes
within which to report believe that they can be
flexible when called for and some, it's a
blanket. "We always waive the deadline for
sexual assault victims."

So, I think the impression that the
Panel may have had that victims have to come in
very quickly is simply not the case and probably
for a majority of sexual assault victims, because
these very flexible deadlines or no deadlines at
all are within the very largest states.

California and Texas provide about a
fourth to a third of all the compensation
nationally. So, that's one thing.

"Lack of cooperation with law
enforcement results in claim denial." Yes, it is
true that there is a reporting and cooperation
requirement. However, as I note in this statement, there are many exceptions. And, in fact, some states, again, always waive and without regard to cooperation.

Another factor from a practical standpoint is that compensation programs, I had the manager of the Texas program tell me today, "we're just too busy to try to figure out if a victim has followed up and cooperated and appeared at trial. That's not what we're about."

If we have something at the outset as a state government program, we need something that tells us that something occurred. We cannot rely simply, usually on the statement, the assertion, that I was a sexual assault victim. There has to be something else for the disbursement of public funds.

Sexual assault victims' behavior as a grounds for denial, I think I was probably not clear with that the last time I appeared before the Panel.

We have several states that, in writing,
their guidelines say we do not consider contributory conduct on the part of the victim in sexual assault cases.

When we teach this at our conferences, we find that even absent written guidelines, this is the approach that states take. At best, some behavior that might make someone vulnerable such as underage drinking to a sexual assault does not cause the perpetrator to do that act and, therefore, the victim is eligible.

While there is a diversity of approaches and no one can deny that, just as there is a diversity in the criminal justice system, criminal justice is not a national program. We don't have national prosecutors except for federal crimes.

So, violent crimes, rapes, are dealt with at the local and state level. So, there's a diversity of approach and a diversity of outcome at the state level to some degree because not only the state governments, but Congress placed the responsibility for crime victims'
compensation at the state level, there will be
some diversity. Sometimes, this reflects funding
issues at states.

But most states, over the years, have
developed sufficient state resources combined
with the federal resources that began in 1986
after the passage of the VOCA Act of 1984 when
Congress clearly said, we're not going to start a
federal program. We don't need to, it's already
in existence in the states. Let's put certain
conditions on it but then we'll let them do the
job that they know how to do.

I did -- one concern, and I'll wrap up
with these two or three last points, I did
address in my written statement the same types of
factors in setting up a program that Mr. Feinberg
covered.

I was pleased to hear that we pretty
much agree on the factors that would go into
setting up a compensation program such as at what
point do you say someone's eligible? Is it an
assertion? Is it a report to the counselor? Is
it a report to law enforcement? Is it an investigation at the law enforcement level that would substantiate the crime in some way?

I think one concern, if the Panel considers setting up a compensation program that pays some kind of lump sum or some substantial amount for pain and suffering, particularly if this reaches into the civilian world, there have been concerns expressed by victims in recent years as these large charitable donations are distributed, which is quite a different thing, of course, than trying to get compensation, having a huge lump sum and a defined set of victims to distribute it to requires a different set of procedures and rules than it does for an ongoing crime victim compensation program.

But there are concerns expressed that, why would this rape victim, who happened to be raped by someone in the Service, perhaps get something that has no relationship to her out-of-pocket costs, her actual loss, but is some recognition of pain and suffering, and this
victim might have been raped in the same bar,
same night, different person would get something
that would be more akin to what her actual loss
would be?

So, those concerns have been expressed
by some victims in the light of some of these
large charitable fund distributions.

Mr. Stone asked questions about what was
covered by some of the programs that Mr. Feinberg
has administered. Other than the property loss,
all of those things are covered by the state comp
programs today.

And, of course, primarily what they're
dealing with with crime victims of sexual assault
is post-traumatic stress disorder.

So, that's what I was here to do is just
to try to make sure that I'd given the
information that I may have failed to do the last
time I was before the Panel, so I thank you for
that opportunity.

CHAIR HOLTZMAN: Thank you.

I'm going to start with Judge Jones
because you may have a time constraint.

JUDGE JONES: Yes, thank you.

So, in order to try to figure out, we have two things here. We have restitution, we have compensation and we have military victims and civilian victims.

And now, there is some consideration here, having listened to Mr. Feinberg about a separate system.

I'm just grappling with what is restitution and what is compensation? And the military victim will get taken care of. Pretty much everything that a civilian victim who is a victim of the military assault will not get taken care of.

In other words, the civilian victim is the gap for us, right? The military victims get their medical taken care of. They're still paid their wages. The civilian victim will not have those advantages and has to go to the state compensation authority. Correct? Do I have that right, Mr. Masterton? You are looking at me like
you weren't sure.

MR. MASTERTON: Well, as I mentioned, overseas, of course, we do have a way of --

JUDGE JONES: Well, I'm not talking about -- for now let's stay here.

MR. MASTERTON: -- compensating. But, in the United States, I believe your statement is correct. Mr. Eddy would probably be in a better position.

MR. EDDY: Certainly. The civilian has to go to the state compensation program for those out-of-pocket costs that she has.

JUDGE JONES: Right.

MR. EDDY: With so many victims having insurance today as a result of the Affordable Care Act, compensation programs are reporting fewer claims and less payouts.

JUDGE JONES: Okay. So, let's just go to the military victim now who has all of the out-of-pocket costs, if we can call them that for the moment, taken care of.

And we're focused on should we make
restitution something that's part of the
sentencing process? An additional, I suppose,
penalty, if you will.

I'm trying to figure out, frankly, we
wouldn't be compensating military victims if we
had an independent compensation board because
they're already, except for pain and suffering,
perhaps.

It seems to me that we're talking about
out-of-pocket costs that the military victims
don't have an issue with and which civilian
victims do.

But, we're also talking about then pain
and suffering which I gather can be part of the
compensation system in the -- no.

MR. EDDY: No, the compensation programs
--

JUDGE JONES: So --

MR. EDDY: -- do not pay pain and
suffering with a couple of small exceptions.

JUDGE JONES: Okay.

MR. EDDY: In fact, the one program that
did, Rhode Island, offered $25,000.00 in pain and suffering for about the first two decades that it operated. It fell behind in claims by 12 years and went bankrupt and the legislature got rid of it.

JUDGE JONES: All right. So --

MR. EDDY: The same thing happened in --

JUDGE JONES: So, civilian victims aren't getting pain and suffering?

MR. EDDY: They are not.

JUDGE JONES: All right. And the military victims are pretty much being compensated for everything and they're not getting anything for pain and suffering. Is that what I'm hearing? At this moment.

MR. MASTERTON: At this moment, I believe that's an accurate statement. Again, not to go through this in too much detail, but under the Foreign Claims Act overseas, we're authorized to pay pain and suffering.

JUDGE JONES: Right, right, right. No, I'm giving you your foreign overseas exception.
So, I guess what I'm just struggling with is the real issue here to try to figure out, one, is there some value to making a defendant deal with an order of restitution in relationship to all of the issues that I see with it in the military justice system?

It's obviously, the importance of restitution is that it comes from the defendant. So, we wouldn't be setting up a source of compensation, if you want to call it that, or monies for restitution to pay the restitution if it was in the military justice system. You want it to come from the defendant.

But, it seems to me that most defendants don't have any money and that most forfeitures of pay go to their dependents, not to -- and there is no way for them to go to a victim at the moment.

Mr. Eddy, I see you're --

MR. EDDY: Yes, ma'am. When I first learned that there was no restitution in the military criminal justice system, I was
astonished.

JUDGE JONES: Okay.

MR. EDDY: Because, of course, it's standard and mandatory in the civilian and the state court systems and the federal court system. So, it's an important thing for state compensation programs, when they get a claim from someone, they check with the prosecution, see if an offender has been identified and prosecution is under way and then request restitution.

In fact, they can substitute for the victim if they have paid the victim in advance, which they will do, pending the restitution payment from the defendant.

JUDGE JONES: But do you offset the restitution payment with the monies that you paid --

MR. EDDY: Yes, once it's received.

JUDGE JONES: -- for what I would call the compensable?

MR. EDDY: Yes, the comp program can pay and then we'll take the restitution to reimburse
themselves, but will not -- they won't wait for
the restitution to be paid because often the
defendants can't pay.

These claims tend to be relatively low-
cost because we're dealing with out-of-pockets.
A rape victim may have medical bills. She may
have been assaulted physically at the same time.
So, that can be substantial.

But, for many rape victims, they are
looking for some amount of counseling. Studies
have shown that many do not seek more than a half
a year to a year. So, these are -- compensation
programs regard these in comparison to the
gunshots and the knifings and the crushed skulls
as very important cases but are relatively low-
cost items involving counseling.

So, my point simply might be that
restitution in these cases from a Service member
under the control of the Service, you've already
done this really with your transitional
compensation which is a kind of restitution.

You're taking this guy's pay and using
it as restitution for the victim. So, to have
control of the --

The problem with restitution, I know
this as a private lawyer, too, getting money from
somebody, if you have control over the money,
wow, that would be a great thing to be able to
use that money to restitute someone.

JUDGE JONES: But, in any event, if
there was restitution, you would take that had
you paid compensation?

MR. EDDY: It is taken into
consideration, yes.

JUDGE JONES: Up to the amount that you
had paid out?

MR. EDDY: That is correct.

JUDGE JONES: So, you could get
restitution though beyond the amount of those
compensable --

MR. EDDY: Oh, yes, of course.

JUDGE JONES: All right. So, it still
has a value and could be --

MR. EDDY: Yes, yes, it certainly does.
JUDGE JONES: Okay.

CHAIR HOLTZMAN: Do you mind if I ask a question?

JUDGE JONES: Yes, no, absolutely not.

CHAIR HOLTZMAN: Are you saying then, that if the restitution award is bigger than the compensation award that's made by the state, that the state can obtain the balance of --

MR. EDDY: No, not at all.

CHAIR HOLTZMAN: Okay.

MR. EDDY: In no way. If the compensation program is paid $2,000.00 to a counselor for this rape victim, she gets restitution of $20,000.00 which may cover other things including that $2,000.00 bill, all the compensation program would ask for is that $2,000.00. The rest is hers.

CHAIR HOLTZMAN: Clarify that point.

Do you have other questions?

JUDGE JONES: No, I'm just trying to figure out how pain and suffering, which is really what we're talking about, I think, here
fits into a restitution sentence.

But, yes, I'm sorry. Go ahead, Mr. Stone.

MR. STONE: Can I pick that up? That's exactly where I want to go.

If I understand it correctly, in the states, the victim, after they completely in addition to your compensation program can sue civilly for pain and suffering, that's how they get it, right?

MS. EDDY: Yes, sir.

MS. STONE: And you don't cover it because, in effect, you say that hey, that's not something we cover, go sue them if you want. Right?

MR. EDDY: It's a matter of funding partially.

MR. STONE: Okay, but that's how they get pain and suffering?

MR. EDDY: That's correct.

MR. STONE: But, maybe Mr. Masterton can help me on this. You can't sue the military.
So, if you're a victim of a sexual assault that happens in the military, the military can't be sued. Is that right?

MR. MASTERTON: The military may not be able to be sued, but, of course, the offender can be sued. And the obvious answer or the obvious remedy for a victim in the United States would be a lawsuit in local court against the offender.

The problem, of course, is that the offender may not have the funds to pay the judgment rendered from the lawsuit.

MR. STONE: Do you even get jurisdiction of him if he's on base? And can't he be transferred at a moment's notice if the military needs him?

MR. MASTERTON: We do have jurisdiction over a Service member stationed in, let's say the assault happens in Virginia, you certainly have jurisdiction over the Service member.

The issue would be if the Service member is then transferred, isn't court-martialed and then is then transferred or is court-martialed
and then transferred somewhere else, then enforcement would be a problem.

      But certainly, a lawsuit against the offender is possible.

      MR. STONE: But not against DoD, right?
      For not, say, either training him or for providing adequate supervision at that point?

      MR. MASTERTON: Generally not against the Department of Defense under the Feres doctrines, that's --

      CHAIR HOLTZMAN: Just, again, to follow up on both these points, so, what you're saying is that there's the civilian in state court who's been the victim of a rape, civilian in New York or Virginia, would have the right to go to state compensation and for her pain and suffering would either get restitution locally or would get a lawsuit, would have the right to a lawsuit against the perpetrator?

      Okay, so the difference between the civilian and the military would be, in the military, you would -- there are mechanisms to
get property compensation, your health compensation costs are covered if you're active duty. You don't get pain and suffering and you still have the right to get -- for a lawsuit.

So, the only difference is the right to restitution in a state court case for pain and suffering, whereas you don't have that in the military case.

Do you have any idea of the number of times that you get restitution for pain and suffering in a sexual assault case in the state court system?

MR. EDDY: I don't have any expertise on that. I think typically a rape victim may get significant compensation by a calculation of loss of future quality of life or income. It may not be called pain and suffering.

I would be happy to look that up for the Panel and try to get some information on that.

CHAIR HOLTZMAN: Yes, that would be really -- that would be very helpful.

MR. EDDY: I think it's ascertainable --
CHAIR HOLTZMAN: To get some idea of what the comparable status is and what the differences are.

MR. EDDY: Of course, the problem with restitution is if there are large amounts then there's difficulty in getting it from the perpetrator. So, it may be all that it's worth is on paper.

CHAIR HOLTZMAN: Exactly.

MR. STONE: And, of course, if the person's in the military and you want to civilly sue him, you've got to be able to get on base to serve them, right?

