

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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EXAMINING PROPOSED CHANGES TO
RESTITUTION AND COMPENSATION

AND

PREVENTION & RESPONSE TO RETALIATION
AGAINST VICTIMS OF SEXUAL ASSAULT CRIMES

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THURSDAY
JUNE 18, 2015

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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

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

2 9:09 a.m.

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

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

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

21 The JPP issued its first report on
22 February 4, 2015 and that report is available on

1 the JPP website at www.JPP.whs.mil. For
2 additional information on the establishment of
3 the Panel, Panel Membership, and Panel charter is
4 also available on the website. Presentations and
5 resources used by the Panel are also posted to
6 the website.

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

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

20 We have received one request for an oral
21 statement this afternoon. The period for public
22 comment is designated to begin at 4:45 and the

1 speaker is allowed five minutes to make her
2 comments.

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

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

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

22 Today's meeting is being transcribed and

1 also video recorded by Army Television. The
2 meeting transcript and link to the video
3 recording will be posted on the JPP's website.

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

9 Col GREEN: Thank you, ma'am.

10 CHAIR HOLTZMAN: Thank you. The Judicial
11 Proceedings Panel was created by the National
12 Defense Authorization Act of Fiscal Year 2013, as
13 amended by the National Defense Authorization Act
14 for Fiscal Years 2014 and 2015.

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

21 Today's meeting addresses two of the
22 Panel's focus topics, restitution and

1 compensation for victims of sexual assault crimes
2 in the military and prevention and response to
3 retaliation and ostracism against victims of
4 sexual assault crimes. The agenda for today's
5 meeting has been updated from the initial
6 schedule posted in the Federal Register notice of
7 this meeting.

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

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

1 compensation program.

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

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

17 Finally, each public meeting of the
18 Judicial Proceedings Panel includes time to
19 receive comments and input from the public. As
20 you heard, we've received some comments in
21 respect to that. Thank you very much for joining
22 us today and we are ready to begin our first

1 session.

2 Our first session deals with the
3 Overview of the Continuation of Care for Former
4 Active-Duty Service Members and Family Members
5 who are Victims of Sexual Assault.

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

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

20 MS. JUSTIS: Thank you. Good morning.
21 Thank you for having us here today. We very much
22 appreciate the opportunity.

1 I'm sure that you are aware that at the
2 Department of Defense as a part of the TRICARE
3 Health Plan, we offer broad services and very
4 comprehensive services for our active-duty and
5 our active-duty family members. This involves
6 pretty much all aspects of medical services, as
7 well as behavioral health services. And I'm very
8 proud of what we're able to offer for
9 individuals.

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

18 And those provide for care both in the
19 network in the case of continuation of care or
20 transitional care options, and at the MTFs. So
21 there are options to receive care both within the
22 military treatment facilities, as well as outside

1 in what we consider the Purchased Care Network
2 from civilian providers.

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

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

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

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

22 My focus today is to discuss policies in

1 place for sexual assault victims in particular.
2 There are several policies for the healthcare of
3 survivors of sexual assault. Department of
4 Defense Instruction 6495.01, Sexual Assault
5 Prevention and Response Program, sets policy for
6 who is eligible for more than limited emergency
7 care.

8 Department of Defense Instruction
9 6595.02, Sexual Assault Prevention and Response
10 Program Procedures, sets policy for acute and
11 follow-up healthcare management of survivors of
12 sexual assault.

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

20 As in the civilian sector, individuals
21 who present to an emergency room with life-
22 threatening injuries will receive care to

1 stabilize and treat any injuries regardless of
2 their eligibility. DoD Instruction 6495.01 and
3 6495.02 define cases of sexual assault as
4 priority care emergencies, regardless of the
5 survivor's appearance.

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

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

21 Our policy requires health providers to
22 provide comprehensive medical care with needed

1 follow-up and referral, offer appropriate
2 testing, prophylactic medications and treatments,
3 and assessment for the need for behavioral health
4 services. DoD 6495.02 also sets specific
5 selection criterion training requirements for
6 providers who are credentialed or authorized to
7 perform SAFEs.

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

15 Service members, dependents, retirees,
16 and certain reservists receive the full range of
17 services of the MHS, the Military Health System,
18 to include follow-on care after the initial
19 emergency care is rendered. For eligible
20 beneficiaries over the age of 18, this includes
21 the services of the sexual assault medical
22 forensic examiner and a Sexual Assault Response

1 Coordinator or a Sexual Assault Response Program
2 Victim Advocate, and other services as needed,
3 and follow-on care by referral or through the
4 military treatment facility.

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

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

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

20 I think it's important for us to start
21 and talk about what is military sexual trauma by
22 the VA's definition. Military sexual trauma is

1 the term used by the VA to refer to an experience
2 of sexual assault or repeated threatening sexual
3 harassment that a veteran experienced during his
4 or her military service.

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

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

21 More concretely, MST from our definition
22 involves any sexual activity where a Service

1 member is involved against his or her will. For
2 example, someone who is pressured into sexual
3 activities, someone who is unable to consent to
4 sexual activities while intoxicated, unwanted
5 sexual touching or grabbing, threatening,
6 offensive remarks about a person's body or sexual
7 activities, and threatening or unwanted sexual
8 advances. So we have a much broader definition
9 than just sexual assault.

10 In terms of how common MST is in the VA,
11 VA has a national screening program in which
12 every veteran who is seen for healthcare is asked
13 whether or not he or she has experienced military
14 sexual trauma. Our data indicates that one in
15 four women and one in 100 men respond, yes, that
16 they've experienced military sexual trauma.

17 It's important to recognize though that
18 these rates only speak about veterans who have
19 chosen to get VA healthcare. This cannot be
20 generalized to make an actual estimate of the
21 rates of sexual assault and harassment amongst
22 individuals in the military.

1 And it's also important to remember that
2 even though there are -- the percentage of women
3 who have experienced sexual assault or MST is
4 higher, based on numbers there are more men in
5 the VA system who are seeking care for military
6 sexual trauma.

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

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

21 For VA, all treatment for physical and
22 mental health conditions related to military

1 sexual trauma are free of charge. People are not
2 charged for their healthcare related to any
3 experience of MST. And it's important to
4 understand for our system, people do not need to
5 be service-connected, do not have to have
6 benefits to be able to access VHA healthcare.
7 Even if they are not eligible for other VHA care,
8 they're still eligible for treatment related to
9 conditions secondary to MST.

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

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

19 We service-connect or provide
20 compensation and benefits for individuals who
21 have a disability, a condition that is secondary
22 to their experience of military sexual trauma.

1 So not for the event itself, but for a medical
2 condition, whether that be psychological or
3 physical in nature.

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

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

1 harassment may have occurred.

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

9 There are separate lanes to process MST
10 claims in VA and we just actually rolled out a
11 course that the DoD was working with us on in
12 terms of looking for individuals who are
13 separating from the military, who are going
14 through a separation health assessment where all
15 VHA providers are providing those individuals as
16 they're separating with information about
17 military sexual trauma, so that they are aware of
18 the benefits that may be eligible to them and
19 that they are aware also of the importance of
20 making a report through the Safe Helpline,
21 through the DoD channels so that they are able to
22 access both care and benefits.

1 MS. WILLIARD: Good morning. My name is
2 Diana Williard. I'm the Quality Assurance
3 Officer for Compensation Service for Veterans
4 Benefits Administration. I'm also a veteran. I
5 spent 20 years in the Army and I retired in 1992.

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

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

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

1 at VHA to continue this process for our veterans.

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

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

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

22 And currently in my current position,

1 I'm looking at sort of the policy surrounding it,
2 considering all of the different interests, some
3 of the legislative proposals, and legislation
4 that has been introduced in Congress surrounding
5 this issue. Thank you.

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

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

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

1 job?

2 MS. JUSTIS: That's a great question.
3 Certainly. What I see in my role, is that we
4 have obviously a very comprehensive benefit for
5 active-duty family members as well as active-duty
6 and in addition, for retirees or individuals who
7 separate, certainly. That includes pretty much
8 all aspects of medical services and behavioral
9 health services.

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

18 I believe we have the skill sets and the
19 ability and the tools to provide the care that is
20 needed. I mean, we have great ability in the
21 TRICARE program to look for emerging technologies
22 now, to look for established treatments, to

1 provide care that's medically necessary, which
2 includes certainly all aspects of behavioral
3 health.

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

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

16 MS. JUSTIS: Frankly, what I see is that
17 when we find an individual who has specific needs
18 that may be outside of what is normal treatment
19 or what is normally done, if there is a way that
20 we can provide that care, we do find a way. I
21 think sometimes externally, the perception may be
22 that the goal is to say no, but actually the goal

1 is to get to yes as long as it's safe and
2 effective, proven treatment.

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

13 MR. TAYLOR: Well, thank you very much.

14 MS. JUSTIS: Thank you.

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

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

22 MR. TAYLOR: Well, one thing you said

1 that I thought was very interesting is that when
2 the eligibility question comes up -- let's say
3 for example, you have a pure civilian victim who
4 because of the nature of the injury ends up at a
5 military treatment facility, so you provide
6 emergency treatment.

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

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

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

21 DR. KRULEWITCH: No, I don't have an
22 idea from policy.

1 MR. TAYLOR: Okay. Dr. Pollack, do you
2 have any evidence of how VA's changing the
3 standards for MST has impacted your ability to
4 grant more PTSD claims?

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

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

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

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

20 So in the case of military sexual
21 trauma, as Dr. Pollack indicated, we oftentimes
22 don't have any specific indication of the MST

1 itself in service, and we relied on
2 circumstantial evidence, which we call markers.

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

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

22 Since we have sort of beefed up our

1 training on that in 2011 -- we always have had
2 this since 2002, but in 2011 our Undersecretary
3 put together a task force to build some new
4 training materials and collaborated with VHA as
5 well. Since that, we have seen the grant rate
6 rise from approximately 34 percent to -- I think
7 within six months of the initial training in
8 2011, we were up to 55-percent grant rate. And
9 the grant rate for all the other PTSD at that
10 point was 60 percent.

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

21 MR. TAYLOR: So just one last question
22 from me for this round. And that is, in

1 attempting to put together a package of
2 circumstantial evidence that would constitute
3 markers, do you have any difficulty getting
4 information in the records from the Military
5 Services? Are they bureaucratic about how they
6 release the information, given privacy and other
7 concerns, or is it a pretty easy release of
8 records to you for this purpose?

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

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

17 It's putting the parts of the puzzle
18 together. We look at the veteran's statement and
19 then we start looking for the markers, the clues
20 to help put that puzzle together. These claims
21 are very complex because oftentimes veterans do
22 not report the incident for fear of retaliation,

1 for being ostracized -- whatever, for whatever
2 reason.

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

14 We'll look for behavior changes in their
15 201 file. We'll look at if they've identified
16 maybe another veteran as the perpetrator. We may
17 look to see if there's anything -- if they have a
18 claim in there, if there's something that we can
19 correlate. We'll look at their buddy statements.
20 Some veterans submit diaries. Some submit
21 letters where they share the event with a family
22 member.

1 So we look at every single piece of
2 information. We make phone calls. These are
3 very traumatic events and veterans ---- when we
4 need additional information, sometimes it is very
5 difficult because they flash back to the event.
6 Sometimes they don't want to talk about it.
7 Sometimes they feel like they have to relive it
8 again by just going through the whole process.
9 It's very difficult, but we put those pieces
10 together.

11 MR. TAYLOR: Thank you.

12 CHAIR HOLTZMAN: Thank you. Judge
13 Jones?

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

20 MS. WILLIARD: It is. There is one
21 veteran in particular that I've worked with for
22 four years to finally get the PTSD diagnosis for

1 his military sexual trauma event that happened in
2 service.

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

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

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

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

16 MS. LI: So I know Stacey is going to
17 talk about the treatment, but I do just want to
18 point out, in addition to the Military Sexual
19 Trauma Coordinator at the VHA, VBA has military
20 sexual trauma -- the MST Coordinator at each of
21 our regional offices. We have one male and one
22 female.

1 And that individual is designed to sort
2 of help individuals as they go through the
3 benefits side and hook them up with their VHA
4 counterparts, which will allow them to get the
5 free care that they need. Here, I'll let Stacey
6 speak more to that.

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

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

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

21 JUDGE JONES: So we're talking about
22 authorization for benefits --

1 MS. LI: Yes.

2 JUDGE JONES: -- needing that diagnosis
3 for benefits?

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

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

9 MS. LI: Correct.

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

12 CHAIR HOLTZMAN: Mr. Stone?

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

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

20 And the same thing is true if it's a
21 civilian victim of a military person, that they
22 don't get in the door? So you're focused

1 entirely on it being a former active-duty member?

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

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

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

16 So we're not just talking about
17 individuals serving on full active-duty. And
18 it's important to note that this is also beyond
19 MST that occurs sort of as you would say in the
20 line of duty or by another military member. If
21 someone's on some sort of duty and a civilian in
22 the general population and they experience an MST

1 event during that duty, we would service-connect
2 that as well. It's not limited to sort of
3 Service member-to-Service member events.

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

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

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

17 MS. LI: Okay.

18 MR. STONE: I am aware of individuals
19 who, as a condition of their termination from the
20 military, have to waive their veterans benefits
21 generally. And that includes all their medical
22 care benefits. So if their termination, their

1 separation includes a waiver of veterans
2 benefits, you're not going to see them, right?

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

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

18 MR. STONE: I understand. I am familiar
19 with it and I know that there are people with
20 honorable discharges who've been asked to waive
21 veteran benefits in order to get the discharge.
22 And I'm just saying, but you're not going to see

1 those, right? If they've waived their veterans
2 benefits?

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

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

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

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

20 MR. STONE: Okay.

21 MS. LI: -- health side.

22 DR. POLLACK: They don't have to have

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

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

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

11 MR. STONE: That's what --

12 DR. POLLACK: -- have veterans status.

13 MR. STONE: That's what I wanted to know.
14 That's correct. Again, talking about these
15 people who are not covered, if I can go to Dr.
16 Krulewitch, I noticed that you finished your
17 opening remarks and you said again, the
18 questioning, something about a handoff. If the
19 handoff turns -- I presume that's to a private
20 provider after this person is done getting their
21 emergency care.

22 But there are many people who don't have

1 mental health benefits. If the person you handed
2 them off to is going to need to expend money for
3 treatment or medication, I presume that unless
4 the person who's been handed off has mental
5 health benefits, they're not going to be treated.

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

8 MR. STONE: Yes. Right.

9 JUDGE JONES: Private insurance?

10 MR. STONE: Unless they have private
11 insurance --

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

14 MR. STONE: Okay.

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

20 A piece of that is also the mental
21 health parity that every insurance organization
22 is required to cover mental health care the same

1 way that they cover medical care. So you can't
2 put extensive day limits on it, service limits on
3 it, that you don't have as a part of your medical
4 coverage.

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

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

18 And so I guess my question still
19 remains. They get handed off, but you don't --
20 you stop reimbursement even to this private
21 provider. You don't provide them reimbursement
22 for any depression medication or treatment they

1 would provide. The person who's handed off has
2 to have their own private mental health care
3 coverage. Isn't that right?

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

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

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

21 MS. JUSTIS: TRICARE has eligibility that
22 is defined in statute in terms of who is eligible

1 for TRICARE coverage. We have a broad variety of
2 ways to do continuation of coverage for active-
3 duty, for retirees, for families. Even if the
4 military member left the military prior to
5 retirement, there are continuation and
6 transitional care options that are available.

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

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

19 In the information that we previously
20 got, I understood that there was total TRICARE
21 coverage for certain things like STD testing and
22 prophylactic medications, but that TRICARE as to

1 psychiatric medications and treatment was only
2 partial coverage for dependent victims. And we
3 were informed that it is only until the accused's
4 separation and then TRICARE stops.

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

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

18 When you talk about psychotherapy, the
19 coverage for psychotherapy, TRICARE offers
20 extensive psychotherapy coverage. In addition to
21 providing long-term care, providing many options,
22 we offer an initial eight kind of unmanaged

1 psychotherapy visits. So if somebody wants to
2 seek behavioral health treatment and is
3 uncomfortable sharing it with a family member,
4 sharing it with a provider, we allow that to
5 happen to really encourage not to have any
6 barriers for people seeking treatment.

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

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

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

1 my head for the transitional care benefits.

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

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

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

16 MS. JUSTIS: Sure.

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

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

1 includes behavioral health areas.

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

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

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

19 MS. JUSTIS: It would be covered as a
20 part of PTSD. I would assume anybody who's
21 receiving treatment for post-sexual trauma, that
22 would be a part of it. If they did not have that

1 PTSD diagnosis and their provider indicated that
2 they needed that service, we would certainly look
3 for ways to be able to approve that.

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

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

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

17 DR. KRULEWITCH: Well, it's policy that
18 they -- if they are assaulted on base and they're
19 an employee that they will receive limited
20 benefits of treatment. Most certainly emergency
21 care. Most certainly a sexual assault forensic
22 exam, if they wish one. And some of the benefits

1 of the Sexual Assault Response Coordinator or
2 their designated Sexual Assault Program Advocate.
3 Beyond that, if they need further care, I can't
4 speak to the benefits of that.

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

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

21 MS. JUSTIS: A civilian overseas on a
22 overseas base, then they have received care

1 within the MTF. That occurs with --

2 CHAIR HOLTZMAN: What's an MTF?

3 MS. JUSTIS: Military treatment facility.

4 CHAIR HOLTZMAN: All right.

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

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

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

16 CHAIR HOLTZMAN: Assuming they had that.

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

21 CHAIR HOLTZMAN: Okay. Did you have a
22 comment, Dr. Krulewitch?

1 DR. KRULEWITCH: No. I -- she just said
2 it. Because you're talking about me in
3 particular because I'm a civilian employee of the
4 Department of Defense. And the expectation is
5 that I'll have coverage.

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

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

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

21 Is that pretty standard in all of your
22 workplaces that most of the people are civilian

1 employees? And, therefore, they tend to have
2 fairly long, dedicated backgrounds in the care?

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

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

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

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

1 assignment structure.

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

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

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

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

20 So that if a person who's been a victim
21 tries to develop a relationship with a particular
22 mental health professional, it's going to

1 typically last two years and then it's going to
2 be a rotation. It's not -- we've seen that in a
3 lot of the different locations with people
4 looking for help.

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

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

16 CHAIR HOLTZMAN: I'm going to reclaim my
17 time. Sorry. Okay. I just want to go to some
18 of the points that were raised in the GAO report,
19 if you don't mind, about VA treatment. First of
20 all, you mentioned about the MST markers -- I
21 mean the markers that you have to have for an
22 MST-related claim, when it's related to the PTSD.

1 And you've done -- I think it's fair to
2 say that you've tried to do training programs and
3 intensify your efforts to make sure that your
4 identification markers -- you're doing a better
5 job at that. But the report says that when a
6 veteran is diagnosed with a mental condition
7 other than PTSD, for example, depression or
8 anxiety disorder, I'm quoting from the report,
9 Page 24, that you can't use markers.

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

16 MS. LI: It's extremely difficult.

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

20 MS. LI: Of course, so --

21 CHAIR HOLTZMAN: If you don't mind --

22 MS. LI: Oh, no, no. It's important to

1 know that over 90 percent of claims for military
2 sexual trauma benefits are PTSD.

3 CHAIR HOLTZMAN: I can imagine.

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

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

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

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

22 With regard to mental health conditions,

1 PTSD is the only condition that we have where
2 there can be a delayed onset. So when we have a
3 diagnosis many years after service, we can look
4 to see what happened in service. And that's why
5 we have these relaxed evidentiary standards.
6 Because we may not have evidence of symptoms of
7 the disability in service because it may not have
8 manifested at that point.

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

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

20 MS. JUSTIS: Sure.

21 CHAIR HOLTZMAN: Is there scientific
22 evidence that these other mental health

1 conditions don't manifest themselves at the time
2 and they can't be a delayed onset?

3 MS. LI: I would reference Stacey on
4 that.

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

7 DR. POLLACK: Yes. So --

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

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

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

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

20 It could certainly be considered that,
21 that could be related to their assault. But it's
22 very difficult for us to make that nexus because

1 of the regulations. I think because of this
2 difficulty -- and, you're right, it is a
3 challenge.

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

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

21 DR. POLLACK: So I think --

22 CHAIR HOLTZMAN: This very large

1 challenge?

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

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

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

21 Otherwise, you're going to have a devil
22 of a time. Is that a fair statement or an unfair

1 -- I don't mean to put words in your mouth, but
2 I'm trying to understand.