MR. MASTERTON: That can be oftentimes, the Service members live off base. But, to the extent that you have to serve the Service member, there are procedures to make that happen.

MR. STONE: Okay. And then --

MR. MASTERTON: Generally, a coordination with the local Military Police. Soldiers can be sued even if they are living on base in a state court.
MR. STONE: Let's go back for a minute to the fact that you said in the three rape cases overseas where you paid out an award, it was like five times the size of your average payment, it was in the $15,000.00-plus range instead of the average $3,000.00 range.

Was there pain and suffering considered either explicitly or implicitly in that $15,000.00 payment? What was in the $15,000.00? Why was it five times the size of other awards?

MR. MASTERTON: We consider pain and suffering. We consider lost wages. We consider all of the damages that you mentioned earlier in the request.

MR. STONE: So, in effect, if it's a foreign person who has been sexually assaulted by a military member, you're going to give them some kind of a pain and suffering award?

MR. MASTERTON: That's correct and it's based on local law. We'll examine what, for example, a German court would issue for a similar rape or sexual assault case.
MR. STONE: And you're doing that in part because your Service people abroad are not subject to local lawsuit, is that right?

MR. MASTERTON: Our Service members are actually subject to local lawsuits. The reason we have the Foreign Claims Act is because it becomes very, very -- it is very difficult for local nationals to bring such lawsuits. Typically, by the time the lawsuit's completed, the Service member has been reassigned and is gone.

MR. STONE: Do your awards preclude -- is there like a waiver from local lawsuits?

MR. MASTERTON: There is no waiver of local lawsuits. However, we do, if there is insurance coverage or some other way that the victim is compensated, we do deduct that from the awards that we provide to the local victims. So, for example, if a local victim has successfully sued the Soldier, whatever the results of that lawsuit are or whatever the judgment from that lawsuit that they're able to
collect is taken away from the amount that we
would pay. Generally, we don't see that.

MR. STONE: Okay. Am I fair in guessing
that if your average awards are $3,000.00 and the
sexual assault awards are $15,000.00 that maybe
as much as $10,000.00 of those awards are pain
and suffering or would you like to maybe do an
analysis of those three or any older ones and get
back to us and give us an idea if you actually
have calculations without identifying the victims
at all?

But, if you can actually tell us when
you look back, how much of that is for pain and
suffering? If it's a majority of the award?

MR. MASTERTON: Generally, pain and
suffering will be a majority of the awards. Some
of those $3,000.00 payments also involve pain and
suffering. A lot of the ex gratia claims or the
Foreign Claims Act claims we pay in Germany
involve bar fights where the German ended up on
the wrong end of the bar fight.

And so, oftentimes, the assaults that we
see, the vandalism that we see, well, the assaults that we see will involve pain and suffering as well.

In the case of rape and sexual assault, my experience is that the majority of the payment involved, pain and suffering, again, based on local law.

MR. STONE: So, that's a big component of what you're paying out?

MR. MASTERTON: Yes, sir.

MR. STONE: And that's all approved by Army regulation and statute right now?

MR. MASTERTON: It is. The Foreign Claims Act and Army Regulation 27-20 dictate what we can award and how the program is run.

MR. STONE: And if we saw the other people like you in the other theaters of operations, we might be able to put together more than three cases, especially if we went back four or five years of the kinds of awards for rape and pain and suffering that you're paying out all around the world? Maybe in Okinawa and other
places where sexual assaults occur?

MR. MASTERTON: It certainly is true
that these type of awards are made all over the
world including Korea, Okinawa, Iraq,
Afghanistan. So, it certainly is true that those
type of awards are worldwide.

MR. STONE: Is your office or someone
else you can tell us who would get us that kind
of data if we wanted it?

MR. MASTERTON: I'm not sure that the
U.S. Army Claims Service tracks that particular
data. The way I got the data that I gave you was
having the folks in my office scrub individually
all of the foreign claims that we adjudicated
over the last year. So, I don't know whether the
Army Claims Service report these. I don't
believe they keep -- they don't break out the
data that way.

MR. STONE: I did have one question from
the earlier session this morning that I wanted to
ask you which was, and we sort of discussed it
before, do you think there would be any great
disruption of the court-martial system if there was a mandated one-day break between a finding of guilt and a sentencing so that at least during an overnight period, a victim would be in a position to put together what they wanted to say at the sentencing?

And, for that matter, the recommendation of the social work person who would come to the sentencing hearing could think of -- could work on something overnight? And even the defense counsel would have overnight if it was a mandated one-day break?

MR. MASTERTON: I don't think that would -- a mandated one-day break would significantly disrupt the military justice system. I think it's important, however, to ensure that the military justice system operates smoothly and fairly and efficiently.

So, I would not encourage long breaks between findings and sentencing.

MR. STONE: Well, I did have one or two more questions unless you're in a hurry?
CHAIR HOLTZMAN: No, go ahead.

MR. STONE: I have a question of Mr. Eddy.

You mentioned that the states' rules on paying compensation vary somewhat. You also mentioned that at least since the '80s that there's been federal funding of states that gets passed along to fund them.

Does the federal funding rules provide any limitations or guidelines that generally say to all the states, if you want our money, you should pay the claims out within two years or the claims should be made within -- I mean are there any limitations in that federal money or not?

MR. EDDY: There are a few conditions but no time limitations. The conditions are you must cover mental health counseling. You must cover medical bills. You must cover lost wages.

You must cover funerals. You must cover drunk driving. You must cover domestic violence and sexual assault. And that's about it. The rest was left to the states to administer.
At the time that the federal money came in, close to 40 states already had compensation programs operational. So, there are very minimal conditions.

Things like reporting and cooperation are left up to the states to determine.

MR. STONE: And you said that contributory conduct doesn't affect a variety of states. I know it does affect some states. Is there a listing that ultimately you could get back to us as to which states it does affect and which ones it doesn't?

MR. EDDY: Let me be clear, all states, every state has a contributory conduct statutory provision that requires the program to determine whether or not the victim's criminal or substantially wrong behavior directly caused that victimization. That is standard.

What also is standard is that with regard to sexual assault cases, and I know this because I trained on this at every conference that we have, not only are programs writing into
their rules and guidelines that contributory
conduct is not a factor in sexual assault cases.

On a practical basis, as we discuss these cases,
we learn from managers of the programs that they
do not consider contributory conduct.

So, again, the example, and I think I
was unclear in this example the last time I
spoke, if someone drinks underage and ends up in
the bedroom of a frat house and somebody comes
into the room and beats her up with a baseball
bat, at best, she has made herself vulnerable to
that attack.

If that same gentleman comes in and
assaults her with a sexual weapon, his body,
there is no difference. She has just made
herself vulnerable. She did not cause the
attack.

So, for that reason, we do not see
examples of sexual assault victims being denied
compensation when they seek it.

MR. STONE: But what would be an
example, take that same hypothetical without
contributory conduct, does it disqualify them?

    MR. EDDY: I cannot think of an example.

    Now, there are tests with regard to whether -- I mean programs struggle with police investigations that may determine this did not happen because she's accused the wrong person. Those are the reasons that some cases may be denied, but not contributory conduct.

    Now, they are advised of contributory conduct there so that the drug dealers do not get compensation because they have committed crimes, these are what the rules are about, so that criminals do not qualify for public funds intended for crime victims.

    It makes it somewhat awkward, but the rules apply to everyone. So, the programs must determine, well, is the victim's behavior criminal or substantially wrongful? Is the reason you got shot is because you didn't pay your drug bill? Those are the bar fight, did you start the fight in the bar and just ended up the loser? Those may be denied on that basis, but
not sexual assault.

MR. STONE: Let me ask you another question. You were talking about needing something to begin a claim. It's not enough that they come in and allege something.

Let's say that we have a military victim who filed a restricted report, therefore, there is no official military record that they're going to give you or a police report for even finding or trial or anything like that.

But, they go to the state. Is the state going to say, I'm sorry, that's not -- a restricted report is typically not enough for me to go forward on, you need to have filed an unrestricted report? Have you had experience with that and could you tell us about that?

MR. EDDY: Sure. There is evolution going on on that particular point as we speak, it is this year.

So, to make it a simple answer, I would say yes. A restricted report, absent something more that, if it's just an assertion to police,
that may not be enough. If the police have
information to pursue an investigation, that is
something that might make it more easy for that
claim to go through.

There are some changes afoot. Texas
recently passed legislation that would enable the
payment of a medical bill for the first trip to
the hospital that that victim makes. Typically,
she may go for a forensic exam and that's covered
by the states without cost. And she may go over
here to get her strangulation or her wound
treated. That bill will be paid without
reporting -- without any report to law
enforcement. But that is rare.

States are working toward becoming more
flexible, both statutorily and in practice. And
at what point along that spectrum of I assert
without a law enforcement report that I am not --
other than I am a victim to law enforcement
substantiating that crime. There are differences
among states along that spectrum.

MR. STONE: Okay. I understand that,
though, and I'm not suggesting that the states should change it, I'm just trying to find out because a military person filed a restricted report could expect their state compensation.

And it sounds like since they don't want a police investigation, they probably wouldn't. They would not qualify.

MR. EDDY: I'm not sure what a restricted report might entail, but a state could certainly look at that and in some states, certainly, let me not fail to say, there are some states that that would be sufficient because there are some states that would take simply submitting to a forensic exam at the hospital, that would be sufficient to get the woman in the door to regular compensation benefits, not just the payment of the forensic exam.

But, it would depend on what that report said for many states. If it gave them enough to go on to say that we believe that there is enough to justify our payment because this person is a crime victim and there is enough evidence to show
1 that. But I'm not going to deny that that might,
2 depending on what that restricted --
3     MR. STONE: If it's not a law
4 enforcement report, I thought typically the
5 states --
6     MR. EDDY: Typically, a law enforcement
7 --
8     MR. STONE: They need a law enforcement
9 report?
10     MR. EDDY: Typically, that is correct.
11 And that is what they'll be asking for. If they
12 got a claim from a military victim, they would be
13 going to military authorities seeking an
14 investigative report to establish what happened.
15     CHAIR HOLTZMAN: Mr. Taylor?
16     MR. TAYLOR: Yes, well, first of all,
17 thank you both for double punishment here by
18 testifying twice.
19     MR. EDDY: It was a double honor.
20     MR. TAYLOR: Thank you, Mr. Eddy.
21     And I was looking at my notes from your
22 -- I have your last time and I really think you
were a lot more clear than you indicated that you were. So, thank you for being back to clarify some of the points that you felt at least were not as clear.

But, one disconnect that I would like to explore a little bit is that the literature that we had when you were here for your previous visit indicated that, under your program, and the term used is while each state's eligibility requirements vary slightly, victims are generally required, and then you list the general requirements.

And one was report the crime promptly to law enforcement and then it's followed by saying many states have a 72-hour reporting requirement.

And I take it from your comment that that is still true. It's just that not all states have a reporting deadline. Is that what you were trying to clarify for us?

MR. EDDY: To be clear, there is an evolution -- things change over time.

MR. TAYLOR: Right.
MR. EDDY: So, you may have been reading something that we have not edited recently perhaps. But this is the status, about 30 programs have reporting deadlines of 72 hours with significant flexibility built in.

For example, all of them are flexible with regard to child victims. They are not required to report or even to file the claim until they reach the age of majority.

In the 20-plus other states, 23 or so other jurisdictions, the reporting requirements range from no deadline at all to 180 days in some states, nine months in New Jersey, seven days in New York. So, there's a range.

All of those also have the flexibility to waive those requirements when necessary.

MR. TAYLOR: So, if we were looking to a best practice based on your personal experience and what you see as the trend along these lines, what would be your recommendation?

MR. EDDY: Well, there certainly is a trend to extend reporting requirements and the
deadlines from the 72 hours to something else.

Over the last 20 years, we've seen probably 15 states extend them. Ohio, Texas and California, the fact that they have no reporting deadline whatsoever now, that's a fairly recent phenomenon, I'd say in the last five years now. Ohio was about three years ago.

So, I think we expect that other states also will extend their deadlines or make them, as they are in California, Ohio and Texas really no limit at all. You can report at any time. Then it becomes a matter of substantiating the crime if someone's claiming they were a victim ten years ago, it makes it more difficult to do that.

And programs report, that have extended their deadlines, that the vast majority of crime victims still report within the 72 hours and file claims. Sexual assault victims may be different and that's why programs are making their programs more flexible with regard to those.

MR. TAYLOR: So, another one of these requirements had to do with this point that you
discussed earlier in response to Mr. Stone's question. And that is, the innocence requirement, if you will, evidence of any misconduct.

And, as written, it talks about misconduct leading to the injuries that the person suffered. But I'm taking your testimony to mean that there's got to be a causation factor there, not just a contributing factor?

MR. EDDY: That is correct.

On the occasions that courts in the states have ruled on appeals of contributory conduct decisions, they are consistent in saying this does not mean something done in poor taste or some slight misconduct.

So, we avoid the use of "innocence" of any misconduct. It's very misleading and nobody uses that term. It's contributory conduct defined as criminal behavior or substantially wrong behavior that directly causes, proximately caused, the victimization.

MR. TAYLOR: And how about the
cooperation requirement? What do you see as the
trend in that regard? Cooperating with law
enforcement activities?

MR. EDDY: It's a difficult issue but
legislatures set these requirements, some of them
20, 50 years ago in California. It's the 50th
anniversary in California of the creation of the
program.