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

13 So if someone doesn't feel safe, feels
14 fear of retaliation, ostracization and doesn't
15 come forward in service, if they come in
16 generally within a short period after service,
17 and that's what I think Stacey's trying to
18 explain with the VHA and the separation health
19 assessment, we're trying to explain to people,
20 look you're getting ready to leave service, maybe
21 you don't want to bring this up, maybe you just
22 want to get separated and get out and get into

1 the civilian world.

2 At that point, come to VHA, come to VBA,
3 come to VA and we're going to get you the care
4 immediately and we're going to get you on the
5 path to benefits. Because oftentimes, folks who
6 file shortly after service, that link is --
7 there's almost no time differential.

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

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

19 CHAIR HOLTZMAN: Well, coming up with a
20 policy on how -- yes, right. What are we going
21 to do with this problem? How are we going to
22 find -- we don't have markers, so now what are we

1 going to do? Are you in the throwing up your
2 hands situation? Or are --

3 MS. LI: No.

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

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

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

14 MS. LI: You're talking about --

15 CHAIR HOLTZMAN: The non-PTSD area.

16 MS. LI: -- building markers in --

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

1 but --

2 MS. LI: Sure.

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

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

10 CHAIR HOLTZMAN: Okay. So you aren't.

11 MS. LI: -- diagnoses.

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

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

18 CHAIR HOLTZMAN: I got that.

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

21 CHAIR HOLTZMAN: Thank you. And let me
22 just --

1 MR. STONE: Then could --

2 CHAIR HOLTZMAN: No. Just let me finish

3 --

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

5 CHAIR HOLTZMAN: I just want to go on

6 because I still have -- then I'll let you or the

7 Members of the Panel ask. My other question is,

8 okay, the military now or for the past several

9 years, has had a system in which there is

10 restrictive reporting.

11 Which means there's no -- so I'm a

12 military person and I say, I'm not reporting

13 this. I don't want it to be reported elsewhere,

14 but I'm making a restrictive report. I'm

15 reporting either to the chaplain or I'm reporting

16 to the VA. And then I said, I don't want

17 anything else done.

18 How do you have a record of that? Do

19 you have a record of that? So that they can

20 establish that in fact there was something done

21 when they were in the military?

22 MS. LI: So we have a process when we

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

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

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

21 CHAIR HOLTZMAN: Okay. So there is a
22 process. So in other words, DoD is keeping a

1 record of those reports?

2 MS. LI: Absolutely.

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

5 MS. LI: Yes.

6 CHAIR HOLTZMAN: And get them to the VA?
7 Okay. Thank you.

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

14 CHAIR HOLTZMAN: Excellent. Thank you.
15 I just wanted to have that clarified. Now, I
16 have one just quick question. Maybe this won't
17 be so quick, but I hope it is. What are you
18 doing about -- I mean, there are various
19 treatments that you have for MST.

20 But what are you doing to evaluate the
21 effectiveness of those treatments? What's the
22 science and the medicine behind trying to

1 evaluate the effectiveness of those treatments,
2 develop new treatments, to improve the
3 treatments?

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

7 CHAIR HOLTZMAN: Oh, I'm sorry.

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

10 CHAIR HOLTZMAN: All right.

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

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

15 (Laughter.)

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

20 CHAIR HOLTZMAN: That's related to MST.

21 DR. POLLACK: That is related to MST --

22 CHAIR HOLTZMAN: Okay.

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

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

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

21 MS. JUSTIS: And if I can add also, from
22 the DoD, from the TRICARE standpoint, we do a

1 frequent review of emerging technologies and
2 treatments to learn what is coming that may not
3 be fully proven yet. But what are the emerging
4 technologies? What are new treatments?

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

14 CHAIR HOLTZMAN: Okay. Thank you.
15 Anybody -- Mr. Stone, you had one question?
16 Judge Jones?

17 JUDGE JONES: Just one quick question.
18 In terms of canvassing for new treatments and
19 that sort of thing. Is there any emphasis placed
20 on treatments for men as opposed to women? It
21 was something that came up constantly when we had
22 the prior Panel that there didn't -- they didn't

1 seem to seek it out, frankly, in the same numbers
2 or proportion as women did.

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

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

16 Within the VA perspective, it's often
17 harder to get men into, say, groups than women,
18 based on stigma. And we do a lot to try and sort
19 of reduce that stigma. We have even our sort of
20 outreach materials really actually have men on
21 them as well to try and encourage men and
22 recognize that this is not a female problem.

1 For VA, people coming into VA, they can
2 request a provider of a certain gender if that
3 makes them more comfortable. And we do have some
4 sites that have male specific programs.

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

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

17 CHAIR HOLTZMAN: About what?

18 DR. KRULEWITCH: Trauma-informed care.
19 So we do focus also on experiences that could
20 have happened in the person's lifetime that may
21 affect how they even present. And we're looking
22 at all those pieces.

1 I'm not a psychologist, I'm a nurse
2 midwife, so my focus is a little bit different.
3 But we do have experts in psychology on the group
4 as well. And there is a psychological health
5 council that's also been looking at this. So I
6 have experts to draw on for that.

7 CHAIR HOLTZMAN: Thank you. Mr. Stone?

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

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

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

22 DR. POLLACK: No. They'll absolutely

1 qualify for any sort of treatment services
2 really. It does not have to be PTSD. Anybody
3 who comes into the VA with any condition
4 secondary to a MST event, whether that be
5 depression, whether that be an STD, whether that
6 be a broken jaw related to an assault that
7 occurred, is eligible for VHA healthcare for that
8 condition.

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

15 DR. POLLACK: Right.

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

18 DR. POLLACK: Correct.

19 MR. STONE: -- in my own mind, it's not
20 always easy for me to separate when they're
21 getting care from when they're qualifying for a
22 check.

1 MS. LI: And I just want to point out
2 that when an individual -- although we try to
3 engage the veteran in the claims process because
4 obviously they're in the best position to know
5 what sort of information is out there that might
6 assist in supporting their claim, we don't expect
7 veterans to come in and know exactly what they're
8 looking for until we try to help them through
9 that process.

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

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

22 And, again, even if the veteran --

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

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

17 MR. STONE: Yes. The reason I ask, and
18 this relates also to the last question you were
19 just asked. I think that if a woman is the
20 victim of the military sexual traumatic event,
21 and she's upset about it, I think she is going to
22 report it and make a record.

1 But I think if a man, and there's many
2 more men in the military, is the victim, he may
3 not have reported it at the time. He would not
4 want you to go back and talk to the other people
5 in his unit. He kept the thing totally quiet
6 because he wanted his military career to go on.

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

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

21 It could be the individual indicated
22 that the event happened in the winter time, they

1 might not be specific about the timeframe because
2 maybe they have forgotten, and we see that around
3 the same time, that their performance improved or
4 their performance declined.

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

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

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

22 We look at it again, and since our

1 training, and this veteran talks about how there
2 was some kind of ritual. During that ritual, he
3 was assaulted. But then he went AWOL. All
4 right. And from the AWOL, then he talks about as
5 he was chased through the ship that he was pushed
6 from the catwalk. Okay.

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

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

21 MR. STONE: And you just mentioned he's
22 had the claim denied --

1 MS. WILLIARD: It may be denied --

2 MR. STONE: -- two times --

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

4 MR. STONE: Okay.

5 MS. WILLIARD: -- it's possible.

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

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

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

1 every day.

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

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

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

21 And if they submit their second appeal,
22 which we call a Substantive Appeal, is what gives

1 jurisdiction to the Board of Veterans Appeals.
2 And that's going to be your last level of agency
3 review. At that point, the individual if they're
4 not satisfied can appeal to the Court of Appeals
5 for Veterans Claims.

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

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

20 And it starts a new claim and it starts
21 the whole process over again for them to go
22 through and appeal. And individuals are not

1 limited in the number of times that they can
2 reopen a claim. So it's possible that
3 individuals can come to us five, six times.

4 Right now, with our MST PTSD, because we
5 had such a ramp-up in our training and sort of
6 moving both into the special operations claims,
7 we have a special review going on for folks who
8 were previously denied prior to December 2011 for
9 a PTSD claim based on MST. At this time, any
10 individual who was previously denied prior to
11 2011, we are encouraging them, we've reached out
12 to a little over 5,000 that we were able to
13 identify. But we're taking anyone that comes in.

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

21 So we're getting these individuals the
22 examinations that they should've been given and

1 getting them service-connected. And that's just
2 a special review that we've been doing over the
3 last two years.

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

7 MS. LI: The regulation changed in 2002.
8 In 2011 is when we increased our training and
9 focus on making sure that the regulations were
10 being appropriately applied by adjudicators in
11 the Regional Offices.

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

14 MS. LI: That -- claims between 2002 and
15 2011. That were not done -- that may have been
16 done under the marker process, but not have been
17 adjudicated with the level of focus that we have
18 our folks doing now.

19 MR. STONE: So the 5,000 goes back to
20 2002?

21 MS. LI: Yes.

22 MR. STONE: Okay. And --

1 MS. LI: And I believe there's some
2 information about that in the GAO report.

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

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

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

20 MS. LI: I can't really speak to the
21 backlog. That's not my expertise. I mean, I
22 know there is a VBA backlog. In terms of what

1 that is for the various lanes, we work every
2 claim and we call it sort of first in the door,
3 first worked.'

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

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

11 MS. LI: Take a little longer --

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

13 MS. LI: -- than sort of a basic, like,
14 hearing loss claim or some -- because of the
15 process in which we're looking to gather as much
16 evidence as possible, both in the military record
17 and outside of the military record to make sure
18 that we can find information that will
19 corroborate the event in service.

20 MR. STONE: I thought that the length of
21 some of the non-MST processes was in the realm of
22 one to two years. Your claims are taking longer

1 than that? I mean, as an estimate?

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

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

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

22 There was nothing in her records. Her

1 records were very scant because she was in for a
2 short period of time. However, what we found out
3 is that prenatal records are not kept with the
4 Service treatment records. So we went back out
5 and looked for the prenatal records.

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

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

16 MS. WILLIARD: Of course.

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

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

21 MS. LI: Yes. I'm not familiar with the
22 actual time line to the appeal. Each stage of

1 the process is a little different. And the
2 Board, again, has its own docket and backlog as
3 well.

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

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

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

1 the military.

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

5 CHAIR HOLTZMAN: Right.

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

9 CHAIR HOLTZMAN: Okay.

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

18 And I just wanted to stress that, that
19 goes to all individuals who are going through --
20 have filed a claim for anything, so for an ankle
21 injury. Because recognizing that there is a
22 difficulty in terms of oftentimes people don't

1 want to report, we don't want to just target
2 individuals who have already filed a mental
3 health claim.

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

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

19 But as Stephanie indicated, that we are
20 constantly looking to update our policies, our
21 procedures, to make things better for our
22 veterans and for our active-duty Service members.

1 And so we will provide this to the committee if
2 it would be of use to you.

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

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

11 CHAIR HOLTZMAN: Okay.

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

20 CHAIR HOLTZMAN: Okay.

21 DR. KRULEWITCH: -- separated. So some
22 of the separation health assessments do occur

1 before that time. So our agreement was that they
2 would get all this information to know what to do
3 when they're out.

4 CHAIR HOLTZMAN: Excellent.

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

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

14 (Whereupon, the above-entitled matter
15 went off the record at 10:38 a.m. and resumed at
16 10:49 a.m.)

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

22 We have two presenters. First will be

1 Mr. R. Peter Masterton, Chief of the European
2 Tort Claims Division, U.S. Army Claims Service,
3 Europe. Afterwards, we will hear from Ms.
4 Jennifer Riley, Assistant Counsel for Military
5 and Civilian Pay, Defense Finance and Accounting
6 Service. Mr. Masterton, welcome. You may
7 proceed.

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

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

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

21 First of all, restitution is unlikely,
22 I believe, to be uniform. The military has no

1 sentencing guidelines of course, like the federal
2 system. The sentencing, military sentencing
3 authorities would probably have very little
4 guidance on when restitution is appropriate and
5 the amount of restitution.

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

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

17 Another issue with military sentencing
18 is that military sentencing of course occurs
19 immediately after findings. This is the unique
20 but important part of the military justice
21 system, which ensures that the outcome of a
22 military court-martial is speedy.

1 There is no pre-sentencing report, of
2 course, prepared. It may be difficult to gather
3 the appropriate restitution evidence in advance
4 without knowing exactly what the accused is going
5 to be convicted of.

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

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

18 Typically, when you review pain and
19 suffering cases and medical malpractice cases, or
20 similar cases, we have to review the medical
21 records carefully. We oftentimes will have an
22 independent medical examination conducted.

1 The claimant is typically interviewed,
2 preferably in person. Family members and friends
3 are interviewed, preferably in person. Of course
4 liability, damages and causation are all examined
5 and once we've made a determination, an initial
6 determination in the claim, the claimant is
7 typically given an opportunity to address
8 potential problems with the claim or potential
9 gaps in the damage portion of the claim.

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

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

20 Another thing for the Panel to realize
21 is that it may well be unlikely that the accused
22 would be able to personally pay restitution if

1 the accused is pending trial or has been
2 convicted at a court-martial.

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

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

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

19 So, I think there are very -- there are
20 a great deal of benefits to restitution. I just
21 wanted to point out a few of the potential
22 pitfalls or limitations. That's all I have.

1 CHAIR HOLTZMAN: Thank you very much.

2 Ms. Riley, welcome.

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

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

15 I joined DFAS Office of General Counsel
16 in 2007 and entered my current job with the
17 Military and Civilian Pay Directorate in 2008.

18 Since entering my current job, I've
19 handled the majority of questions that have come
20 into our office regarding courts-martial. We
21 receive court-martial finance questions obviously
22 from people within DFAS but more frequently from

1 Service finance offices and Service JAG offices.

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

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

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

20 So, although a convening authority may
21 have deferred and waived forfeitures, the
22 dependents of the defendant will not receive any

1 pay because there is no pay to be forfeited.

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

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

16 CHAIR HOLTZMAN: Thank you very much.

17 Mr. Taylor?

18 MR. TAYLOR: Mr. Masterton, you listed
19 all the problems that you saw with restitution as
20 a penalty. Do you think that during the
21 evolution of the authority of military judges it
22 is about time to give the military judge that

1 tool in the toolkit, along with the others that
2 have expanded over your career, for example,
3 while you served as a JAG, including a military
4 judge?

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

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

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

22 Certainly, as the military justice

1 system evolves, many adjustments have been made.
2 Perhaps it is time to include restitution as one
3 of those adjustments.

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

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

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

21 MR. MASTERTON: Sir, of course, that
22 would be ultimately for your Panel to decide. I

1 personally do not believe there are any
2 showstoppers. As long as the Panel realizes that
3 there are potential limitations in restitution as
4 an authorized court-martial punishment, and
5 certainly if Congress authorizes restitution as
6 an authorized punishment and the military has
7 given an appropriate amount of time to develop
8 appropriate Benchbook instructions to inform
9 panel members what guidelines they should
10 consider in adjudging restitution, I think that
11 it is something that certainly could be
12 implemented in the military.

13 MR. TAYLOR: Well, thank you very much.

14 Ms. Riley, what is the most frequent type of
15 question you get that would be important for us
16 to know in assessing any recommendations that we
17 might make regarding fines and forfeitures and
18 restitution?

19 MS. RILEY: I think a question we get
20 often concerns entitlements to pay after a court-
21 martial sentence has been set aside. Currently,
22 a military member, when a sentence is set aside,

1 is entitled to restoration of all rights,
2 privileges and property that he or she was
3 deprived of by virtue of the executed portion of
4 the court-martial sentence.

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

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

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

18 MS. RILEY: The other thing I mentioned
19 about the fact that a lot of times the --
20 depending upon when a member's term of Service
21 expires, deferred or waived forfeitures may
22 actually not be paid.

1 So, again, there may be inconsistency as
2 to whether victims actually receive money if
3 deferred forfeitures or waived forfeitures are
4 provided to them.

5 MR. TAYLOR: Thank you.

6 CHAIR HOLTZMAN: Thank you. Judge
7 Jones?

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

12 MR. MASTERTON: That is correct.

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

17 MR. MASTERTON: That is correct. A
18 pretrial agreement can include a term that
19 requires the accused to pay restitution. That
20 pretrial agreement would be approved by the
21 convening authority. The case would then be sent
22 to trial. The accused would, under the terms of

1 the pretrial agreement typically plead guilty,
2 and in return would be obliged to make
3 restitution.

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

6 JUDGE JONES: Would be breached?

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

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

21 MR. MASTERTON: The claims that I was
22 mentioning, my office and the U.S. Army Claims

1 Service, and actually the Air Force and the Navy
2 adjudicates a number of different types of claims
3 under a number of different statutes.

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

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

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

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

21 For example in Iraq, Afghanistan and
22 Europe, we oftentimes use this authority to pay

1 for sexual assaults, murders.

2 JUDGE JONES: Just as a matter of
3 policy?

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

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

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

1 claimant interview.

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

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

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

19 We'll tell the claimant, for example,
20 you don't have sufficient medical records to show
21 the injuries that you've alleged, and the
22 claimant will then have the opportunity to

1 provide additional medical records, get an
2 additional exam perhaps.

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

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

6 JUDGE JONES: And how do you value the
7 claim?

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

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

22 JUDGE JONES: I guess what I'm getting

1 to is that in the criminal context, to ask for --
2 or for there to be a charge or request for
3 restitution from a military jury, or maybe just
4 the judge, it would require that kind of
5 analysis.

6 I'm talking about pain and suffering.

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

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

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

18 MR. MASTERTON: My office is capable of
19 doing it after a long and careful examination
20 that sometimes takes months. At a military
21 court-martial, the findings are adjudged, and
22 then sentencing proceeds immediately thereafter.

1 Certainly, some of the investigations
2 that I've talked about that we do in a claims
3 context could be done upfront, and typically is
4 done upfront. It is not unusual at military
5 sentencing proceedings for the victim to desire
6 to testify during sentencing.

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

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

18 JUDGE JONES: When you began your
19 discussion, you talked about restitution and
20 forfeitures together. Are you suggesting that
21 the forfeitures would be the only way to fund the
22 restitution? I just wanted to ask.

1 MS. RILEY: Well, I think that's the
2 concern with restitution is that because of how
3 frequently forfeitures are imposed on a convicted
4 member's pay, it is unlikely that the member
5 would have any means to pay a restitution
6 sentence.

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

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

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

20 I think I did state before that it would
21 be difficult to ensure that the accused actually
22 paid the restitution. A fine is an authorized

1 penalty at a court-martial. Oftentimes, it is
2 difficult to enforce the fine for the same
3 reasons.

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

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

19 BAH fraud is one of the cases where we
20 see corrupt fines. Oftentimes, a judge -- and
21 for example, if the accused has stolen \$30,000,
22 perhaps he'll have a fine of \$30,000 adjudged as

1 part of the sentence. It is difficult to enforce
2 that particular fine.

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

5 JUDGE JONES: That fine sounds to me
6 like restitution to the agency that lost the
7 \$30,000. But I mean in sexual assault, and
8 assuming that the victim is a military member,
9 really we're talking about pain and suffering
10 because in terms of compensation if you wanted to
11 add things like medical bills and all that, there
12 aren't any.

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

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

21 JUDGE JONES: For a civilian, right.

22 MR. MASTERTON: -- not associated with

1 the military, victim. We may be talking about
2 property loss that is associated with the case,
3 to the extent there is property loss.

4 JUDGE JONES: Okay.

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

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

10 CHAIR HOLTZMAN: Mr. Stone?

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

16 MR. MASTERTON: That is correct.

17 MR. STONE: And restitution is not
18 imposed?

19 MR. MASTERTON: Restitution is not an
20 authorized punishment.

21 MR. STONE: Okay, so all we're left with
22 in this realm is forfeitures, right?

1 MR. MASTERTON: Yes, sir, and the panel
2 of course or the military judge sentencing
3 authority has the authority to adjudge
4 forfeitures. Even if they don't, certain
5 sentences will automatically result in
6 forfeitures.

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

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

18 MR. MASTERTON: Well, the bottom line is
19 the accused, to the extent he's still in the
20 military and their term of service hasn't
21 expired, is not being paid as a Soldier, Airman
22 or Marine while in confinement.

1 MR. STONE: So, there's not a
2 forfeiture, nothing to forfeit?

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

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

18 MR. STONE: I see dollars as pretty
19 fungible so I don't understand exactly. I could
20 totally understand why the military doesn't want
21 to pay a salary to someone it has just sentenced
22 to prison, but I don't see why that dollar

1 matters in terms of making things right for the
2 victim.