I think states are becoming more
flexible. We see some states that don't have
cooperaion requirements at all but they are a
relatively small number.

I do think as things evolve, we will see
more states move in that direction, that
cooperation won't be as necessary. But I think
it will occasionally be to -- as the interest,
the mission to help crime victims wherever they
are and whatever decisions they make with regard
to the criminal justice system, how is that
balanced against the state's interest in finding
the perpetrator, protecting the community and
getting justice? That's the balancing act that
is slowly moving, I think, from a seesaw over
here to something that's more balanced.

MR. TAYLOR: And just one final follow-
up from your testimony from last time, according
to my notes and my memory, I think you said that
there were very few claims that you saw from
military victims because the system pretty well
took care of most of their needs.

And also, that you thought that there
was an underutilization of the program probably
by the military, which I think you attributed to
lack of information, lack of knowledge, program
awareness. Does that sound --

MR. EDDY: I would say that 95 percent
of the reason for few claims is the first reason
which is that their needs are taken care of and
if the states are covering out-of-pocket costs
and if there are none, then it means there's no
claim that would be successful with the state
compensation program.

I think information is important, so
we're certainly prepared, and states are too, I
was just talking with the Florida director yesterday who had met with people from the base in their area, so they're eager to get the word out.

They find, I should mention one thing, they find it's difficult to get that investigative report from the military.

Two directors told me today that it takes months for them to go through Virginia Central Command to get an investigative report which they need as a public-funded agency to document the payment.

So, they could go ahead and help now, but they're waiting months to get that report.

MR. TAYLOR: Well, I guess there are two responses I might add to that along with a question.

The response is, I wonder if it would help if someone at your level who has oversight of the national program could be responsible for at least coordinating with the Defense Department to see if there couldn't be some change to DoD
policy that would make it clearer to the policymakers and ripple down through the system that this is the kind of cooperation that would be expected in these areas.

And second, is there something more your office could do when you have these meetings of coordinators throughout the country to urge them to get in touch with their local military communities, and perhaps you're already doing both of those things.

MR. EDDY: We have done some of that. There can always be more that can be done.

I know the Office for Victims of Crime, while I'm not aware -- I noted that there was some note that there's a military division in the Office of Victims of Crime. I've worked with them for close to two decades and I'm not aware of any military division at all.

There may be someone assigned to oversee grant work or training, education. So, I'm not denying there may be somebody that specializes in military affairs.
But OVC has just come into four times as much money that it can spend on training and I'm sure they would be very interested in getting the word out and helping the military get the word out about whatever opportunities there would be in the civilian world.

MR. TAYLOR: Well, thanks to both of you for what you're doing.

Madam Chair?

CHAIR HOLTZMAN: Thank you.

Just a few questions.

Mr. Masterton, I guess I'm confused a little bit about what's going on overseas. My concern is with U.S. civilians overseas. What rights do they have? Are they covered under your program?

MR. MASTERTON: If they are not residents, locally resident overseas, they would not be covered by the program.

So, for example, family members of Soldiers who are living overseas, DA civilians who are --
CHAIR HOLTZMAN: What's a DA?

MR. MASTERTON: I'm sorry, Department of the Army civilians, civilian employees of the government who are stationed overseas personnel, would not be covered by the program.

CHAIR HOLTZMAN: Okay. Well, that's my concern here. Because I'm concerned about where those people get compensation. They're not -- they may be stationed in Afghanistan, the station may not be there, they may be working for the military, they're U.S. civilians working for the military in Afghanistan. They don't live in a state, maybe. How do they -- what compensation program are they entitled to?

MR. MASTERTON: Well, if it's a government employee or a family member, of course, they'd have the compensation or they have the -- they'd be entitled to the various programs that we've already discussed, either a DA civilian would be covered by insurance or health care, mental health care, things of that nature.

A family member would be also covered by
TRICARE or healthcare.

CHAIR HOLTZMAN: Right.

MR. MASTERTON: And also, there's a transitional compensation program, of course, for family members.

So, there are programs covering these people, depending on what their status is.

The program that I was talking about under the Foreign Claims Act requires you to be essentially a local national.

CHAIR HOLTZMAN: Right.

MR. MASTERTON: But the locally resident

--

CHAIR HOLTZMAN: Right. Okay, but I'm -- right. I'm focused on U.S. citizens at the moment.

And so, I don't know what state compensation program they would be eligible for.

MR. MASTERTON: They would not be eligible for any state compensation programs.

I'm sorry.

MR. EDDY: Actually, that would be
1 incorrect.

This is a significant gap, Madam Chairman. About half the state compensation programs extend benefits to their residents who are victims of crimes overseas. And about a half don't.

The half that do, again, concentrate in the larger states. So, there may be examples where those who are victimized overseas are not helped by state comp programs.

But, we find that -- your specific question was with regard to employees of contractors, perhaps. My understanding is that they are required to have insurance that would cover medical costs and that kind of thing.

So, what the compensation programs find when they get claims from Americans overseas is that they don't have insurance to cover their out-of-pocket. It may be a student traveling or somebody who's expatriate doing nothing and is not employed. Those are the types of claims that may fall into the gaps whereas people who are
tourists, who are employed, you know, I would be covered by my insurance if I went abroad.

Virginia also happens to cover --

MR. STONE: But that's only medical costs, not lost wages. If they don't feel they can go to work --

CHAIR HOLTZMAN: Right, I mean --

MR. EDDY: Well, contract -- you know, my understanding is contractors would be able to.

CHAIR HOLTZMAN: No, I --

MR. EDDY: You are correct, there is a gap.

CHAIR HOLTZMAN: Right. So, right. Well, I appreciate your candor in pointing that out because I mean you have said in your testimony that misconception number four is that state compensation programs present a patchwork of approaches.

I mean, in all fairness, this is -- you acknowledge that there's a gap and so there's a gap here.

And, from that point of view, I guess I
don't really understand what your objection would be to a federal compensation program that dealt with federal civilians who are not covered by state programs or felt that the state program -- and we'll have to deal with whether they have to make a report here or a report there or they -- and so forth.

I mean what were your -- why do you have an objection?

MR. EDDU: I have no objection.

CHAIR HOLTZMAN: Oh, okay.

MR. EDDY: I think we're talking about a relatively small number of victims.

CHAIR HOLTZMAN: Correct. I think the number is something around 600 a year, something like that.

MR. EDDY: Okay.

CHAIR HOLTZMAN: Maybe more, maybe less, but in that ballpark. I understand we're not talking about tens of thousands of people here. But we are --

MR. EDDY: And, of course, they're not
-- I mean this is a problem that likely might be
solved by another condition to the Victims of
Crime Act because the number of about 600 that
you're saying, I'm not sure what that number is,
but however many there are where an American is
victimized overseas, there's surely not many that
are victimized by military members. They're more
likely -- they're victimized by nationals.

CHAIR HOLTZMAN: I'm not only talking
about overseas, I'm talking about civilians and
dependents and others who are not covered,
whether they're abroad or here, by existing
programs.

MR. EDDY: Sure.

CHAIR HOLTZMAN: We have a chart here
that our Staff was kind enough to give us that's
buried on my desk.

But I think the number might have been
600 if I'm wrong, it's somewhere in there, it's
not an enormous number, but it is a substantial
number.

So, you have no problem with that and
you have no objection to that in --

MR. EDDY: I have no objection to
covering gaps in services, no.

CHAIR HOLTZMAN: And I guess the other
approach would be to the federal government,
since it is contributing to state programs to
impose some additional conditions on states that
receive it, for example, covering U.S. civilians,
you know, who are state residents who are living
abroad dealing with the 72-hour issue, dealing
with contributory conduct.

I know you say, in practice, the
language is not observed. But, if you're a
lawyer, Special Victims' Counsel, for example,
advising a victim of sexual assault in the
military, are they supposed to rely on the
received wisdom of how these laws are applied in
practice or the actual language of the laws?

And so, I mean I think part of the
problem here is that if the states really feel
that they're doing such a great job, they need to
get their act together so that there's no
miscommunication.

I'm very concerned about that and you want to distribute information, but what are you going to say? Can you really say -- can you really tell -- distribute a piece of paper that says, just for example, I don't know what New York does about it, but New York State says, well you said every state, so New York State says contributory conduct is a factor, but you can disregard that if you were drunk or using drugs. That's not going to be an issue in terms of dealing with sexual assault.

Should you put materials like that -- written materials like that?

MR. EDDY: That's my belief that's the fact.

CHAIR HOLTZMAN: And you have written materials to that effect?

MR. EDDY: You have them in front of you.

CHAIR HOLTZMAN: Oh, okay. Well, I'll be happy to take a look at them.
MR. STONE: That's not the case in Maryland. The Maryland Compensation Board, for example, is very strict and any contributory conduct, even if it's not causation, disqualifies you. That's just the way that they interpret the statute. So, as we've said, it varies among states.

MR. EDDY: It also varies among victimizations. You're talking about drug dealers in Baltimore, it may be different than sexual assault victims.

CHAIR HOLTZMAN: Any other questions?

MR. STONE: Yes, I did have a question.

I didn't ask you before, could you give us either now or perhaps follow-up, the federal statutory and regulatory citation to the funding statute that puts those limits that are out there now so we can take a look at them? I didn't know if it was in the Vower Statute or one of the others but I don't know if it's something you know offhand?

MR. STONE: 42 U.S.C. 10 --

MR. EDDY: Actually, it may be 10602, 10603, those are the eligibility requirements under the Victims of Crime Act.

 Actually, I have it here, too. So, it's -- to be accurate, it is 42 U.S.C. 10602.

MR. STONE: Okay, yes, I see we have it on Tab -- just one tab, on Tab 11, 10602.

Are there any CFRs that are implemented?

MR. EDDY: Yes, there are guidelines written by the Office for Victims of Crime. I would not be able to cite --

MR. STONE: Okay, but you can get back to us and give us that citation?

MR. EDDY: Yes.

MR. STONE: Sure, thank you.

CHAIR HOLTZMAN: Well, thank you very much. I guess there are no further questions.

We really, really appreciate your coming back and sharing your expertise with us and thanks for the double punishment.

We'll now stand -- I guess we go into
deliberations or do we take a five-minute break?

Let's take a five-minute break and then we'll go into deliberations.

(Whereupon, the above-entitled matter went off the record at 1:53 p.m. and resumed at 2:06 p.m.)

CHAIR HOLTZMAN: Our next Panel is Special Victims' Counsel Perspectives on Retaliation Against Victims of Sexual Assault Crimes in the Military. We have a very distinguished Panel, Lieutenant Commander James Toohey, U.S. Navy Victims' Legal Counsel, Lieutenant Commander Kismet Wunder, U.S. Coast Guard Special Victims' Counsel, Captain George (Rob) Lavine -- is that correct?

CPT LAVINE: Yes, ma'am.

CHAIR HOLTZMAN: Third, U.S. Army Special Victims' Counsel, Captain Micah Smith, U.S. Air Force Special Victims' Counsel, Major Chantell Higgins, U.S. Marine Corps Victims' Legal Counsel. We'll start with Lieutenant Commander James Toohey. Welcome.
LCDR TOOHEY: Thank you, ma'am. Good afternoon, Members of the Panel. My name is Lieutenant Commander Toohey, as has been said. I'm the Navy Victims' Legal Counsel for Naval Base Coronado in San Diego, California. I've been a Victims' Legal Counsel for about 12 months. My current orders extend me out until June 10, 2017 in my job. Since I began my job about a year ago, I've represented 49 clients. Of those 49 clients, about 11 of them have reported to me some form of retaliation. By way of example, the vast majority of the cases that I've seen that would involve retaliation are of the variety that involve some sort of social consequence to the victim by her peers after reporting. Specifically, in one case, which is representative of most of these cases, my victim and the accused were at the same command. After reporting, the peers of the victim started to isolate the victim, kind of ignore, and rumors began to spread about the victim, so much so that the command climate in
that department, which both the accused and the
victim were in the same department, became
unbearable.

Ultimately, an expedited transfer was
executed after the victim's request. Because
this is prototypical of the types of retaliation
cases that I've seen, I'll just add a few other
elements of ones that I've seen that also involve
social consequences or social retaliation. In
some occasions, victims have expressed fear of
the accused. That's typically handled by issuing
a military protective order to the accused to
refrain from having any contact with the victim.
On some occasions, those military protective
orders have been violated by the accused.

The way that they typically do that is
not necessarily direct contact, but subtle ways
in which they come around where the victim is and
maybe linger or stay too long in what is
perceived by the victim as an effort to
intimidate or make them uncomfortable. The last
form that I see, along with social consequences
in some of my cases was -- but these are more
rare -- is direct contact by a third party, who
may or may not have an interest in the case but,
in any event, has an opinion.

Now the current policy for Navy Victims'
Legal Counsel, in terms of representing our
clients in addressing retaliation complaints is
that our program supports, encourages, and
indeed, expects us to represent our clients
across the gamut of retaliation complaints,
whether that be taking the complaint directly to
the command, helping with an Inspector General
complaint, a Congressional, or any method of
resolving or remedying the perceived or actual
retaliation is within our scope in our current
program. In terms of what I typically see in my
practice, and what I have typically done on
behalf of clients, is I usually address these
issues directly with the chain of command.

I have direct conversations face-to-face
with Commanding Officers, Executive Officers,
Command Master Chiefs, email, phone calls, and
sometimes, when it becomes necessary, I generate formal letters to commands requesting relief from specific actions that I have observed or been informed about by my clients. I can say, without exception, the commands have been responsive to my requests and to the complaints.

In terms of consequences that have occurred, when I talk about the specific retaliation by the accused or by third parties, individuals have been taken to non-judicial punishment or counseling has happened. By far, though, the most common example of how these issues have been resolved is by transfer of the victim, at her own request, either through expedited transfer or some other method, either a TAD or a change of department. Quickly, just three recommendations for improving the environment.

I would recommend that our general military training that we have yearly that requires a facilitator to provide training on sexual assault for the commands be provided by
someone senior enough in the command's chain of
command that both can deliver effective training,
get the message out that we're serious about
retaliation, and also create a training
environment that demands that the material be
taken seriously.

Quickly, as I need to wrap up, the other
two recommendations are that leadership must
seriously consider the option of temporary
transfers of the accused, pending the outcome of
the investigation, and the third recommendation
is that when personnel decisions are made by
leadership about the victim, whether that be
keeping someone back from a deployment or making
other personnel decisions, that even when they
think they are in the best interest of the
victim, they should be done with input from the
victim, and they should effectively communicate
their decision and their rationale to the victim
at the time they make those decisions. That
concludes my comments. Thank you.

CHAIR HOLTZMAN: Thank you very much.
Lieutenant Commander Kismet Wunder, please.

LTC WUNDER: Thank you, ma'am.

CHAIR HOLTZMAN: You're welcome.

LTC WUNDER: Good afternoon, Members of the Panel. As you know, my name is Lieutenant Commander Kismet Wunder. I'm a Special Victims' Counsel in the United States Coast Guard. I was one of the first Coast Guard attorneys selected for this duty in July 2013. My SVC duties are collateral to my regularly assigned duties as the health, safety and work life regional practice manager for Base Cleveland, in Cleveland, Ohio.

I expect to continue serving as an SVC until the summer of 2016. In total, I've represented approximately 20 victims. Of those victims, the vast majority have reported to me that their Coast Guard commands have been very supportive and accommodating for their situations. I have had victims with collateral misconduct issues which naturally cause friction between the victim and their command, but these cases did not rise to the level of retaliation.
I have had only one victim who reported issues of retaliation, harassment, and a hostile work environment. This victim reported a sexual assault by another member in her same command.

Over a period of five months, the situation devolved to a point that the command and the victim were unable to interact with any effectiveness. The victim experienced insensitive comments made by the chain of command, ostracism by her peers, negative counseling, removal from duties, and not being recommended for promotion. The situation became so toxic that the victim felt no choice but to seek an expedited transfer, and the command fully supported this request.

My time here does not allow me to go into all the specific details of this case, however, the situation ultimately resulted in a Coast Guard Investigative Service investigation, a civil rights complaint, and an administrative investigation and employee evaluation appeal, some of which are still pending. As SVC, I
assisted and represented the victim with the complaints to the command. The current Coast Guard policy allows Special Victims' Counsels to handle these types of situations, and the Office of Member Advocacy and Legal Assistance provides oversight, support, and supervision in these cases.

Based on my experience, the situation --

CHAIR HOLTZMAN: Excuse me, I just need to interrupt because I don't understand. Against whom were these complaints filed that you mentioned? Were these against the victim, or was the victim against others?

LTC WUNDER: They were filed by the victim against the command. There was also an investigation -- administrative investigation was by the command, directly after the --

CHAIR HOLTZMAN: Thank you.

LTC WUNDER: This case resulted from a perfect storm created by a loss of trust, lack of effective communications, inexperience and stubbornness. I'm not privy to all of the facts
and circumstances of this case, but I am confident that no one is 100 percent at fault, and no one is 100 percent in the right. I can say, though, with certainty, that when these issues were brought to the attention of the Coast Guard, the Coast Guard took them seriously and initiated investigations to determine what happened.

It is unfortunate that this victim's experience with the system will be forever colored by the actions of a few individuals who were unable or unwilling to appreciate or recognize what a victim of sexual assault experiences. Enhancing how individuals in command respond to retaliation is extremely challenging.

Socioeconomic backgrounds, cultural differences, and emotional maturity are just three of the many factors that influence how individuals respond to a particular situation. Add into this mix the close sense of community and commitment felt in a small Service like the
Coast Guard, and the response becomes that much more difficult to control. Influencing and educating individuals on how to better respond to this type of situation will require patience and strong leadership. As far as a recommendation for this Panel to consider, people who are involved in the prosecution and defense of sexual assault cases are well aware of the term of counter-intuitive behavior of sexual assault victims.

A significant amount of time and resources are devoted to educating a jury that a victim's response to a sexual assault may not line up with their ideas of how a typical victim should respond. I believe with all the attention on sexual assault and efforts to eliminate this problem from our ranks, this issue of counter-intuitive behavior has been left on the sidelines.

In my particular case, I believe the command, if it had had some of this counter-intuitive training, it would have been better
able to recognize that the situation that the victim was dealing with was not because she was disrespectful to authority or a difficult leadership challenge, and the command may have recognized and been able to be supportive, like the vast majority of my other clients have felt after coming forward. Finally, if you'd like to learn more about this topic, I found an article written by Patricia Fanflik, entitled "Victim Responses to Sexual Assault, Counter-Intuitive or Simply Adaptive?" I appreciate your time today, and if you have any questions, I'm happy to answer them.

CHAIR HOLTZMAN: Thank you very much.

Captain Lavine, welcome.

CPT LAVINE: Thank you, ma'am. Good afternoon, Chairwoman Holtzman and Panel Members, I'm Captain Lavine. I'm a United States Army Special Victims' Counsel part time, out of Grafenwoehr, Germany. I went through the certification course that the Army had in Charlottesville, Virginia, in August 2014. Mr.
Stone was there for a couple days, as was
Lieutenant Commander Toohey, so it's a small
world.

I didn't actually start seeing clients
until December 2014. Since that time, I've seen
nine total clients. Of those nine clients, at
least four of them have reported to me they've
faced or are currently facing some form of
retaliation. Just to give you sort of the gamut
of that, everything from anonymous Facebook
messages telling a male victim to, "man up and
take it," to actual threats, either to the victim
or the victim's family. As far as social
ostracism, that's something we've been talking
about. I did have a young female Soldier who
reported sexual assault by a Non-Commissioned
Officer.

In the small post where she was at,
there had been rampant rumors, negative comments
and everything directed towards her, both within
her own social circle and when she comes to work
having to hear these types of things. As far as
our current policy on how we address that, the Army has its own directive, 2014-20, entitled "Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense." Basically the way it works is if it's the chain of command that has taken some kind of action against a Soldier, I report that through the IG -- the Inspector General's office.

If it's another Soldier taking some kind of action against a reporting victim, or it could be a civilian kind of taking that action, we report it up through the chain of command or through another appropriate agency. For example, the threats can go right to CID or the Army Criminal Investigative Command. As far as how things have been handled, really I would just focus -- for the actual threats, we're hoping that those will resolve in some type of criminal charges. For the anonymous comments, we still brought those forward. Then again, with that young female Soldier who had to deal with all these rumors and the demeaning comments and
everything, went right to command said, "There's a real issue throughout the command here. You need to instruct the people on the Army directive. We need to have some training," and they did. About a month later, they had a SHARP stand-down day, and they put out the message about retaliation and why it's important to nip that in the bud, why it's very detrimental to the victims. So we were happy to hear that. The victim was happy with that.

As far as recommendations go, obviously the Army directive is a good first step. Kind of like we've talked about, education is good, and then training. Training your units so they can recognize retaliation when it's happening, so members will feel confident coming forward and stopping it, and then going from there, they'll take the appropriate action, whether it be a criminal charge, whether it be training everybody, as far as that goes. I think just talking to the other Special Victims' Counsel this morning, one of the keys here has to come
from the right level. It can't just be from a senior sergeant. It can't just be from a troop commander, like me, that was a captain or something.

It really needs to come from a higher level. Maybe that's a battalion commander level. Maybe that's a garrison commander as we have in the Army. It really has to come from that higher-up level. As far as military criminal justice, we do a good job at making sure that the alleged perpetrator of these offenses is treated innocent until proven guilty, but we don't always set the stage for the victim. How are we going to treat the victims?

I'd almost say the commanders almost need to be a little bit pessimistic and say when someone makes one of these allegations, expect retaliation unless you set the right environment, so people know retaliation's not going to be tolerated, as far as that goes. I thank you for your attention to this matter and speaking with you today.
CHAIR HOLTZMAN: Thank you very much, Captain. Captain Smith, welcome.

Capt SMITH: Thank you, ma'am. Good afternoon, Madam Chairwoman and Members of the Panel, I'm Captain Micah Smith. I'm the Special Victims' Counsel at RAF Lakenheath in the United Kingdom. I've been an SVC since the inception of the program in January of 2013. I'll be moving out of the job next month to be one of the law clerks for our Court of Appeals.

Since January of 2013, I've had the privilege of representing 54 survivors of sexual assault. Of those 54, 11 reported some form of retaliation, reprisal, ostracism, maltreatment, and of those 11, eight made formal complaints through the chain of command, the Air Force, or other DoD Agencies, or to a member of Congress.

To start, the comments I have today are my own. They're not necessarily the views of my clients or the SVC program or anything like that. They're about the experiences that I've had. I think it's also important to say up front that
the majority of my clients have not experienced any retaliation. Most of the time, retaliation just wasn't an issue. When it did come up, most of the time it was handled effectively and swiftly through the chain of command, but that's not to say that retaliation doesn't happen, or that every leader responds appropriately every time. So when retaliation did happen, the SVC program was an essential part of that response.

To illustrate that, I'd like to provide a real-world example for you. Last month, you heard from Staff Sergeant N.L., who recounted some of his difficulties he faced after reporting a sexual assault that some of his fellow Airmen considered a part of their tradition. He was excluded from professional and social events. He missed out on professional opportunities and generally made to feel like he wasn't a part of the team.

For him, the most important way to address that retaliation was to get out of his particular career field. Unfortunately, he was
in what we call a critically manned career field, which basically means you're not allowed to retrain. You are stuck in that, unless you want to get out of the Air Force. As his SVC, I began working with his chain of command to try to make some small changes in his environment, work schedules, that kind of thing, to get him away from it. We looked at an expedited transfer to move him to a new base, but because his career field's pretty small, he would have been going to the same base with other people that he'd already worked with.

So we took a step further, actually on the recommendation of another SVC, contacted our Air Force personnel center. Eventually, wound my way through to the enlisted retraining policy office, who informed that there's an exception to policy for everything. We got an exception to policy request put together, justified it, gave it to the chain of command, and the chain of command was phenomenally supportive.

They pushed that all the way up through.
Happy to say that as of this month, he's being retrained out of his career field, which was a phenomenal win for him. That's just one small example of how an SVC can respond to it. Like a lot of my colleagues here, the SVC does help with retaliation concerns. It could be as simple as attending interviews with them when they go to report the retaliation to a chain of command or to the IG. It's reviewing those things to make sure what they're going to say about retaliation isn't going to negatively impact the actual underlying sexual assault case. No system is perfect, and there are times where I wish I would have pushed the envelope harder for them when they're having a difficult situation, things that in hindsight, I wish I could've done better.

There are also times where I think that the system we have to respond to retaliation kind of let them down. Some examples of that, it's been my experience that the IG program that we currently have is not set up to handle retaliation as I've seen it, clients who want to
file IG complaints, but were turned away because their complaints fall outside the scope of the IG program.

Most commonly, that's when there are concerns about peer retaliation, as opposed to formal personnel action. Another difficulty in responding is the current regulations that we have that define retaliation, ostracism, maltreatment, require the retaliator to have a specific intent of discouraging reporting or the due administration of justice. That makes it difficult, especially in Staff Sergeant N.L.'s case, where he'd already reported, criminal justice process had already run its course, so it was very difficult to go back and say that there was any sort of specific intent, so it made it difficult for his report.

Also, just his whole retraining situation makes it clear to me that we need an expedited process for that, but once I got in touch with the retraining policy office, they were very, very helpful, but it took me, a lawyer
 who works in the field of victim rights, almost a
year to even find that program and put together a
process.

It's my understanding that there are
efforts now to implement a process like that, and
I would encourage that. I think that's a great
program. Just in conclusion, I recognize that
retaliation, like sexual assault, doesn't have
easy answers. I'm grateful for the opportunity
to come here today and talk to you about some of
the experiences that I've had, and I look forward
to answering any questions that you may have.

CHAIR HOLTZMAN: Thank you very much.

Major Higgins, welcome.

Maj HIGGINS: Good afternoon, Madam
Chair and distinguished Panel. I'm honored to
have this opportunity today to address the Panel
on the topic of retaliation. Specifically, I'm
going to address three instances of retaliation.

Two involve Marines victims of sexual
assault, and then I'd like to share an experience
that I personally had as a VLC, while
representing a minor dependent of a victim of sexual assault, in which I was taken into custody, questioned, and investigated by NCIS in the course of representing a victim. All three incidents occurred while I was assigned as a regional Victims' Legal Counsel in Okinawa, Japan.

In doing so, I'll highlight some of the systemic challenges with implementing the VLC program and also preventing retaliation. Since 1 November, 2013, the Marines have assisted more than 1,100 victims of crime at various locations across the world, 255 of those have been assisted in the Pacific, and 60 of those clients I personally assisted. I've been in my current position since we started this program on 1 November, 2013. The senior Marines leadership, to include the Commandant of the Marine Corps and the Staff Judge Advocate to the Commandant and his staff have been, overall, unyielding supportive to our program and our staff. They've afforded us the necessary autonomy to do our jobs
and represent our clients.