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

7 MR. MASTERTON: Yes, sir.

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

18 MR. MASTERTON: Yes, sir.

19 MR. STONE: So, I don't see that tie.
20 Also, before we leave this conference, maybe Ms.
21 Riley, you can explain to me. I heard you say
22 one of the problems will be that even if the

1 person doesn't go to jail, they will be
2 discharged, and there will be nothing to forfeit.
3 Did you say that? Did I hear that right?

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

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

16 I guess I'm wanting to know why there
17 isn't a similar mechanism that if you're afforded
18 some kind of a forfeiture that doesn't continue,
19 you retire the next day and you've been kicked
20 out of the Service, terminated. But you have a
21 nice retirement you're getting; is there a
22 carryover?

1 MS. RILEY: I believe adjudged
2 forfeitures do apply to retiree pay. Automatic?
3 I don't believe they do. Those are only
4 effective while you're confined or on parole.
5 So, I don't believe automatic forfeitures apply
6 to retiree pay.

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

12 MR. STONE: So, it is possible?

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

15 MR. STONE: Okay, so this now goes to
16 the next question I had, which is something Mr.
17 Masterton brought up, which is the lack of
18 guidelines that -- and it seems to me that the
19 guidelines are all that much more important
20 because unlike in a civilian sector where -- when
21 appointed a judge, you serve for a long enough
22 period of time that after a year or so, you start

1 to acquire a lot of experience with certain cases
2 or after several years.

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

8 So, it seems to me it is even more
9 imperative than in a civilian sector that they're
10 given guidelines that give them both a range of
11 likely punishments, which we have in the federal
12 system, as well as perhaps a minimum and a
13 maximum so that they know at a minimum what
14 should be imposed, and at a maximum what is
15 available, but also a range of what is -- in
16 fact, the federal sentencing guidelines were
17 arrived at by looking at actual punishments, and
18 then they derive ranges so that judges would know
19 what's actually happening out there. Because
20 even then, they only know what comes before them
21 in their court, and they're very interested, and
22 they want to be uniform across all the federal

1 courts, the 50,000 criminal prosecutions a year.

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

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

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

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

22 JUDGE JONES: I agree, but I think we're

1 talking about restitution in the context of
2 sexual assault cases here, and I don't think -- I
3 am just saying I'm not sure the guideline analogy
4 fits precisely. That's all.

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

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

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

20 MR. STONE: Right. Here we're talking
21 about fines, restitution and forfeitures. I
22 guess what I'm asking is if a number, in that

1 case it's a minimum of \$25,000 fine, can be put
2 on someone's pain and suffering for their
3 pornographic images being trafficked, it seems to
4 me that there could as well be some kind of a
5 guideline proposed that provides a minimum -- at
6 least a minimum for the pain and suffering,
7 without putting a victim through trying to
8 establish and show how many times she broke down
9 in tears, and how many breakdowns she had, and
10 how many days she called her counselor in the
11 aftermath of having been sexually assaulted.

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

18 MR. MASTERTON: Sir, if I could go back
19 just for a minute to your prior question. Just
20 to make clear, if a Soldier/Sailor/Airman
21 receives a discharge, he or she loses any
22 retirement benefits. And that's often times a

1 sentence -- however, your prior point is well
2 taken. There are certainly Service members who
3 are sentenced for sexual assault to prison terms,
4 or sentenced to some other -- or given some other
5 sentence who do have retirement benefits.

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

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

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

20 So, that issue does get examined very
21 carefully. The specifics of what happens to the
22 retirement benefits if a restitution is adjudged

1 -- obviously now one can't be, but what happens
2 to those retirement benefits in light of a fine
3 or in light of forfeitures, those specific topics
4 may not be fully investigated during sentencing
5 proceedings. There may well be certain
6 sentencing authorities that don't know that much
7 about it.

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

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

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

22 MR. STONE: You also mentioned that

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

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

1 totally change the nature of a court-martial
2 situation?

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

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

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

22 I think perhaps the more typical

1 solution or the more typical result would be to
2 try to do as much of the investigation on the
3 injury to the victim upfront, as much as can be
4 done.

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

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

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

18 MR. MASTERTON: I think having a 30-day
19 delay would, number one, turn the military
20 justice system into something it currently isn't,
21 and I think that it would have a significant
22 impact on, adverse impact on, military discipline

1 and the ability to move courts-martial quickly.

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

5 MR. STONE: I can continue with the --

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

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

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

22 The other way is if the forfeiture

1 occurs as a matter of law. That happens when a
2 member is sentenced to either 60 days -- excuse
3 me, six months of confinement or a punitive
4 discharge an any confinement.

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

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

14 (Whereupon, the above-entitled matter
15 went off the record at 11:32 a.m. and resumed at
16 12:20 p.m.)

17 CHAIR HOLTZMAN: The Panel will
18 recommence.

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

21 The panel is called Developing a
22 Department of Defense Uniform Crime Victims

1 Compensation Program with Consultation From
2 Claims System Experts.

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

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

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

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

22 Mr. Feinberg, you may commence.

1 MS. FEINBERG: Well, thank you very
2 much, Congresswoman Holtzman. And I'm grateful
3 to the Panel and I'm honored that you've reached
4 out to me.

5 I can fairly quickly summarize what I've
6 concluded are these building blocks of any
7 compensation program. And this is based on my
8 experience, as Elizabeth Holtzman knows, going
9 back to my role as Special Master for the Agent
10 Orange Vietnam Veterans' Fraud Liability
11 Litigation, the 9/11 Victim Compensation Fund
12 appointed by President Bush, the BP Oil Spill
13 Fund in the Gulf of Mexico appointed by President
14 Obama, the Boston Marathon bombings appointed by
15 Mayor Menino and Governor Patrick of
16 Massachusetts and similar others, Virginia Tech
17 shootings, the Aurora, Colorado shootings, the
18 Sandy Hook Elementary School shootings in
19 Connecticut, a wide range of programs where I've
20 been asked by various policymakers to design,
21 implement and administer compensation programs
22 for innocent victims.

1 And although the programs vary program
2 to program, the following critical elements arise
3 in all of the programs. And I suggest, with
4 respect, that the Panel consider in its
5 deliberations how it would respond to these seven
6 or eight elements, building blocks of any
7 compensation program that I've been involved in.

8 First, how much money is there? Where
9 is the money coming from to pay innocent victims?
10 Is the money coming from private donations? Is
11 it coming from government? Is there a cap on the
12 aggregate amount of funds appropriated? Or like
13 9/11, all taxpayer money, was it uncapped? Was
14 it as much money as is necessary to pay eligible
15 victims?

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

19 The amount of money available to
20 innocent victims drives all of the other
21 elements, building blocks. So, I'm putting this
22 first, question 1 and 1a, how much money and

1 where is it coming from as the source?

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

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

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

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

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

20 Even if an individual is eligible, there
21 has to be a transparent methodology that is being
22 implemented to decide the amount of compensation.

1 Is it tort-based? Is it akin to
2 workers' compensation? Is it a varying amount,
3 depending on pain and suffering and emotional
4 distress, tort concepts? Or instead, is it a
5 flat amount paid for certain eligible injuries as
6 defined? What is the methodology you will use to
7 calculate what an eligible claimant will receive?

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

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

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

1 compensation?

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

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

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

22 Half the people in 9/11 submitted their

1 claims on papers. The other half wanted a
2 hearing. We held a hearing.

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

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

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

19 Does the claimant have a lawyer? Is the
20 claimant required to have a lawyer? May the
21 claimant appear pro se? "I don't want a lawyer
22 but I want my brother to appear with me."

1 These are all important due process
2 questions which have to be dealt with in setting
3 up a protocol to compensate.

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

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

21 These are the issues. Don't forget, the
22 9/11 Victim Compensation Fund, the BP Oil Spill

1 Fund, the current GM Ignition Switch Compensation
2 Fund, those three funds which I have designed and
3 administered are all alternatives to the tort
4 system.

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

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

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

22 So, those are the basic building blocks

1 that I check off any time we establish one of
2 these programs, whether they're alternatives to
3 the tort system or not.

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

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

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

10 MR. TAYLOR: I'll pass.

11 CHAIR HOLTZMAN: Judge Jones?

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

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

20 For instance, for civilian victims of
21 military sexual assault, they're not covered and
22 have to go to a state compensation program.

1 This is a very long and terribly vague
2 question, but do you have any ideas about whether
3 this is a sensible idea to follow up on or a
4 proposal that we should look into?

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

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

14 From the victim's perspective, usually,
15 not always, but usually, the victim welcomes
16 administrative independence as a signal of
17 empathy, a desire to be treated fairly outside
18 the regular structured system versus the
19 perception, I would think, of any organization,
20 especially the military, that well, we can take
21 care of our own, that our code of military
22 justice maybe it needs to be amended.

1 But to establish a process completely
2 outside the organized military hierarchy is a
3 signal of mistrust or of absence of understanding
4 as to how the military justice system works.

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

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

12 MR. STONE: Thank you for your
13 presentation.

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

19 So, the compensation application and the
20 adjudication of it and their feelings towards it
21 also affect their everyday existence. They're
22 assigned to a base, their job is on base, it's a,

1 much more of a closed community than some of the
2 systems you've described so far.

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

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

19 And so, they have an ongoing connection
20 and the community is going to turn around, it
21 might be a big corporation, for example, some
22 giant multinational corporation, and within it,

1 within the corporation, it wants to provide a
2 compensation system to keep its organization
3 running along smoothly, but at the same time,
4 recognize the loss.

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

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

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

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

22 Now, in the civil justice system, 9/11,

1 BP, General Motors, compensating strangers. All
2 three of those programs, in order to assure a
3 perception of independence, that there is no
4 effort to undercut the legitimacy of a claim on
5 the grounds that we're doing it or we're part of
6 an internal closed structure.

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

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

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

19 And the real familial or cultural bond
20 among the Vietnam Veterans was in per se among
21 themselves, not against -- not as it pertained to
22 the Defense Department.

1 So, you had Vietnam Veterans wanting me
2 to give -- to provide limited compensation, we
3 only had limited compensation there, \$250
4 million.

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

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

17 Although, what I can't speak to is
18 whether or not the victim herself or himself
19 welcomes that independence or has more confidence
20 in the military system as being a member of that
21 family. I don't know the answer to that
22 question.

1 MR. STONE: Do you know off hand or do
2 you think you could find out for us if there is a
3 post hoc summary report on the Agent Orange
4 program or a lessons learned?

5 Because, you're right, that sounds to me
6 at least a little more analogous to what we're
7 looking at. And plus the fact that it was
8 related to military issues, that might shed some
9 light on some of the questions we're struggling
10 with.

11 MS. FEINBERG: Well, it might. But,
12 remember, at the time of that program, 1986, the
13 Defense Department and the Veterans
14 Administration were both at odds with the Vietnam
15 Veterans who had come home.

16 They were at odds over the issue of
17 whether or not Agent Orange had caused any of the
18 alleged diseases.

19 And, the way we did that in Agent
20 Orange, we adopted a workers' comp system which
21 looked to Agent Orange exposure in Vietnam
22 resulting in degree of disability. And the more

1 disabled the Veteran was, the more money they
2 received regardless of a medical link between
3 Agent Orange exposure and the condition.

4 We also set aside, very interesting,
5 Elizabeth Holtzman knows Judge Jack Weinstein
6 very well who had the Agent Orange case in
7 Brooklyn. He set aside about \$45 million of the
8 \$250 million, not for individual compensation but
9 to establish an Agent Orange Vietnam Veterans
10 Foundation to fund unique programs designed to
11 assist Vietnam Veterans only, as opposed to other
12 Veterans, and it worked very well.

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

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

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

1 Veterans.

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

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

5 MR. STONE: Great.

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

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

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

22 So, you may have -- if you've been a --

1 your spouse, for example, of an active military -
2 - someone who's active military personnel, you
3 can get health benefits for as long as your
4 spouse is in the active military. But after
5 that, it may cease.

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

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

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

22 So, one of the things that we are

1 concerned about is how to make sure that nobody
2 falls between the cracks here and that victims
3 who are victimized by members of the military
4 should, whether they are in active duty or not
5 active duty, there should be a system that
6 applies to them.

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

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

13 And what my concern is, I don't know
14 that I speak for any of the other Members, I
15 probably don't, but it's to make sure that we
16 have a fair system in place that's not dependent
17 on the vagary of where you wind up in the United
18 States as to what state law is going to govern,
19 how it's going to govern, what the amount of
20 compensation is, because that's really a matter
21 of caprice. It should be a matter of, as you
22 said, it should be -- even though the system is

1 transparent, I'm not sure how much victims will
2 feel that it is a just and fair system.

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

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

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

20 Instead, what we do in all of these
21 programs, here is your compensation. This is
22 what you're entitled to whether you're a civilian

1 or this person or that person. We have set up a
2 separate program and it's very egalitarian and
3 you will receive this and you'll receive that and
4 you'll receive this.

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

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

20 So, I'm a big believer in standalone
21 compensation, with no impact that other programs
22 may have on this program itself.

1 CHAIR HOLTZMAN: Thank you.

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

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

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

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

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

22 MR. STONE: Okay. What about --

1 MR. FEINBERG: And, in these other
2 programs, it is difficult to prove. It is too
3 difficult. It would be a very cost-ineffective
4 and outpatient mental assistance or mental --

5 MR. STONE: Right, psychotherapy.

6 MR. FEINBERG: -- services.

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

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

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

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

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

22 MR. STONE: What about moving expenses

1 for victims in 9/11, security deposits for
2 current apartments or the new apartment?

3 MR. FEINBERG: Yes, yes, covered.

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

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

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

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

1 available.

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

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

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

12 MR. FEINBERG: What?

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

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

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

1 of the medical injury.

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

4 MR. FEINBERG: No, it doesn't.

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

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

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

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

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

22 If you didn't receive -- if you were in

1 an automobile accident and you didn't receive
2 medical treatment within 48 hours, you're
3 ineligible.

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

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

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

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

1 you went to a doctor within 48 hours of the
2 accident.

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

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

10 MR. STONE: Right.

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

13 MR. STONE: Okay. Just follow my
14 hypothetical.

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

20 MR. FEINBERG: Ineligible. You can sue,
21 I guess. I don't know who you would sue.
22 Ineligible.

1 If a program like ours in the Marathon
2 was going to try and compensate PTSD, there'd be
3 a million people claiming PTSD in Boston. And we
4 only had \$61 million in private money. We
5 focused on death and physical injury only.

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

10 CHAIR HOLTZMAN: Well, any other
11 questions?

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

17 MR. FEINBERG: I'm sorry I couldn't be
18 there today in person, but I assure the Panel and
19 Congresswoman Holtzman that I am available at any
20 time to assist you with any specific questions or
21 to secure any documents which I will do like
22 Agent Orange that I promised the Panel Member,

1 and I'll stand by to help you in any way I can.

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

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

6 MR. FEINBERG: Thank you. Bye.

7 CHAIR HOLTZMAN: Bye.

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

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

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

19 Thank you very much. Both of you have
20 appeared before this Panel before and you're just
21 a glutton for punishment. We very much
22 appreciate that.

1 And we'll start with you, Mr. Masterton
2 first.

3 Thank you very much.

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

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

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

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

21 The compensation is based on local legal
22 standards. My office, in Germany at least and in

1 Europe, investigates the cases locally.

2 Just to give you an idea of some
3 numbers, in the past year, we had 38 total claims
4 under the Foreign Claims Act in Germany. Three
5 of those involved sexual assault or rape. The
6 average payment for all Foreign Claims Act claims
7 was \$3,628.00 for those three involving sexual
8 assault or rape. The average payment was
9 \$15,656.00.

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

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

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

22 Just a couple of general comments about

1 the proposal to create a military Crime Victims
2 Compensation Board, one comment, one thought that
3 I have on such a board is that, at least a
4 centralized board, in my view, would not be
5 conducive to a proper claims investigation.

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

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

16 A compensation system that is set up to
17 pay victims of sexual assault cases would likely
18 be paid by taxpayers and I think we discussed
19 this this morning, if such a compensation system
20 was based on a conviction and a court-martial,
21 certainly the accused would likely have either
22 adjudged or automatic forfeitures and discharge

1 which would limit the amount of compensation
2 available from the accused themselves.

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

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

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

17 CHAIR HOLTZMAN: Thank you.

18 Mr. Eddy?

19 MR. EDDY: Yes.

20 CHAIR HOLTZMAN: Thank you, again.

21 MR. EDDY: Thank you. Thank you, Madam
22 Chair.

1 Since I have testified before this Panel
2 before, I don't want to go over that ground
3 again. Of course, I more than welcome your
4 questions about how state compensation programs
5 operate.

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

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

15 I think there may be a misconception
16 that sexual assault victims must report within 72
17 hours in most states. In fact, that's not true.

18 California and Texas, Ohio and other
19 large states have no reporting deadline
20 whatsoever. Connecticut does not either.
21 Smaller states don't.

22 There are quite a few states with longer

1 deadlines. It is certainly undeniable, and I
2 don't mean to say it's not true, but there are
3 different standards, there are different
4 deadlines.

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

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

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

20 "Lack of cooperation with law
21 enforcement results in claim denial." Yes, it is
22 true that there is a reporting and cooperation

1 requirement. However, as I note in this
2 statement, there are many exceptions. And, in
3 fact, some states, again, always waive and
4 without regard to cooperation.

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

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

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

22 We have several states that, in writing,

1 their guidelines say we do not consider
2 contributory conduct on the part of the victim in
3 sexual assault cases.

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

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

17 So, violent crimes, rapes, are dealt
18 with at the local and state level. So, there's a
19 diversity of approach and a diversity of outcome
20 at the state level to some degree because not
21 only the state governments, but Congress placed
22 the responsibility for crime victims'

1 compensation at the state level, there will be
2 some diversity. Sometimes, this reflects funding
3 issues at states.

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

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

18 I was pleased to hear that we pretty
19 much agree on the factors that would go into
20 setting up a compensation program such as at what
21 point do you say someone's eligible? Is it an
22 assertion? Is it a report to the counselor? Is

1 it a report to law enforcement? Is it an
2 investigation at the law enforcement level that
3 would substantiate the crime in some way?

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

17 But there are concerns expressed that,
18 why would this rape victim, who happened to be
19 raped by someone in the Service, perhaps get
20 something that has no relationship to her out-of-
21 pocket costs, her actual loss, but is some
22 recognition of pain and suffering, and this

1 victim might have been raped in the same bar,
2 same night, different person would get something
3 that would be more akin to what her actual loss
4 would be?

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

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

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

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

21 CHAIR HOLTZMAN: Thank you.

22 I'm going to start with Judge Jones

1 because you may have a time constraint.

2 JUDGE JONES: Yes, thank you.

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

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

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

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

1 you weren't sure.

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

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

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

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

13 JUDGE JONES: Right.

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

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

22 And we're focused on should we make

1 restitution something that's part of the
2 sentencing process? An additional, I suppose,
3 penalty, if you will.

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

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

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

16 MR. EDDY: No, the compensation programs
17 --

18 JUDGE JONES: So --

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

21 JUDGE JONES: Okay.

22 MR. EDDY: In fact, the one program that

1 did, Rhode Island, offered \$25,000.00 in pain and
2 suffering for about the first two decades that it
3 operated. It fell behind in claims by 12 years
4 and went bankrupt and the legislature got rid of
5 it.

6 JUDGE JONES: All right. So --

7 MR. EDDY: The same thing happened in --

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

10 MR. EDDY: They are not.

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

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

21 JUDGE JONES: Right, right, right. No,
22 I'm giving you your foreign overseas exception.

1 So, I guess what I'm just struggling
2 with is the real issue here to try to figure out,
3 one, is there some value to making a defendant
4 deal with an order of restitution in relationship
5 to all of the issues that I see with it in the
6 military justice system?

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

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

19 Mr. Eddy, I see you're --

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

1 astonished.

2 JUDGE JONES: Okay.

3 MR. EDDY: Because, of course, it's
4 standard and mandatory in the civilian and the
5 state court systems and the federal court system.

6 So, it's an important thing for state
7 compensation programs, when they get a claim from
8 someone, they check with the prosecution, see if
9 an offender has been identified and prosecution
10 is under way and then request restitution.

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

15 JUDGE JONES: But do you offset the
16 restitution payment with the monies that you paid
17 --

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

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

21 MR. EDDY: Yes, the comp program can pay
22 and then we'll take the restitution to reimburse

1 themselves, but will not -- they won't wait for
2 the restitution to be paid because often the
3 defendants can't pay.