Notwithstanding the Marine Corps' efforts in improving victim support and representation, confusion, misunderstanding still remain on the part of the commands and law enforcement in recognizing and understanding the attorney/client relationship that we have with our clients. Unfortunately, instances still occur where the victim or victim counsel experience alienation, ostracism, undue punishment, threats and harassment, just to name a few.

The first instance of retaliation I'll describe involved a male victim of sexual assault. Just last month, the Panel heard from Lance Corporal J.J., who was my client, who testified at this very venue. I won't repeat his story because you heard it, but as you remember, he had never been accused of a crime before and was an honor grad of his Marine Corps training class. But he told the story of how he'd been ostracized and retaliated against. He became
withdrawn, depressed, and had to seek medical assistance. He referred himself to treatment for alcohol abuse and suicidal ideations.

But for almost six months between August of 2014 and February of this year, he was not permitted to leave the base, taunted about his sexuality by his senior enlisted leadership, separated from his friends by no-contact orders that were placed on him by his command. In that process, he was also subjected to administrative separation. He received a series of NJPs -- three of them, actually, in a period of two weeks, and that sent him from a rank of corporal E4 to a private.

It was during this time that the Sergeant Major was doing things like inducing him to plead guilty at those NJPs, making promises to him to get him to do that, and then also inducing others to levy testimony against him. When I requested to set aside the NJPs under the provisions of Article 15 of the UCMJ, I submitted my request as a retaliation complaint. The
problem is that there's no real procedural
guidance with respect to the retaliation
complaint, so I forwarded it to his next superior
Commanding Officer. If it were not for the Staff
Judge Advocate assigned to the unit, who was
assisting me, Lance Corporal J.J. would not have
been re-instated.

However, the lack of any clearly defined
process means that our complaints could fall into
a black hole. That's because we are often
submitting the complaint to the very command that
may be allowing the retaliation in the first
place. While I received a letter from the
Commanding Officer addressing the fact that he
set aside two of the three NJPs, my request for
an investigation into the retaliation was never
addressed.

To date, I'm not aware of any
investigation initiated or any action for the
retaliation itself, per our SECNAV Instruction
5370.7(d). After several months of waiting,
Lance Corporal J.J., in June 2015, finally
received his back pay and had his E3 pay restored just this month. The second instance of retaliation involved a female Marine victim of domestic sexual assault. This particular client was an officer, married to another senior Servicemember whose military specialty was in law enforcement. When she reported her spouse for sexual assault and other abuse, the spouse retaliated by launching a campaign of character assassination against her.

This retaliation included frivolous counter-allegations, unfounded complaints circulated by him through her command, stale allegations of child abuse, and it just resulted in serious ongoing harassment by others within her command. By itself, this abuse might have been bearable, except the accused was able to convince law enforcement to open an investigation against the victim for counter-allegations of sexual assault.

These complaints were outside of the statute of limitations and later dismissed as
false, but not until a full custodial detention, fingerprints, DNA, mugshots, etc. Interrogation and investigation was conducted on my client, the victim. This resulted, also, in family advocacy labeling her as a suspect and stripping her of her victim advocate and victim services under the FAP program. Those were never restored. My client's command took actions tending to demonstrate support for her spouse, in an effort to discourage her participation. Some of those were first, they categorized her case as he said/she said, and yet these are the very cases that usually occur in the privacy of one's home, where there are no witnesses.

Second, shortly after her report of sexual assault, the command counseled her on obvious domestic responsibilities. They counseled her in writing. They counseled her on things such as providing support for her spouse. They warned her about making false official statements and other things that are -- in fact, my client was actually pending divorce for two
years prior to the counseling.

   As a result, she was subjected to repeated interrogations, detention, scrutiny and harassment by law enforcement and the advocacy and members of her command. Finally, and concurrently, the investigation initiated as a result of her spouse's claim of sexual assault against her was actually taking place. However, her command and the spouse's command eventually dismissed it as a false allegation. There were several other incidents that occurred against this particular client. In response to these actions, I decided to submit a letter to my client's Commanding Officer requesting that all collateral matters be set aside until the disposition of the accused's case.

   It was at this time that I was summoned into my client's leadership and told that I was wasting my time preaching and that my written request for relief was too long. Although I felt somewhat berated, the commanding general did take interest in the matter, and my request was
approved, assigning my client a victim advocate
from the SAPR program, but not the FAP program,
to assist us.

That is even though it does not fall
under the purview of the domestic case, he
effectively assigned one of his majors, who was a
trained victim advocate, to be her victim
advocate. This victim advocate was extremely
helpful, as she was well respected, pretty savvy,
and a credible advocate with a wealth of military
experience. The problem with domestic assault
cases involving active-duty Servicemembers is
that the SAPR program does not ordinarily get
involved. All domestic cases are deferred to the
Family Advocacy Program. In this case, the
concern is our family advocacy representatives
felt this situation was too complicated, and
while they did not want to provide services, they
conducted a board and made an independent
determination as to whether allegations, against
my client, of abuse were substantiated or not.

Further, while an active-duty
Servicemember, my client was not entitled to an expedited transfer because FAP does not initiate those transfers. As the situation degenerated, my client became more and more distressed, with no escape. With no right to an expedited transfer, she could not transfer. Instead, she would have to wait until a permanent change of station.

To date, my client did execute PCS orders. She is now re-assigned to another command, back in the States. As for the case against her spouse, it's pending with the trial counsel for charging. Last, I will describe my own experience with retaliation against my client from NCIS and myself. My experience with what I believe to be retaliation against my client and me, which occurred while I was representing a client, in short, I was accused by NCIS of obstructing justice, that they believed that I had my client delete images from her electronic devices, to include a cell phone and an iPad.

The client and both her parents verified
that I, in fact, instructed them not to remove anything from the devices until we could meet with NCIS and determine if there was anything else that they needed from the devices. Nonetheless, on 2 March, 2015, I was detained, read my rights, interrogated, fingerprinted, and had my DNA and booking photos taken.

The details leading up to my account are as follows. I received a call on Saturday morning in February by the command SARC to assist with a victim. A Marine Corps Criminal Investigative Division agent was the lead in an unrelated theft investigation in which my client was a witness. One week prior to my involvement as a VLC, and as a part of this theft investigation, CID seized a copy of her electronic devices in search of the evidence related to the theft. They returned the devices back to her immediately after they copied them. However, in a few days, when CID inadvertently discovered evidence on my client's cell phone indicating that she had possibly been sexually
1 victimized, they immediately contacted NCIS who,
2 in turn, contacted her parents.
3
4     Before meeting with NCIS, the military
5 higher-ups, senior in rank, first sought VLC
6 assistance and arranged to meet with me that
7 Saturday morning. There was some reluctance on
8 my client's behalf as to whether she wanted to
9 report these sexual-related events; therefore, it
10 was important for her to meet with VLC. After I
11 became involved with the case, I arranged a
12 meeting with the NCIS myself.
13
14     The agent indicated that he was not
15 concerned about evidence preservation in this
16 case, as they had already copied the phone. The
17 iPad was an exact copy of her phone. However,
18 the family was told by NCIS that they could not
19 keep the devices because they contained images
20 that were considered contraband. I inquired with
21 the assigned agent about the possibility of
22 deleting the contraband, in order to permit them
23 to keep at least one of the devices contraband
24 free. Their main concern was that her schoolwork
was on her iPad. The agent indicated that the contraband would still be embedded in the memory, retrievable, and would have to be forensically deleted. When I first met with the client and her parents on Saturday, I informed the client of these discussions.

While we, the victim and her parents and the SARC discussed all options, including deleting the contraband images from their personal devices, my advice, and our final decision, was to keep the devices locked away, untouched and intact, until speaking with NCIS on Monday afternoon. Thereafter, I made a number of attempts to reach NCIS, but was unable to do so.

However, on that Saturday, same Saturday, when my client and her parents returned home, my client contacted me because NCIS, without prior notice to the victim and her family and counsel, were waiting outside her home to retrieve the devices. I advised the clients to surrender the devices, and they did so immediately, with everything intact, as
previously discussed. At that point, to my knowledge, nothing had been deleted. The following Monday morning, we arrived at NCIS, where I was separated from my client and taken into custody. While NCIS attempted to get a statement from my client, I was being interrogated for accusations of obstructing justice, tampering with, falsifying evidence, and destroying evidence.

This is despite the fact that the same day NCIS confirmed with the client and her parents that I did not advise anyone to delete anything, and NCIS had the devices since Saturday, for two days, as a result of my assistance. My client was also treated as if her right to VLC didn't matter, and her statutory and constitutional rights were completely disregarded.

Even had her devices contained contraband, the agents were attempting to ask her incriminating questions without her parents or attorney present, and without her waiving that
right. According to the installation SARC, who was present, NCIS subjected her to repeated questioning in an attempt to convince her to change her mind and make a statement about sexual assault and the contraband. She declined. The next day, Tuesday, we started anew with NCIS, in hopes that the issue was dropped. It was not. The agent still insisted that I was a suspect and denied my client's right to allow me to accompany her to the interview where she signed a victim preference statement.

Since that day, the agents have communicated with her directly, and her parents, disregarding her legal representation altogether. This is clear violation of my client's right to VLC and her parents' desire for me to represent her. While the NCIS investigation against me was completed on or about 19 March, 2015, their actions not only affected me personally and professionally, but my ability to effectively represent my client and their interest.

First, their attempts to interview other
VLCs within my supervisory chain about my advice to them and their clients had a shocking effect on the VLCs and paralegal under my charge. They did interview my attorneys and my paralegal, as well. They refused to acknowledge confidentiality among VLCs and with any client/attorney relationship. Secondly, worry about the investigation against me ran rampant among the military justice community. Thus, defense counsel began submitting motions in unrelated cases involving other clients of mine that had electronic devices that were tampered with and evidence was destroyed. In fact, the military judge's finding of facts and conclusion of law in one case affirmed that no such advice was given.

Further, the most devastating to my career was the week after NCIS completed its investigation, in an article that was released by Hope Hodge in the "Marine Times" on 24 March, 2015, exposing my rank, full name, and billet description as VLC for all to see.
The article titled, "NCIS Investigates Lawyer in Japan on Obstruction Claim," it lacked any details, was completely inaccurate, and relied on an anonymous Marines official as her source, but made sure to destroy my reputation and that of the organization. Further, the article stated that NCIS confirmed the existence of an investigation, but they could not comment as the probe was still ongoing. This article seemed to perpetuate the retaliation even more, and yet the investigation was completed. Lastly, there were at least eight NCIS agents working on the case against me. I was eventually cleared of all allegations by my superior commander, in that there was no probable cause, no evidence to support the allegation and, therefore, no misconduct, but the damage to my reputation as a Marine Corps Officer and Judge Advocate had already been done.

When I reached out to Hope Hodge to clear my name from her article, she never responded to this day. NCIS actions towards me
and my client illustrate their lack of
institutional understanding of victims' rights
and the statutory rights that a victim has to a
client/attorney relationship with their VLC.

When NCIS separated me from my client
and continued to question my client, they
violated the attorney/client relationship.
Further, when they tried to question my
subordinates as to my communication with them and
my client, they again failed to appreciate the
autonomous relationship that we have as an
organization and the confidentiality that comes
along with these relationships and organization.
I have heard investigative agents question why we
have to have sidebar conversations with our
clients. This, again, goes to show that they do
not understand, do not appreciate the
client/attorney relationship between the victim
and their attorney. As we know, per the NDAA
FY13, NCIS is a member of the special victims'
capability team.

Therefore, by now they should have
incorporated all of these statutory changes into the SOP. I further believe that they fail to appreciate what constitutes retaliation. These are just a few examples of retaliation and ostracism. As we can see from these examples, the victim retaliation can be subtle or blatant, and when practiced unchecked, serves to discourage reporting and re-victimizes or unnecessarily casts the victim in a less-than-sympathetic light, or even ruin careers.

We need more defined procedural guidance for commanders who receive retaliation complaints, to include proper documentation that the matter has been investigated or handled to some degree of fairness. Secondly, there's a disparity of services provided between active-duty victims of sexual assault and those active-duty victims of domestic assault in domestic assault matters. Domestic cases are common in the military and, therefore, those victims in those cases need heightened protection from retaliation. In my client's case against her
husband, she was an active-duty Servicemember.

Lastly, I probably would not have shared my story with you regarding NCIS if the retaliation hadn't occurred in the course of my representation of the client. Players in this process need to be extensively educated about the role between the client and VLC involving sexual assault cases. They also need to be educated about the victimology and how these victims can be re-victimized from the retaliation, as well.

Our leaders and the law enforcement community must come to appreciate retaliation at all levels and understand how their actions can be based on stereotypes and ignorance concerning victimization. SAPR training is not the end-all answer. The issue is much more cerebral than just, "say no," or "no means no." In closing, thank you for this opportunity to speak with you. I look forward to your questions.

CHAIR HOLTZMAN: Thank you very much, Major Higgins. Start with you, Mr. Stone.

MR. STONE: I guess I'm really upset by
the last testimony we just heard. Was there an
OIG investigation of NCIS for what they did, do
you know?

Maj HIGGINS: No, sir, I've been FOIAing
and requesting, via Privacy Act, a copy of the
investigation, but NCIS still has it open, so I
can't really articulate fully, without actually
seeing what was actually reported by NCIS, so I
have not submitted a complaint. I do know that
the SARC from -- the installation SARC, she
actually did submit a complaint, but I don't know
what happened to it. I think it was pushed to
MCICOM for action.

MR. STONE: Have any of your superiors
asked for an OIG investigation or an explanation
from NCIS why they would separate you from a
client, or would not provide the client with a
different SVC?

Maj HIGGINS: Yes, sir. I know that
they've been in communication about it, and there
is apparently a learning point that's been
expressed by NCIS about this incident. I know
that they're trying to take action to make sure
that it doesn't happen again.

MR. STONE: Because this goes beyond
intimidation of a victim. This goes to
intimidation of a victim's counsel, and I find
that completely unacceptable. I will hope that
if there is a report of this incident that it be
forwarded to us because otherwise, your
testimony's going to stand here as an example of
the fact that NCIS operating on Marines
complaints is doing a horrible job of recognizing
and respecting the rights of victims and victims'
counsel.

I hope any of those representatives in
the audience take action to see that we get some
kind of an explanation of what happened here.

You mentioned NJPs, is it? What is that?

Maj HIGGINS: Oh, non-judicial
punishment, sir.

(Simultaneous speaking.)

MR. STONE: Non-judicial punishment.

Okay, that's the NJPs, okay. I guess I didn't
understand -- you said that no action was taken
upon complaints about retaliation regarding the
J.J. situation. Was there, to date, any
explanation of that, either?

Maj HIGGINS: No, sir. We did receive,
I guess, a letter explaining what was going to	happen, in terms of trying to restore him back to
where he -- as much as they could to where he was
in rank and pay. At that point, my client was
satisfied with the result. He was getting ready
to -- they were no longer administratively
separating him, and they were getting ready to
PCS him to his new duty station. I guess from
the excitement of that, we kind of dropped the
issue.

MR. STONE: Where does that letter come
from? Who signed it? Does it come from the
Commanding Officer? Does it come from the legal
side? Where does it come from?

Maj HIGGINS: It came from the next
superior Commanding Officer. His battalion
commander, we skipped him and went to the next --
the group commander. That's where we got our
letter back from.

MR. STONE: Doesn't the Judge Advocate
in charge of that location have a responsibility
to respond to those when a complaint is made like
that?

Maj HIGGINS: I submitted the complaint
via the SJA. That's where I really got my
traction, sir, is through the SJA. Like I said
about the order, it doesn't really say who's
supposed to do what. I think that they were, and
rightfully so, thinking that we just wanted some
results here for the Marine. The investigation
revealed that they took too much rank and did too
much, so I guess that was, for the command, some
satisfaction for us, as well.

MR. STONE: This is generally to the
panel. Correct me if I'm wrong, but I assume all
these complaints that you each reported, in terms
of a number, and then how many retaliation
complaints, are all unrestricted reports, and
none of these are restricted reports, am I right?
(Simultaneous speaking.)

MR. STONE: Okay, so there may be restricted reports that result in retaliation, but those you can't account for because those wouldn't get to you, I gather, correct?

LTC WUNDER: They would still come to us. Those would be in the reports. It may not be retaliation for a sexual assault report, but the victim could still have feelings of being ostracized or of harassment based on, maybe, her response. If she or he is having a difficult time emotionally dealing with the assault, and that affects their performance or their standing within their unit, they may feel like it's retaliation not because they made a report, but because they are responding to the effects of the assault.

MR. STONE: How would you count that in your numbers? Would that be counted in your numbers or just --

LTC WUNDER: I personally have not had a restricted client report to me retaliation, but
I don't want you to have the impression that it's not possible. It wouldn't be a retaliation claim under, at least, the Coast Guard's policy of prohibited retaliation, where it would be actionable under the existing policy, but it still would be a form of retaliation, more due to the effects of the assault, as opposed to the report, itself, if that makes sense.

MR. STONE: How would we capture that number, then? Would you be capturing it anywhere, or it wouldn't be captured because it wasn't in response to a sexual assault?

LTC WUNDER: It wouldn't be captured in a number, as a statistic.

MR. STONE: That's what I wanted to know. You mentioned that there was at least one situation still unresolved that resulted in -- sounded like a civil rights case. Is that right?

LTC WUNDER: Yes, sir.

MR. STONE: Is that a public case? Is that a publicly filed case in a federal court?

LTC WUNDER: No, it is not. It was
resolved at an informal level.

MR. STONE: So it's not like there's a public report of it, a civil rights report?

LTC WUNDER: That's correct.

MR. STONE: Do you know if a complaint in the federal court was ever filed?

LTC WUNDER: No, there was not one.

MR. STONE: I guess one of the concerns I have, and I guess I'd like anybody's reaction on this panel, is although I hear -- and Captain Smith mentioned a situation where a person, after a year of complaints, was finally retrained -- set into motion retraining and a transfer, and several others of you have spoken about the number of people who needed to be transferred -- as you may know from the background materials, I spent a lot of time as counsel to the federal witness security program.

Contrary to what people think, taking a person and moving them to a different location and a different job, and maybe even different -- to start over with friends, and if they have
kids, a new school, and maybe a new church and
whatever, is not actually as much fun as the
movies portray it as. In fact, most of those
people find it so discouraging that on average,
after five years, they want out of that
tsituation, even if those people are facing
serious threat to harm.

So hearing that all these people get
expedited transfers or retraining, when that's
not the job they chose, but it's just the least
worst option, and they wind up going to a
location they didn't choose, and they get a new
situation that may or may not follow them with
rumors, it may be the least worst option, but I
don't really find it to be what we want to
happen. I guess one of the questions I have that
strikes me, and I'd like each of you to mention
it, if you would, among the people that you had
get those expedited transfers, how many have
opted out of the military at the first
opportunity they had? How many have left, and
how many have stayed? I presume quite a few of
them, then, have then left. Maybe you can tell me what you know about how they feel about the military afterwards.

LCDR TOOHEY: At this point, none of the clients who have executed expedited transfers that were my clients have reached the point where they would be at the end of their enlistment, so I can't answer that part of the question. I would say, though, that I think this is really the crux of the issue, in terms of the social retaliation piece.

Because in my experience -- and in talking to some of my colleagues, I think it goes for them as well -- the victims who have gotten the most in terms of support and care and not having issues of ostracism and other social retaliation are those who are in a different command from the accused originally. So there's not an issue because both people aren't at the same command. Really, the crux of the issue -- and my one comment about seriously considering the temporary transfer of the accused -- that's
an option for a commanding officer when an
assault happens. They can move someone
temporarily out of the command. Now the problem
is for the accused, they'd be doing it usually
against their will, and they'd normally do that
for a number of reasons.

One is they don't want to engage in
potential pre-trial punishment. They don't want
to pre-judge the case that they may have to later
on convene an authority. They also don't want to
lose a body temporarily that they're not going to
be able to replace. But when you do that, when
you see that done -- and I have seen that done in
cases where I haven't even asked for it because
the command just took that action initially --
victims do better, even though they don't
necessarily think they're going to.

And what I mean by that is in cases
where I have an individual who is having these
social retaliation issues. I say, "Do you think
this problem would be solved if we just move the
accused?" The answer is usually no because it's
not just him. It's everybody. But really, what happens when you move the accused is that everything gets better. Obviously, if the case is never prosecuted, that person has to come back eventually, but it's six months down the road, and things may be at a point where she can now, or he can now continue in the command. That victim can continue in the command, even if that other person comes back, if it's a big enough command, where they can potentially be separated, or they can do an expedited transfer at that point.

But I think, Mr. Stone, that you really -- the crux that I've seen is when they're both at the same command, is it, how do we manage them both at the same command going forward, without disrupting either career, particularly the victim's career? Because an expedited transfer is an option, but it's not always the perfect option, as you mentioned.

LTC WUNDER: Sir, I can think of two of my clients who executed expedited transfers, and
then were subsequently separated from the
Service. One was medical, and the other one was
administrative.

MR. STONE: Was that by their choice, or
it wasn't by their choice?

LTC WUNDER: Both of them accepted their
separation, so they didn't -- they could have
availed themselves of more due process and chose
not to. They were fine with leaving the Service.

MR. STONE: But they didn't put in the
papers, themselves?

LTC WUNDER: Correct. That being said,
I think I can speak for my brethren here that the
military is set up so that you rotate every so
often, so moving to a different location and
uprooting yourself, while it could be traumatic
and it's disruptive to your family and yourself,
it is also a part of the culture that we are in,
so it isn't maybe the same as similar context in
the civilian world, where that same situation is
not a part of the culture.

MR. STONE: Do you think, then, that
maybe we should recommend making wider avail of
moving the accused, since people move every two
years, and maybe have the trial at his new base,
at his new location, instead of where everybody
locally gets to hear every detail?

LTC WUNDER: Yes, but in addition to
that, I think more weight should be given to the
victim, or the victim should be consulted to
decide whether or not the victim would rather
move, or if she would or he would have the
subject moved.

Because some victims would rather pick
up and go to another location, where they can
start fresh, as opposed to have to stay in the
situation where there may be rumors or bad
feelings or whatever it is. If you just say
we're just going to move the accused, it may not
fit in every situation.

MR. STONE: I guess since that was
brought up by Commander Toohey, let me ask him.
It occurs to me, do you think that that moving of
the accused actually is a shot across the bow and
cuts down on retaliation because the other people
who may be sympathetic to the accused realize if
they take some obnoxious actions that amount to
retaliation, they too could be at least
temporarily removed to a different base, which is
going to disrupt their career, and they ought to
just not get involved in this issue?

LCDR TOOHEY: No, sir, and the reason
why -- I'm not advocating that the accused be
moved permanently, and certainly not as
punishment. He or she can only be moved if it's
a remedy for a prejudicial discipline
essentially, so that the commanding officer says
there's a problem here, and I think removing him
is going to be a temporary solution to that
problem, or her, not a permanent transfer, and
with due accord for all of the rights that that
person would have as the investigation continues,
and as, potentially, a court-martial begins or
charges are preferred.

I'm not saying that -- and I think the
key is that, as Lieutenant Commander Wunder said,
the expedited transfer, very frequently, is --
there's a significant change that you notice in
certain victims when they move to a new location
and they get a fresh start.

It really is the best thing for them at
that time. It has to be if they want to execute
that, that's a lot of times the right option.
Sometimes I think that commanders don't always
seriously consider the option of a temporary
transfer of the accused under certain
circumstances, when it might be the right answer.
But I'm not certainly advocating for a permanent
transfer of the accused, involuntarily, or any
other type of pre-trial punishment because I
think that's going to adversely affect the
process.

MR. STONE: That's pre-trial. What
about later? What if it's reduced to non-
judicial punishment? Do you think one of the
options ought to be transfer of the accused?
Would you like to see victim's counsel be able to
ask for it, if that's what the victim would like?
Victim wants to stay in their position, their specialty, their family is there, but they think as a condition of non-judicial punishment, the aggressor -- the defendant ought to be reassigned?

LCDR TOOHEY: All I can say -- this is something that I would just say that I think that at that point, you'd probably be sending the message that he's being punished and involuntarily transferred, even though the case is not being prosecuted. I think that's going to maybe make people lose a little bit of -- it's going to make the system lose a little bit of credibility.

MR. STONE: Isn't non-judicial punishment an admission of guilt? Isn't there an admission of guilt to non-judicial punishment?

LCDR TOOHEY: If there's a non-judicial punishment and there's a finding of guilt, you mean, make the person move?

MR. STONE: No, not make them, but make it an option of the Special Victims' Counsel to
ask for it, instead of their only option being to ask to try and get the victim moved over time.

LCDR TOOHEY: I can certainly -- in terms of the intricacies of the detailing and the personnel piece that would be involved in that -- maybe someone else can answer that a little better than I can. I'm not even sure -- certainly, we can always ask for something like that to be done. The exact procedure for that to be done or whether that's -- I'm not exactly sure I'm prepared to answer that question right now, sir.

MR. STONE: I'm mostly talking about whether you think there would be some useful tool to have in your arsenal. Captain Smith, I thought you might have wanted to say something.

Capt SMITH: Yes, sir. I think keeping the moving as an administrative piece, not as a punishment piece, is important. But I think when I have a client who wants to do an expedited transfer, we talk about what if we move the accused instead of you?
I have had that situation, where we go to the command, and we say, "Sir/Ma'am, this situation is not working. Instead of my client moving under the expedited transfer, we'd like you to actually move the accused." That situation played out where the commander then went to the accused and his defense counsel and basically said I'm considering doing this. Please give me your input. Do you want to move? Do you not want to move? In that case, the accused did not want to move.

The commander decided not to move a duty location, but did switch up the work schedules and actually, in our situation, moved to a whole different squadron -- same base, but different squadron, so really, interactions ceased at that point.

MR. STONE: Anybody else have a --

Maj HIGGINS: The Marine Corps has no problem moving the accused. We frequently -- it's called 50/50 percent, in terms of whether the accused moves or the victim moves. If the
victim expresses a concern about moving, and they
don't really want to move, then the commands will
certainly consider moving the accused, instead.
It's a matter of good order and discipline and
safety for the victim, as well. I see it about
50 percent of the time the accused moves, and 50
percent of the time, the victim moves.