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

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

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

22 You're taking this guy's pay and using

1 it as restitution for the victim. So, to have
2 control of the --

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

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

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

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

15 MR. EDDY: That is correct.

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

19 MR. EDDY: Oh, yes, of course.

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

22 MR. EDDY: Yes, yes, it certainly does.

1 JUDGE JONES: Okay.

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

4 JUDGE JONES: Yes, no, absolutely not.

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

9 MR. EDDY: No, not at all.

10 CHAIR HOLTZMAN: Okay.

11 MR. EDDY: In no way. If the
12 compensation program is paid \$2,000.00 to a
13 counselor for this rape victim, she gets
14 restitution of \$20,000.00 which may cover other
15 things including that \$2,000.00 bill, all the
16 compensation program would ask for is that
17 \$2,000.00. The rest is hers.

18 CHAIR HOLTZMAN: Clarify that point.

19 Do you have other questions?

20 JUDGE JONES: No, I'm just trying to
21 figure out how pain and suffering, which is
22 really what we're talking about, I think, here

1 fits into a restitution sentence.

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

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

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

11 MS. EDDY: Yes, sir.

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

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

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

20 MR. EDDY: That's correct.

21 MR. STONE: But, maybe Mr. Masterton can
22 help me on this. You can't sue the military.

1 So, if you're a victim of a sexual assault that
2 happens in the military, the military can't be
3 sued. Is that right?

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

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

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

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

20 The issue would be if the Service member
21 is then transferred, isn't court-martialed and
22 then is then transferred or is court-martialed

1 and then transferred somewhere else, then
2 enforcement would be a problem.

3 But certainly, a lawsuit against the
4 offender is possible.

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

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

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

20 Okay, so the difference between the
21 civilian and the military would be, in the
22 military, you would -- there are mechanisms to

1 get property compensation, your health
2 compensation costs are covered if you're active
3 duty. You don't get pain and suffering and you
4 still have the right to get -- for a lawsuit.

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

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

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

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

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

22 MR. EDDY: I think it's ascertainable --

1 CHAIR HOLTZMAN: To get some idea of
2 what the comparable status is and what the
3 differences are.

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

9 CHAIR HOLTZMAN: Exactly.

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

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

18 MR. STONE: Okay. And then --

19 MR. MASTERTON: Generally, a
20 coordination with the local Military Police.
21 Soldiers can be sued even if they are living on
22 base in a state court.

1 MR. STONE: Let's go back for a minute
2 to the fact that you said in the three rape cases
3 overseas where you paid out an award, it was like
4 five times the size of your average payment, it
5 was in the \$15,000.00-plus range instead of the
6 average \$3,000.00 range.

7 Was there pain and suffering considered
8 either explicitly or implicitly in that
9 \$15,000.00 payment? What was in the \$15,000.00?
10 Why was it five times the size of other awards?

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

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

19 MR. MASTERTON: That's correct and it's
20 based on local law. We'll examine what, for
21 example, a German court would issue for a similar
22 rape or sexual assault case.

1 MR. STONE: And you're doing that in
2 part because your Service people abroad are not
3 subject to local lawsuit, is that right?

4 MR. MASTERTON: Our Service members are
5 actually subject to local lawsuits. The reason
6 we have the Foreign Claims Act is because it
7 becomes very, very -- it is very difficult for
8 local nationals to bring such lawsuits.

9 Typically, by the time the lawsuit's completed,
10 the Service member has been reassigned and is
11 gone.

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

14 MR. MASTERTON: There is no waiver of
15 local lawsuits. However, we do, if there is
16 insurance coverage or some other way that the
17 victim is compensated, we do deduct that from the
18 awards that we provide to the local victims.

19 So, for example, if a local victim has
20 successfully sued the Soldier, whatever the
21 results of that lawsuit are or whatever the
22 judgment from that lawsuit that they're able to

1 collect is taken away from the amount that we
2 would pay. Generally, we don't see that.

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

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

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

22 And so, oftentimes, the assaults that we

1 see, the vandalism that we see, well, the
2 assaults that we see will involve pain and
3 suffering as well.

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

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

10 MR. MASTERTON: Yes, sir.

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

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

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

1 places where sexual assaults occur?

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

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

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

19 MR. STONE: I did have one question from
20 the earlier session this morning that I wanted to
21 ask you which was, and we sort of discussed it
22 before, do you think there would be any great

1 disruption of the court-martial system if there
2 was a mandated one-day break between a finding of
3 guilt and a sentencing so that at least during an
4 overnight period, a victim would be in a position
5 to put together what they wanted to say at the
6 sentencing?

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

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

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

21 MR. STONE: Well, I did have one or two
22 more questions unless you're in a hurry?

1 CHAIR HOLTZMAN: No, go ahead.

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

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

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

15 MR. EDDY: There are a few conditions
16 but no time limitations. The conditions are you
17 must cover mental health counseling. You must
18 cover medical bills. You must cover lost wages.
19 You must cover funerals. You must cover drunk
20 driving. You must cover domestic violence and
21 sexual assault. And that's about it. The rest
22 was left to the states to administer.

1 At the time that the federal money came
2 in, close to 40 states already had compensation
3 programs operational. So, there are very minimal
4 conditions.

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

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

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

19 What also is standard is that with
20 regard to sexual assault cases, and I know this
21 because I trained on this at every conference
22 that we have, not only are programs writing into

1 their rules and guidelines that contributory
2 conduct is not a factor in sexual assault cases.
3 On a practical basis, as we discuss these cases,
4 we learn from managers of the programs that they
5 do not consider contributory conduct.

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

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

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

21 MR. STONE: But what would be an
22 example, take that same hypothetical without

1 contributory conduct, does it disqualify them?

2 MR. EDDY: I cannot think of an example.

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

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

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

1 not sexual assault.

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

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

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

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

20 So, to make it a simple answer, I would
21 say yes. A restricted report, absent something
22 more that, if it's just an assertion to police,

1 that may not be enough. If the police have
2 information to pursue an investigation, that is
3 something that might make it more easy for that
4 claim to go through.

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

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

22 MR. STONE: Okay. I understand that,

1 though, and I'm not suggesting that the states
2 should change it, I'm just trying to find out
3 because a military person filed a restricted
4 report could expect their state compensation.

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

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

18 But, it would depend on what that report
19 said for many states. If it gave them enough to
20 go on to say that we believe that there is enough
21 to justify our payment because this person is a
22 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

1 were a lot more clear than you indicated that you
2 were. So, thank you for being back to clarify
3 some of the points that you felt at least were
4 not as clear.

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

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

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

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

22 MR. TAYLOR: Right.

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

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

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

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

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

21 MR. EDDY: Well, there certainly is a
22 trend to extend reporting requirements and the

1 deadlines from the 72 hours to something else.

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

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

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

21 MR. TAYLOR: So, another one of these
22 requirements had to do with this point that you

1 discussed earlier in response to Mr. Stone's
2 question. And that is, the innocence
3 requirement, if you will, evidence of any
4 misconduct.

5 And, as written, it talks about
6 misconduct leading to the injuries that the
7 person suffered. But I'm taking your testimony
8 to mean that there's got to be a causation factor
9 there, not just a contributing factor?

10 MR. EDDY: That is correct.

11 On the occasions that courts in the
12 states have ruled on appeals of contributory
13 conduct decisions, they are consistent in saying
14 this does not mean something done in poor taste
15 or some slight misconduct.

16 So, we avoid the use of "innocence" of
17 any misconduct. It's very misleading and nobody
18 uses that term. It's contributory conduct
19 defined as criminal behavior or substantially
20 wrong behavior that directly causes, proximately
21 caused, the victimization.

22 MR. TAYLOR: And how about the

1 cooperation requirement? What do you see as the
2 trend in that regard? Cooperating with law
3 enforcement activities?

4 MR. EDDY: It's a difficult issue but
5 legislatures set these requirements, some of them
6 20, 50 years ago in California. It's the 50th
7 anniversary in California of the creation of the
8 program.

9 I think states are becoming more
10 flexible. We see some states that don't have
11 cooperation requirements at all but they are a
12 relatively small number.

13 I do think as things evolve, we will see
14 more states move in that direction, that
15 cooperation won't be as necessary. But I think
16 it will occasionally be to -- as the interest,
17 the mission to help crime victims wherever they
18 are and whatever decisions they make with regard
19 to the criminal justice system, how is that
20 balanced against the state's interest in finding
21 the perpetrator, protecting the community and
22 getting justice? That's the balancing act that

1 is slowly moving, I think, from a seesaw over
2 here to something that's more balanced.

3 MR. TAYLOR: And just one final follow-
4 up from your testimony from last time, according
5 to my notes and my memory, I think you said that
6 there were very few claims that you saw from
7 military victims because the system pretty well
8 took care of most of their needs.

9 And also, that you thought that there
10 was an underutilization of the program probably
11 by the military, which I think you attributed to
12 lack of information, lack of knowledge, program
13 awareness. Does that sound --

14 MR. EDDY: I would say that 95 percent
15 of the reason for few claims is the first reason
16 which is that their needs are taken care of and
17 if the states are covering out-of-pocket costs
18 and if there are none, then it means there's no
19 claim that would be successful with the state
20 compensation program.

21 I think information is important, so
22 we're certainly prepared, and states are too, I

1 was just talking with the Florida director
2 yesterday who had met with people from the base
3 in their area, so they're eager to get the word
4 out.

5 They find, I should mention one thing,
6 they find it's difficult to get that
7 investigative report from the military.

8 Two directors told me today that it
9 takes months for them to go through Virginia
10 Central Command to get an investigative report
11 which they need as a public-funded agency to
12 document the payment.

13 So, they could go ahead and help now,
14 but they're waiting months to get that report.

15 MR. TAYLOR: Well, I guess there are two
16 responses I might add to that along with a
17 question.

18 The response is, I wonder if it would
19 help if someone at your level who has oversight
20 of the national program could be responsible for
21 at least coordinating with the Defense Department
22 to see if there couldn't be some change to DoD

1 policy that would make it clearer to the
2 policymakers and ripple down through the system
3 that this is the kind of cooperation that would
4 be expected in these areas.

5 And second, is there something more your
6 office could do when you have these meetings of
7 coordinators throughout the country to urge them
8 to get in touch with their local military
9 communities, and perhaps you're already doing
10 both of those things.

11 MR. EDDY: We have done some of that.
12 There can always be more that can be done.

13 I know the Office for Victims of Crime,
14 while I'm not aware -- I noted that there was
15 some note that there's a military division in the
16 Office of Victims of Crime. I've worked with
17 them for close to two decades and I'm not aware
18 of any military division at all.

19 There may be someone assigned to oversee
20 grant work or training, education. So, I'm not
21 denying there may be somebody that specializes in
22 military affairs.

1 But OVC has just come into four times as
2 much money that it can spend on training and I'm
3 sure they would be very interested in getting the
4 word out and helping the military get the word
5 out about whatever opportunities there would be
6 in the civilian world.

7 MR. TAYLOR: Well, thanks to both of you
8 for what you're doing.

9 Madam Chair?

10 CHAIR HOLTZMAN: Thank you.

11 Just a few questions.

12 Mr. Masterton, I guess I'm confused a
13 little bit about what's going on overseas. My
14 concern is with U.S. civilians overseas. What
15 rights do they have? Are they covered under your
16 program?

17 MR. MASTERTON: If they are not
18 residents, locally resident overseas, they would
19 not be covered by the program.

20 So, for example, family members of
21 Soldiers who are living overseas, DA civilians
22 who are --

1 CHAIR HOLTZMAN: What's a DA?

2 MR. MASTERTON: I'm sorry, Department of
3 the Army civilians, civilian employees of the
4 government who are stationed overseas personnel,
5 would not be covered by the program.

6 CHAIR HOLTZMAN: Okay. Well, that's my
7 concern here. Because I'm concerned about where
8 those people get compensation. They're not --
9 they may be stationed in Afghanistan, the station
10 may not be there, they may be working for the
11 military, they're U.S. civilians working for the
12 military in Afghanistan. They don't live in a
13 state, maybe. How do they -- what compensation
14 program are they entitled to?

15 MR. MASTERTON: Well, if it's a
16 government employee or a family member, of
17 course, they'd have the compensation or they have
18 the -- they'd be entitled to the various programs
19 that we've already discussed, either a DA
20 civilian would be covered by insurance or health
21 care, mental health care, things of that nature.

22 A family member would be also covered by

1 TRICARE or healthcare.

2 CHAIR HOLTZMAN: Right.

3 MR. MASTERTON: And also, there's a
4 transitional compensation program, of course, for
5 family members.

6 So, there are programs covering these
7 people, depending on what their status is.

8 The program that I was talking about
9 under the Foreign Claims Act requires you to be
10 essentially a local national.

11 CHAIR HOLTZMAN: Right.

12 MR. MASTERTON: But the locally resident

13 --

14 CHAIR HOLTZMAN: Right. Okay, but I'm
15 -- right. I'm focused on U.S. citizens at the
16 moment.

17 And so, I don't know what state
18 compensation program they would be eligible for.

19 MR. MASTERTON: They would not be
20 eligible for any state compensation programs.

21 I'm sorry.

22 MR. EDDY: Actually, that would be

1 incorrect.

2 This is a significant gap, Madam
3 Chairman. About half the state compensation
4 programs extend benefits to their residents who
5 are victims of crimes overseas. And about a half
6 don't.

7 The half that do, again, concentrate in
8 the larger states. So, there may be examples
9 where those who are victimized overseas are not
10 helped by state comp programs.

11 But, we find that -- your specific
12 question was with regard to employees of
13 contractors, perhaps. My understanding is that
14 they are required to have insurance that would
15 cover medical costs and that kind of thing.

16 So, what the compensation programs find
17 when they get claims from Americans overseas is
18 that they don't have insurance to cover their
19 out-of-pocket. It may be a student traveling or
20 somebody who's expatriate doing nothing and is
21 not employed. Those are the types of claims that
22 may fall into the gaps whereas people who are

1 tourists, who are employed, you know, I would be
2 covered by my insurance if I went abroad.

3 Virginia also happens to cover --

4 MR. STONE: But that's only medical
5 costs, not lost wages. If they don't feel they
6 can go to work --

7 CHAIR HOLTZMAN: Right, I mean --

8 MR. EDDY: Well, contract -- you know,
9 my understanding is contractors would be able to.

10 CHAIR HOLTZMAN: No, I --

11 MR. EDDY: You are correct, there is a
12 gap.

13 CHAIR HOLTZMAN: Right. So, right.
14 Well, I appreciate your candor in pointing that
15 out because I mean you have said in your
16 testimony that misconception number four is that
17 state compensation programs present a patchwork
18 of approaches.

19 I mean, in all fairness, this is -- you
20 acknowledge that there's a gap and so there's a
21 gap here.

22 And, from that point of view, I guess I

1 don't really understand what your objection would
2 be to a federal compensation program that dealt
3 with federal civilians who are not covered by
4 state programs or felt that the state program --
5 and we'll have to deal with whether they have to
6 make a report here or a report there or they --
7 and so forth.

8 I mean what were your -- why do you have
9 an objection?

10 MR. EDDU: I have no objection.

11 CHAIR HOLTZMAN: Oh, okay.

12 MR. EDDY: I think we're talking about
13 a relatively small number of victims.

14 CHAIR HOLTZMAN: Correct. I think the
15 number is something around 600 a year, something
16 like that.

17 MR. EDDY: Okay.

18 CHAIR HOLTZMAN: Maybe more, maybe less,
19 but in that ballpark. I understand we're not
20 talking about tens of thousands of people here.
21 But we are --

22 MR. EDDY: And, of course, they're not

1 -- I mean this is a problem that likely might be
2 solved by another condition to the Victims of
3 Crime Act because the number of about 600 that
4 you're saying, I'm not sure what that number is,
5 but however many there are where an American is
6 victimized overseas, there's surely not many that
7 are victimized by military members. They're more
8 likely -- they're victimized by nationals.

9 CHAIR HOLTZMAN: I'm not only talking
10 about overseas, I'm talking about civilians and
11 dependents and others who are not covered,
12 whether they're abroad or here, by existing
13 programs.

14 MR. EDDY: Sure.

15 CHAIR HOLTZMAN: We have a chart here
16 that our Staff was kind enough to give us that's
17 buried on my desk.

18 But I think the number might have been
19 600 if I'm wrong, it's somewhere in there, it's
20 not an enormous number, but it is a substantial
21 number.

22 So, you have no problem with that and

1 you have no objection to that in --

2 MR. EDDY: I have no objection to
3 covering gaps in services, no.

4 CHAIR HOLTZMAN: And I guess the other
5 approach would be to the federal government,
6 since it is contributing to state programs to
7 impose some additional conditions on states that
8 receive it, for example, covering U.S. civilians,
9 you know, who are state residents who are living
10 abroad dealing with the 72-hour issue, dealing
11 with contributory conduct.

12 I know you say, in practice, the
13 language is not observed. But, if you're a
14 lawyer, Special Victims' Counsel, for example,
15 advising a victim of sexual assault in the
16 military, are they supposed to rely on the
17 received wisdom of how these laws are applied in
18 practice or the actual language of the laws?

19 And so, I mean I think part of the
20 problem here is that if the states really feel
21 that they're doing such a great job, they need to
22 get their act together so that there's no

1 miscommunication.

2 I'm very concerned about that and you
3 want to distribute information, but what are you
4 going to say? Can you really say -- can you
5 really tell -- distribute a piece of paper that
6 says, just for example, I don't know what New
7 York does about it, but New York State says, well
8 you said every state, so New York State says
9 contributory conduct is a factor, but you can
10 disregard that if you were drunk or using drugs.
11 That's not going to be an issue in terms of
12 dealing with sexual assault.

13 Should you put materials like that --
14 written materials like that?

15 MR. EDDY: That's my belief that's the
16 fact.

17 CHAIR HOLTZMAN: And you have written
18 materials to that effect?

19 MR. EDDY: You have them in front of
20 you.

21 CHAIR HOLTZMAN: Oh, okay. Well, I'll
22 be happy to take a look at them.

1 MR. STONE: That's not the case in
2 Maryland. The Maryland Compensation Board, for
3 example, is very strict and any contributory
4 conduct, even if it's not causation, disqualifies
5 you. That's just the way that they interpret the
6 statute. So, as we've said, it varies among
7 states.

8 MR. EDDY: It also varies among
9 victimizations. You're talking about drug
10 dealers in Baltimore, it may be different than
11 sexual assault victims.

12 CHAIR HOLTZMAN: Any other questions?

13 MR. STONE: Yes, I did have a question.

14 I didn't ask you before, could you give
15 us either now or perhaps follow-up, the federal
16 statutory and regulatory citation to the funding
17 statute that puts those limits that are out there
18 now so we can take a look at them? I didn't know
19 if it was in the Vower Statute or one of the
20 others but I don't know if it's something you
21 know offhand?

22 MR. EDDY: It's 42 U.S.C. 10603.

1 MR. STONE: 42 U.S.C. 10 --

2 MR. EDDY: Actually, it may be 10602,
3 10603, those are the eligibility requirements
4 under the Victims of Crime Act.

5 Actually, I have it here, too. So, it's
6 -- to be accurate, it is 42 U.S.C. 10602.

7 MR. STONE: Okay, yes, I see we have it
8 on Tab -- just one tab, on Tab 11, 10602.

9 Are there any CFRs that are implemented?

10 MR. EDDY: Yes, there are guidelines
11 written by the Office for Victims of Crime. I
12 would not be able to cite --

13 MR. STONE: Okay, but you can get back
14 to us and give us that citation?

15 MR. EDDY: Yes.

16 MR. STONE: Sure, thank you.

17 CHAIR HOLTZMAN: Well, thank you very
18 much. I guess there are no further questions.

19 We really, really appreciate your coming
20 back and sharing your expertise with us and
21 thanks for the double punishment.

22 We'll now stand -- I guess we go into

1 deliberations or do we take a five-minute break?

2 Let's take a five-minute break and then
3 we'll go into deliberations.

4 (Whereupon, the above-entitled matter
5 went off the record at 1:53 p.m. and resumed at
6 2:06 p.m.)

7 CHAIR HOLTZMAN: Our next Panel is
8 Special Victims' Counsel Perspectives on
9 Retaliation Against Victims of Sexual Assault
10 Crimes in the Military. We have a very
11 distinguished Panel, Lieutenant Commander James
12 Toohey, U.S. Navy Victims' Legal Counsel,
13 Lieutenant Commander Kismet Wunder, U.S. Coast
14 Guard Special Victims' Counsel, Captain George
15 (Rob) Lavine -- is that correct?

16 CPT LAVINE: Yes, ma'am.

17 CHAIR HOLTZMAN: Third, U.S. Army
18 Special Victims' Counsel, Captain Micah Smith,
19 U.S. Air Force Special Victims' Counsel, Major
20 Chantell Higgins, U.S. Marine Corps Victims'
21 Legal Counsel. We'll start with Lieutenant
22 Commander James Toohey. Welcome.

1 LCDR TOOHEY: Thank you, ma'am. Good
2 afternoon, Members of the Panel. My name is
3 Lieutenant Commander Toohey, as has been said.
4 I'm the Navy Victims' Legal Counsel for Naval
5 Base Coronado in San Diego, California. I've
6 been a Victims' Legal Counsel for about 12
7 months. My current orders extend me out until
8 June 10, 2017 in my job. Since I began my job
9 about a year ago, I've represented 49 clients.
10 Of those 49 clients, about 11 of them have
11 reported to me some form of retaliation.

12 By way of example, the vast majority of
13 the cases that I've seen that would involve
14 retaliation are of the variety that involve some
15 sort of social consequence to the victim by her
16 peers after reporting. Specifically, in one
17 case, which is representative of most of these
18 cases, my victim and the accused were at the same
19 command. After reporting, the peers of the
20 victim started to isolate the victim, kind of
21 ignore, and rumors began to spread about the
22 victim, so much so that the command climate in

1 that department, which both the accused and the
2 victim were in the same department, became
3 unbearable.

4 Ultimately, an expedited transfer was
5 executed after the victim's request. Because
6 this is prototypical of the types of retaliation
7 cases that I've seen, I'll just add a few other
8 elements of ones that I've seen that also involve
9 social consequences or social retaliation. In
10 some occasions, victims have expressed fear of
11 the accused. That's typically handled by issuing
12 a military protective order to the accused to
13 refrain from having any contact with the victim.
14 On some occasions, those military protective
15 orders have been violated by the accused.

16 The way that they typically do that is
17 not necessarily direct contact, but subtle ways
18 in which they come around where the victim is and
19 maybe linger or stay too long in what is
20 perceived by the victim as an effort to
21 intimidate or make them uncomfortable. The last
22 form that I see, along with social consequences

1 in some of my cases was -- but these are more
2 rare -- is direct contact by a third party, who
3 may or may not have an interest in the case but,
4 in any event, has an opinion.

5 Now the current policy for Navy Victims'
6 Legal Counsel, in terms of representing our
7 clients in addressing retaliation complaints is
8 that our program supports, encourages, and
9 indeed, expects us to represent our clients
10 across the gamut of retaliation complaints,
11 whether that be taking the complaint directly to
12 the command, helping with an Inspector General
13 complaint, a Congressional, or any method of
14 resolving or remedying the perceived or actual
15 retaliation is within our scope in our current
16 program. In terms of what I typically see in my
17 practice, and what I have typically done on
18 behalf of clients, is I usually address these
19 issues directly with the chain of command.

20 I have direct conversations face-to-face
21 with Commanding Officers, Executive Officers,
22 Command Master Chiefs, email, phone calls, and

1 sometimes, when it becomes necessary, I generate
2 formal letters to commands requesting relief from
3 specific actions that I have observed or been
4 informed about by my clients. I can say, without
5 exception, the commands have been responsive to
6 my requests and to the complaints.

7 In terms of consequences that have
8 occurred, when I talk about the specific
9 retaliation by the accused or by third parties,
10 individuals have been taken to non-judicial
11 punishment or counseling has happened. By far,
12 though, the most common example of how these
13 issues have been resolved is by transfer of the
14 victim, at her own request, either through
15 expedited transfer or some other method, either a
16 TAD or a change of department. Quickly, just
17 three recommendations for improving the
18 environment.

19 I would recommend that our general
20 military training that we have yearly that
21 requires a facilitator to provide training on
22 sexual assault for the commands be provided by

1 someone senior enough in the command's chain of
2 command that both can deliver effective training,
3 get the message out that we're serious about
4 retaliation, and also create a training
5 environment that demands that the material be
6 taken seriously.

7 Quickly, as I need to wrap up, the other
8 two recommendations are that leadership must
9 seriously consider the option of temporary
10 transfers of the accused, pending the outcome of
11 the investigation, and the third recommendation
12 is that when personnel decisions are made by
13 leadership about the victim, whether that be
14 keeping someone back from a deployment or making
15 other personnel decisions, that even when they
16 think they are in the best interest of the
17 victim, they should be done with input from the
18 victim, and they should effectively communicate
19 their decision and their rationale to the victim
20 at the time they make those decisions. That
21 concludes my comments. Thank you.

22 CHAIR HOLTZMAN: Thank you very much.

1 Lieutenant Commander Kismet Wunder, please.

2 LTC WUNDER: Thank you, ma'am.

3 CHAIR HOLTZMAN: You're welcome.

4 LTC WUNDER: Good afternoon, Members of
5 the Panel. As you know, my name is Lieutenant
6 Commander Kismet Wunder. I'm a Special Victims'
7 Counsel in the United States Coast Guard. I was
8 one of the first Coast Guard attorneys selected
9 for this duty in July 2013. My SVC duties are
10 collateral to my regularly assigned duties as the
11 health, safety and work life regional practice
12 manager for Base Cleveland, in Cleveland, Ohio.

13 I expect to continue serving as an SVC
14 until the summer of 2016. In total, I've
15 represented approximately 20 victims. Of those
16 victims, the vast majority have reported to me
17 that their Coast Guard commands have been very
18 supportive and accommodating for their
19 situations. I have had victims with collateral
20 misconduct issues which naturally cause friction
21 between the victim and their command, but these
22 cases did not rise to the level of retaliation.

1 I have had only one victim who reported issues of
2 retaliation, harassment, and a hostile work
3 environment. This victim reported a sexual
4 assault by another member in her same command.

5 Over a period of five months, the
6 situation devolved to a point that the command
7 and the victim were unable to interact with any
8 effectiveness. The victim experienced
9 insensitive comments made by the chain of
10 command, ostracism by her peers, negative
11 counseling, removal from duties, and not being
12 recommended for promotion. The situation became
13 so toxic that the victim felt no choice but to
14 seek an expedited transfer, and the command fully
15 supported this request.

16 My time here does not allow me to go
17 into all the specific details of this case,
18 however, the situation ultimately resulted in a
19 Coast Guard Investigative Service investigation,
20 a civil rights complaint, and an administrative
21 investigation and employee evaluation appeal,
22 some of which are still pending. As SVC, I

1 assisted and represented the victim with the
2 complaints to the command. The current Coast
3 Guard policy allows Special Victims' Counsels to
4 handle these types of situations, and the Office
5 of Member Advocacy and Legal Assistance provides
6 oversight, support, and supervision in these
7 cases.

8 Based on my experience, the situation --

9 CHAIR HOLTZMAN: Excuse me, I just need
10 to interrupt because I don't understand. Against
11 whom were these complaints filed that you
12 mentioned? Were these against the victim, or was
13 the victim against others?

14 LTC WUNDER: They were filed by the
15 victim against the command. There was also an
16 investigation -- administrative investigation was
17 by the command, directly after the --

18 CHAIR HOLTZMAN: Thank you.

19 LTC WUNDER: This case resulted from a
20 perfect storm created by a loss of trust, lack of
21 effective communications, inexperience and
22 stubbornness. I'm not privy to all of the facts

1 and circumstances of this case, but I am
2 confident that no one is 100 percent at fault,
3 and no one is 100 percent in the right. I can
4 say, though, with certainty, that when these
5 issues were brought to the attention of the Coast
6 Guard, the Coast Guard took them seriously and
7 initiated investigations to determine what
8 happened.

9 It is unfortunate that this victim's
10 experience with the system will be forever
11 colored by the actions of a few individuals who
12 were unable or unwilling to appreciate or
13 recognize what a victim of sexual assault
14 experiences. Enhancing how individuals in
15 command respond to retaliation is extremely
16 challenging.

17 Socioeconomic backgrounds, cultural
18 differences, and emotional maturity are just
19 three of the many factors that influence how
20 individuals respond to a particular situation.
21 Add into this mix the close sense of community
22 and commitment felt in a small Service like the

1 Coast Guard, and the response becomes that much
2 more difficult to control. Influencing and
3 educating individuals on how to better respond to
4 this type of situation will require patience and
5 strong leadership. As far as a recommendation
6 for this Panel to consider, people who are
7 involved in the prosecution and defense of sexual
8 assault cases are well aware of the term of
9 counter-intuitive behavior of sexual assault
10 victims.

11 A significant amount of time and
12 resources are devoted to educating a jury that a
13 victim's response to a sexual assault may not
14 line up with their ideas of how a typical victim
15 should respond. I believe with all the attention
16 on sexual assault and efforts to eliminate this
17 problem from our ranks, this issue of counter-
18 intuitive behavior has been left on the
19 sidelines.

20 In my particular case, I believe the
21 command, if it had had some of this counter-
22 intuitive training, it would have been better

1 able to recognize that the situation that the
2 victim was dealing with was not because she was
3 disrespectful to authority or a difficult
4 leadership challenge, and the command may have
5 recognized and been able to be supportive, like
6 the vast majority of my other clients have felt
7 after coming forward. Finally, if you'd like to
8 learn more about this topic, I found an article
9 written by Patricia Fanflik, entitled "Victim
10 Responses to Sexual Assault, Counter-Intuitive or
11 Simply Adaptive?" I appreciate your time today,
12 and if you have any questions, I'm happy to
13 answer them.

14 CHAIR HOLTZMAN: Thank you very much.
15 Captain Lavine, welcome.

16 CPT LAVINE: Thank you, ma'am. Good
17 afternoon, Chairwoman Holtzman and Panel Members,
18 I'm Captain Lavine. I'm a United States Army
19 Special Victims' Counsel part time, out of
20 Grafenwoehr, Germany. I went through the
21 certification course that the Army had in
22 Charlottesville, Virginia, in August 2014. Mr.

1 Stone was there for a couple days, as was
2 Lieutenant Commander Toohey, so it's a small
3 world.

4 I didn't actually start seeing clients
5 until December 2014. Since that time, I've seen
6 nine total clients. Of those nine clients, at
7 least four of them have reported to me they've
8 faced or are currently facing some form of
9 retaliation. Just to give you sort of the gamut
10 of that, everything from anonymous Facebook
11 messages telling a male victim to, "man up and
12 take it," to actual threats, either to the victim
13 or the victim's family. As far as social
14 ostracism, that's something we've been talking
15 about. I did have a young female Soldier who
16 reported sexual assault by a Non-Commissioned
17 Officer.

18 In the small post where she was at,
19 there had been rampant rumors, negative comments
20 and everything directed towards her, both within
21 her own social circle and when she comes to work
22 having to hear these types of things. As far as

1 our current policy on how we address that, the
2 Army has its own directive, 2014-20, entitled
3 "Prohibition of Retaliation Against Soldiers for
4 Reporting a Criminal Offense." Basically the way
5 it works is if it's the chain of command that has
6 taken some kind of action against a Soldier, I
7 report that through the IG -- the Inspector
8 General's office.

9 If it's another Soldier taking some kind
10 of action against a reporting victim, or it could
11 be a civilian kind of taking that action, we
12 report it up through the chain of command or
13 through another appropriate agency. For example,
14 the threats can go right to CID or the Army
15 Criminal Investigative Command. As far as how
16 things have been handled, really I would just
17 focus -- for the actual threats, we're hoping
18 that those will resolve in some type of criminal
19 charges. For the anonymous comments, we still
20 brought those forward. Then again, with that
21 young female Soldier who had to deal with all
22 these rumors and the demeaning comments and

1 everything, went right to command said, "There's
2 a real issue throughout the command here. You
3 need to instruct the people on the Army
4 directive. We need to have some training," and
5 they did. About a month later, they had a SHARP
6 stand-down day, and they put out the message
7 about retaliation and why it's important to nip
8 that in the bud, why it's very detrimental to the
9 victims. So we were happy to hear that. The
10 victim was happy with that.

11 As far as recommendations go, obviously
12 the Army directive is a good first step. Kind of
13 like we've talked about, education is good, and
14 then training. Training your units so they can
15 recognize retaliation when it's happening, so
16 members will feel confident coming forward and
17 stopping it, and then going from there, they'll
18 take the appropriate action, whether it be a
19 criminal charge, whether it be training
20 everybody, as far as that goes. I think just
21 talking to the other Special Victims' Counsel
22 this morning, one of the keys here has to come

1 from the right level. It can't just be from a
2 senior sergeant. It can't just be from a troop
3 commander, like me, that was a captain or
4 something.

5 It really needs to come from a higher
6 level. Maybe that's a battalion commander level.
7 Maybe that's a garrison commander as we have in
8 the Army. It really has to come from that
9 higher-up level. As far as military criminal
10 justice, we do a good job at making sure that the
11 alleged perpetrator of these offenses is treated
12 innocent until proven guilty, but we don't always
13 set the stage for the victim. How are we going
14 to treat the victims?

15 I'd almost say the commanders almost
16 need to be a little bit pessimistic and say when
17 someone makes one of these allegations, expect
18 retaliation unless you set the right environment,
19 so people know retaliation's not going to be
20 tolerated, as far as that goes. I thank you for
21 your attention to this matter and speaking with
22 you today.

1 CHAIR HOLTZMAN: Thank you very much,
2 Captain. Captain Smith, welcome.

3 Capt SMITH: Thank you, ma'am. Good
4 afternoon, Madam Chairwoman and Members of the
5 Panel, I'm Captain Micah Smith. I'm the Special
6 Victims' Counsel at RAF Lakenheath in the United
7 Kingdom. I've been an SVC since the inception of
8 the program in January of 2013. I'll be moving
9 out of the job next month to be one of the law
10 clerks for our Court of Appeals.

11 Since January of 2013, I've had the
12 privilege of representing 54 survivors of sexual
13 assault. Of those 54, 11 reported some form of
14 retaliation, reprisal, ostracism, maltreatment,
15 and of those 11, eight made formal complaints
16 through the chain of command, the Air Force, or
17 other DoD Agencies, or to a member of Congress.

18 To start, the comments I have today are
19 my own. They're not necessarily the views of my
20 clients or the SVC program or anything like that.
21 They're about the experiences that I've had. I
22 think it's also important to say up front that

1 the majority of my clients have not experienced
2 any retaliation. Most of the time, retaliation
3 just wasn't an issue. When it did come up, most
4 of the time it was handled effectively and
5 swiftly through the chain of command, but that's
6 not to say that retaliation doesn't happen, or
7 that every leader responds appropriately every
8 time. So when retaliation did happen, the SVC
9 program was an essential part of that response.

10 To illustrate that, I'd like to provide
11 a real-world example for you. Last month, you
12 heard from Staff Sergeant N.L., who recounted
13 some of his difficulties he faced after reporting
14 a sexual assault that some of his fellow Airmen
15 considered a part of their tradition. He was
16 excluded from professional and social events. He
17 missed out on professional opportunities and
18 generally made to feel like he wasn't a part of
19 the team.

20 For him, the most important way to
21 address that retaliation was to get out of his
22 particular career field. Unfortunately, he was

1 in what we call a critically manned career field,
2 which basically means you're not allowed to
3 retrain. You are stuck in that, unless you want
4 to get out of the Air Force. As his SVC, I began
5 working with his chain of command to try to make
6 some small changes in his environment, work
7 schedules, that kind of thing, to get him away
8 from it. We looked at an expedited transfer to
9 move him to a new base, but because his career
10 field's pretty small, he would have been going to
11 the same base with other people that he'd already
12 worked with.

13 So we took a step further, actually on
14 the recommendation of another SVC, contacted our
15 Air Force personnel center. Eventually, wound my
16 way through to the enlisted retraining policy
17 office, who informed that there's an exception to
18 policy for everything. We got an exception to
19 policy request put together, justified it, gave
20 it to the chain of command, and the chain of
21 command was phenomenally supportive.

22 They pushed that all the way up through.

1 Happy to say that as of this month, he's being
2 retrained out of his career field, which was a
3 phenomenal win for him. That's just one small
4 example of how an SVC can respond to it. Like a
5 lot of my colleagues here, the SVC does help with
6 retaliation concerns. It could be as simple as
7 attending interviews with them when they go to
8 report the retaliation to a chain of command or
9 to the IG. It's reviewing those things to make
10 sure what they're going to say about retaliation
11 isn't going to negatively impact the actual
12 underlying sexual assault case. No system is
13 perfect, and there are times where I wish I would
14 have pushed the envelope harder for them when
15 they're having a difficult situation, things that
16 in hindsight, I wish I could've done better.

17 There are also times where I think that
18 the system we have to respond to retaliation kind
19 of let them down. Some examples of that, it's
20 been my experience that the IG program that we
21 currently have is not set up to handle
22 retaliation as I've seen it, clients who want to

1 file IG complaints, but were turned away because
2 their complaints fall outside the scope of the IG
3 program.

4 Most commonly, that's when there are
5 concerns about peer retaliation, as opposed to
6 formal personnel action. Another difficulty in
7 responding is the current regulations that we
8 have that define retaliation, ostracism,
9 maltreatment, require the retaliator to have a
10 specific intent of discouraging reporting or the
11 due administration of justice. That makes it
12 difficult, especially in Staff Sergeant N.L.'s
13 case, where he'd already reported, criminal
14 justice process had already run its course, so it
15 was very difficult to go back and say that there
16 was any sort of specific intent, so it made it
17 difficult for his report.

18 Also, just his whole retraining
19 situation makes it clear to me that we need an
20 expedited process for that, but once I got in
21 touch with the retraining policy office, they
22 were very, very helpful, but it took me, a lawyer

1 who works in the field of victim rights, almost a
2 year to even find that program and put together a
3 process.

4 It's my understanding that there are
5 efforts now to implement a process like that, and
6 I would encourage that. I think that's a great
7 program. Just in conclusion, I recognize that
8 retaliation, like sexual assault, doesn't have
9 easy answers. I'm grateful for the opportunity
10 to come here today and talk to you about some of
11 the experiences that I've had, and I look forward
12 to answering any questions that you may have.

13 CHAIR HOLTZMAN: Thank you very much.

14 Major Higgins, welcome.

15 Maj HIGGINS: Good afternoon, Madam
16 Chair and distinguished Panel. I'm honored to
17 have this opportunity today to address the Panel
18 on the topic of retaliation. Specifically, I'm
19 going to address three instances of retaliation.

20 Two involve Marines victims of sexual
21 assault, and then I'd like to share an experience
22 that I personally had as a VLC, while

1 representing a minor dependent of a victim of
2 sexual assault, in which I was taken into
3 custody, questioned, and investigated by NCIS in
4 the course of representing a victim. All three
5 incidents occurred while I was assigned as a
6 regional Victims' Legal Counsel in Okinawa,
7 Japan.

8 In doing so, I'll highlight some of the
9 systemic challenges with implementing the VLC
10 program and also preventing retaliation. Since 1
11 November, 2013, the Marines have assisted more
12 than 1,100 victims of crime at various locations
13 across the world, 255 of those have been assisted
14 in the Pacific, and 60 of those clients I
15 personally assisted. I've been in my current
16 position since we started this program on 1
17 November, 2013. The senior Marines leadership,
18 to include the Commandant of the Marine Corps and
19 the Staff Judge Advocate to the Commandant and
20 his staff have been, overall, unyielding
21 supportive to our program and our staff. They've
22 afforded us the necessary autonomy to do our jobs

1 and represent our clients.

2 Notwithstanding the Marine Corps'
3 efforts in improving victim support and
4 representation, confusion, misunderstanding still
5 remain on the part of the commands and law
6 enforcement in recognizing and understanding the
7 attorney/client relationship that we have with
8 our clients. Unfortunately, instances still
9 occur where the victim or victim counsel
10 experience alienation, ostracism, undue
11 punishment, threats and harassment, just to name
12 a few.

13 The first instance of retaliation I'll
14 describe involved a male victim of sexual
15 assault. Just last month, the Panel heard from
16 Lance Corporal J.J., who was my client, who
17 testified at this very venue. I won't repeat his
18 story because you heard it, but as you remember,
19 he had never been accused of a crime before and
20 was an honor grad of his Marine Corps training
21 class. But he told the story of how he'd been
22 ostracized and retaliated against. He became

1 withdrawn, depressed, and had to seek medical
2 assistance. He referred himself to treatment for
3 alcohol abuse and suicidal ideations.