MR. STONE: One other question I have
that -- just so I'm sure I understand. There was
a comment about when you report retaliation and
what is obligated to go up the chain. That was
sort of like when somebody reports it. I guess
the question I have is, as a member of the bar,
one of my ethical rules is that I'm obligated to
report unprofessional conduct when I see it.

If I don't report it, there will be an
issue taken with my conduct that I stood by
silently and saw another member of the bar act in
an unprofessional manner, swear to something that
wasn't true, hide evidence, whatever it is. But
there's an obligation on me, as an individual, to
report improper conduct, even if it's not by me
or done to me. I guess the question I have is, is there any obligation on Servicemembers in any of the branches, by regulation, when they see retaliation, to report it, or if they don't, when it does come out, to wind up with a negative comment in their personnel review or their annual military evaluation that they stood by silently when they should have reported that a person was being subject to retaliation, so that it can actually be addressed? Is there any kind of an obligation on them in any of the branches?

Maj HIGGINS: It's the same as the MAR rules. If you know that -- at least for the Marine Corps, we just had an update to our rules. If you know that someone else committed misconduct or failed to exercise their professional responsibility, then you must report it, but you have to know.

MR. STONE: Have any of you ever seen any action like that taken against any individual who stood by while the retaliation was going on?

Maj HIGGINS: No, sir.
LCDR TOOHEY: Are you referring to just
lawyers, or just Servicemen in general, or --

MR. STONE: I'm talking about all
Servicemembers is what I really want to know. In
other words, if something's going on in the
barracks that's really outrageous, you see that a
particular Serviceperson keeps getting retaliated
and harassed in a particular way, that they're
being isolated or they're getting anonymous
messages that are designed to -- calling them
names, designed to harass and intimidate them, if
there's an obligation on the other people in that
unit to report it, or if they can all just stand
by silently and let this go on and on and on
forever?

LCDR TOOHEY: There is a Navy regulation
that requires the reporting of other criminal
misconduct.

MR. STONE: Have you ever seen it used?

LCDR TOOHEY: Have I ever seen anyone
punished for not reporting misconduct?

MR. STONE: Yes.
Lcdr Toohey: Not in the retaliation context, but -- and certainly, I've never seen anyone taken to court-martial for it. It's more lower level type misconduct that --

Mr. Stone: I guess the question -- where I'm going is, do you think if it was clarified so that not reporting retaliation, and it doesn't have to be just for sexual assault allegations. It could be regular assault allegations -- but not reporting retaliation against another Servicemember was, itself, something that was going to be pursued.

If that was put in a training, do you think that would make the training somewhat more effective, so people understood they couldn't just stand by and say well, it wasn't me, I didn't do it, but it keeps going on?

Cpt Lavine: I don't think both, sir. I think part of it is if you're kind of talking more of a punitive nature, you're going to get in trouble if you don't report it, but also going that step farther to encourage the Soldiers, they
feel good about it, recognize retaliation when it's happening, stop it, and then report it back to us, both those, I think, need to sort of happen. So don't just be afraid about retaliation. Recognize it's the wrong thing, and then do something about it. Because I do think, at least in the Army Directive, that you can argue that it does put in there if you knew it was going on, you might also be -- could be punished under Article 92, Failure to Obey a Lawful Order, but also make sure the Soldiers understand why retaliation is wrong, and then feel good about reporting it. This is the right thing to do. Like you said, don't stand idly by. Don't be a bystander with this.

MR. STONE: I guess what I'm saying is typically, in a violation, you've got to show some intent to do wrong. Just standing by, the person will say, "I wasn't a part of that action." I guess I'm not looking to make it a criminal violation. What I'm trying to do is see whether or not it should be a map that goes to
your military conduct, your military evaluation,
your military bearing.

It is sort of conduct unbecoming that
you stood by and allowed -- you wouldn't stand by
and allow another Servicemember who you see in a
bar to rob another patron. It seems to me it's
the same thing, that you wouldn't stand by and
not report when you see someone else being
retaliated against.

Maj HIGGINS: We had discussed this
earlier in the ready room. We discussed the fact
that if we're serious about retaliation, it
should be much like the hazing order and the
sexual harassment order. Frankly, it's also in
the sexual assault order, where you have
bystander intervention. You have to report it if
you see it. The training needs to be the same.

Marines remember things like ---
Servicemembers remember things like, if I touch
you on your shoulder, is it red, green, yellow?
You have to have those scenarios and show Marines
and Servicemembers what does retaliation even
look like? Because if they don't even know what it looks like, then they don't even know if they're retaliating against someone or not. It would be training like SAPR training, basically.

CHAIR HOLTZMAN: Did you want anybody else?

(No audible response.)

CHAIR HOLTZMAN: Okay, Mr. Taylor.

MR. TAYLOR: Thank you. First of all, I'd like to just address a question to the panel, in general. That is, are you aware of any formal or informal restrictions that in any way restrain the kind of actions you can take to assist your clients or former clients in pursuing retaliation claims?

(Chorus of no.)

MR. TAYLOR: When it comes to dealing with command issues, has any of you found it to be a problem that you are outranked by the person that you're taking the complaint to? Has that been an issue for anyone, in terms of how you approach it, or the kind of response you receive,
and if so, what do you do about it?

CPT LAVINE: I don't know if I'd say
it's a problem, but it's always in the back of
your mind. When you're going toe to toe either
with a garrison commander or brigade commander,
as you know, obviously the rank, where you fall
in the hierarchy, in terms of you're not a
commander, that kind of a thing -- basically, you
are going to that commander and saying that
there's a real issue in your command. It's
lacking discipline in this area. I think that's
always there in the back of your mind. It's
never stopped -- like everybody up here,
especially Major Higgins, people aren't afraid of
kicking that hornet's nest, but it is something
that sort of crosses your mind. Will there be
blow back? Do I have to phrase how I'm saying
this appropriately, that kind of thing? I think
it's always there. I don't think it's stopped
anybody, but certainly, it is there.

Capt SMITH: Sir, I think the only thing
I would add is yes, there's always a rank
disparity there, but I've also felt like I have
the support of my leadership, so I may be talking
to a colonel, and I'm a lowly captain, but I know
that I have that support that if there's blow
back of, "What's your crazy captain saying?" I
have that support on an equal rank level.

MR. TAYLOR: Thank you very much,
Captain Smith. That was going to be my next
question. Do you feel confident that if you do
find yourself in a situation where you might feel
overpowered by the rank that somebody's got your
back up the chain? Does everybody feel as if
somebody's got your back out there?

(Chorus of yes.)

MR. TAYLOR: When it comes to advising
your clients about which of the various options
they might want to pursue, whether it be the IG,
writing to Congress, taking it to the chain of
command, how do you evaluate that? You mentioned
that, Commander Toohey, as one of your issues.
How do you go about laying that out to the
client?
LCDR TOOHEY: At this point, in most cases, if you can get the remedy that you want from the chain of command, that's going to be the most effective way to go. That's my experience in the military, in general. This person is responsible for that Service, responsible for everything about that Service, their well-being personally and professionally.

When you can get the remedy that you're looking for, that's your most expedient way to do it. When things are working right -- and my experience is that command triads, generally speaking -- CO, XO, command master chief -- understand the importance, get the whole sexual assault response program and their obligations, generally. If they don't, they're usually responsive to you explaining what they missed. Going to them and saying, "This is the problem," has resulted in, where they could deliver the results, they have acted, and they have given the relief that we requested, or some relief that we've worked out that was within the realm of the
possible. I haven't had to -- certainly, advising on IG or congressional, I haven't had to go that route. There was one congressional file that I was only tangentially involved on, not because I was limited, but for other reasons.

Those take a long time. They tend not to reach the result that your client wants or thinks that they're going to get, and are not necessarily going to be received as well, as easily, and as quickly as going up the chain of command. So that's usually -- unless the problem is with the leadership, that's almost invariably where I'm going to go with my initial complaint.

MR. TAYLOR: I assume, from the looks of assent, that most people would agree with that, which I think is why it's so important to have that ability to go to commanders, even if they are superior in rank to you, and have the credibility to make the case to them, knowing that would be the fastest, easiest way to try to resolve the complaint. Is that the idea? Everybody would agree with that?
(Chorus of yes.)

MR. TAYLOR: Yes, please.

CPT LAVINE: I think that Commander Toohey brings up a good point. It seems like the higher up in command you go, the more they understand. They're more separated from what's going on down in the trenches, and they get it. Sometimes, though, they do push back and say, "Why aren't you going to the troop commander first or the company commander first? Why are you skipping the chain of command and coming right to me?"

It's because that's where the problems are sometimes. These are pretty difficult issues, and we have retaliation because you don't know at the outset who's approving it, who's perhaps looking the other way, that kind of a thing.

As Commander Toohey said, I think as long as you're able to go get that dialogue and they understand, "This is why I'm coming to you, at your level, because you understand that we don't have to have that debate at the lower level..."
about whether or not this is even important," that's kind of good. Sometimes, again, that can take them back because you are coming in as a captain, skipping some chains of command, but that's what you have to do for your client. I've seen the same thing in the Army. Upper levels get it, and you just have to go in there and make that argument.

MR. TAYLOR: I take it from your recommendation, as well, that you think there probably should be more higher level involvement -- I think those were the words you used -- in the training and education, to be sure that the whole chain of command gets the fact that the leader is a believer?

CPT LAVINE: Yes, sir.

MR. TAYLOR: Is that the implication of your comment?

CPT LAVINE: That's absolutely -- that was something we were all kind of talking about this morning, but that higher level will set the tone, and then the lower levels, the troop
commanders, what have you, they'll enforce it.

But that tone needs to be set at the very highest level, as high as you can go, as often as is needed, not just when an issue happens, but before that. I would absolutely agree with that, sir.

MR. TAYLOR: Commander Toohey, you made the same comment, I think, in your direct testimony, so you would agree with that, as well?

LCDR TOOHEY: Yes, sir. Just to add quickly, everyone that was here in this panel, we get a lot of training on a lot of different topics, some of it mundane, and some of it really important. To make certain trainings stand out, you have to do something different.

I think that delivery at that higher level is going to not only be effective in its delivery, but also, I think what's really important is it creates the training environment where everyone is attentive, everyone is understanding the gravity of the issue, unlike how some other trainings can devolve into
something lesser.

MR. TAYLOR: One other comment you made, Commander, had to do with involving the individual who's the victim with the solution and coming up with a solution, whether it's a transfer of the victim or the transfer of the accused. That seemed to be something that you took to the next level, Captain Smith, in coming up with this solution for your client, but it was hard to do that, wasn't it?

Capt SMITH: Yes, sir.

MR. TAYLOR: So is there any best practice that you can pass on about how that process can be expedited?

Capt SMITH: I guess best practice wise, I think it's going through the legal chain of command and making sure that they are aware -- the regulations that are out there explicitly say that they should always be considering transferring the accused, just that, at least -- it sounds like maybe it's different in some other Services, but at least to my experience in the
Air Force has been that wasn't necessarily something that was ever considered. It was, if the victim wants to move, they can move, but we don't ever move the accused.

So I think it was getting the legal side of it spun up, and then also, then, with the commander who ultimately can make that decision, it took -- in my experience, it took a little bit of convincing that this is the way to go. I think a best practice would be making sure that framework is in place before coming there with, "Sir/Ma'am, here's this specific issue I need you to make a decision on," having that person just be reminded before, without a case in front of them, is helpful.

MR. TAYLOR: You also said, Captain Smith, that you thought the IG program was not well set up to handle some complaints, especially if you're outside the formal retaliation. Do you think it should be set up to deal with things other than formal retaliation, or are you confident that you have enough other arrows in
your quiver so that you don't really need to worry about whether the IG is or is not doing what you think it might do?

Capt SMITH: I think as some of the other colleagues mentioned, first go is always going to be with the chain of command, and 90 percent of the time, they're the ones who are going to have the solution anyway.

I think in circumstances where maybe the retaliation concern is with somebody in that upper echelon of chain of command, it would be nice to have an outside option, but there's also always superior commanders that you can go to. So I'm not sure that the IG system has to be totally reformed. There are, as you said, other arrows in the quiver that can be out there. In my personal experience, using that IG system has been less effective than some of the other options that are out there.

MR. TAYLOR: I guess my final question is for you, Major Higgins. Certainly, I'm as upset and outraged as Mr. Stone indicated about
what you had to endure as you represented your
client, but do you feel, at this point, as if
you're getting the kind of support through your
technical channels, from your higher-ups within
your hierarchy that you expect and should have
under these circumstances?

Maj HIGGINS:  One hundred percent, sir,
yes, sir. As soon as the incident happened, I
reached out and contacted my OIC. She was making
phone calls to NCIS and trying to intervene right
away. I have a new boss now. They both have
been incredibly supportive in making sure that
this isn't affecting my career and that I can
move on to another job after this.

MR. TAYLOR: Thanks to all of you.

Madam Chair.

CHAIR HOLTZMAN: Thank you. I want to
associate myself with the remarks of Mr. Taylor,
and also my colleague, Mr. Stone, in expressing
my dismay at what happened to you, and I am glad
to hear that you feel you've got support in the
chain of command. I hope the situation gets
resolved promptly, and that those people who
acted improperly are appropriately punished, and
that that's widely known, and that the people at
NCIS get proper training, so this kind of thing
never happens again.

On the issue of the IG, your indication
was that there are more effective methods. But
if the IG system were more effective, it might be
another arrow in your quiver. Our understanding
about the IG system is it takes -- aside from
anything else, it takes forever, and the number
of times in which they -- I don't want to speak
incorrectly here. I'm sure I am -- but the
number of times in which they've found anyone
responsible for retaliation in sexual assault
cases is exactly zero.

That's not something that gives me a lot
of sense of confidence, a system that takes
forever and produces zero result. It seems to me
the IG system was set up to deal with corruption
and financial fraud and that kind of thing, and
they're not really -- this is really outside of
their ken. I don't know why they should be doing this at all. Do you have any comment on that?
You said you didn't think the system should be changed, but I don't know why you would want to keep it, looking at it from a different point of view.

Capt SMITH: My only comment would be,
I don't necessarily think that I would have a situation where I'd recommend a client go through that system anymore. Again, personal experience.
I'm sure there's a case out there where maybe it's appropriate, but when I have a chain of command or -- honestly, it's been more effective when they've filed a congressional complaint.
I'm not sure that it's a lot of bang for the buck to have them go through the IG system. Again, maybe that's my personal experience.

CHAIR HOLTZMAN: Can you think of an alternative --- before I ask you a second question, does anybody else have any other comment? Yes, Major Higgins?

Maj HIGGINS: I had submitted my
recommendations. One of them was that SAPR be able to supervise investigations into retaliation. Again, you have this issue of recognizing retaliation when you see it. Just like Equal Opportunity, you have an oversight for those being sexually harassed. You have oversight of the EOA, who's advising the individual that's conducting the investigation. That's what you need. Even with the IG, if they can't identify what retaliation looks like, then they're probably not going to find it.

CHAIR HOLTZMAN: So you would suggest having another agency do it?

Maj HIGGINS: Agency within the SAPR. I wouldn't say just --

CHAIR HOLTZMAN: Okay, fine.

Maj HIGGINS: Yes, ma'am.

CHAIR HOLTZMAN: So you'd set up within SAPR, a vehicle to examine these cases?

Maj HIGGINS: Yes, ma'am.

CHAIR HOLTZMAN: Anybody else have any comment? Yes, Captain Lavine.
CPT LAVINE: Just off the cuff, just
like we changed Article 32s, now we have judge
advocates in charge of those as the preliminary
hearing officers, I suppose you could do the same
thing. There was a case referenced to the IG or
something like that, you could detail judge
advocate out there to take a look at that
retaliation. If you really didn't think the IG
had the personnel or the experience to do that,
why not take a judge advocate? That's just off
the cuff. We radically changed Article 32s and
said we want a trained attorney in charge of
that. Perhaps that's an idea, as well.

CHAIR HOLTZMAN: But is anybody here
saying the IG system works? Have you seen it
work in any case of retaliation, anybody?

LTC WUNDER: Coast Guard doesn't have an
organic IG.

CHAIR HOLTZMAN: Oh, okay.

LTC WUNDER: No.

LCDR TOOHEY: I have not filed an IG in
a case of retaliation, partly because I didn't
need to, but based on my past experience with IG, in general, I haven't always had great success.

CHAIR HOLTZMAN: You were saying --

there's been some testimony that the higher up you go, the more the commanders get it, the chain of command gets it, in terms of the importance of protecting sexual assault victims and dealing fairly with these cases, but lower down, it's not as clearly understood. Does that mean the military needs to have more training, in terms of retaliation, also for lower level officers and non-commissioned officers and so forth? Yes?

No? Anybody want to answer?

LTC WUNDER: Ma'am, I would say that we don't necessarily need more training, but the agenda or the topics covered in the existing training should, in my opinion, add something along the lines of a retaliation section.

CHAIR HOLTZMAN: Yes, Captain Smith.

Capt SMITH: I think when it works well is when the commander is intimately involved in it and making it clear that this is how it's
going to be in their squadron and their unit. In the military, we're good at following orders.

So when that major or that lieutenant colonel's out there saying, "This is how it's going to be in my unit. I'm not going to tolerate anything like that," then I think it sets the tone. Whereas, if the commander's less involved, then you end up with a situation where you have a younger Airman who maybe doesn't get the big picture and hasn't had that training. So yes, it's training, but it's also just command involvement and being out front and leading.

CHAIR HOLTZMAN: Two of the issues that have come up in this hearing suggest something about the importance of sharing best practices more broadly among Special Victims' Counsels. For example, your experience with finally pushing the right button, figuring out what agency to go to, figuring out that the despite the black letter law, you were able to get the system to respond.

There are a lot of other Special
Victims' Counsels who have no idea and would have
to reinvent the wheel every time. Is there some
way in which you share that broadly with all
Special Victims' Counsel? What happens in that
circumstance?

Capt SMITH: Yes, ma'am, I can think of
two ways, at least, off the top of my head. One
is, I've had the opportunity to go to our
schoolhouse and train other Special Victims'
Counsels as they're coming through. Some of them
have had experience, some are coming in with --

CHAIR HOLTZMAN: But that's within the
Air Force.

Capt SMITH: It's within the Air Force.

We also have an internal communication system.
Basically, it's a web-based communication system,
so there's lots of information, best practices
that are pushed out that way. Again, I think
that's only within the Air Force, although I'm
not 100 percent sure how that works, but I think
it's just within the Air Force.

CHAIR HOLTZMAN: But do you think that
would be helpful to have a system where these kinds of unique situations are more broadly disseminated, so that other people can learn from your experience?

Capt SMITH: Absolutely, ma'am. Some of the courses that we do teach, a lot of them have been joint. I can think of almost all the ones I've been at have had other representatives from all the other Services. So they are joint training environments, even one I just, a couple months ago, taught at -- it was the Air Force SVC course, but there were representatives from all the other Services there. So it was not wide scale, but it was among the Services.

CHAIR HOLTZMAN: The second example that makes me think about sharing best practices has to do with commanders considering moving the accused. It may be a lot easier for a commander to make that decision if he or she has been aware that this has been done 100 other times in other cases, and here are the examples.

Perhaps we need to be sharing more
broadly some of the experiences of dealing with these cases, so that even well-intentioned commanders would have a better sense of the options that have worked elsewhere -- keeping this information siloed, as opposed to broadly disseminating options.

I don't think I have any other questions, but I just want to thank all the members of the panel for really taking your time to come and help share your experiences with us. We very, very much appreciate that. Major Higgins, we hope things work out appropriately for you. I really do hope they do. Thank you very much. Are we up to you? Oh, we have public comment. Five-minute break, thank you.

(Whereupon, the above-entitled matter went off the record at 3:31 p.m. and resumed at 3:39 p.m.)

CHAIR HOLTZMAN: I think we're ready to commence. We are ready to commence. Time is now for public comment. We will hear from -- hello. Can everyone take a seat in the back. If you're
conversing, please leave the room. We have one
public witness. Welcome. We're ready to hear
you. As you know, there's a five-minute rule.

MS. ADAMS: Yes, ma'am.

CHAIR HOLTZMAN: Thank you.

MS. ADAMS: Before I get started, I
would like to remind the committee, I know that
this statement starts when I got gang raped in
the military in 1977, but I would like to remind
the committee that the VA and medical treatment
didn't even happen. So when I had PTSD, I
couldn't even get treatment until -- it finally
didn't happen until November of 1992, and the VA
didn't even offer any help until 2010. So the
PTSD and some of these things, this is the after-
effect of that, before I start reading my
statement. On July 8, 1977, four fellow
Soldiers, whom I was supposed to be able to trust
with my life, carried out a violent gang rape
against me. All these men were convicted of
their horrific crime. At the time, I was not
moved to a different location, but had to stay in
the same location as my perpetrators. I was
hassled by name calling, threats, and by their
friends.

No one would speak to me about a year
and a half because this was a gang rape, so the
court-martials [sic] went on forever. It's not a
fast-moving machine. I'm going to stop there
because you already have my whole thing. The
next thing I want to talk about is in 2013, I was
a government employee. This was when Congress
was addressing the military about not doing
enough to prevent that.

We had all this SHARP training, and
people were joking about it. It was a big joke.
We had eight SHARP trainings in a three-month
span of time. One of the things I heard --
because I've been sitting here all morning and
listening to what they were saying, that the
command at the upper levels were more sympathetic
and more on board. But in my command, when they
were doing the SHARP training, General DelRocco,
he was the ATEC commander. He held up a SHARP
phone and said, "I got this 24/7. Call me if you need anything, or if you have anything you want to address." I called that number because the joking made it hostile for me. In fact, one of the people I work with, right after the SHARP training, a young man said, "I don't see what the big problem is. I wouldn't mind being raped by a bunch of women."

That was really offensive to me, to say the least, because I am a rape victim. Nothing seemed to be done in my command, and people were joking about it. My commander was getting ready to leave, so he wasn't on Fort Huachuca. They were changing commanders. I called the ATEC commander is why I called him, and the man didn't even answer the phone, not at all.

I emailed him. He didn't get back with me. I emailed my commander, even though he was back East to his new location where he was going to be transferred. The general called me back at 10:30 at night Arizona time, which is three hours difference from East Coast time. I said, "You
didn't answer the call, and it's important to me."

The reason that was so upsetting to me was as a rape victim, I know that within the first 30 minutes is when people make the decision, most times, if they're going to report or not report, and the feedback that they get.

I don't know how many people -- because he did this at all his command -- the ATEC command at all the different locations, so how many people -- it mattered to me because how many people that might have called, like me, that didn't get any kind of response, whatsoever -- you've been talking about retaliation. If you won't even answer the call, and you're paying military sexual trauma lip service at that kind of level, that's unacceptable.

So I went, while I was on vacation, like I'm here now -- I'm on vacation -- while I was still there, I went and saw the ATEC commander because I wanted to address it with him. When I went -- and I had an appointment with him after this -- the man didn't even bother to show up
until two and a half hours later, after the appointment. His EEO person wasn't even there until about two hours after the appointment was. They didn't even really take time to do that. In my recommendations -- I'm going to go there because I have two minutes, and you only gave me five -- but in my recommendations, I think there should be investigating -- redressing of these wrongs must be done by outside of the chain of command and the Department of Defense.

As things currently stand, the inaction of superior officers contributes to the culture of complacency, which allows these events to persist. In fact, these supervisors often intercede on behalf of the very people who carry out these acts, rather than standing up for the victim or the Military Code of Conduct at these times, even retaliation against those who file complaints.

This adds another additional layer of betrayal, alienation, and leaving victims nowhere to turn for help. The Inspector General needs to
assist victims when cases involve retaliation. I was a DA civilian when this retaliation thing happened. I have an EEO complaint that I filed two years ago, and I still don't have a resolution. Investigation was done a year ago, and I still don't have a thing, so my life is in limbo, in reference to that. I contacted the IG, and they told me -- on Fort Huachuca first, and then they said I have to go to the ATEC one because it's not that command. I didn't want to do that because my experience I already had with the general was a waste of my time.

He didn't even bother to show up, and when he did, nothing really was accomplished. I contacted the IG of the Army. They said, "We don't get involved in EEO complaints." It was a retaliation thing. I no longer am working, and that's part of the reason that I filed the EEO complaint. In reference to retaliation, I wanted the IG to address the issue with the general. My time has expired. Can I just --

CHAIR HOLTZMAN: Yes, what we'll do,
ma'am, is to take your written statement and
include it in the record, and it'll be on our
website.

MR. STONE: I'd like to ask one
question. Can I ask one question?

MS. ADAMS: Yes, sir.

MR. STONE: When I was at the Department
of Justice, and I spent many years there, there
came a time when they wanted to do more serious
violence against women training to avoid, again,
a cultural hostility in the office that would
sometimes just arise, and they didn't want to
have each little unit do it differently. They
wound up making a film, which was introduced both
at the beginning, by the Attorney General, and
then included some very high-level people, very
seriously describing what can go on, showing what
was no longer going to be tolerated, etc.

We had to watch it. They did a series
of these films because each year, you had to see
it. It was a film, but it was a very serious
film. I wonder if you think that that kind of a
training, in other words, a standard kind of training that's done very professionally and shown across all levels, might work, as compared to, say, individual training, and one training officer takes it seriously, and the other sort of laughs it off? Do you think that kind of thing is something we might recommend?

MS. ADAMS: Sir, I think some of the training, like the Invisible War, I think that was really important because it showed how it really affected the victims. Because the victims are truly traumatized by the thing. Also, I didn't know there was a DoD IG, so in some of that training -- because I only went as high as I thought I could go with the Department of the Army IG. I didn't realize all the time -- I was in the military and working for the government service and government contractor for over 20 years. I didn't know there was a DoD IG, and I would have taken it up higher.

In the training that I would like to see is where people can turn because GS civilians --
I didn't even get into that. She said it's going
to be on the website -- don't have any
representation. I'm glad the military does have
representation, but one of the things that I
would like to see happen is VA civilians. They
take the same oath, almost like the military.

They put themselves in harm's way, but
they have no protections, whatsoever, no
advocacy. In my case, I ended up paying a lawyer
$10,000 for this EEO complaint, but these GS1-5s
that are living paycheck to paycheck have no
place to turn. There has to be someplace for
them to turn, especially with retaliation. Thank
you for your time.

CHAIR HOLTZMAN: Thank you very much.

MS. FRIED: The meeting's closed.

CHAIR HOLTZMAN: Thank you.

(Whereupon, the above-entitled matter
went off the record at 3:49 p.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: EXAMINING PROPOSED CHANGES TO
RESTITUTION AND COMPENSATION

Before: DOHA Judicial Proceedings Panel

Date: 06-18-15

Place: Washington, DC

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
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______________________________
Court Reporter