4 But for almost six months between August
5 of 2014 and February of this year, he was not
6 permitted to leave the base, taunted about his
7 sexuality by his senior enlisted leadership,
8 separated from his friends by no-contact orders
9 that were placed on him by his command. In that
10 process, he was also subjected to administrative
11 separation. He received a series of NJPs --
12 three of them, actually, in a period of two
13 weeks, and that sent him from a rank of corporal
14 E4 to a private.

15 It was during this time that the
16 Sergeant Major was doing things like inducing him
17 to plead guilty at those NJPs, making promises to
18 him to get him to do that, and then also inducing
19 others to levy testimony against him. When I
20 requested to set aside the NJPs under the
21 provisions of Article 15 of the UCMJ, I submitted
22 my request as a retaliation complaint. The

1 problem is that there's no real procedural
2 guidance with respect to the retaliation
3 complaint, so I forwarded it to his next superior
4 Commanding Officer. If it were not for the Staff
5 Judge Advocate assigned to the unit, who was
6 assisting me, Lance Corporal J.J. would not have
7 been re-instated.

8 However, the lack of any clearly defined
9 process means that our complaints could fall into
10 a black hole. That's because we are often
11 submitting the complaint to the very command that
12 may be allowing the retaliation in the first
13 place. While I received a letter from the
14 Commanding Officer addressing the fact that he
15 set aside two of the three NJPs, my request for
16 an investigation into the retaliation was never
17 addressed.

18 To date, I'm not aware of any
19 investigation initiated or any action for the
20 retaliation itself, per our SECNAV Instruction
21 5370.7(d). After several months of waiting,
22 Lance Corporal J.J., in June 2015, finally

1 received his back pay and had his E3 pay restored
2 just this month. The second instance of
3 retaliation involved a female Marine victim of
4 domestic sexual assault. This particular client
5 was an officer, married to another senior
6 Servicemember whose military specialty was in law
7 enforcement. When she reported her spouse for
8 sexual assault and other abuse, the spouse
9 retaliated by launching a campaign of character
10 assassination against her.

11 This retaliation included frivolous
12 counter-allegations, unfounded complaints
13 circulated by him through her command, stale
14 allegations of child abuse, and it just resulted
15 in serious ongoing harassment by others within
16 her command. By itself, this abuse might have
17 been bearable, except the accused was able to
18 convince law enforcement to open an investigation
19 against the victim for counter-allegations of
20 sexual assault.

21 These complaints were outside of the
22 statute of limitations and later dismissed as

1 false, but not until a full custodial detention,
2 fingerprints, DNA, mugshots, etc. Interrogation
3 and investigation was conducted on my client, the
4 victim. This resulted, also, in family advocacy
5 labeling her as a suspect and stripping her of
6 her victim advocate and victim services under the
7 FAP program. Those were never restored. My
8 client's command took actions tending to
9 demonstrate support for her spouse, in an effort
10 to discourage her participation. Some of those
11 were first, they categorized her case as he
12 said/she said, and yet these are the very cases
13 that usually occur in the privacy of one's home,
14 where there are no witnesses.

15 Second, shortly after her report of
16 sexual assault, the command counseled her on
17 obvious domestic responsibilities. They
18 counseled her in writing. They counseled her on
19 things such as providing support for her spouse.
20 They warned her about making false official
21 statements and other things that are -- in fact,
22 my client was actually pending divorce for two

1 years prior to the counseling.

2 As a result, she was subjected to
3 repeated interrogations, detention, scrutiny and
4 harassment by law enforcement and the advocacy
5 and members of her command. Finally, and
6 concurrently, the investigation initiated as a
7 result of her spouse's claim of sexual assault
8 against her was actually taking place. However,
9 her command and the spouse's command eventually
10 dismissed it as a false allegation. There were
11 several other incidents that occurred against
12 this particular client. In response to these
13 actions, I decided to submit a letter to my
14 client's Commanding Officer requesting that all
15 collateral matters be set aside until the
16 disposition of the accused's case.

17 It was at this time that I was summoned
18 into my client's leadership and told that I was
19 wasting my time preaching and that my written
20 request for relief was too long. Although I felt
21 somewhat berated, the commanding general did take
22 interest in the matter, and my request was

1 approved, assigning my client a victim advocate
2 from the SAPR program, but not the FAP program,
3 to assist us.

4 That is even though it does not fall
5 under the purview of the domestic case, he
6 essentially assigned one of his majors, who was a
7 trained victim advocate, to be her victim
8 advocate. This victim advocate was extremely
9 helpful, as she was well respected, pretty savvy,
10 and a credible advocate with a wealth of military
11 experience. The problem with domestic assault
12 cases involving active-duty Servicemembers is
13 that the SAPR program does not ordinarily get
14 involved. All domestic cases are deferred to the
15 Family Advocacy Program. In this case, the
16 concern is our family advocacy representatives
17 felt this situation was too complicated, and
18 while they did not want to provide services, they
19 conducted a board and made an independent
20 determination as to whether allegations, against
21 my client, of abuse were substantiated or not.

22 Further, while an active-duty

1 Servicemember, my client was not entitled to an
2 expedited transfer because FAP does not initiate
3 those transfers. As the situation degenerated,
4 my client became more and more distressed, with
5 no escape. With no right to an expedited
6 transfer, she could not transfer. Instead, she
7 would have to wait until a permanent change of
8 station.

9 To date, my client did execute PCS
10 orders. She is now re-assigned to another
11 command, back in the States. As for the case
12 against her spouse, it's pending with the trial
13 counsel for charging. Last, I will describe my
14 own experience with retaliation against my client
15 from NCIS and myself. My experience with what I
16 believe to be retaliation against my client and
17 me, which occurred while I was representing a
18 client, in short, I was accused by NCIS of
19 obstructing justice, that they believed that I
20 had my client delete images from her electronic
21 devices, to include a cell phone and an iPad.

22 The client and both her parents verified

1 that I, in fact, instructed them not to remove
2 anything from the devices until we could meet
3 with NCIS and determine if there was anything
4 else that they needed from the devices.

5 Nonetheless, on 2 March, 2015, I was detained,
6 read my rights, interrogated, fingerprinted, and
7 had my DNA and booking photos taken.

8 The details leading up to my account are
9 as follows. I received a call on Saturday
10 morning in February by the command SARC to assist
11 with a victim. A Marine Corps Criminal
12 Investigative Division agent was the lead in an
13 unrelated theft investigation in which my client
14 was a witness. One week prior to my involvement
15 as a VLC, and as a part of this theft
16 investigation, CID seized a copy of her
17 electronic devices in search of the evidence
18 related to the theft. They returned the devices
19 back to her immediately after they copied them.
20 However, in a few days, when CID inadvertently
21 discovered evidence on my client's cell phone
22 indicating that she had possibly been sexually

1 victimized, they immediately contacted NCIS who,
2 in turn, contacted her parents.

3 Before meeting with NCIS, the military
4 higher-ups, senior in rank, first sought VLC
5 assistance and arranged to meet with me that
6 Saturday morning. There was some reluctance on
7 my client's behalf as to whether she wanted to
8 report these sexual-related events; therefore, it
9 was important for her to meet with VLC. After I
10 became involved with the case, I arranged a
11 meeting with the NCIS myself.

12 The agent indicated that he was not
13 concerned about evidence preservation in this
14 case, as they had already copied the phone. The
15 iPad was an exact copy of her phone. However,
16 the family was told by NCIS that they could not
17 keep the devices because they contained images
18 that were considered contraband. I inquired with
19 the assigned agent about the possibility of
20 deleting the contraband, in order to permit them
21 to keep at least one of the devices contraband
22 free. Their main concern was that her schoolwork

1 was on her iPad. The agent indicated that the
2 contraband would still be embedded in the memory,
3 retrievable, and would have to be forensically
4 deleted. When I first met with the client and
5 her parents on Saturday, I informed the client of
6 these discussions.

7 While we, the victim and her parents and
8 the SARC discussed all options, including
9 deleting the contraband images from their
10 personal devices, my advice, and our final
11 decision, was to keep the devices locked away,
12 untouched and intact, until speaking with NCIS on
13 Monday afternoon. Thereafter, I made a number of
14 attempts to reach NCIS, but was unable to do so.

15 However, on that Saturday, same
16 Saturday, when my client and her parents returned
17 home, my client contacted me because NCIS,
18 without prior notice to the victim and her family
19 and counsel, were waiting outside her home to
20 retrieve the devices. I advised the clients to
21 surrender the devices, and they did so
22 immediately, with everything intact, as

1 previously discussed. At that point, to my
2 knowledge, nothing had been deleted. The
3 following Monday morning, we arrived at NCIS,
4 where I was separated from my client and taken
5 into custody. While NCIS attempted to get a
6 statement from my client, I was being
7 interrogated for accusations of obstructing
8 justice, tampering with, falsifying evidence, and
9 destroying evidence.

10 This is despite the fact that the same
11 day NCIS confirmed with the client and her
12 parents that I did not advise anyone to delete
13 anything, and NCIS had the devices since
14 Saturday, for two days, as a result of my
15 assistance. My client was also treated as if her
16 right to VLC didn't matter, and her statutory and
17 constitutional rights were completely
18 disregarded.

19 Even had her devices contained
20 contraband, the agents were attempting to ask her
21 incriminating questions without her parents or
22 attorney present, and without her waiving that

1 right. According to the installation SARC, who
2 was present, NCIS subjected her to repeated
3 questioning in an attempt to convince her to
4 change her mind and make a statement about sexual
5 assault and the contraband. She declined. The
6 next day, Tuesday, we started anew with NCIS, in
7 hopes that the issue was dropped. It was not.
8 The agent still insisted that I was a suspect and
9 denied my client's right to allow me to accompany
10 her to the interview where she signed a victim
11 preference statement.

12 Since that day, the agents have
13 communicated with her directly, and her parents,
14 disregarding her legal representation altogether.
15 This is clear violation of my client's right to
16 VLC and her parents' desire for me to represent
17 her. While the NCIS investigation against me was
18 completed on or about 19 March, 2015, their
19 actions not only affected me personally and
20 professionally, but my ability to effectively
21 represent my client and their interest.

22 First, their attempts to interview other

1 VLCs within my supervisory chain about my advice
2 to them and their clients had a shocking effect
3 on the VLCs and paralegal under my charge. They
4 did interview my attorneys and my paralegal, as
5 well. They refused to acknowledge
6 confidentiality among VLCs and with any
7 client/attorney relationship. Secondly, worry
8 about the investigation against me ran rampant
9 among the military justice community. Thus,
10 defense counsel began submitting motions in
11 unrelated cases involving other clients of mine
12 that had electronic devices that were tampered
13 with and evidence was destroyed. In fact, the
14 military judge's finding of facts and conclusion
15 of law in one case affirmed that no such advice
16 was given.

17 Further, the most devastating to my
18 career was the week after NCIS completed its
19 investigation, in an article that was released by
20 Hope Hodge in the "Marine Times" on 24 March,
21 2015, exposing my rank, full name, and billet
22 description as VLC for all to see.

1 The article titled, "NCIS Investigates
2 Lawyer in Japan on Obstruction Claim," it lacked
3 any details, was completely inaccurate, and
4 relied on an anonymous Marines official as her
5 source, but made sure to destroy my reputation
6 and that of the organization. Further, the
7 article stated that NCIS confirmed the existence
8 of an investigation, but they could not comment
9 as the probe was still ongoing. This article
10 seemed to perpetuate the retaliation even more,
11 and yet the investigation was completed. Lastly,
12 there were at least eight NCIS agents working on
13 the case against me. I was eventually cleared of
14 all allegations by my superior commander, in that
15 there was no probable cause, no evidence to
16 support the allegation and, therefore, no
17 misconduct, but the damage to my reputation as a
18 Marine Corps Officer and Judge Advocate had
19 already been done.

20 When I reached out to Hope Hodge to
21 clear my name from her article, she never
22 responded to this day. NCIS actions towards me

1 and my client illustrate their lack of
2 institutional understanding of victims' rights
3 and the statutory rights that a victim has to a
4 client/attorney relationship with their VLC.

5 When NCIS separated me from my client
6 and continued to question my client, they
7 violated the attorney/client relationship.
8 Further, when they tried to question my
9 subordinates as to my communication with them and
10 my client, they again failed to appreciate the
11 autonomous relationship that we have as an
12 organization and the confidentiality that comes
13 along with these relationships and organization.
14 I have heard investigative agents question why we
15 have to have sidebar conversations with our
16 clients. This, again, goes to show that they do
17 not understand, do not appreciate the
18 client/attorney relationship between the victim
19 and their attorney. As we know, per the NDAA
20 FY13, NCIS is a member of the special victims'
21 capability team.

22 Therefore, by now they should have

1 incorporated all of these statutory changes into
2 the SOP. I further believe that they fail to
3 appreciate what constitutes retaliation. These
4 are just a few examples of retaliation and
5 ostracism. As we can see from these examples,
6 the victim retaliation can be subtle or blatant,
7 and when practiced unchecked, serves to
8 discourage reporting and re-victimizes or
9 unnecessarily casts the victim in a less-than-
10 sympathetic light, or even ruin careers.

11 We need more defined procedural guidance
12 for commanders who receive retaliation
13 complaints, to include proper documentation that
14 the matter has been investigated or handled to
15 some degree of fairness. Secondly, there's a
16 disparity of services provided between active-
17 duty victims of sexual assault and those active-
18 duty victims of domestic assault in domestic
19 assault matters. Domestic cases are common in
20 the military and, therefore, those victims in
21 those cases need heightened protection from
22 retaliation. In my client's case against her

1 husband, she was an active-duty Servicemember.

2 Lastly, I probably would not have shared
3 my story with you regarding NCIS if the
4 retaliation hadn't occurred in the course of my
5 representation of the client. Players in this
6 process need to be extensively educated about the
7 role between the client and VLC involving sexual
8 assault cases. They also need to be educated
9 about the victimology and how these victims can
10 be re-victimized from the retaliation, as well.

11 Our leaders and the law enforcement
12 community must come to appreciate retaliation at
13 all levels and understand how their actions can
14 be based on stereotypes and ignorance concerning
15 victimization. SAPR training is not the end-all
16 answer. The issue is much more cerebral than
17 just, "say no," or "no means no." In closing,
18 thank you for this opportunity to speak with you.
19 I look forward to your questions.

20 CHAIR HOLTZMAN: Thank you very much,
21 Major Higgins. Start with you, Mr. Stone.

22 MR. STONE: I guess I'm really upset by

1 the last testimony we just heard. Was there an
2 OIG investigation of NCIS for what they did, do
3 you know?

4 Maj HIGGINS: No, sir, I've been FOIAing
5 and requesting, via Privacy Act, a copy of the
6 investigation, but NCIS still has it open, so I
7 can't really articulate fully, without actually
8 seeing what was actually reported by NCIS, so I
9 have not submitted a complaint. I do know that
10 the SARC from -- the installation SARC, she
11 actually did submit a complaint, but I don't know
12 what happened to it. I think it was pushed to
13 MCICOM for action.

14 MR. STONE: Have any of your superiors
15 asked for an OIG investigation or an explanation
16 from NCIS why they would separate you from a
17 client, or would not provide the client with a
18 different SVC?

19 Maj HIGGINS: Yes, sir. I know that
20 they've been in communication about it, and there
21 is apparently a learning point that's been
22 expressed by NCIS about this incident. I know

1 that they're trying to take action to make sure
2 that it doesn't happen again.

3 MR. STONE: Because this goes beyond
4 intimidation of a victim. This goes to
5 intimidation of a victim's counsel, and I find
6 that completely unacceptable. I will hope that
7 if there is a report of this incident that it be
8 forwarded to us because otherwise, your
9 testimony's going to stand here as an example of
10 the fact that NCIS operating on Marines
11 complaints is doing a horrible job of recognizing
12 and respecting the rights of victims and victims'
13 counsel.

14 I hope any of those representatives in
15 the audience take action to see that we get some
16 kind of an explanation of what happened here.
17 You mentioned NJPs, is it? What is that?

18 Maj HIGGINS: Oh, non-judicial
19 punishment, sir.

20 (Simultaneous speaking.)

21 MR. STONE: Non-judicial punishment.
22 Okay, that's the NJPs, okay. I guess I didn't

1 understand -- you said that no action was taken
2 upon complaints about retaliation regarding the
3 J.J. situation. Was there, to date, any
4 explanation of that, either?

5 Maj HIGGINS: No, sir. We did receive,
6 I guess, a letter explaining what was going to
7 happen, in terms of trying to restore him back to
8 where he -- as much as they could to where he was
9 in rank and pay. At that point, my client was
10 satisfied with the result. He was getting ready
11 to -- they were no longer administratively
12 separating him, and they were getting ready to
13 PCS him to his new duty station. I guess from
14 the excitement of that, we kind of dropped the
15 issue.

16 MR. STONE: Where does that letter come
17 from? Who signed it? Does it come from the
18 Commanding Officer? Does it come from the legal
19 side? Where does it come from?

20 Maj HIGGINS: It came from the next
21 superior Commanding Officer. His battalion
22 commander, we skipped him and went to the next --

1 the group commander. That's where we got our
2 letter back from.

3 MR. STONE: Doesn't the Judge Advocate
4 in charge of that location have a responsibility
5 to respond to those when a complaint is made like
6 that?

7 Maj HIGGINS: I submitted the complaint
8 via the SJA. That's where I really got my
9 traction, sir, is through the SJA. Like I said
10 about the order, it doesn't really say who's
11 supposed to do what. I think that they were, and
12 rightfully so, thinking that we just wanted some
13 results here for the Marine. The investigation
14 revealed that they took too much rank and did too
15 much, so I guess that was, for the command, some
16 satisfaction for us, as well.

17 MR. STONE: This is generally to the
18 panel. Correct me if I'm wrong, but I assume all
19 these complaints that you each reported, in terms
20 of a number, and then how many retaliation
21 complaints, are all unrestricted reports, and
22 none of these are restricted reports, am I right?

1 (Simultaneous speaking.)

2 MR. STONE: Okay, so there may be
3 restricted reports that result in retaliation,
4 but those you can't account for because those
5 wouldn't get to you, I gather, correct?

6 LTC WUNDER: They would still come to
7 us. Those would be in the reports. It may not
8 be retaliation for a sexual assault report, but
9 the victim could still have feelings of being
10 ostracized or of harassment based on, maybe, her
11 response. If she or he is having a difficult
12 time emotionally dealing with the assault, and
13 that affects their performance or their standing
14 within their unit, they may feel like it's
15 retaliation not because they made a report, but
16 because they are responding to the effects of the
17 assault.

18 MR. STONE: How would you count that in
19 your numbers? Would that be counted in your
20 numbers or just --

21 LTC WUNDER: I personally have not had
22 a restricted client report to me retaliation, but

1 I don't want you to have the impression that it's
2 not possible. It wouldn't be a retaliation claim
3 under, at least, the Coast Guard's policy of
4 prohibited retaliation, where it would be
5 actionable under the existing policy, but it
6 still would be a form of retaliation, more due to
7 the effects of the assault, as opposed to the
8 report, itself, if that makes sense.

9 MR. STONE: How would we capture that
10 number, then? Would you be capturing it
11 anywhere, or it wouldn't be captured because it
12 wasn't in response to a sexual assault?

13 LTC WUNDER: It wouldn't be captured in
14 a number, as a statistic.

15 MR. STONE: That's what I wanted to
16 know. You mentioned that there was at least one
17 situation still unresolved that resulted in --
18 sounded like a civil rights case. Is that right?

19 LTC WUNDER: Yes, sir.

20 MR. STONE: Is that a public case? Is
21 that a publicly filed case in a federal court?

22 LTC WUNDER: No, it is not. It was

1 resolved at an informal level.

2 MR. STONE: So it's not like there's a
3 public report of it, a civil rights report?

4 LTC WUNDER: That's correct.

5 MR. STONE: Do you know if a complaint
6 in the federal court was ever filed?

7 LTC WUNDER: No, there was not one.

8 MR. STONE: I guess one of the concerns
9 I have, and I guess I'd like anybody's reaction
10 on this panel, is although I hear -- and Captain
11 Smith mentioned a situation where a person, after
12 a year of complaints, was finally retrained --
13 set into motion retraining and a transfer, and
14 several others of you have spoken about the
15 number of people who needed to be transferred --
16 as you may know from the background materials, I
17 spent a lot of time as counsel to the federal
18 witness security program.

19 Contrary to what people think, taking a
20 person and moving them to a different location
21 and a different job, and maybe even different --
22 to start over with friends, and if they have

1 kids, a new school, and maybe a new church and
2 whatever, is not actually as much fun as the
3 movies portray it as. In fact, most of those
4 people find it so discouraging that on average,
5 after five years, they want out of that
6 situation, even if those people are facing
7 serious threat to harm.

8 So hearing that all these people get
9 expedited transfers or retraining, when that's
10 not the job they chose, but it's just the least
11 worst option, and they wind up going to a
12 location they didn't choose, and they get a new
13 situation that may or may not follow them with
14 rumors, it may be the least worst option, but I
15 don't really find it to be what we want to
16 happen. I guess one of the questions I have that
17 strikes me, and I'd like each of you to mention
18 it, if you would, among the people that you had
19 get those expedited transfers, how many have
20 opted out of the military at the first
21 opportunity they had? How many have left, and
22 how many have stayed? I presume quite a few of

1 them, then, have then left. Maybe you can tell
2 me what you know about how they feel about the
3 military afterwards.

4 LCDR TOOHEY: At this point, none of the
5 clients who have executed expedited transfers
6 that were my clients have reached the point where
7 they would be at the end of their enlistment, so
8 I can't answer that part of the question. I
9 would say, though, that I think this is really
10 the crux of the issue, in terms of the social
11 retaliation piece.

12 Because in my experience -- and in
13 talking to some of my colleagues, I think it goes
14 for them as well -- the victims who have gotten
15 the most in terms of support and care and not
16 having issues of ostracism and other social
17 retaliation are those who are in a different
18 command from the accused originally. So there's
19 not an issue because both people aren't at the
20 same command. Really, the crux of the issue --
21 and my one comment about seriously considering
22 the temporary transfer of the accused -- that's

1 an option for a commanding officer when an
2 assault happens. They can move someone
3 temporarily out of the command. Now the problem
4 is for the accused, they'd be doing it usually
5 against their will, and they'd normally do that
6 for a number of reasons.

7 One is they don't want to engage in
8 potential pre-trial punishment. They don't want
9 to pre-judge the case that they may have to later
10 on convene an authority. They also don't want to
11 lose a body temporarily that they're not going to
12 be able to replace. But when you do that, when
13 you see that done -- and I have seen that done in
14 cases where I haven't even asked for it because
15 the command just took that action initially --
16 victims do better, even though they don't
17 necessarily think they're going to.

18 And what I mean by that is in cases
19 where I have an individual who is having these
20 social retaliation issues. I say, "Do you think
21 this problem would be solved if we just move the
22 accused?" The answer is usually no because it's

1 not just him. It's everybody. But really, what
2 happens when you move the accused is that
3 everything gets better. Obviously, if the case
4 is never prosecuted, that person has to come back
5 eventually, but it's six months down the road,
6 and things may be at a point where she can now,
7 or he can now continue in the command. That
8 victim can continue in the command, even if that
9 other person comes back, if it's a big enough
10 command, where they can potentially be separated,
11 or they can do an expedited transfer at that
12 point.

13 But I think, Mr. Stone, that you really
14 -- the crux that I've seen is when they're both
15 at the same command, is it, how do we manage them
16 both at the same command going forward, without
17 disrupting either career, particularly the
18 victim's career? Because an expedited transfer
19 is an option, but it's not always the perfect
20 option, as you mentioned.

21 LTC WUNDER: Sir, I can think of two of
22 my clients who executed expedited transfers, and

1 then were subsequently separated from the
2 Service. One was medical, and the other one was
3 administrative.

4 MR. STONE: Was that by their choice, or
5 it wasn't by their choice?

6 LTC WUNDER: Both of them accepted their
7 separation, so they didn't -- they could have
8 availed themselves of more due process and chose
9 not to. They were fine with leaving the Service.

10 MR. STONE: But they didn't put in the
11 papers, themselves?

12 LTC WUNDER: Correct. That being said,
13 I think I can speak for my brethren here that the
14 military is set up so that you rotate every so
15 often, so moving to a different location and
16 uprooting yourself, while it could be traumatic
17 and it's disruptive to your family and yourself,
18 it is also a part of the culture that we are in,
19 so it isn't maybe the same as similar context in
20 the civilian world, where that same situation is
21 not a part of the culture.

22 MR. STONE: Do you think, then, that

1 maybe we should recommend making wider avail of
2 moving the accused, since people move every two
3 years, and maybe have the trial at his new base,
4 at his new location, instead of where everybody
5 locally gets to hear every detail?

6 LTC WUNDER: Yes, but in addition to
7 that, I think more weight should be given to the
8 victim, or the victim should be consulted to
9 decide whether or not the victim would rather
10 move, or if she would or he would have the
11 subject moved.

12 Because some victims would rather pick
13 up and go to another location, where they can
14 start fresh, as opposed to have to stay in the
15 situation where there may be rumors or bad
16 feelings or whatever it is. If you just say
17 we're just going to move the accused, it may not
18 fit in every situation.

19 MR. STONE: I guess since that was
20 brought up by Commander Toohey, let me ask him.
21 It occurs to me, do you think that that moving of
22 the accused actually is a shot across the bow and

1 cuts down on retaliation because the other people
2 who may be sympathetic to the accused realize if
3 they take some obnoxious actions that amount to
4 retaliation, they too could be at least
5 temporarily removed to a different base, which is
6 going to disrupt their career, and they ought to
7 just not get involved in this issue?

8 LCDR TOOHEY: No, sir, and the reason
9 why -- I'm not advocating that the accused be
10 moved permanently, and certainly not as
11 punishment. He or she can only be moved if it's
12 a remedy for a prejudicial discipline
13 essentially, so that the commanding officer says
14 there's a problem here, and I think removing him
15 is going to be a temporary solution to that
16 problem, or her, not a permanent transfer, and
17 with due accord for all of the rights that that
18 person would have as the investigation continues,
19 and as, potentially, a court-martial begins or
20 charges are preferred.

21 I'm not saying that -- and I think the
22 key is that, as Lieutenant Commander Wunder said,

1 the expedited transfer, very frequently, is --
2 there's a significant change that you notice in
3 certain victims when they move to a new location
4 and they get a fresh start.

5 It really is the best thing for them at
6 that time. It has to be if they want to execute
7 that, that's a lot of times the right option.
8 Sometimes I think that commanders don't always
9 seriously consider the option of a temporary
10 transfer of the accused under certain
11 circumstances, when it might be the right answer.
12 But I'm not certainly advocating for a permanent
13 transfer of the accused, involuntarily, or any
14 other type of pre-trial punishment because I
15 think that's going to adversely affect the
16 process.

17 MR. STONE: That's pre-trial. What
18 about later? What if it's reduced to non-
19 judicial punishment? Do you think one of the
20 options ought to be transfer of the accused?
21 Would you like to see victim's counsel be able to
22 ask for it, if that's what the victim would like?

1 Victim wants to stay in their position, their
2 specialty, their family is there, but they think
3 as a condition of non-judicial punishment, the
4 aggressor -- the defendant ought to be
5 reassigned?

6 LCDR TOOHEY: All I can say -- this is
7 something that I would just say that I think that
8 at that point, you'd probably be sending the
9 message that he's being punished and
10 involuntarily transferred, even though the case
11 is not being prosecuted. I think that's going to
12 maybe make people lose a little bit of -- it's
13 going to make the system lose a little bit of
14 credibility.

15 MR. STONE: Isn't non-judicial
16 punishment an admission of guilt? Isn't there an
17 admission of guilt to non-judicial punishment?

18 LCDR TOOHEY: If there's a non-judicial
19 punishment and there's a finding of guilt, you
20 mean, make the person move?

21 MR. STONE: No, not make them, but make
22 it an option of the Special Victims' Counsel to

1 ask for it, instead of their only option being to
2 ask to try and get the victim moved over time.

3 LCDR TOOHEY: I can certainly -- in
4 terms of the intricacies of the detailing and the
5 personnel piece that would be involved in that --
6 maybe someone else can answer that a little
7 better than I can. I'm not even sure --
8 certainly, we can always ask for something like
9 that to be done. The exact procedure for that to
10 be done or whether that's -- I'm not exactly sure
11 I'm prepared to answer that question right now,
12 sir.

13 MR. STONE: I'm mostly talking about
14 whether you think there would be some useful tool
15 to have in your arsenal. Captain Smith, I
16 thought you might have wanted to say something.

17 Capt SMITH: Yes, sir. I think keeping
18 the moving as an administrative piece, not as a
19 punishment piece, is important. But I think when
20 I have a client who wants to do an expedited
21 transfer, we talk about what if we move the
22 accused instead of you?

1 I have had that situation, where we go
2 to the command, and we say, "Sir/Ma'am, this
3 situation is not working. Instead of my client
4 moving under the expedited transfer, we'd like
5 you to actually move the accused." That
6 situation played out where the commander then
7 went to the accused and his defense counsel and
8 basically said I'm considering doing this.
9 Please give me your input. Do you want to move?
10 Do you not want to move? In that case, the
11 accused did not want to move.

12 The commander decided not to move a duty
13 location, but did switch up the work schedules
14 and actually, in our situation, moved to a whole
15 different squadron -- same base, but different
16 squadron, so really, interactions ceased at that
17 point.

18 MR. STONE: Anybody else have a --

19 Maj HIGGINS: The Marine Corps has no
20 problem moving the accused. We frequently --
21 it's called 50/50 percent, in terms of whether
22 the accused moves or the victim moves. If the

1 victim expresses a concern about moving, and they
2 don't really want to move, then the commands will
3 certainly consider moving the accused, instead.
4 It's a matter of good order and discipline and
5 safety for the victim, as well. I see it about
6 50 percent of the time the accused moves, and 50
7 percent of the time, the victim moves.

8 MR. STONE: One other question I have
9 that -- just so I'm sure I understand. There was
10 a comment about when you report retaliation and
11 what is obligated to go up the chain. That was
12 sort of like when somebody reports it. I guess
13 the question I have is, as a member of the bar,
14 one of my ethical rules is that I'm obligated to
15 report unprofessional conduct when I see it.

16 If I don't report it, there will be an
17 issue taken with my conduct that I stood by
18 silently and saw another member of the bar act in
19 an unprofessional manner, swear to something that
20 wasn't true, hide evidence, whatever it is. But
21 there's an obligation on me, as an individual, to
22 report improper conduct, even if it's not by me

1 or done to me. I guess the question I have is,
2 is there any obligation on Servicemembers in any
3 of the branches, by regulation, when they see
4 retaliation, to report it, or if they don't, when
5 it does come out, to wind up with a negative
6 comment in their personnel review or their annual
7 military evaluation that they stood by silently
8 when they should have reported that a person was
9 being subject to retaliation, so that it can
10 actually be addressed? Is there any kind of an
11 obligation on them in any of the branches?

12 Maj HIGGINS: It's the same as the MAR
13 rules. If you know that -- at least for the
14 Marine Corps, we just had an update to our rules.
15 If you know that someone else committed
16 misconduct or failed to exercise their
17 professional responsibility, then you must report
18 it, but you have to know.

19 MR. STONE: Have any of you ever seen
20 any action like that taken against any individual
21 who stood by while the retaliation was going on?

22 Maj HIGGINS: No, sir.

1 LCDR TOOHEY: Are you referring to just
2 lawyers, or just Servicemen in general, or --

3 MR. STONE: I'm talking about all
4 Servicemembers is what I really want to know. In
5 other words, if something's going on in the
6 barracks that's really outrageous, you see that a
7 particular Serviceperson keeps getting retaliated
8 and harassed in a particular way, that they're
9 being isolated or they're getting anonymous
10 messages that are designed to -- calling them
11 names, designed to harass and intimidate them, if
12 there's an obligation on the other people in that
13 unit to report it, or if they can all just stand
14 by silently and let this go on and on and on
15 forever?

16 LCDR TOOHEY: There is a Navy regulation
17 that requires the reporting of other criminal
18 misconduct.

19 MR. STONE: Have you ever seen it used?

20 LCDR TOOHEY: Have I ever seen anyone
21 punished for not reporting misconduct?

22 MR. STONE: Yes.

1 LCDR TOOHEY: Not in the retaliation
2 context, but -- and certainly, I've never seen
3 anyone taken to court-martial for it. It's more
4 lower level type misconduct that --

5 MR. STONE: I guess the question --
6 where I'm going is, do you think if it was
7 clarified so that not reporting retaliation, and
8 it doesn't have to be just for sexual assault
9 allegations. It could be regular assault
10 allegations -- but not reporting retaliation
11 against another Servicemember was, itself,
12 something that was going to be pursued.

13 If that was put in a training, do you
14 think that would make the training somewhat more
15 effective, so people understood they couldn't
16 just stand by and say well, it wasn't me, I
17 didn't do it, but it keeps going on?

18 CPT LAVINE: I don't think both, sir. I
19 think part of it is if you're kind of talking
20 more of a punitive nature, you're going to get in
21 trouble if you don't report it, but also going
22 that step farther to encourage the Soldiers, they

1 feel good about it, recognize retaliation when
2 it's happening, stop it, and then report it back
3 to us, both those, I think, need to sort of
4 happen. So don't just be afraid about
5 retaliation. Recognize it's the wrong thing, and
6 then do something about it. Because I do think,
7 at least in the Army Directive, that you can
8 argue that it does put in there if you knew it
9 was going on, you might also be -- could be
10 punished under Article 92, Failure to Obey a
11 Lawful Order, but also make sure the Soldiers
12 understand why retaliation is wrong, and then
13 feel good about reporting it. This is the right
14 thing to do. Like you said, don't stand idly by.
15 Don't be a bystander with this.

16 MR. STONE: I guess what I'm saying is
17 typically, in a violation, you've got to show
18 some intent to do wrong. Just standing by, the
19 person will say, "I wasn't a part of that
20 action." I guess I'm not looking to make it a
21 criminal violation. What I'm trying to do is see
22 whether or not it should be a map that goes to

1 your military conduct, your military evaluation,
2 your military bearing.

3 It is sort of conduct unbecoming that
4 you stood by and allowed -- you wouldn't stand by
5 and allow another Servicemember who you see in a
6 bar to rob another patron. It seems to me it's
7 the same thing, that you wouldn't stand by and
8 not report when you see someone else being
9 retaliated against.

10 Maj HIGGINS: We had discussed this
11 earlier in the ready room. We discussed the fact
12 that if we're serious about retaliation, it
13 should be much like the hazing order and the
14 sexual harassment order. Frankly, it's also in
15 the sexual assault order, where you have
16 bystander intervention. You have to report it if
17 you see it. The training needs to be the same.

18 Marines remember things like ---
19 Servicemembers remember things like, if I touch
20 you on your shoulder, is it red, green, yellow?
21 You have to have those scenarios and show Marines
22 and Servicemembers what does retaliation even

1 look like? Because if they don't even know what
2 it looks like, then they don't even know if
3 they're retaliating against someone or not. It
4 would be training like SAPR training, basically.

5 CHAIR HOLTZMAN: Did you want anybody
6 else?

7 (No audible response.)

8 CHAIR HOLTZMAN: Okay, Mr. Taylor.

9 MR. TAYLOR: Thank you. First of all,
10 I'd like to just address a question to the panel,
11 in general. That is, are you aware of any formal
12 or informal restrictions that in any way restrain
13 the kind of actions you can take to assist your
14 clients or former clients in pursuing retaliation
15 claims?

16 (Chorus of no.)

17 MR. TAYLOR: When it comes to dealing
18 with command issues, has any of you found it to
19 be a problem that you are outranked by the person
20 that you're taking the complaint to? Has that
21 been an issue for anyone, in terms of how you
22 approach it, or the kind of response you receive,

1 and if so, what do you do about it?

2 CPT LAVINE: I don't know if I'd say
3 it's a problem, but it's always in the back of
4 your mind. When you're going toe to toe either
5 with a garrison commander or brigade commander,
6 as you know, obviously the rank, where you fall
7 in the hierarchy, in terms of you're not a
8 commander, that kind of a thing -- basically, you
9 are going to that commander and saying that
10 there's a real issue in your command. It's
11 lacking discipline in this area. I think that's
12 always there in the back of your mind. It's
13 never stopped -- like everybody up here,
14 especially Major Higgins, people aren't afraid of
15 kicking that hornet's nest, but it is something
16 that sort of crosses your mind. Will there be
17 blow back? Do I have to phrase how I'm saying
18 this appropriately, that kind of thing? I think
19 it's always there. I don't think it's stopped
20 anybody, but certainly, it is there.

21 Capt SMITH: Sir, I think the only thing
22 I would add is yes, there's always a rank

1 disparity there, but I've also felt like I have
2 the support of my leadership, so I may be talking
3 to a colonel, and I'm a lowly captain, but I know
4 that I have that support that if there's blow
5 back of, "What's your crazy captain saying?" I
6 have that support on an equal rank level.

7 MR. TAYLOR: Thank you very much,
8 Captain Smith. That was going to be my next
9 question. Do you feel confident that if you do
10 find yourself in a situation where you might feel
11 overpowered by the rank that somebody's got your
12 back up the chain? Does everybody feel as if
13 somebody's got your back out there?

14 (Chorus of yes.)

15 MR. TAYLOR: When it comes to advising
16 your clients about which of the various options
17 they might want to pursue, whether it be the IG,
18 writing to Congress, taking it to the chain of
19 command, how do you evaluate that? You mentioned
20 that, Commander Toohey, as one of your issues.
21 How do you go about laying that out to the
22 client?

1 LCDR TOOHEY: At this point, in most
2 cases, if you can get the remedy that you want
3 from the chain of command, that's going to be the
4 most effective way to go. That's my experience
5 in the military, in general. This person is
6 responsible for that Service, responsible for
7 everything about that Service, their well-being
8 personally and professionally.

9 When you can get the remedy that you're
10 looking for, that's your most expedient way to do
11 it. When things are working right -- and my
12 experience is that command triads, generally
13 speaking -- CO, XO, command master chief --
14 understand the importance, get the whole sexual
15 assault response program and their obligations,
16 generally. If they don't, they're usually
17 responsive to you explaining what they missed.
18 Going to them and saying, "This is the problem,"
19 has resulted in, where they could deliver the
20 results, they have acted, and they have given the
21 relief that we requested, or some relief that
22 we've worked out that was within the realm of the

1 possible. I haven't had to -- certainly,
2 advising on IG or congressional, I haven't had to
3 go that route. There was one congressional file
4 that I was only tangentially involved on, not
5 because I was limited, but for other reasons.

6 Those take a long time. They tend not
7 to reach the result that your client wants or
8 thinks that they're going to get, and are not
9 necessarily going to be received as well, as
10 easily, and as quickly as going up the chain of
11 command. So that's usually -- unless the problem
12 is with the leadership, that's almost invariably
13 where I'm going to go with my initial complaint.

14 MR. TAYLOR: I assume, from the looks of
15 assent, that most people would agree with that,
16 which I think is why it's so important to have
17 that ability to go to commanders, even if they
18 are superior in rank to you, and have the
19 credibility to make the case to them, knowing
20 that would be the fastest, easiest way to try to
21 resolve the complaint. Is that the idea?
22 Everybody would agree with that?

1 (Chorus of yes.)

2 MR. TAYLOR: Yes, please.

3 CPT LAVINE: I think that Commander
4 Toohey brings up a good point. It seems like the
5 higher up in command you go, the more they
6 understand. They're more separated from what's
7 going on down in the trenches, and they get it.
8 Sometimes, though, they do push back and say,
9 "Why aren't you going to the troop commander
10 first or the company commander first? Why are
11 you skipping the chain of command and coming
12 right to me?"

13 It's because that's where the problems
14 are sometimes. These are pretty difficult issues,
15 and we have retaliation because you don't know at
16 the outset who's approving it, who's perhaps
17 looking the other way, that kind of a thing.

18 As Commander Toohey said, I think as
19 long as you're able to go get that dialogue and
20 they understand, "This is why I'm coming to you,
21 at your level, because you understand that we
22 don't have to have that debate at the lower level

1 about whether or not this is even important,"
2 that's kind of good. Sometimes, again, that can
3 take them back because you are coming in as a
4 captain, skipping some chains of command, but
5 that's what you have to do for your client. I've
6 seen the same thing in the Army. Upper levels
7 get it, and you just have to go in there and make
8 that argument.

9 MR. TAYLOR: I take it from your
10 recommendation, as well, that you think there
11 probably should be more higher level involvement
12 -- I think those were the words you used -- in
13 the training and education, to be sure that the
14 whole chain of command gets the fact that the
15 leader is a believer?

16 CPT LAVINE: Yes, sir.

17 MR. TAYLOR: Is that the implication of
18 your comment?

19 CPT LAVINE: That's absolutely -- that
20 was something we were all kind of talking about
21 this morning, but that higher level will set the
22 tone, and then the lower levels, the troop

1 commanders, what have you, they'll enforce it.
2 But that tone needs to be set at the very highest
3 level, as high as you can go, as often as is
4 needed, not just when an issue happens, but
5 before that. I would absolutely agree with that,
6 sir.

7 MR. TAYLOR: Commander Toohey, you made
8 the same comment, I think, in your direct
9 testimony, so you would agree with that, as well?

10 LCDR TOOHEY: Yes, sir. Just to add
11 quickly, everyone that was here in this panel, we
12 get a lot of training on a lot of different
13 topics, some of it mundane, and some of it really
14 important. To make certain trainings stand out,
15 you have to do something different.

16 I think that delivery at that higher
17 level is going to not only be effective in its
18 delivery, but also, I think what's really
19 important is it creates the training environment
20 where everyone is attentive, everyone is
21 understanding the gravity of the issue, unlike
22 how some other trainings can devolve into

1 something lesser.

2 MR. TAYLOR: One other comment you made,
3 Commander, had to do with involving the
4 individual who's the victim with the solution and
5 coming up with a solution, whether it's a
6 transfer of the victim or the transfer of the
7 accused. That seemed to be something that you
8 took to the next level, Captain Smith, in coming
9 up with this solution for your client, but it was
10 hard to do that, wasn't it?

11 Capt SMITH: Yes, sir.

12 MR. TAYLOR: So is there any best
13 practice that you can pass on about how that
14 process can be expedited?

15 Capt SMITH: I guess best practice wise,
16 I think it's going through the legal chain of
17 command and making sure that they are aware --
18 the regulations that are out there explicitly say
19 that they should always be considering
20 transferring the accused, just that, at least --
21 it sounds like maybe it's different in some other
22 Services, but at least to my experience in the

1 Air Force has been that wasn't necessarily
2 something that was ever considered. It was, if
3 the victim wants to move, they can move, but we
4 don't ever move the accused.

5 So I think it was getting the legal side
6 of it spun up, and then also, then, with the
7 commander who ultimately can make that decision,
8 it took -- in my experience, it took a little bit
9 of convincing that this is the way to go. I
10 think a best practice would be making sure that
11 framework is in place before coming there with,
12 "Sir/Ma'am, here's this specific issue I need you
13 to make a decision on," having that person just
14 be reminded before, without a case in front of
15 them, is helpful.

16 MR. TAYLOR: You also said, Captain
17 Smith, that you thought the IG program was not
18 well set up to handle some complaints, especially
19 if you're outside the formal retaliation. Do you
20 think it should be set up to deal with things
21 other than formal retaliation, or are you
22 confident that you have enough other arrows in

1 your quiver so that you don't really need to
2 worry about whether the IG is or is not doing
3 what you think it might do?

4 Capt SMITH: I think as some of the
5 other colleagues mentioned, first go is always
6 going to be with the chain of command, and 90
7 percent of the time, they're the ones who are
8 going to have the solution anyway.

9 I think in circumstances where maybe the
10 retaliation concern is with somebody in that
11 upper echelon of chain of command, it would be
12 nice to have an outside option, but there's also
13 always superior commanders that you can go to.
14 So I'm not sure that the IG system has to be
15 totally reformed. There are, as you said, other
16 arrows in the quiver that can be out there. In
17 my personal experience, using that IG system has
18 been less effective than some of the other
19 options that are out there.

20 MR. TAYLOR: I guess my final question
21 is for you, Major Higgins. Certainly, I'm as
22 upset and outraged as Mr. Stone indicated about

1 what you had to endure as you represented your
2 client, but do you feel, at this point, as if
3 you're getting the kind of support through your
4 technical channels, from your higher-ups within
5 your hierarchy that you expect and should have
6 under these circumstances?

7 Maj HIGGINS: One hundred percent, sir,
8 yes, sir. As soon as the incident happened, I
9 reached out and contacted my OIC. She was making
10 phone calls to NCIS and trying to intervene right
11 away. I have a new boss now. They both have
12 been incredibly supportive in making sure that
13 this isn't affecting my career and that I can
14 move on to another job after this.

15 MR. TAYLOR: Thanks to all of you.

16 Madam Chair.

17 CHAIR HOLTZMAN: Thank you. I want to
18 associate myself with the remarks of Mr. Taylor,
19 and also my colleague, Mr. Stone, in expressing
20 my dismay at what happened to you, and I am glad
21 to hear that you feel you've got support in the
22 chain of command. I hope the situation gets

1 resolved promptly, and that those people who
2 acted improperly are appropriately punished, and
3 that that's widely known, and that the people at
4 NCIS get proper training, so this kind of thing
5 never happens again.

6 On the issue of the IG, your indication
7 was that there are more effective methods. But
8 if the IG system were more effective, it might be
9 another arrow in your quiver. Our understanding
10 about the IG system is it takes -- aside from
11 anything else, it takes forever, and the number
12 of times in which they -- I don't want to speak
13 incorrectly here. I'm sure I am -- but the
14 number of times in which they've found anyone
15 responsible for retaliation in sexual assault
16 cases is exactly zero.

17 That's not something that gives me a lot
18 of sense of confidence, a system that takes
19 forever and produces zero result. It seems to me
20 the IG system was set up to deal with corruption
21 and financial fraud and that kind of thing, and
22 they're not really -- this is really outside of

1 their ken. I don't know why they should be doing
2 this at all. Do you have any comment on that?
3 You said you didn't think the system should be
4 changed, but I don't know why you would want to
5 keep it, looking at it from a different point of
6 view.

7 Capt SMITH: My only comment would be,
8 I don't necessarily think that I would have a
9 situation where I'd recommend a client go through
10 that system anymore. Again, personal experience.
11 I'm sure there's a case out there where maybe
12 it's appropriate, but when I have a chain of
13 command or -- honestly, it's been more effective
14 when they've filed a congressional complaint.
15 I'm not sure that it's a lot of bang for the buck
16 to have them go through the IG system. Again,
17 maybe that's my personal experience.

18 CHAIR HOLTZMAN: Can you think of an
19 alternative --- before I ask you a second
20 question, does anybody else have any other
21 comment? Yes, Major Higgins?

22 Maj HIGGINS: I had submitted my

1 recommendations. One of them was that SAPR be
2 able to supervise investigations into
3 retaliation. Again, you have this issue of
4 recognizing retaliation when you see it. Just
5 like Equal Opportunity, you have an oversight for
6 those being sexually harassed. You have
7 oversight of the EOA, who's advising the
8 individual that's conducting the investigation.
9 That's what you need. Even with the IG, if they
10 can't identify what retaliation looks like, then
11 they're probably not going to find it.

12 CHAIR HOLTZMAN: So you would suggest
13 having another agency do it?

14 Maj HIGGINS: Agency within the SAPR.
15 I wouldn't say just --

16 CHAIR HOLTZMAN: Okay, fine.

17 Maj HIGGINS: Yes, ma'am.

18 CHAIR HOLTZMAN: So you'd set up within
19 SAPR, a vehicle to examine these cases?

20 Maj HIGGINS: Yes, ma'am.

21 CHAIR HOLTZMAN: Anybody else have any
22 comment? Yes, Captain Lavine.

1 CPT LAVINE: Just off the cuff, just
2 like we changed Article 32s, now we have judge
3 advocates in charge of those as the preliminary
4 hearing officers, I suppose you could do the same
5 thing. There was a case referenced to the IG or
6 something like that, you could detail judge
7 advocate out there to take a look at that
8 retaliation. If you really didn't think the IG
9 had the personnel or the experience to do that,
10 why not take a judge advocate? That's just off
11 the cuff. We radically changed Article 32s and
12 said we want a trained attorney in charge of
13 that. Perhaps that's an idea, as well.

14 CHAIR HOLTZMAN: But is anybody here
15 saying the IG system works? Have you seen it
16 work in any case of retaliation, anybody?

17 LTC WUNDER: Coast Guard doesn't have an
18 organic IG.

19 CHAIR HOLTZMAN: Oh, okay.

20 LTC WUNDER: No.

21 LCDR TOOHEY: I have not filed an IG in
22 a case of retaliation, partly because I didn't

1 need to, but based on my past experience with IG,
2 in general, I haven't always had great success.

3 CHAIR HOLTZMAN: You were saying --
4 there's been some testimony that the higher up
5 you go, the more the commanders get it, the chain
6 of command gets it, in terms of the importance of
7 protecting sexual assault victims and dealing
8 fairly with these cases, but lower down, it's not
9 as clearly understood. Does that mean the
10 military needs to have more training, in terms of
11 retaliation, also for lower level officers and
12 non-commissioned officers and so forth? Yes?
13 No? Anybody want to answer?

14 LTC WUNDER: Ma'am, I would say that we
15 don't necessarily need more training, but the
16 agenda or the topics covered in the existing
17 training should, in my opinion, add something
18 along the lines of a retaliation section.

19 CHAIR HOLTZMAN: Yes, Captain Smith.

20 Capt SMITH: I think when it works well
21 is when the commander is intimately involved in
22 it and making it clear that this is how it's

1 going to be in their squadron and their unit. In
2 the military, we're good at following orders.

3 So when that major or that lieutenant
4 colonel's out there saying, "This is how it's
5 going to be in my unit. I'm not going to
6 tolerate anything like that," then I think it
7 sets the tone. Whereas, if the commander's less
8 involved, then you end up with a situation where
9 you have a younger Airman who maybe doesn't get
10 the big picture and hasn't had that training. So
11 yes, it's training, but it's also just command
12 involvement and being out front and leading.

13 CHAIR HOLTZMAN: Two of the issues that
14 have come up in this hearing suggest something
15 about the importance of sharing best practices
16 more broadly among Special Victims' Counsels.
17 For example, your experience with finally pushing
18 the right button, figuring out what agency to go
19 to, figuring out that despite the black
20 letter law, you were able to get the system to
21 respond.

22 There are a lot of other Special

1 Victims' Counsels who have no idea and would have
2 to reinvent the wheel every time. Is there some
3 way in which you share that broadly with all
4 Special Victims' Counsel? What happens in that
5 circumstance?

6 Capt SMITH: Yes, ma'am, I can think of
7 two ways, at least, off the top of my head. One
8 is, I've had the opportunity to go to our
9 schoolhouse and train other Special Victims'
10 Counsels as they're coming through. Some of them
11 have had experience, some are coming in with --

12 CHAIR HOLTZMAN: But that's within the
13 Air Force.

14 Capt SMITH: It's within the Air Force.
15 We also have an internal communication system.
16 Basically, it's a web-based communication system,
17 so there's lots of information, best practices
18 that are pushed out that way. Again, I think
19 that's only within the Air Force, although I'm
20 not 100 percent sure how that works, but I think
21 it's just within the Air Force.

22 CHAIR HOLTZMAN: But do you think that

1 would be helpful to have a system where these
2 kinds of unique situations are more broadly
3 disseminated, so that other people can learn from
4 your experience?

5 Capt SMITH: Absolutely, ma'am. Some of
6 the courses that we do teach, a lot of them have
7 been joint. I can think of almost all the ones
8 I've been at have had other representatives from
9 all the other Services. So they are joint
10 training environments, even one I just, a couple
11 months ago, taught at -- it was the Air Force SVC
12 course, but there were representatives from all
13 the other Services there. So it was not wide
14 scale, but it was among the Services.

15 CHAIR HOLTZMAN: The second example that
16 makes me think about sharing best practices has
17 to do with commanders considering moving the
18 accused. It may be a lot easier for a commander
19 to make that decision if he or she has been aware
20 that this has been done 100 other times in other
21 cases, and here are the examples.

22 Perhaps we need to be sharing more

1 broadly some of the experiences of dealing with
2 these cases, so that even well-intentioned
3 commanders would have a better sense of the
4 options that have worked elsewhere -- keeping
5 this information siloed, as opposed to broadly
6 disseminating options.

7 I don't think I have any other
8 questions, but I just want to thank all the
9 members of the panel for really taking your time
10 to come and help share your experiences with us.
11 We very, very much appreciate that. Major
12 Higgins, we hope things work out appropriately
13 for you. I really do hope they do. Thank you
14 very much. Are we up to you? Oh, we have public
15 comment. Five-minute break, thank you.

16 (Whereupon, the above-entitled matter
17 went off the record at 3:31 p.m. and resumed at
18 3:39 p.m.)

19 CHAIR HOLTZMAN: I think we're ready to
20 commence. We are ready to commence. Time is now
21 for public comment. We will hear from -- hello.
22 Can everyone take a seat in the back. If you're

1 conversing, please leave the room. We have one
2 public witness. Welcome. We're ready to hear
3 you. As you know, there's a five-minute rule.

4 MS. ADAMS: Yes, ma'am.

5 CHAIR HOLTZMAN: Thank you.

6 MS. ADAMS: Before I get started, I
7 would like to remind the committee, I know that
8 this statement starts when I got gang raped in
9 the military in 1977, but I would like to remind
10 the committee that the VA and medical treatment
11 didn't even happen. So when I had PTSD, I
12 couldn't even get treatment until -- it finally
13 didn't happen until November of 1992, and the VA
14 didn't even offer any help until 2010. So the
15 PTSD and some of these things, this is the after-
16 effect of that, before I start reading my
17 statement. On July 8, 1977, four fellow
18 Soldiers, whom I was supposed to be able to trust
19 with my life, carried out a violent gang rape
20 against me. All these men were convicted of
21 their horrific crime. At the time, I was not
22 moved to a different location, but had to stay in

1 the same location as my perpetrators. I was
2 hassled by name calling, threats, and by their
3 friends.

4 No one would speak to me about a year
5 and a half because this was a gang rape, so the
6 court-martials [sic] went on forever. It's not a
7 fast-moving machine. I'm going to stop there
8 because you already have my whole thing. The
9 next thing I want to talk about is in 2013, I was
10 a government employee. This was when Congress
11 was addressing the military about not doing
12 enough to prevent that.

13 We had all this SHARP training, and
14 people were joking about it. It was a big joke.
15 We had eight SHARP trainings in a three-month
16 span of time. One of the things I heard --
17 because I've been sitting here all morning and
18 listening to what they were saying, that the
19 command at the upper levels were more sympathetic
20 and more on board. But in my command, when they
21 were doing the SHARP training, General DelRocco,
22 he was the ATEC commander. He held up a SHARP

1 phone and said, "I got this 24/7. Call me if you
2 need anything, or if you have anything you want
3 to address." I called that number because the
4 joking made it hostile for me. In fact, one of
5 the people I work with, right after the SHARP
6 training, a young man said, "I don't see what the
7 big problem is. I wouldn't mind being raped by a
8 bunch of women."

9 That was really offensive to me, to say
10 the least, because I am a rape victim. Nothing
11 seemed to be done in my command, and people were
12 joking about it. My commander was getting ready
13 to leave, so he wasn't on Fort Huachuca. They
14 were changing commanders. I called the ATEC
15 commander is why I called him, and the man didn't
16 even answer the phone, not at all.

17 I emailed him. He didn't get back with
18 me. I emailed my commander, even though he was
19 back East to his new location where he was going
20 to be transferred. The general called me back at
21 10:30 at night Arizona time, which is three hours
22 difference from East Coast time. I said, "You

1 didn't answer the call, and it's important to
2 me." The reason that was so upsetting to me was
3 as a rape victim, I know that within the first 30
4 minutes is when people make the decision, most
5 times, if they're going to report or not report,
6 and the feedback that they get.

7 I don't know how many people -- because
8 he did this at all his command -- the ATEC
9 command at all the different locations, so how
10 many people -- it mattered to me because how many
11 people that might have called, like me, that
12 didn't get any kind of response, whatsoever --
13 you've been talking about retaliation. If you
14 won't even answer the call, and you're paying
15 military sexual trauma lip service at that kind
16 of level, that's unacceptable.

17 So I went, while I was on vacation, like
18 I'm here now -- I'm on vacation -- while I was
19 still there, I went and saw the ATEC commander
20 because I wanted to address it with him. When I
21 went -- and I had an appointment with him after
22 this -- the man didn't even bother to show up

1 until two and a half hours later, after the
2 appointment. His EEO person wasn't even there
3 until about two hours after the appointment was.
4 They didn't even really take time to do that. In
5 my recommendations -- I'm going to go there
6 because I have two minutes, and you only gave me
7 five -- but in my recommendations, I think there
8 should be investigating -- redressing of these
9 wrongs must be done by outside of the chain of
10 command and the Department of Defense.

11 As things currently stand, the inaction
12 of superior officers contributes to the culture
13 of complacency, which allows these events to
14 persist. In fact, these supervisors often
15 intercede on behalf of the very people who carry
16 out these acts, rather than standing up for the
17 victim or the Military Code of Conduct at these
18 times, even retaliation against those who file
19 complaints.

20 This adds another additional layer of
21 betrayal, alienation, and leaving victims nowhere
22 to turn for help. The Inspector General needs to

1 assist victims when cases involve retaliation. I
2 was a DA civilian when this retaliation thing
3 happened. I have an EEO complaint that I filed
4 two years ago, and I still don't have a
5 resolution. Investigation was done a year ago,
6 and I still don't have a thing, so my life is in
7 limbo, in reference to that. I contacted the IG,
8 and they told me -- on Fort Huachuca first, and
9 then they said I have to go to the ATEC one
10 because it's not that command. I didn't want to
11 do that because my experience I already had with
12 the general was a waste of my time.

13 He didn't even bother to show up, and
14 when he did, nothing really was accomplished. I
15 contacted the IG of the Army. They said, "We
16 don't get involved in EEO complaints." It was a
17 retaliation thing. I no longer am working, and
18 that's part of the reason that I filed the EEO
19 complaint. In reference to retaliation, I wanted
20 the IG to address the issue with the general. My
21 time has expired. Can I just --

22 CHAIR HOLTZMAN: Yes, what we'll do,

1 ma'am, is to take your written statement and
2 include it in the record, and it'll be on our
3 website.

4 MR. STONE: I'd like to ask one
5 question. Can I ask one question?

6 MS. ADAMS: Yes, sir.

7 MR. STONE: When I was at the Department
8 of Justice, and I spent many years there, there
9 came a time when they wanted to do more serious
10 violence against women training to avoid, again,
11 a cultural hostility in the office that would
12 sometimes just arise, and they didn't want to
13 have each little unit do it differently. They
14 wound up making a film, which was introduced both
15 at the beginning, by the Attorney General, and
16 then included some very high-level people, very
17 seriously describing what can go on, showing what
18 was no longer going to be tolerated, etc.

19 We had to watch it. They did a series
20 of these films because each year, you had to see
21 it. It was a film, but it was a very serious
22 film. I wonder if you think that that kind of a

1 training, in other words, a standard kind of
2 training that's done very professionally and
3 shown across all levels, might work, as compared
4 to, say, individual training, and one training
5 officer takes it seriously, and the other sort of
6 laughs it off? Do you think that kind of thing
7 is something we might recommend?

8 MS. ADAMS: Sir, I think some of the
9 training, like the Invisible War, I think that
10 was really important because it showed how it
11 really affected the victims. Because the victims
12 are truly traumatized by the thing. Also, I
13 didn't know there was a DoD IG, so in some of
14 that training -- because I only went as high as I
15 thought I could go with the Department of the
16 Army IG. I didn't realize all the time -- I was
17 in the military and working for the government
18 service and government contractor for over 20
19 years. I didn't know there was a DoD IG, and I
20 would have taken it up higher.

21 In the training that I would like to see
22 is where people can turn because GS civilians --

1 I didn't even get into that. She said it's going
2 to be on the website -- don't have any
3 representation. I'm glad the military does have
4 representation, but one of the things that I
5 would like to see happen is VA civilians. They
6 take the same oath, almost like the military.

7 They put themselves in harm's way, but
8 they have no protections, whatsoever, no
9 advocacy. In my case, I ended up paying a lawyer
10 \$10,000 for this EEO complaint, but these GS1-5s
11 that are living paycheck to paycheck have no
12 place to turn. There has to be someplace for
13 them to turn, especially with retaliation. Thank
14 you for your time.

15 CHAIR HOLTZMAN: Thank you very much.

16 MS. FRIED: The meeting's closed.

17 CHAIR HOLTZMAN: Thank you.

18 (Whereupon, the above-entitled matter
19 went off the record at 3:49 p.m.)
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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

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